ISSN 2321-1059

Journal

of Legal Studies

International Refereed Peer-Reviewed Legal Journal

MANAVTA
SAMAJIK
SANSTHA
MUGHALSARAI CHANDAULI U.P.

Published By:
Manavta Samajik Sanstha
Mughalsarai, Chandauli, U.P. India

Cite this Volume as *JLS* Vol. 8, Issue II, July, 2020

The Journal of Legal Studies is an International Refereed Peer-Reviewed Journal of Legal Studies is published biannually in the month of January and July. The Journal focused on gathering knowledge on the different issues of Law. The Journal welcomes and encourages original legal research papers and articles in not more than 3000-5000 words in English. Main body A-4 size paper 11 pt. font Size in Times New Roman Font in single space.

Papers are processed through a blind referral system by experts in concerned subjects. To ensure anonymity in reviewing the papers, name of the author, co-author, designation, address, contact number, e-mail, and title of the paper should appear only on the first page of the paper.

Except calling for paper, the most valuable and suggestive comments of all the readers are always awaited and welcomed in order to achieve the ultimate goal. We are looking forward for your contributions; all communications must be made only in electronic form e-mailed to: journalforlegalstudies@gmail.com. For more information visit our website at http://journaloflegalstudies.com

Dr. Pradeep Kumar, Executive Editor & Managing Director, Journal of Legal Studies shall be the sole copyright owner of all the published material. No part of this Journal may be used in any form whatsoever without prior written permission from the publisher.

DISCLAIMER: The views/opinion expressed by the contributors does not necessarily match the opinion of the Chief Patron, Patron Chief Editor, Executive Editor & Managing Director, Editorial Advisory Board, Publisher Sanstha and Printer. The views of contributors are their own hence the contributors are solely responsible for their contributions. The Journal shall not be responsible in any manner in pursuance of any action on the basis of opinion expressed in the Journal. In publishing the Journal utmost care and caution has been taken by the editors and publisher Sanstha, even if any mistake whatsoever occurs the editorial board shall not be responsible or liable for any such mistakes in any manner.

Journal
of Legal Studies

International Refereed Peer-Reviewed Legal Journal

Chief Patron:
Prof. *(Dr.)* S.K. Bhatnagar
Vice-Chancellor, Dr. Ram Manohar Lohiya
National Law University, Lucknow, India

Patron:
Prof. R. K. Chaubey
Professor, University of Allahabad, Allahabad, India

Chief Editor:
Prof. (Dr.) Priti Saxena
Head & Dean, School for Legal Studies,
BBA University Lucknow, India

Executive Editor & Managing Director:
Dr. Pradeep Kumar
Assistant Professor
Banaras Hindu University, Varanasi, Uttar Pradesh, India

Editorial Advisory Board:

Dr. Olaolu S. Opadere
Department of International Law,
Faculty of Law, Obafemi Awolowo
University, Nigeria

Dr. Anil Kumar Maurya
Assistant Professor
Banaras Hindu University, Varanasi,
Uttar Pradesh, India

Dr. Karna Bahadur Thapa
Associate Prof., Faculty of Law,
Tribhuvan University, Nepal Law
Campus, Kathmandu, Nepal

Dr. Kabindra Singh Brijwal
Assistant Professor
Banaras Hindu University, Varanasi,
Uttar Pradesh, India

Dr. Prabhat Kumar Saha
Assistant Professor
Banaras Hindu University, Varanasi, Uttar Pradesh, India

CONTENTS

	Author	Title	Pages
1.	***Dr. Aniruddha Ram*** Associate Professor, Jaipur School of Law, Maharaj Vinayak Global University, Jaipur Rajasthan	**Uniform Civil Code or Common Civil Code Under the Constitution of India**	**1-5**
2.	***Dr. Pradeep Kumar*** Assistant Professor, Faculty of Law, Banaras Hindu University, Varanasi & ***Mr. Prakash Singh Bisht*** Guest Faculty, P.N.G. Government P.G. College, Rampur, Nainital, Uttarakhand	**The Transgender Persons (Protection of Rights) Act, 2019: An Analysis**	**6-10**
3.	***Dr. S.K. Singh*** Associate Professor of Law, Sri JNM (PG) College (KKC), Lucknow	**Growth of Administrative Tribunals: New Hope for Administrative Justice System**	**11-19**
4.	***Abhishek Kumar*** Assistant Professor, Faculty of Law, University of Allahabad, Prayagraj	**Flexibilities Under Indian Patent Law and Public Health**	**20-24**
5.	***Mr. Abhishek Dubey*** Ph.D. Scholar, Law, Deen Dayal Upadhyaya Gorakhpur University, Gorakhpur, Uttar Pradesh	**Right to Information as a Human Right: A Study of Nexus**	**25-33**
6.	***Dr. Chandra Shekhar Rai*** Post Doc Fellow, Faculty of Law, Banaras Hindu University, Varanasi	**Reforms in Water Law of India: Trends and Prospects**	**34-40**

7.	***Mr. Hemant Khosla*** Research Scholar, Department of Legal Studies, Ch. Charan Singh University, Meerut, Uttar Pradesh, India & ***Dr. Anurag Singh*** Assistant Professor, Meerut College, Ch. Charan Singh University, Meerut, Uttar Pradesh, India	**A Path to get Accession Madrid Protocol: Ways and Process**	**41-46**
8.	***Dr. Ravindra Kumar*** Assistant Professor, Faculty of Law, University of Delhi, Delhi	**Lacunas of the RTE Act, 2009**	**47-52**
9.	***Dr. Girish Kumar*** Project Fellow, IUCTE, BHU, Varanasi & ***Mr. Ambrish Kumar*** Master of Education, MGKVP, Varanasi, U.P.	**Law and Governance for Disaster and Epidemic in India**	**53-61**
10.	***Mr. Amrendra Kumar Singh*** Research Scholar, Faculty of Law, BHU, Varanasi	**Issues Relating to Enforcement of Election Manifestos**	**62-69**
11.	***Mr. Ravi Ranjan Roy*** Research Scholar, Faculty of Law, Banaras Hindu University, Varanasi	**The Immoral Traffic (Prevention) Act, 1956: An Appraisal**	**70-82**
12.	***Dr. Vikas Sisodia*** Assistant Professor (Law), Puspa Devi Law College, Mirjapur, Uttar Pradesh	**Reservation: A Need or A Political Agenda**	**83-86**

13.	***Mr. Ankit Yadav*** B.A. LL.B. (Hons.), Law School, Banaras Hindu University, Varanasi	**The Finance Act, 2017 in Conflict with the Rule of Separation of Power: An Analysis**	**87-97**
14.	***Apoorva Bhardwaj*** 5th Year, B.A.LLB Course, Faculty of Law, Banasthali Vidyapith University	**Inter-Country Adoption and Its Judge-Centric Approach in The Indian Legal System**	**98-105**
15.	***Manisha Batwal*** Advocate, High Court of Judicature at New Delhi	**Implementation of a Uniform Civil Code in India**	**106-115**

Statement about Ownership and other Particulars

Journal
of Legal Studies

International Refereed Peer-Reviewed Legal Journal

ISSN	**2321-1059**
Volume, Issue and Year	**Vol. 8, Issue II, July, 2020**
Place of Publication	**Varanasi**
Language	**English**
Periodicity	**Biannual in the month of January and July**
Printer's Name, Nationality and Address	**Poddar Foundation, Varanasi, Uttar Pradesh, India, Pin Code-221005**
Publisher's Name, Nationality and Address	**Manavta Samajik Sanstha Mughalsarai, Chandauli, U.P. India Pin Code-232101**
Editors' Name, Nationality and Address	**Dr. Pradeep Kumar Faculty of Law, Banaras Hindu University, Varanasi, Uttar Pradesh, India, Pin Code-221005**

I, Dr. Pradeep Kumar, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-

Date: July, 31, 2020 **Dr. Pradeep Kumar**

ISSN 2321-1059

CALL FOR PAPERS

Journal

of Legal Studies

International Refereed Peer-Reviewed Legal Journal

The Journal of Legal Studies is an International Refereed Peer-Reviewed Journal of Legal Studies is published biannually in the month of January and July. The Journal focused on gathering knowledge on the different issues of Law.

Papers are processed through a blind referral system by experts in concerned subjects. To ensure anonymity in reviewing the papers, name of the author, co-author, designation, address, contact number, e-mail, and title of the paper should appear only on the first page of the paper.

Except calling for paper, the most valuable and suggestive comments of all the readers are always awaited and welcomed in order to achieve the ultimate goal. Dr. Pradeep Kumar, Executive Editor & Managing Director, Journal of Legal Studies shall be the sole copyright owner of all the published material. No part of this Journal may be used in any form whatsoever without prior written permission from the publisher.

Journal of Legal Studies welcomes and encourages original research papers & articles not more than 3000-5000 words in English. (Main body A-4 size paper 11 pt. in Times New Roman Font in single space) We are looking forward for your contributions; all communications must be made only in electronic form e-mailed to: journalforlegalstudies@gmail.com. For more information visit our website at http://journaloflegalstudies.com/

Dr. Pradeep Kumar
Executive Editor & Managing Director
Journal of Legal Studies

Uniform Civil Code or Common Civil Code Under the Constitution of India

Dr. Aniruddha Ram[1]

Introduction

Article 44, under the Directive Principles of State Police says- The State shall endeavor to secure for this citizen a uniform Civil Code throughout the territory or India[2]. The direction having a 'Uniform Civil Code' has been the part of the Constitution of India from the very inception but it has been more than fifty-five years, that Constitution of India come into force, however no action has been taken so far, no implement Article 44. No doubt Article 37 of the Constitution says that the directive principles, "shall not be enforceable by any Court[3]". nevertheless, it cannot be disregarded that they are fundamental in the governance of the Country. At the time of making of Constitution, it was thought that the social climate is not proper to have a Common or Uniform Civil Code". The incorporation or the direction of 'Uniform Civil Code' indicates the clear intention of the framers of the Constitution to have such law in the near future as and when the time is ripe.

Today, the masses are aware of their rights, a demand for humanitarian laws has arisen, and gender bias personal laws are being criticized. So, this for a secular and progressive personal law, which certainly can be resolved by adopting a 'Uniform Civil' for all the religious communities in India. Such law will eliminate all the discriminatory practices prevalent under different personal laws and one secular law in respect to marriage, inheritance, maintenance and divorce will be applicable to all. It is to be noted that only the personal laws of the various communities are different whereas all other laws for example. The Indian Contract Act, The Indian Penal Code, The Transfer of Property Act etc. are common for the peoples of India. Act it is in regard for a Uniform personal law that the demand of Uniform Civil Code is made.

The Supreme Court first directed the Parliament to frame a Uniform Civil Code in the year 1985 in the case of ***Mohmmed Ahmed khan v. Shah Bano Begum*[4].** In this case a penurious Muslim lady who was given divorce by her husband claimed for maintenance under Section 125 of the Code of Criminal Procedure. While granting her maintenance under the said section, the then Chief Justice of India Y.V. Chandra chud observed that "A Common Civil Code will help the cause of national integration by removing disparate loyalty to law which have conflicting ideologies". However, it was only an 'Obiter Dictum' to which the Muslims reacted sharply. Nationwide discussions, meetings and agitation were held. In order to appease the Muslim, the

---

[1] ***Associate Professor, Jaipur School of Law, Maharaj Vinayak Global University, Jaipur Rajasthan-302028.***
[2] Article 44 Constitution of India, 1950.
[3] Article 37 Constitution of India, 1950.
[4] A.I.R. 1985 S.C 945, Popularly known as *Shah Bano* Case.

then Rajiv Gandhi led government passed the Protection on Divorce Act, 1986 which would regulate the law related to maintenance of woman on divorce. The Government of emphasized that the Supreme Court had merely made an observation for enacting the Uniform Civil Code, which was not binding on the Government or the Parliament and stated that there would be no interference with the personal laws of the communities, unless the demand comes from within. The Supreme Court maintenance its view, again in ***Sarla Mudgal v. Union of India***[5]. Directed the Government to consider the implementation of Article 44. The case related to a Hindu re-marrying after conversion to Muslim religion. Without dissolving his first marriage Law does not allow polygamy, so such marriage solemnized after converting to Islam would be an offence under Section 494 of the Indian Penal Code. The court held that a Hindu marriage continues to exist even after one spouse converted to Islam. There is no automatic dissolution of Hindu marriage. It can only be dissolved by a decree of divorce under section 13 of the Hindu marriage Act.

While delivering the Judgment in ***Sarla Mudgal Case***, Justice Kuldip Singh said that since 1950 a number of Government have come and gone but they have failed to make any efforts towards implementing the Constitutional mandate under Article 44 of the Constitution. According to the said Judge, Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized society. Marriage, succession and like matters are of a secular nature and therefore, they can be regulated by law. In the same Judgment, Justice R.M Sahai very well said-

"Ours is a Secular, Democratic, Republic country. Freedom of religion is the core of our culture. Even the slightest of deviation shakes the social fabric. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms are not autonomy but oppression. Therefore, a unified code is imperative, both, for protection of the appressed and for promotion of national unity and solidarity. The court felt that 'Uniform Civil Code' is imperative for both protection of the appressed and promotion of national unity and integrity".

In ***Ahmedabad Women Action Group v. Union of India***[6], when the petition was made challenging certain provisions under various personal laws, and a prayer was made to enact a Common Civil Code, the Court rejecting the prayer said that the issue was for the legislature to deal with and the Court could not legislate in these matters. The Court referred to the decision make in ***Panna Lal Bansilal v. State of Andhra Pradesh***[7] and said that no doubt a uniform law is highly desirable, enactments. In one go, it might be counterproductive to unity and integrity of the National. It could be done by process of law at stages.

---

[5] A.I.R. 1995 S.C 1531.
[6] A.I.R. 1997 S.C 3614.
[7] A.I.R. 1996 S.C 1023.

Denial of Uniform Civil Code

The prominent leaders like Mohammad Ismail Sahib, Naziruddin Ahned, Mogmood Ali Baig and Hussain Imam during the debates in the Constituent Assembly in 1948 opposed the inclusion of Article 44 in the Constitution on the basis that it violates the right to freedom of religion and it is a tyranny on minorities. Even today the Muslim Fundamentalist employs this argument to let down the implementation of 'Common Civil Code'. According to All India Muslim Personal Law Board, the personal law of Muslims is a part of Shariat Law that in itself is an integral part of Islam. Therefore, any tampering with personal law would amount to infringement of the right of freedom of religion. If would certainly be against India's commitment for 'Secularism'.

But the basis of the arguments of Muslims in not sound. First of all, Shariat was never operative as common social and moral code, it is a dynamic concept and carries different connotation. That is probably the reason of different justice interpreting it in their own way. That is it has given rise to different schools of Islamic Jurisprudence. Hence, it cannot be un-Islamic to reinterpret Shariat law in changed circumstances. Secondly, who observes Shariat today most of the Islamic Countries have codified Islamic laws. In order to do away with the injustice to women, polygamy has been banned in Syria, Iran, Morocco, Indonesia and Pakistan and the laws of these nations have been largely modernized. Thirdly, it is strange to witness that Muslims when go to western countries like America, have to abide by local civil laws and they do so without any opposition.

Right of Religion v. Uniform Civil Code

India is a Secular Democratic Republic Nation. State has no religion of its own. It governs the relation of man with man and not of man with God. Though the expression 'Secularism' was added by the 42nd Amendment, 1976 but it was implicit under various Articles from the very beginning[8]. And the Indian Commitment for liberty of thought expression, brief, faith and worship, hence ensures equal respect for all the religions. The constitution of India recognizes that there are many secular activities like marriage, succession, adoption and maintenance which may be associated with religious practices, but they cannot be common code for these secular activities, will not violate one's right to freedom of religion (Article 25-28).

In a recent case ***John Vallamatton v. Union of India***[9] where section 118 of Indian Succession Act, 1925 was challenged. The said section imposes a restriction only on Indian Christians, which prevents Christians from bequeathing properly for religious and Charitable purposes. The petition was moved by John Vallamattom, a Christian priest in 1997. He also pointed out that if anyone wanted to donate property for religious and charitable purposes, the person's 'will' would have to be on record at least 12 months prior to his/her death. Else, the 'will' was considered invalid.

---

[8] Article 25 to 28 of the Constitution of India, 1950.
[9] A.I.R. 2003 S.C 2902.

Justice Khare while striking down the said section declared it as unreasonable arbitrary and violative of Article 14 of the Constitution. Very emphatically he said, “It is no matter of doubt that marriage, succession and 26 of the Constitution. He cautioned that any legislation which brought succession and like matters of secular character within the ambit of Article 25 and 26 would be a suspect legislation.

The foregoing observation may be having some truth but no steps were taken until recently to provide a Uniform Civil Code. Only law marriage, succession, guardianship and maintenance among Hindus were given some uniformity in mid-1950. On the country, reliance on this article by the Supreme Court in upholding the right of maintenance of a Muslim divorce under Section 125 Criminal Procedure Code, which applies to everyone irrespective of religion or community, boomeranged resulting in enactment of separate law of maintenance of Muslim for female divorce[10]. Later the Court again reminded the State of its obligation under this article and issued direction to it to take appropriate steps for its implementation and inform the court of such steps[11]. But again, sometime later it retraced its steps and stated that it did not issue any direction for the codification of a common civil code[12].

On the specific issue of outlawing Triple Takaq in Muslim Law, a petition is, however, pending in the Supreme Court at the time of this revision. While the issue on Uniform Civil Code seemed to have gone into the background, for the first time the Law Commission of India constituted in later part of 2016 issued a questionnaire consisting of 16 questions to the general public on the desirability of such Code. While the Bhartiya Janata Party government in office at the Centre is in support of it, others, particularly the minorities are raising questions on its desirability. In the current era of constitutional pluralism even on principled grounds doubts are expressed on the desirability of such a Code.

Another obstacle in implementing the Uniform Civil Code is the drafting of such a law. Should Uniform Civil Code be a blend of all the personal laws saw or should it be a completely new law adhering to the Constitutional mandate. No model till date has been drafted. Many fears, that under the guise of uniform civil code, the Hindu Law will be imposed on all. In this regard, the former Prime Minister Mr. Atal Bihari Vajpayee has one made the statement that the new code would base on gender equality and comprising of the best elements of all the personal law. It would not be the repacking of ‘Hindu Law’ for all.

Conclusion

It is high time that the government should adhere to the constitutional mandate and the direction of the Supreme Court. A uniform law would promote national integrity and unity. The minority should understand that in this way they will get the similar treatment as the majority would get

---

[10] *Mohd. Agmed Khan v. Shah Bano Megum,* (1985)2 SCC 556: AIR 1985 SC 945, 954, and the Muslim Woman (Protection of Rights on Divorce) Act, 1986. Also seen, *Morden Diengdesh v.S.S Chopra,* (1985)3SCC 62 935,940

[11] *Sarala Mudgal v. Union of India,* (1995) 3 SCC 635: AIR 1995 SC 1531.

[12] *Liya Thomas v. Union of India,* (2000) 6 SCC 224: AIR 2000 SC 1650, Also, *John Vallamattom v. Union of India*, (2003) 6 SCC 611: AIR 2003 SC 2902.

because a uniform law would be applicable to all. However, at the time of the drafting of the uniform civil code, the government has to play a very responsible and unbiased role, so that the law so framed is in the interest of all the communities. No government wanted to meet the criticism of any section of the society and let go its votes. Due to this reason, the direction of uniform civil code has not been able to become a reality.

The Transgender Persons (Protection of Rights) Act, 2019: An Analysis

Dr. Pradeep Kumar[1]
Mr. Prakash Singh Bisht[2]

Abstract

Transgenders are human beings and all the laws of the country should be applied to them like any other person. They should be treated equally, respectfully, and without any gender discrimination. They should not be discriminated against in exercising their right to apply for a job, access to a public place, right to property, their right to earn livelihood, right to the resident, or right to movement. Civil rights under law such as the right to get a voter card, Aadhaar card, pan Card, passport, ration card, make a will, inherit property, and adopt children must be available to all regardless of the change in gender/sex identities. Transgenders as an integral part of our society have been excluded from all the mainstream social cultural and economic activities continuously and systematically since ancient times. In the case of National Legal Services Authority v Union of India and others, the Supreme Court directed the Central and State Governments to take necessary steps for various social welfare schemes for transgender persons and to conduct public awareness campaigns to eradicate all social evils associated with them. Keeping all these points in mind, the Central Government passed the Bisexual Persons (Protection of Rights) Act, 2019 for the protection of transgender persons. This article analyzed the Transgender Persons (Protection of Rights) Act, 2019.

Keywords: Transgender Rights, hijra, third Gender, Equality, Protection of Rights.

Introduction

The Constitution of India, 1950 is 'sex blind', that is to say, the basic premise of equality before the law and equal protection of the law is based on a Constitutional mandate that the sex of a person is irrelevant. True concerns about sex and gender were a feature of the present century in promoting egalitarian participants in the society. Gender is a complex social construct based upon biological sex, but it is not the same as sex. It can also be argued that gender alone drives and that sex is an incidental feature. Gender facilitates sexual interaction and reproduction. Gender is intertwined with identity, expression, presentation, relationships, child-rearing, societal role and structure, pairing, games, and eroticism. Human race is a sexually dimorphic species, where physical appearance is one component of gender marker. Gender becomes fixed in infancy, but it remains remarkably fluid, full of twists and surprises.

Gender Equality means that the rights, responsibilities and opportunities of individuals will not depend on whether they are born male, female or a transgender and promotion of Gender Equality has a quantitative and a qualitative aspect. The quantitative aspect refers to the desire to achieve equitable representation, increasing balance and parity refers to achieving equitable influence on establishing development priorities and outcomes wherein equality involves

---

[1] ***Assistant Professor, Faculty of Law, Banaras Hindu University, Varanasi.***
[2] ***Guest Faculty, P.N.G. Government P.G. College, Rampur, Nainital, Uttarakhand.***

ensuring that the perceptions, interests, needs and priorities to be given equal weight age in planning and decision making.

Though the visibility of transgender people is increasing in daily life, they are still discriminated, disrespected and downtrodden. One of the main challenges faced by transgender people is how to live a normal life in a society which maintains rigid gender norms and beliefs. In ***National Legal Services Authority v. Union of India and Ors***[3]., the Supreme Court had not only recognized transgender as a 'third gender' but also directed the Centre and the State Governments to take necessary steps for various Social Welfare Schemes and run public awareness campaigns to erase all the social stigma attached with the transgender. They have not only been segregated from the society but also have been ostracized from their rights and privileges. As much as our society is developing in many aspects but when it comes to transgender people the society hesitates to accept them as an integral part of the society.

Definition of Transgender

According to Section 2(k) of The Transgender Persons (Protection of Rights) Act, 2019[4]. "Transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, gender queer and person having such socio-cultural identities as *kinner, hijra, aravani* and *jogta.*

The Transgender Persons (Protection of Rights) Act, 2019

The object of this Act is to provide for the protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto. The Transgender Persons (Protection of Rights) Act, 2019 seeks to recognize the identity of transgender persons and prohibit discrimination in, inter alia, the fields of education, employment, healthcare, holding or disposing of property, holding public or private office, and access to and use of public services and benefits.

The Act provides the fully-fledged definition of Transgender people. Chapter II of the Act deals with the Right of Transgender regarding the prohibition against any type of discrimination. Under this chapter, the Act prohibits discrimination such as denial of admission of transgender in the educational institution, unfair treatment in the work or denial of the work, denial of a proper healthcare facility, denial of usage of public good and services, denial of holding public and private office and denial of rent/purchase/occupy the property. All of this is prohibited and they have equal rights same as given to other genders.

The Act deals with the Recognition of Identity of Transgender Person, under this, The District Magistrate is been authorized to give or issue an identification certificate to the Transgender, and to avail benefits given to Transgender, this certificate is mandatory. The person has to apply

---

[3] AIR 2014 SC 1863.

[4] The Transgender Persons (Protection of Rights) Act, (Act No. 40 of 2019) 2019.

with proper application in the DM office, then after examining documents the DM will give the certificate. Also, if the person wants to recognize as male or female, he has to go for Sex Reassignment Surgery and then get the approval of DM by showing the medical certificate issued by the Chief Medical Officer, and only after that the person can be recognized as male or female.

The Act deals with the Welfare Measure by the Government for the Transgender People, under this, the government will take measures for the greater number of participants of Transgender people and the inclusion of transgender in the society. The government will ensure welfare measures for the rights and interests of the transgender community. The government will ensure policies for the protection of the transgender, their rescue and rehabilitation of transgender people, and the government will take measures to involve the transgender people in cultural and recreational activities.

The Act deals with the Obligation of the Establishment and Other Person, in which it is mentioned that No establishment can discriminate against any transgender in the matter of employment which includes recruitment, promotion, and other related issues, The Transgender people should get the compliance facilities in every establishment in which a Compliant officer should be there in every establishment who will deal with the complaints of the above-mentioned issues. This part also gives the right to Transgender, to reside with their family and enjoy the facilities, and in case the family is not able to take care of the child, then by the court order of the competent court, the transgender child will be sent to the rehabilitation center.

The Act deals with the education, social security and health of transgender person and under this the Government emphasizes on education as it mandates all educational institutes which are aided and funded by the government to provide educational opportunities for transgender persons which will help them for their inclusion and include them in sports and recreational activities without discrimination. The government emphasizes the making of welfare schemes which will include vocational courses and training to make transgender people self-employed and financially strong. Under Healthcare, the government is proposing to set up Sero-surveillance Centers, medical facilities for sex reassignment surgery, and also the coverage of expense involved in the sex reassignment surgery with the help of insurance and include therapies in the insurance cover for transgender persons.

The Act also talks about the National Council for Transgender Person. The Central Government will form a National Council in which the members will be Union Minister, Minister of State, Secretary and Joint Secretary of Social Justice Ministry, one representative from ministries like Health, Family, House, and Urban Affair, Human Resource and Rural Development Ministry, one representative from National Human Rights Commission, one representative each from state ministries from north, south, east, west and north-east zones and Union Territories. Five representatives of the Transgender Community and five experts from NGOs and will be nominated by the Central Government. The term of the members will be three years from the date of nomination. The Council will help the Government in making policies for the welfare

of the transgender community and the council is there for the grievance redressal related to the transgender community.

The Act also deals with the offences and penalties where the government explains the type of offenses such as if forced labour is done by transgender then the employer will be punished and any type of abuse which includes physical, mental, sexual, or any other abuse has done to a transgender, it will be a criminal offense and the person will be punished in the form of imprisonment from six months up to two years and fine or both.

Conclusion

The preamble of the Indian Constitution dictates justice, social, economic and political equality of status to all its citizens. The constitution guarantees the fundamental right to equality and promises no discrimination on the basis of caste, religion, race, sex, and place of birth through articles 14 and 15 respectively. Article 14 of the Indian Constitution i.e., equality before law states that 'The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India'. The Constitution makers were of the opinion that no person within the territory of India should be denied these rights. Article 14 deals with both positive and negative aspects of equality wherein the first part deal with 'Equality before Law while the second part throws alight on 'Equal protection of laws.

After analyzing the discrimination, it is revealed that the transgender along with other person have been conferred the following rights, that is, right to equality, equality of opportunity, fundamental freedoms, right to life which includes the right to live with human dignity and right against exploitation. These rights include the basic and inalienable rights and such deprivation excludes hijras from the very fabric of Indian civil society. India is walking towards a better future with a positive mindset as gradually it has started recognizing the rights of the unheard through the golden doors of judicial activism.

One of the particular problems persists with the Special Marriage Act, 1954 which requires a “male” and a “female” among other conditions to register a marriage. Therefore, there is no scope for registration of marriage for “third gender” under the Special Marriage Act, 1954. In 2019 Indian legislature passed the special Act regarding the transgender entitled “The Transgender Persons (Protection of Rights) Act, 2019”. This Act was passed with an object providing for the protection of rights of transgender persons and their welfare and for matters connected therewith.

There is now a specific prohibition against discrimination against a transgender person. A transgender person cannot be discriminated against in matters of education, employment, healthcare, right to purchase/reside/occupy the property, right to movement, opportunity to stand for public or private office, access to Government or private establishment etc. While this prohibition seems basic and it can be said that the same is already guaranteed under the Constitution of India a specific provision will act as a deterrent for any person from discriminating against transgender Persons. The act falls short in certain other aspects also while providing the transgender persons with a right of recognition of identity.

The government is required to take steps for providing health care facilities to transgender persons. Such steps include providing medical care facilities, facilitating access in hospitals, providing hormonal therapy counseling, etc. However, the Act does not indicate any timeline for taking such measures.

The Supreme Court, in its verdict, asserted that transgender persons have the right to self-identify themselves as either male or female or third gender, but section 6 of the Act makes it mandatory for them to get the Certificate of Identification from the District Magistrate. The District Magistrate can issue the certificate only after the approval of the District Screening Committee.

Forcing transgender persons to indulge in bonded labour, denying them the right of passage, forcing them to leave households/villages harming them or physical/sexual abuse, etc. are some of the specifically recognized offenses against Transgender Persons. These offenses are punishable with imprisonment between 6 months & 2 years and a fine according to Section 18 of the Act. This punishment has raised eyebrows in the transgender community, more particularly, 2-year imprisonment for sexual abuse against a transgender person when a higher punishment is prescribed for the same offense against male or female. Now there is a need to make an effort to use gender-neutral terms in the legislative drafting so that the laws explicitly excluding the third gender should be made applicable to them.

Growth of Administrative Tribunals: New Hope for Administrative Justice System

Dr. S.K. Singh[1]

Introduction

Administrative Tribunals offer better safeguards to the individual than an administrative authority entrusted with the task of taking decisions or even their writ jurisdiction. When the state system was transformed form police ate into a welfare state, it brought about a considerable change in the functions of state. These modern welfare states came to possess vast powers affecting rights of citizens. A number of disputes arising out of various kinds of welfare legislation gave rise to a special kind of litigation which it was thought could be better dealt with by a set of special administrative courts or administrative tribunals.[2]

Administrative Tribunals are somewhat independent of the executive and are thus in a position to take an objective view of the matter rather than be guided by administrative expediency or policy which may happen in the case of the department. They arrive at their decision after giving a fair hearing to the individual whereas this may not apply to decision-making by the department. In comparison with the writ jurisdiction of the courts, administrative tribunals may give better protection to the individual on substantive grounds, whereas the courts have evolved a few restrictions of their power of review.**[2]** The courts do not review questions of fact unless there is no legal evidence or questions of law unless the error is apparent on the face of the record, or decide on merits, whereas tribunals are not silimited in their power.

The matters which may be entrusted to administrative tribunals as against the department and vice-versa is comparatively easy to determine why, in the most cases, a tribunal may be preferred to court as a deciding authority. The tribunal finds facts and decides the cases by applying legal rules. The inquiry finds and leads to a recommendation to a minister who then takes a decision in which there may be a large element of policy.[3] Nearly all tribunals apply rules Particular decision cannot, single case by single case, after the minister's policy. Where this is so, it is natural to entrust the decisions to a tribunal, if not to the courts.

On the other hand, it is sometimes desirable to preserve flexibility of decisions in the pursuance of public policy. Then a wise expediency is the proper basis of right adjudication, and the decision must be left with a minister.[4] In comparison to the courts the tribunals' needs of expedition, cheapness, freedom from technicality, easy accessibility, informality of

---

[1] ***Associate Professor of Law, Sri JNM (PG) College (KKC), Lucknow.***
[2] M.L. Upadhyaya, Tribunals, 1985, Constitutional Law of India, Vol.2 ed. by Mohd. Hidayatullah, at PP. 509-10.
[3] Indian Law Institute, 1977, Administrative Tribunals in India at pg. no. 33.
[4] H.W.R. Wade, Administrative Law, (1971) at p. 256.

atmosphere and expertise. However, to specify the factors which control allocation of functions of tribunals as against the department is not an easy matter.

Discretionary Power of Tribunal

Where a decision is reached according to fixed rules the process is essentially a logical one. The question that has to be asked is whether the facts of the particular case fall within the rule. Almost any words raise problems of definition and most of all words such as 'reasonable' or 'just and equitable' or 'in public interest' which involve value judgements. Rules may therefore be merely a delegation of discretion to the decision maker. Further, discretion will enter into the process of selecting the rules to be applied to the facts. This is one of the main areas of judicial discretion of which distinguishing precedents is the most common example. Rules do not therefore exclude discretion.

Every application of the rule involves some discretion and is more than a purely logical process.[5] What then is the difference between decisions according to rule and discretionary decisions? Rules are themselves value judgements whereas discretion is the power to make a value judgment. In practice the difference may not be vary grate as in the examples mentioned where the rule contains words such as 'reasonable' which amount to a delegation of discretion to make value judgements. A discretion may be substantially limited by laying down the factors which must be evaluated and even the weight to be attached to them. There is no absolute difference between rules and discretion as regards the area of choice left to the decision maker. Every rule involves some limitation. The degree of freedom of choice will depend on the type of rule and its context and on the extent to which discretion is limited.[6] Discretion element is, however, an important controlling factor in determining allocation of functions, though other factors also come into operation.

If discretion is to be exercised on the basis of a particular departmental policy, position of finance, priorities, and allocation of resources between competing claims, then it may be that the function is assigned to the department for its decision. If the departmental policy is not material or if consideration of fairness overwhelms the departmental policy, then it may be desirable to entrust the task to an administrative tribunal.[7] The need for accountability of Ministers to Parliament is factor going in favour of the executive. Again, smallness in the number of cases which are likely to occur under the statute may not justify creation of separate autonomous machinery, though the subject matter is otherwise suitable for decision by a tribunal. Accordingly, a number of such tribunals were created to hear and resolve disputes arising out of the provisions of the respective Acts.[8] Notwithstanding the fact that the system of adjudication by tribunals proved its merit of rendering expeditious and inexpensive justice, the system was criticized as constituting an encroachment on the function of the ordinary courts.

---

[5] Report of the Franks Committee, 6, 1957

[6] G. Gonz, Allocation of Decisions Making function, 1972, Public Law, at PP. 215-216

[7] Ibid.

[8] Indian Law Institute, 1977, Administrative Tribunal in India at P. 35

Tribunals under French Legal System

In the French Legal system undoubted advantages especially the administrative expertise of those called upon to sit in judgement upon the administration. Here it must be essential to know the meaning of 'Droit Administration' which contains certain set of rules relating to administration. The first set of rules determine what type of state official and administrative authorities are to be maintained their appointment, duties, status, dismissal and retirement. The second set of rules determines in what manner public services operate to meet the needs of citizen. The third set of rules relate to administrative.[9]

(i) Conseil D' Etat – In its beginning stages Counseil D' Etat work as a body whose principal function was to determine disputes and alleviation of tensions between great nobles. In pre-revolution era, the Counseil D' Etat advised the king on legal as well as administrative matters. In post-revolution era, the Counscil D' Etats' main function was to resolve difficulties which might occur in course of administration. It was during this period when the king made a decree which empowered the Couscil to advise the Head of State in matters arising between the administration and the civil courts and between the various ministers. This on was a stage where the Counscil did not enjoy many powers but acted as an advisor to the Head of State. The third republic[10] (1870-1940) gave to Counscil D' Etat the proper jurisdiction of a court which could administer justice in the name of French People.

(ii) Tribunaux Administrative – The Counseil D' Etat worked successfully till 1945. Later its work was distributed into eight subsections but still it fails behind in its race to go with the speed of litigation by the end of 1953,[11] Because of these situations and to remove the difficulties, its work on the original side was assigned to local courts which were named as Tribunaux Administrative. The object of this change was to quicken the processes of justice and reduce the work load of Counseil D' Etat. However, the Counseil exercised the appellate jurisdiction over the newly created Tribunaux Administrative.[12] Thus the reform of 1953 conferred a new status upon those local courts. By way of promotion the persons form the Tribunals. Administrative could be appointed to the Counscil D' Etat. This is present position of the Tribunals in France.

Tribunals under English Legal System

The specific characteristics of the English legal system are the multitude of special Tribunals made by the Act of Parliament. These tribunals are the product of the welfare state. The jurists and thinkers have observed that the idea of Administrative Tribunals is not all together foreign to the British soil. First attempt of the kind reminds of the Tudor Administrative courts. The King Council, Bishops, lawyers and others exercised a residuary jurisdiction in offended

[9] *Ibid.*
[10] V.G. Ramchandran Administrative Tribunals, AIR Journal 1958, at P. 10.
[11] Cobben, A History of Modern France, Vol 2, P. 33.
[12] *Ibid.*

which endangered the peace of the realm, though not in practice at present period. Star Chamber[13] was just another name in respect of King's Council exercising judicial functions in a chamber ornamented with star but, generally it delegated these functions to a committee consisting the above mentioned persons who exercised a jurisdiction which Holdsworth describes as being both large and vague, i.e. cases side the common court's jurisdiction.[14] Although, the Star Chamber may have been instituted as a political means of maintaining the power of Tudor Monarchy, its efficiency quickly made it a popular alternative to the ordinary courts and for the same reasons that are generally cited in justification of administrative tribunals today, i.e. cheapness, accessibility, freedom from technicality, expedition etc.[15]

In the very beginning of the 20th century, there was a rapid growth of tribunals in England. In the year 1929, we find that there was a share reaction against the growth of these adjudicatory bodies. Lord Hewart[16], the then Chief Justice launched a seating attack on the ousting of the court's jurisdiction and vesting it in the hands of bureaucracy. The view of the learned Lord Hewart, C.J. had an impact on the thinking of the English government and it was because of such a reaction that the British Parliament in the same year appointed a Committee on Minister's Power known as Donoghue more Committee. The Committee was asked to examine the power exercised by or under the direction of Ministers by way of delegated legislation, judicial or quasi-judicial decision or reports.

What measures were necessary to the constitutionally well-established principle or parliamentary sovereignty and the rule of law? The Committee described the criticism by Lord Hewart as baseless and observed: "Over conclusion on the whole matter is that there is nothing radically wrong about the existing practice of parliament in permitting the exercise of judicial and quasi-judicial powers by Ministerial Tribunal."[17] The Committee also emphasized on ensuring the independence of tribunals and recommended that the parties should be given a right of appeal to High Court in the point of law. During the Second World War and after the tribunals continue to grow, a number of welfare legislation were under the different setup of tribunals were created in the respective fields. The unprecedented growth of tribunals into different areas of state activity led to tribunals into different areas of state activity led to the appointment of Franks Committee by British Parliament in 1955.

The Franks Committee terms of reference were to consider and make recommendations on : (i) The Constitution and working of tribunals other than the ordinary courts of law, constituted under any act of Parliament by the Minister of the Crown or for the purpose of a Minister's functions, and (ii) The working of such administrative procedures as include the holding of an enquiry or hearing by or on behalf of a Minister on an appeal or as a result of objections of representations, and in particular the procedure for the compulsory purchase of land. They

---

[13] L.R. Brown, The Reform of French Administrative Courts, at P. 22.
[14] Modern Law Review, 357, as cited in Brown and Garner, French Administrative Law, 20 (2nd ed., 1973).
[15] By Virtue of the Bill of Rights, 1691 and Act of Settlement of 1701, Parliament rather than courts became the protector of constitution of civil liberties at P. 22.
[16] *Ibid.*
[17] The Report of the Committee on Minister's Power, (1957) at PP. 115-116.

also accepted the principle of openness, fairness and impartiality as the very basis of the functioning of the tribunals and observed, "We consider that tribunals should properly be regarded as machinery provided by parliament for adjudication rather than as a hart of the machinery of administration."[18] Further they make recommendations relating to the working, composition and supervision of tribunals. The Committee proposed a Council on Tribunals to supervise it's working.[19]

The report of the Franks Committee which was published in July 1957 gave to tribunals a status higher than the one, they have previously enjoyed. Today, we find a lot of administrative tribunals in England dealing with economic matters such as agriculture, commerce, housing transport, revenue, industrial matters etc. There are other tribunal's deals with personal welfare, service, pension, education employment, national health service and immigration.

Tribunals under India Legal System

In ancient India the king was regarded as the fountain of justice. To advise the king, there were Brahmins, Judges, Ministers elders etc. Below the King's court was the court of Chief Justice, which was empowered to constitute separate Tribunals for deciding specific matters. It appears that the institution of lawyer was not recognised in those days. The judicial procedure appeared to be the very simple, the aggrieved person could file a plaint and the court could order the appearance of the defendant. The case was decided after giving full opportunity to both the parties. During the Muslim rule, there does not appear to be any major changes in the administration of justice. In the beginning of 17th century when the Britishers came to India, they also did not bother much about the administration of justices. Though in subsequent years they began to think in terms of setting up courts at the three presidencies, viz., Bombay, Calcutta and Madras.[20]

However, these Presidency Court acted under the overall authority of Governor-General in Council, but the matter regarding the constitution of Tribunal for specified matters did not receive the attention of the British in 17th and 18th century. It was in the year 1858 when India was brought under the direct control of British Government and the Indian High Court Act of 1861 was a step in the direction of imparting justice to the people. The Act established High Courts in some of the states.[21] These High Courts were empowered to decide all civil and criminal cases including the cases of civil servants.

All cases of serving personnel relating to different fields like labour, industry, tax, railway Transport and commercial transaction fell within the overall jurisdiction of High Courts. As for as the new constitution proposals are concerned, amongst the subjects mentioned for possible adjudication by tribunals, there are clear cases which could be tribunalized, e.g.,

---

[18] *Supra notes* 14.
[19] Id at P. 41
[20] Supra notes 5.
[21] Charter Act of 1661

assessment, collection and enforcement of tax, industrial and labour disputes and elections to the legislature, but these are subject which are not so very clear for tribunalization. Though creation of tribunals in some of these matters as against the department and to the exclusion of courts may provide a better safeguard to the individual on substantive grounds, as a tribunal will be a body having authority to go into the merits of the case and also into questions both of law and facts as against the limited nature of the writ jurisdiction, yet would hamper functioning of the administration.[22] The makers of the Indian constitution had deliberately adopted the British system of tribunals.

The first law Commission of India was appointed to examine the entire system of Administration of Justice in India. The Commission submitted its report in 1958. The Commission took note of the developments that had taken place in USA, UK and France. The Commission also examined the working of administrative tribunals in India with reference to the various provisions of the Indian constitution and finally the commission did not favour a change in the system as it then existed. The Commission was guided in its deliberation by the following considerations:[23]

(i) It would be derogatory to the citizens' rights to establish system of administrative courts which would take the place of the ordinary courts of law for examining the validity of administrative action.

(ii) It may be that in view of certain inherent advantages like, speed, cheapness, procedural simplicity and availability of special knowledge in extra judicial tribunals, these may be useful as a supplementary system. But it will not be right to conceive them as a device to supplant the ordinary courts of law. It would be unthinkable to allow judicial justice administered by courts of law to be superseded by executive justice administered by administrative tribunals.

(iii) We may impute our administrative tribunals with a greater judicial spirit and insist upon their observance of the rules which would obtain in any system molded on the principles of natural justice; the ultimate review must lie with our High Court.

(iv) Any scheme of administrative adjudication which has not at its apex the High Court or High Court Judge in manner will fall of its purpose.

The Commission accepted the desirability of tribunal system and supported the case for creating new tribunals but it was not prepared for any proposal for exclusion of judicial review of administrative adjudication. The Commission saw positive merit in then prevailing system of higher judiciary exercising power of superintendence over the tribunals. The existing jurisdiction of the Supreme Court and High Courts which enables them to examine to limited extent the action of administrative bodies should be maintained unimpaired. The creation of general administrative body like the council d' Etat in France is not practicable in our country. Decisions of tribunals should be demarcated into judicial quasi-judicial and administrative. In the judicial and quasi-judicial decisions, an appeal on the facts should lie to an independent tribunal presided over by a person qualified to be judge of a High Court. The

---

[22] Government of India Bill, 1858 and Indian High Court Act 1861.
[23] *Supra notes* 3 at PP. 37-38.

tribunal must function with openness, fairness and impartiality as laid down by the Franks Committee. In the case of administrative decisions, provision should be made that they would be accompanied by reasons. The reasons will make it possible to test the validity of these decisions by the machinery or appropriate writs. The tribunals delivering administrative judgement should conform to the principles of natural justice and should act with openness and impartiality legislation providing single procedure embodying the principles of natural justice for the functioning of tribunals may be passed. Such procedure will be applicable to the functioning of all tribunals in the absence of special provisions or provisions in the statutes constituting them.[24]

Today we have a hierarchy of well organised tribunals functioning both under Central laws as well as the State laws. The Indian law followed the British pattern in this respect. The law creating a tribunal enumerated the matters which were covered by the jurisdiction of the said tribunal and then provided for finality of its decisions and determinations with complete ouster of jurisdiction of the ordinary civil courts. But the ouster of the jurisdiction the ordinary civil courts did not operate to exclude judicial review of administrative adjudication by the High Court and the Supreme Court. Indeed, the supreme Court and the High Courts were expressly vested with power of judicial review under the provisions contained in Articles 32,136 and 226 of the constitution.[25]

It must be said to the credit of the higher judiciary in India that a well-knit body of law on the judicial control of administrative tribunals in India has come to be build up. In cases of alleged errors as jurisdiction, violation of natural justice or any other error of law apparent on the face of record the High Court and the Supreme Court quashed the proceedings before the tribunal by issuing a writ in the nature of certiorari or any other appropriate order or direction. The technique devised and deployed to control excess of jurisdiction by tribunals and other aspect of judicial control of administrative adjudication have already been dealt with under Articles 226 and 227 of the constitution.

Having regard to the importance of the administrative Tribunals Act, 1985, as it concerns all the public servants of the Union and States and also the instrumentalities of the Union of and the states who could be brought within the preview of the jurisdiction of the Administrative Tribunals established under the Act. Now it is clear that the growth of Administrative Tribunals in different legal systems are a continuous process and that it shall also be going on with the help of judiciary and also according to the creative nature of Parliament, which is indicated by the *S.P. Sampath Kumar v. Union of India*,[26] *L. Chandra Kumar's case*[27], and tribunals made by the Parliament as in Carvery's Case.

---

[24] 14th Report of the Law Commission of India, 1858, Vol II at PP. 693-94.
[25] Id at PP. 694-695.
[26] *S.P. Sampath Kumar v. Union of India* (1987) S.C.C. 124
[27] The Constitution (42nd Amendment) Act, 1976, provided for the exclusion of judicial review by High Courts of the Administrative Tribunals. But the Constitution (44th Amendment) Act, 1978 has restored the previous position.

Conclusion

After the above discussion it is clear that the entire constitutional system is founded on the rule of law which means observe of wide discretionary power. It implies no one is above the law. The preamble of the Constitution sets out the concept of rule of law, details of which are worked out in other provisions of the constitution. It envisages democracy, the true kernel of which is the ultimate quality of the courts to restrain all exercises of absolute and arbitrary power not only by the executive and officials but also by the legislature. The constitution of India though recognized the existence of Administrative Tribunals by providing a method of judicial supervision over these bodies through Articles 32, 136, 226 and 227 yet did not make any provision for establishments of these bodies.

Only the 42nd Amendment of the Constitution make a change in this scheme by empowering the legislature to create tribunals in the areas of civil service, levy, assessment, collection and enforcement of any tax, foreign exchange, import and export across custom frontiers; industrial and labor disputes, ceiling on urban properties, election to the legislatures, etc. The role of tribunals in the adjudicative process will be clear from the fact that there are more than 2000 bodies which came under the general supervising jurisdiction of the Council of Tribunals.[28]

Thus, it is clear that all the litigation governed by these factors could not surely have been handled by the system of ordinary courts because of several factors, necessitating the development of administrative adjudication. A government cannot function effectively it those who man it suffers a sense of injustice in respect of their career at some stage or other. So, while a cheap and effective remedy has been envisaged by the establishment of Tribunals. cumulatively they provide the much-needed guideline for quick disposal and ensure certainty and predictability of result.

In a landmark judgment, *L. Chandra Kumar v Union of India*[29], the Supreme Court had propounded the theory of alternative mechanism as substitute of with regard to the Constitution and composition of the Tribunal. The Administrative Tribunal Act, 1985 was accordingly amended to give effect to the said suggestion. Thus, the power of the High Court and the Supreme Court to test the constitutionals validity of legislation cannot be ousted or excluded. However, the court held that all the decision of these tribunals, will be the subject to the scrutiny before Division bench of the High Courts which has the jurisdiction over a tribunal concerned.

There are a few fundamental differences among our tribunal system and the offer legal systems. *Firstly*, in France there are separate systems of courts for private law litigation. The two systems exist side by side without coordination or assimilation of the jurisprudence developed them both. However, under the common law systems so for as the courts keep their supervisory jurisdiction over tribunals there is assimilation of the jurisprudence developed by

[28] The first Report of Council of Tribunals 1 (1960).
[29] *L. Chandra Kumar v. Union of India* AIR 1997 S.C. 1125.

tribunals with the general jurisprudence of the country *secondly*, the largest single group of French administrative tribunals are one which we should classify rather as domestic tribunals, namely as disciplinary organs of public professions. Over all these specialized administrative jurisdictions the Council d' least exercises supervision by way of cessation. *Thirdly*, the administrative courts of France have general jurisdiction over administrative litigation, unlike the specialized jurisdiction of tribunals in the common law system. *Fourthly*, in common law system, administrative tribunals have also been created to decide disputes of private nature. However, this is not so in France.

Flexibilities Under Indian Patent Law and Public Health

Abhishek Kumar[1]

The TRIPS Agreement comprised of a number of public health safeguards in addition to harmonized minimum standards, giving nations enough latitude to take their individual patent systems and developmental requirements into account and prohibiting the exploitation of intellectual property laws though the impact of these public health safeguards have been contested by developing countries with regard to access to medicine.

Pascal Lamy, the current Director-General of the WTO, reaffirmed the significance of the safeguards, saying that safeguards "*can make an important difference in saving life and ensuring more people can afford medical treatment*".[2]

In order to fulfil the TRIPS obligations, India carried out three amendments in its Patent law and through these amendments, TRIPS flexibilities were also incorporated for ensuring access to medicine. Access to essential medicines is influenced by international patent law and other factors, such as drug distribution and price control. Since India complied fully with the TRIPS Agreement in 2005 which is the major doctrine for international patent protection, it should be analyzed whether the safeguards provided by the TRIPS Agreement are sufficient to provide access to essential medicines at affordable prices. The Indian Government has also adopted other policies or strategies like regulation of drug prices outside the TRIPS Agreement for ensuring access to essential medicines. In this research paper, the inclusion of the TRIPS safeguards under Indian patent law (i.e., parallel imports, Bolar provisions, compulsory licenses and government uses) have been critically examined.

Scope of Patentability

A number of exceptions to patentability have been adopted by Indian patent law which is unique among world's patent regimes. Though, these exceptions have been incessantly criticised by the developed countries of the world but these exclusions have significantly filtered the numerous frivolous pharmaceutical patents to a great extent. The Indian patent law has also raised the bar for innovative step (or obviousness), which, if strictly enforced, will have a significant impact. Even though both these actions alone potentially invalidate a sizable portion of the drug patents that industrialised nations would otherwise grant, they appear to be

1 ***Assistant Professor, Faculty of Law, University of Allahabad, Prayagraj***
2 Sidonie Descheemaeker, "India, Pharmacy of the Developing World IP, Trade and the Access to Medicine" 49 *Jura Falconis* 546 (2012-2013).

completely TRIPS compliant.[3] The patenting of known substances was one of the most pressing concerns, which is often misused by pharmaceutical companies to get patents for incremental modifications, which is known as – “ever greening of patents”. The ever greening of patents derails the development of generic medicines through acquisition of many patents on the known substances.

Indian Patent Law has adopted two filters by which the scope of patentability of inventions has been restricted. Novelty, inventive step and industrial applications are the three common criterion under patent law which is required to be satisfied by the patentee in order to be granted patent for his invention. Firstly, under Indian patent law, the threshold limit of patentability criterion has significantly been enhanced by incorporating definition of novelty, inventive step and industrial application.[4] Secondly, certain inventions that either do not meet any of the criteria for patentability or that compromise national security or jeopardise the health of people, animals, or plants have been excluded from the scope of Indian patent law.[5]

Any invention awarded a patent under the terms of the Patent Act is defined in Section 2(m). While the definition of "invention" according to section 2(1)(j) is ‘a new product or process involving an inventive step and capable of industrial application.’[6] According to the Act, an inventive step is characteristic of an invention which involves technological breakthroughs compared to the state of the art, has economic significance, or both, and renders an invention not obvious to a person well-versed in the relevant field. Therefore, each invention must satisfy one of the following three criteria in order to satisfy the inventive step: i) advancements above existing technical knowledge; ii) economic significance; or iii) both

Further, Section 3 of Indian Patent Act, is one of the most controversial exclusionary provisions which prohibits patents on derivatives of known substances, unless such derivatives display significantly enhanced efficacy.[7] Section 3 (d) has been consistently criticised by pharmaceutical MNCs. The constitutional validity of this provision was contested by Novartis AG before the Madras High Court in 2006.[8]

The Madras High Court stated in dismissing Novartis' writ petitions:
“We have borne in mind the object which the Amending Act wanted to achieve, namely to prevent ever-greening; to provide easy access to the citizens of this country to life-saving drugs;

---

[3] Amy Kapczynski, “Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector” 97 *California Law Review* 1589 (2009).

[4] Section 2 (1) (ac) (ja) (l) of The Patents Act,1970.

[5] Section 3 & Section 4 of The Patents Act, 1970.

[6] Janice M. Mueller, “The Tiger Awakens: The Tumultuous Transformation of India's Patent System and the Rise of Indian Pharmaceutical Innovation” 68 *University of Pittsburgh Law Review* 548 (2007).

[7] *Id*. at 550.

[8] W.P. No. 24759 and 24760 of 2006 before The High Court of Judicature at Madras.

and to discharge their Constitutional duty of providing good health care to its citizens.[9] Therefore, it was decided that in order to secure a patent for a novel form of a known chemical or for its derivatives, the patent applicant must demonstrate greater therapeutic effect.'

Therefore, the Court emphasized that Section 3(d) is not in violation of Article 14 of the Constitution of India.[10] Finally, Supreme Court of India settled the controversy in its decision[11]and has brought great degree of clarity with regard to the term 'efficacy'. On April 1, 2013, the Supreme Court of India upheld the rejection of Novartis's patent application on Gleevec, a ground breaking drug used in the treatment of chronic myeloid leukaemia, on the grounds that the patent failed to meet section 3(d) requirements.[12]According to the decision, only such properties that directly relate to efficacy, which in case of medicine, as seen above, is its therapeutic efficacy. From the judgement, it can be inferred that a mere change in form which consists of properties in the earlier form would not qualify as "enhancement of efficacy". The Court pointed out that Section 3(d) established a second level of requirements for qualifying to patent pharmaceutical products and was specifically designed to encompass those products.[13]Thus, the Supreme Court has clarified the interpretative meaning of the term efficacy as therapeutic efficacy.

Parallel Import

Parallel Importation allows member states the choice to buy patented goods when they are legally and more affordably available in a foreign market, allowing nations to compare prices on patented goods. Parallel import is covered by Section 107 (A) (b)[14] of the Indian Patent Act of 1970.[15] It defines parallel import as the "importation of a patented product by any person from a person who was duly authorized by the patentee to sell or distribute the product." Under this Section, importation is a legal act if it has been authorized by the patentee. The TRIPS agreement, which permits the importation of patented products from any source from any country where the product is lawfully introduced in the market, is perfectly compliant with Indian parallel import regulations.

Early Working

---

[9] *Ibid.*

[10] Timothy Bazzle, "Pharmacy of the Developing World: Reconciling Intellectual Property Rights in India with the Right to Health: TRIPS, India's Patent System and Essential Medicines" 42 *Georgetown Journal of International Law* 805 (2011).

[11] *Novartis AGv. Union of India* (2013) 6 SCC 1

[12] Jodie Liu, "Compulsory Licensing and Anti-Evergreening: Interpreting the TRIPS Flexibilities in Sections 84 and 3(d) of the Indian Patents Act" 56*Harvard International Law Journal* 221 (2015).

[13] *Ibid.*

[14] Section 107 (A) (b) reads as: Certain acts not to be considered as infringement. -For the purposes of this Act, -*importation of patented products by any person from a person who is duly authorised under the law to produce and sell or distribute the produce, shall not be considered as an infringement of patent rights.*

[15] In 2002, this provision was amended and inserted in the Patent Act.

The Indian patent regime provides what is commonly referred to as the Bolar exception[16] -an exception that allows generic medication producers to begin making patented medicines in small quantities within the patent's validity period in order to gather data for submission to a drug approval body. Because of this exception, generic drugs can enter the market quickly after a patent expires, benefiting patients by making them more accessible and affordable. Early Working Exception which is also known as Bolar provisions are regulated by Section 107 (A)[17] of the Indian Patent Act of 1970. This clause permits Indian businesses to exploit patents without prior authorization in order to get regulatory approval for the manufacture and marketing of a product. The efforts of generic producers, who are looking at every avenue to assist mitigate the negative effects of a pharmaceutical patent regime, would undoubtedly benefit from this.

Compulsory Licensing and Government Use

A government-issued compulsory license, typically in exchange for a royalty, permits a party to utilize a patent without the patentee's consent. The justification for giving compulsory licenses is obvious: in some cases, the public welfare benefit of a license outweighs the infringement on the patent holder's monopoly and the resulting adverse effects.[18] TRIPS agreement permits WTO members to issue mandatory licenses for "public health" reasons, but it also instructs them to only do so on an individual basis and under conditions that are appropriate for the purpose for which the licenses are being provided.[19]

India's law has very expansive compulsory licensing provisions. The most comprehensive grounds for requesting a compulsory licence are found in Section 84 of the Patents Act. A party seeking a compulsory licence under Section 84 cannot submit an application until the targeted patent has been in effect for at least three years, and they must establish a prima facie case before the licence can be granted. The holder of a patent has the right to start an opposition process against the issuance of this kind of compulsory licence. Furthermore, using this process, a compulsory licence could only be given for domestic sales of the patented product.

Government use is another one of the most effective means to curb abuse of patents. It allows a

---

[16] This expression is borrowed from a US case, *Roche Products Inc. v. Bolar Pharm. Co. Inc*., 733 F.2d 858 (Fed. Cir. 1984), in which it was held that the 'experimental use' exception under US law was not broad enough to permit Bolar to develop and submit a generic product for regulatory approval before the expiry of Roche's patent. The Hatch-Waxman Act in the US, which introduced such an exemption favouring generic companies, was introduced in response to this ruling.

[17] Section 107A Certain acts not to be considered as infringement. -For the purposes of this Act, -

(a) any act of making, constructing, using, selling or importing a patented invention solely for uses reasonably related to the development and submission of information required under any law for the time being in force, in India, or in a country other than India, that regulates the manufacture, construction, use, sale or import of any product.

[18] Sara Germano, “Compulsory Licensing of Pharmaceuticals in Southeast Asia: Paving the Way for Greater Use of the TRIPS Flexibility in Low- and Middle-Income Countries” 76 *UMKC Law Review* 279-80 (2007).

[19] *Supra* note 9 at 213.

government to exploit the relevant patent owned by a patent holder without the authorization for non-commercial use. Government use is regulated by Section 47 and Section 100 of the Indian Patent Act, 1970.

The Central Government and any person authorised in writing by it may use [an] invention, according to India's primary government's use provision, without the patent holder's consent.[20]

Are the flexibilities under Indian Patent Law Consistent with the TRIPS Agreement?

The Indian Patent Law has laid down broader interpretation of those spaces in TRIPS where certain terms have remained undefined. The high degree of originality incorporated under Indian Patent law is not deemed objectionable under the TRIPS Agreement because it does not define the term itself. The TRIPS agreement, which permits the importation of patented products from any source from any country where the product is lawfully introduced in the market, is perfectly compliant with Indian parallel import regulations. The bolar provision is only for activities prior to actual production and selling. These activities do not damage the patent holder's interests during the patent period and therefore bolar provisions under the Indian patent regime are fully consistent with the TRIPS Agreement. Therefore, it can be conclusively said that the Indian Patent Law is fully compatible with TRIPS agreement. For its unique features and for taking full advantages of the TRIPS provisions which are instrumental for securing public health and various human rights, the Indian Patent Law has been hailed world over especially by the developing countries.

[20] Section 100(1) of India Patents Act, 1970.

Right to Information as a Human Right: A Study of Nexus

Mr. Abhishek Dubey[1]

Abstract

Human Rights are a wide subject within its periphery and gives rise to the notion of innumerable rights. In the same order, Right to Information is also one of the species of the genus Human Right. On this axis, an attempt has been made in this article to trace the origin and development of Right to Information as a Human Right, its global position with a comparative inference. It has also been made to investigate the nexus of Right to Information with Human Rights in present context. Since the study is more about Indian scenario, the constitutional and statutory status has been taken to the account with reference to the Indian context. Further, the implementation aspect is explored together with the safeguards and protection measures suggested.

Keywords: Right to Information, Human Right, Nexus, Fundamental Rights, Right to Development.

Introduction

It may be noted at the outset that human rights are a matter and part & parcel of international law because human rights do not depend on an individual's nationality and therefore the protection of these rights cannot be limited to the jurisdiction of any state[2].

Human rights may be regarded as those fundamental and inalienable rights which are essential for life as human being[3]. Human rights as the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India[4].

The different definitions of human rights are suggesting it to include the matter of international law i.e. law without boundary or jurisdiction of a political state, a fundamental or basic right in nature, which is inalienable essential for human being and its enforceability i.e. by a court of competent jurisdiction. It can be derived from here that human rights are subject matter of international law in sense of its necessity and it may be matter of a state jurisdiction for the purpose of its enforcement, which is a procedural aspect of human rights. In India, Constitution has provided fundamental rights[5] with strict enforceability by courts. Interestingly, several human rights are similar to that of fundamental rights provided under the Constitution of India. The subject and genesis of human rights is so vast that it is not suitable to institute all such rights in the form of constitutional right of country and so there are several rights, which are still subject to the international intervention only.

---

[1] ***Ph.D. Scholar - Law, Deen Dayal Upadhyaya Gorakhpur University, Gorakhpur, Uttar Pradesh – 273009.***
[2] Dr. S. K. Kapoor, Human Rights under International Law & Indian Law, 5th Edition, 2011, p. 1.
[3] *Ibid.*
[4] Section 2(1)(d), The Protection of Human Rights Act, 1993 (Act No. 10 of 1994).
[5] Part III, The Constitution of India, 1950.

Honourable High Court of Delhi expresses that the Right to Information Act is not repository of the right to information. Its repository is the constitutional rights guaranteed under Article 19(1) (a). The Act is merely an instrument that lays down statutory procedure in the exercise of this right... According to the learned author Referring to S.P. Sathe, Right to Information, Lexis Nexis, the right to information is not confined to Article 19(1)(a) but is also situated in Article 14 (equality before the law and equal protection of law) and Article 21 (right to life and personal liberty). The right to information may not always have a linkage with the freedom of speech. If a citizen gets information, certainly his capacity to speak will be enhanced. But many a time, he needs information, which may have nothing to do with his desire to speak[6]. It suggests that Right to Information is a fundamental right in India under article 19(1) (a) of the Constitution of India[7]. Apart from this, its genus i.e. Right to Know is also a fundamental right under article 21 of the Constitution of India[8]. Now articles 19(1) (a)[9] and 21[10], both are human rights too. Certainly, these two are connected, subject to the right extraction.

Origin & Development of Right to Information as a Human Rights

In India, Right to Information has been originated from the Constitution itself and further it has been emphasized by statutory form. It has its objective to promote transparency and accountability in the working of every public authority. It has also this feature being implemented in a democratic republic, where people are supreme.

Categorization of Right to Information as a human right is based on the notion of Right to Development. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized[11].

The right to development was first recognized in 1981 in Article 22 of the African Charter on Human and Peoples' Rights as a definitive individual and collective right. Article 22 (1) provides that: "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. It was subsequently proclaimed by the United Nations in 1986 in the "Declaration on the Right to Development, which was adopted by the United Nations General Assembly resolution 41/128. The Right to development is a group right of peoples as opposed to an individual right, and was reaffirmed by the 1993 Vienna Declaration and Programme of Action[12].

---

[6] *Secretary General, Supreme Court of India v. Subhash Chandra Agarwal*, 12th January 2010.
[7] *India Soaps & Toiletries Makers Association v. Ozair Hussain*, AIR 2013 SC 1834.
[8] *Reliance Petro Chemicals Ltd v. Proprietors of Indian Express Newspaper*, AIR 1989 SC 190, 202-203.
[9] Right to Freedom of Speech and Expression.
[10] Protection of Life and Personal Liberty.
[11] Article 1(1), UN Declaration on the Right to Development, 1986.
[12] Available at https://en.wikipedia.org/wiki/Right_to_development accessed on 20 June 2020 at 12:45 pm.

Right to participate in, contribute to and enjoy the political development is direct inference to opine that right to information is based on notion of right to development, which is a human right. Being a modern approach, it is also called third generation human right signifying its relevance in human development as essential one. Therefore, it is derived that right to information has travelled to be a human right originated from Constitution of India and supported through right to development, as recognized internationally.

Global Position: Comparative Perspective

Right to information is a significant feature of democracy and in other format wherever the people's participation in political development is to be restored. Its availability in several countries in different forms is supplied here, so as to approximate the idea of comparative global position and its impact.

Over 100 countries around the world have implemented some form of freedom of information legislation. Sweden's Freedom of the Press Act of 1766 is the oldest in the world. In Australia, the Freedom of Information Act 1982 was passed at the federal level in 1982, applying to all "ministers, departments and public authorities" of the Commonwealth. There is similar legislation in all states and territories. In Brazil, the Article 5, XXXIII, of the Constitution sets that "everyone shall have the right to receive information of his own interest or of public interest from public entities, which shall be given within the time prescribed by law". A statute passed in 2011 and that will enter into force in regulates the manner and the timetable for the information to be given by the State. In Canada, the Access to Information Act allows citizens to demand records from federal bodies. The act came into force in 1983, under the Pierre Trudeau government, permitting Canadians to retrieve information from government files, establishing what information could be accessed, mandating timelines for response. This is enforced by the Information Commissioner of Canada. In April 2007, the State Council of the People's Republic of China promulgated the Regulations of the People's Republic of China on Open Government Information.

In Denmark access to Public Administration Files Act of 1985 is a Danish act passed by the Folketing concerning public access to governmental records. The Act came into force in 1987 and repealed the Public Records Act of 1970. New version of the Act came into force on 1 January 2014. Denmark is considered to be a historic pioneer in the field of FOI along with Sweden, Finland and Norway. There is no constitutional basis in the Constitution of Denmark for the right of the public to information. In Mexico the Constitution was amended in 1977 to include a right of freedom of information. Article 6 says the right of information shall be guaranteed by the state.

In New Zealand, the relevant legislation is the Official Information Act 1982. This implemented a general policy of openness regarding official documents and replaced the Official Secrets Act. Section 32 of the Constitution of South Africa guarantees "the right of access to any information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights." This right is implemented

through the Promotion of Access to Information Act, which was enacted on 2 February 2000. The right of access to privately held information is an interesting feature, as most freedom of information laws only covers governmental bodies. In United Kingdom the Freedom of Information Act 2000 is the implementation of freedom of information legislation in the United Kingdom on a national level, with the exception of Scottish bodies, which are covered by the Freedom of Information (Scotland) Act 2002. Environmental information is covered by further legislation Environmental Information Regulations 2004. In United States of America the Freedom of Information Act was signed into law by President Lyndon B. Johnson on July 4, 1966 and went into effect the following year. Ralph Nader has been credited with the impetus for creating this act, among others. The Electronic Freedom of Information Act Amendments was signed by President Bill Clinton on October 2, 1996[13]. Apart from above, in India we have the Right to Information Act, 2005[14]. It is the exclusive legislation on the subject covering the whole nation and is recognized as one of the effective instruments of people participation in governance as well as their development.

The comparative observations suggest that the presence of right to information is remarkable in several countries and most interesting point is that either it is a constitutional right or statutory almost everywhere, which signifies the effective implementation of the same right from the intent of the legislation. Therefore, it may be reasoned that it has greater importance and that is none other than being it human right. There are several other mechanisms of people’s development and participation in development have been conceptualized but the right to information has been developed as different feature of its category as we have seen its strong implementation in several countries. Justice B. Subhashan Reddy, Lokayukta for Andhra Pradesh and Telangana, has rightly said that the Right to Information was recognised as a fundamental human right and balance should be exercised while using the right by activists in a proper to ensure public good[15], which is evident in the comparative study also.

Nexus with Human Rights

The nexus of right to information with human rights has been little elaborated in this article above. The detail and logical emphasis may serve the purpose of exploring its right interweaving. Primarily, the definition of human right, notion of right to development and origin of right to information is in coherence to reveal its proper foundational nexus of never breakable nature. Secondarily, some situational analysis could be a diagrammatic study to enlighten the nexus of right to information with human right. In Indian scenario, as provided under the provisions of act on the subject, a citizen may seek information as per the procedure provided therein. A citizen approaches rightly and rightfully to a government office and submitted his/her application seeking some information regarding a recruitment process taken place recently in a government office. The reply received from the authority includes some

---

[13]Available at https://en.wikipedia.org/wiki/Freedom_of_information_laws_by_country

[14] Act No. 22 of 2005.

[15]Available at http://www.thehindu.com/news/national/andhra-pradesh/rti-is-fundamental-human-right/article7740639.ece

irregularity and the applicant took it to the judicial intervention where the court set aside the whole recruitment on finding of recruitment of an ineligible candidate.

Further, another valid recruitment process took place and legible and eligible candidates were recruited properly. Here, this right to information led to a justice which could not have been attained in absence of this right. The direct nexus as well as impact may be observed from this situation. In present time, right to information in India is serving the innumerable purposes pertaining directly to people's development and also securing justice for them. It includes the area of education, medical, public distribution, welfare schemes and several other arena of government where right to information is serving to provide information to citizens and it has been a great instrument to radicalise corruption and to secure justice, as being essential feature of a democracy. The attractive feature of this right is making it statutory and separate independent commissions are constituted with statutory power, which looks after the non-compliance of the act, wherever it is made applicable.

It directly covers the one of the major aspects of right to development, which is not directly implemented despite being fundamental right in India. The implementation of this right has therefore safeguarded several other related rights and also other forms of human right which could not be the part of direct emphasis in any of the rights being implemented. Further, in order to protect human rights in India, the national legislation on the subject provides a very democratic provision which says that every member of the National Human Rights Commission, State Human Rights Commission and every officer appointed or authorised by the Commission or the State Commission to exercise functions under this Act shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code[16], which signifies, as in consonance of the relevant provision of the Right to Information Act[17], the coverage of human rights agencies under the right to information act. It will ensure high level of compliance and excludes any possible demerit of the procedure or probable abuse by authorities. Interesting to note that the right to information, which is a human right and fundamental right and also statutorily implemented right, covers the statutory human rights implementing agencies also, which is sensible step in process of democracy and unique in nature.

In Indian context, rights of the people have been provided wide enforcement, however because of huge population as well as geographical coverage the ground reality somewhere expresses different picture, which all subject to further studies, rectification and more fabric implementation of rights concerned. The biggest source of inspiration and compliance behind such developments is Constitution of India, which provides almost everything required for a democratic republic, which we inherit from our forefathers and the proud nationality of our country too.

---

[16] Section 39, The Protection of Human Rights Act, 1993 (Act No. 10 of 1994).
[17] Section 4, The Right to Information Act, 2005 (Act No. 22 of 2005).

Constitutional Interweaving

The Constitution of India is an organic law which entails source to every law thereafter enacted and also those laws enacted thereafter need to be consistent with Constitution. In this case right to information as a human right and its related statute is based on constitutional interweaving, is matter of relevant analysis.

The preamble to the Constitution, Citizenship, Fundamental Rights, Directive Principles of State Policy and Fundamental Duties are foundation in establishing the constitutional interweaving of the subject being studied. The preamble establishes a democratic republic, which necessitates the participation of people and their welfare by the state. The citizenship is essential requirement in some of the fundamental rights in Indian Constitutional scheme, and so the citizenship or a law enacted regulating the citizenship must be in consonance of part II of the Constitution of India. Further, part III i.e. fundamental rights are so important in this democracy. The relevant articles are 19 (1) (a) and 21, for the purpose of right to information and right to know respectively. However, human right as a notion is so wide that it can be traced in other articles of part III also.

Under part IV i.e. directive principles of state policy, however not enforceable by any court but nevertheless fundamental in the governance of the country as a duty of state to apply these policies in making laws[18], expresses that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life[19].It is directing towards the welfare policy of people through certain necessary ingredients, which is the implication of idea of maximum welfare of people and their development.

The court also viewed that the directive principles have been described as forerunners of the UN Convention on right to development as an inalienable human rights[20]. At the end, fundamental duties are, however the duty of citizen[21], but also collective duty of state[22], making its status special in ascertaining the significance of people preference by state. On the whole, the above explained all provisions have interwoven a constitutional structure to sustain the notion of people welfare and human rights. This order entails the right to information as human rights and greatly signifies the constitutional back up to the proposition of participation of people through right to information for their welfare.

Statutory Intervention

The making of laws is the exclusive function of the parliament on subjects assigned to it and no other authority has been empowered to intervene in this function directly under the constitutional scheme. In routine of governance through constitutional arrangement, the

[18] Article 37, The Constitution of India, 1950.
[19] Article 38 (1), The Constitution of India, 1950.
[20] *Air India Statutory Corporation v. United Labour Union*, AIR 1997 SC 645.
[21] Article 51A, The Constitution of India, 1950.
[22]*AIIMS Students Union v. AIIMS & Others*, AIR 2001 SC 3262.

parliament enacts different laws as per the need and recommendations. Some of the constitutional provisions also have been legislated so as either to provide procedure thereto or to specifically enforce the particular provision. In the same way, after several demands from the public and different associations, some state governments enacted laws relating to disclosure of information from public authorities for their respective states and by the time it was felt by central government to enact a central law relating to disclosure of information for whole of India, which also got coupled with the feature of fundamental and human right.

Consequently, the Right to Information Act, 2005[23] was enacted and came to effect as notified by the Government of India. Interestingly, the Protection of Human Rights Act, 1993[24] was already enacted and so specifying the right to information as a pure human right was not the suitable instance in legislative model, because it was already made a statutory right with background of fundamental rights too. The definition provided in the act[25] was of wide scope and did not intend to specify all human rights. Basically, it was a feature addition statute to explore wide notion of people's rights.

The statutory intervention in context of human rights, as first came in 1994, extended the significance of human rights. It has got a specific notion and some powers relating to the execution of the human rights. After a decade of the enactment of this law, right to information was enacted in form of a statute, which never defined as human right in its statute but court has interpreted it as a human right.

The international exposure of human rights has supported a lot in extending its concept in Indian scenario and consequently, the wider notion respects right to information as a human right pertaining to human development. However, jurisprudential background has always been in consonance that right to information is a right leading to people participation in governance and it is so a right to development, which in international context, referred as a human right and therefore the right to information is clearly a human right. The silence of statute to name right to information as human right is a technical footing as discussed.

Position of Implementation

A right is said to be safeguarded, when it has no complaints of violation. But it is not possible to have a society free from violations and therefore from complaints. Accordingly, our society also has several violations and so complaints but the counter of violation has been placed in the system at several required levels through statute and other regulatory instruments.

As far as right to information is concerned, it is implemented as provided in the act and non-compliance is subject to penal provisions. Independent Central & State Commissions have been constituted under the statute to ensure the compliance. In terms of exercise of this right,

---

[23] *Supra Note* 14.
[24] Act No. 10 of 1994.
[25] The Protection of Human Rights Act, 1993 (Act No. 10 of 1994).

one aspect is important that right to information is limited to be exercised by the citizens only. Since it is originated from a fibre of Article 19, which is available only to citizens of India[26], it cannot be made available otherwise.

Apart from right to information, other human rights which are common to fundamental rights are enforceable[27] through courts by way of issuing relevant writs, which itself a fundamental right[28] and basic feature of the Constitution[29]. Ultimately, National Human Rights Commission and State Human Rights Commission have been empowered to ensure the compliance of human rights in India, as per the mechanism provided in the statute concerned.

Safeguards & Protections

Despite the fact that right to information is a human right, no safeguards & protections can be provided to this right under the scheme arranged for the safeguards & protections of general human rights. It is so because right to information has been provided the special status and it is regulated specifically by the statue enacted for the purpose, which is also general feature of the law and legal process.

The safeguards & protections provided to right to information under its statute are sufficient for the purpose. Under the act, if information is not provided within the time limit prescribed there is a provision of first appellate authority within the organization from which the information is sought and subsequently denied in any way and even after the first appeal grievance is not redressed, the applicant can move to Central or State Commission, as the case may be, which is empowered by the act to impose penalty, if required. Different from this, safeguards available to other human rights are in consonance of its nature.

Conclusion

Human Rights being a part & parcel of international law have several folds and facets. Its features are so foundational to the human being that it has its existence parallel to that of a human life, which is inalienable actually. Right to information is a fundamental human right in Indian context and the acceptance of this notion is widely exposed by enacting a separate statute for proper implementation and safeguards. In any system of governance, the participation of its people with equal facilitation under the law shall strengthen the status of that system and democracy will survive as long as the people's will is respected in systematic manner. The same sketch is drawn in case of right to information by making it as a human right.

Conclusively, right to information has its origin from aspects of human rights and in its comparative perspective of global position it is appreciated as essential aspect in democracy,

---

[26] *Alagaapuram R. Mohanraj v. Tamil Nadu Legislative Assembly*, AIR 2016 SC 867.
[27] Article 32, The Constitution of India, 1950
[28] *Assam Public Works v. Union of India*, AIR 2015 SC 783.
[29] *Kihota Hollohan v. Zachillhu*, AIR 1993 SC 412.

it also signifies its proper and traceable nexus with human rights and constitutional interweaving in special context of India has left no stone unturned to get it as a human right.

There are several other aspects remaining to be examined about the right to information and its implementation, that too in a comparative manner, so as to determine the scope of right to development and particular related aspects of the same. It is to iterate that the main objective of this article was inclined to the revelation of notional nexus between the right to information and human rights and therefore amplifying effect to the subject could have made it Diaspora in its own periphery. It is to conclude that human existence cannot be respected unless the rights are so respected and rights are not found direct but are highly interwoven, as seen in case of right to information as a human right.

Reforms in Water Law of India: Trends and Prospects

Dr. Chandra Shekhar Rai[1]

Introduction

The lack of a comprehensive legislation in India has entrusted that, water law is made up of different instruments, principles and judicial decisions which are not necessarily fully compatible with each other. Last two decades, institutional changes as well as policy reforms in the water sector have been vividly transforming the background of water. The regulation of freshwater uses has been a subjection of increasing attention.

This is due to increasing water scarcity and in part to the inadequacy of existing policy, law and principle in water sector. The existing water law framework in India is characterised by the co-existence of a number of different principles, Rules and Acts adopted over many decades. The process of reform has formally started in the 1980s with the adoption of the first National Water policy after that led to the introduction of number of changes at the national and state level. The process of water law reform is now picking up for a variety of reasons which includes a solid policy backed by international policy.

Origins and Concept of Water Law Reforms

Water is the essence of life. Safe drinking water is indispensable to sustain life and health, and fundamental to the dignity of all. Yet, 884 million people do not have access to improved sources of drinking water.[2] While these numbers shed light on a worrying situation, the reality is much worse, as millions of poor people living in informal settlements are simply missing from national statistics. The roots of the current water crisis can be traced to poverty, inequality and unequal power relationships, and it is exacerbated by social and environmental challenges: accelerating urbanization, climate change, and increasing pollution and depletion of water resources.[3]

In order to address this crisis, the international community has increasingly recognized that access to safe drinking water must be considered within a human rights framework. Such access is explicitly referred to, for instance, in the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities. In 2002, the United Nations Committee

---

[1] ***Post Doc Fellow, Faculty of Law, Banaras Hindu University, Varanasi.***

[2] United Nations Children's Fund and World Health Organization, *Progress on Drinking Water and Sanitation: Special Focus on Sanitation* (2008).

[3] United Nations Development Programme, *Human Development Report 2006: Beyond Scarcity–Power, poverty and the Global Water Crisis* (Basingstoke, United Kingdom, Palgrave Macmillan, 2006).

on Economic, Social and Cultural Rights adopted its general comment No. 15 on the right to water, defined as the right of everyone "to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses." Four years later, the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted guidelines for the realization of the right to drinking water and sanitation. The United Nations Development Programme (UNDP), too, has underlined that the starting point and the unifying principle for public action in water and sanitation is the recognition that water is a basic human right. In 2008, the Human Rights Council created the mandate of the "independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation" to help clarify the scope and content of these obligations.

Several national constitutions protect the right to water or outline the general responsibility of the State to ensure access to safe drinking water for all. Courts from various legal systems have also adjudicated cases related to the enjoyment of the right to water, covering issues such as the pollution of water resources, arbitrary and illegal disconnections. At the regional level, both the African Charter on the Rights and Welfare of the Child (1990) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) contain explicit human rights obligations related to access to safe drinking water and sanitation.

The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) underlines that everyone shall have the right to live in a healthy environment and to have access to basic public services (Art. 11.1). The Arab Charter on Human Rights (2004) similarly recognizes the right of everyone to the enjoyment of the highest attainable standard of health, for which States should ensure the provision of basic nutrition and safe drinking water for all and proper sanitation systems (Art. 39).

Although the Revised European Social Charter (1996), the American Convention on Human Rights (1969), and the African Charter on Human and Peoples' Rights (1981) do not explicitly refer to human rights obligations to provide access to safe drinking water and sanitation, related jurisprudence has derived protection of such access from the enjoyment of other human rights, such as the rights to adequate housing, health or life. Several international guidelines and principles encompass provisions related to access to safe drinking water and sanitation.

International humanitarian and environmental law also specifically protect access to safe drinking water and sanitation. The Geneva Conventions (1949) and their Additional Protocols (1977) outline the fundamental importance of access to safe drinking water and sanitation for health and survival in international and non-international armed conflicts. Finally, many constitutions contain explicit references to the right to water, including those of Bolivia (Plurinational State of), the Democratic Republic of the Congo, Ecuador, South Africa, Uganda and Uruguay.[4]

---

[4] See, for instance, the constitutions of Cambodia, Colombia, Eritrea, Ethiopia, Gambia, Iran (Islamic Republic of), Mexico, Nigeria, Panama, Philippines, Portugal and Zambia

Law and Policy Framework in India

Right to water as a fundamental right was not added to the Constitution originally. As such water right exists in the Indian Constitution as riparian right under Article262. In Indian Constitution confusion regarding whether water is state subject or national subject still not come to an end. According to Entry 17 of State List water is a state subject but subject to Entry 56 of the Union List. By the 1980s, it become evident that while water was largely a state subject, the lack of national policy on water was a major impediment to the development of a coherent set of policies on water at the stated and national levels.

This led to development of the Water Policy 1987. The rapidly deteriorating water scenario and the significant economic policy changes that occurred throughout the 1990s led to the reformulation of the Water Policy in 2002. These two Water Policies are quite similar o each other. They focus on developing a databank, estimating the available water, prioritising access to drinking water, developing groundwater, meeting drinking water needs, developing irrigation facilities, encouraging the participation of stakeholders in water management, managing water quality, promoting conservation consciousness, developing a flood-control management system, using cost-effective measures to minimise erosion, maintenance and modernisation of water works etc.

The main differences between the above stated two policies are that the 2002 policy focuses on the development of an improved institutional framework with a focus on improving the performance of the institutions, promotion of rehabilitation scheme for the displaced, enhancing participation by private parties in water management, creating an effective monitoring system and ensuring that states share the waters of a joint river. The National has been supplemented by the adoption of a number of state water policies such as Rajsthan State Water Policy 1999, Uttar Pradesh State Water Policy 1999, Maharastra State Water Policy 2003. The national and state policies are based on a set of principles that are emphasis is on water as a natural or economic resource that can be harnessed to foster the productive capacity of the economy, from irrigation water for agricultural production to water for hydropower, prioritisation of water use in the following order drinking water, irrigation, hydropower, ecology, agro industries.[5]

Recent Water Policy generally promotes the use of 'incentives' to ensure that water is used 'more efficiently and productively'.[6] Water Policies proposes the introduction of water rights. The policies try to do two different things. On the one hand, some policies restate the proposition that the state is the 'sole owner of the water resources. On the other hand, policies propose the creation of water right in favour of users.[7] Policies seek the introduction of wide –ranging legal and institutional reforms. These include the introduction of various amendments to existing laws as well as the introduction of new laws. The introduction of laws providing for the

[5] National Water Policy, 2002, section 5.
[6] Maharastra State Water Policy, 2003, Section 1(3).
[7] Orissa State Water Policy (draft 20)

establishment of a water resource authority whose primary character is to be largely independent from existing irrigation and other water resource departments and the regulation of groundwater.

Water Law Reform in Various Sectors

Drinking Water Sector
Water is as much a Central subject as a state subject, yet the Central government has played a very important role in fashioning the policies that states apply and has provided significant funding to ensure access to water in rural areas. For several decades, the basic framework governing rural water was the Accelerated Rural Water Supply Programme (ARWSP).[8] The ARWSP was first introduced in 1972. Apart from an interruption during the 1970s, it has been a central component of the government's attempt to ensure full coverage of all habitations throughout the country. It continues provide the basis for the central government's interventions in rural drinking water.

The most important body at the national level is the Rajiv Gandhi National Drinking Water Mission (RGNDWM), which function within the Department of Drinking Water Supply established under the ministry of Rural Development. It has been the key institution with regard to the development of the policies and the administration of the rural drinking water sector. In the context of overall water sector reforms, the Government of India came up in 2002 with a new scheme known as Swajaldhara, which proposes to foster new types of intervention to ensure better drinking water availability in village. The guidelines on Swajaldhara are the direct outcome of a World Bank-sponsored pilot project.

The ARWSP Guidelines have been replaced since 2009 by the National Rural Drinking Water Programme (NRDWP). The NRDWP proposes a number of significant changes to the ARWSP framework. It is remarkable in the context of the right to water for specifically ignoring the fundamental right to water. Indeed, while the 2009 version of the NRDWP specified that water is a 'socio-economic good and demand for basic drinking water needs is a fundamental right',[9] both the reference to a 'fundamental right' and 'human right' have been expunged from the later version of the NRDWP.

Groundwater Sector
The extremely rapid increase in ground water use for irrigation and other uses over the past 60 years has led to the lowering of water tables in many part of the country. The desire of the state to regulate the use of ground water together with the need to address groundwater use, has progressively led to the development of a number of rules and principles in this area. From a legal point of view, progressive shift from the use of surface water as the main source of the

[8] Government of India, Accelerated Rural Water Supply Programme Guidelines (ARWSP Guidelines).
[9] 12. Department of Drinking Water Supply, National Rural Drinking Water Movement Towards Ensuring People's Drinking Water Security in Rural India - Implementation 2009-2012 (2009) s 12(1).

irrigation water to groundwater due to new technology led to the realisation that land based rules of ground water extraction were becoming inappropriate. This led to the Central Government to formulate a model bill for groundwater which was first introduced in 1970 and then periodically reintroduced.[10]

At the Central level, other measures were later taken under the environmental Protection Act, in particular the setting up of the Central Groundwater authority to regulate and control the development and management of groundwater resources in the country. In past decade a number of states have adopted Groundwater Acts such as Kerala Groundwater (Control and Regulation0 Act, 2002, Goa Groundwater Regulation Act, 2002. Overall, the model bill constitutes an instrument seeking to broaden the control that the state has over the use of groundwater by imposing the registration of al groundwater infrastructure and providing a basis for introducing permits for groundwater extraction in regions where groundwater is overexploited. Besides providing a clear framework for asserting government control over the use of groundwater, the model bill also shows limited concerns for the sustainability of use.

Besides legislative developments, courts have also addressed the issue of control over groundwater. In *Hindustan Coca-Cola Beverages (P) Ltd. v. Perumatty Grama Panchayata*[11] Case the High Court of Kerala held that groundwater is a 'private water resource' and accepting the proposition of law that landowners have proprietary rights over groundwater.

Irrigation Sector

The exact nature and form of irrigation in India and the way it is managed have changed over the years though the formal institutions entrusted with water resources have not kept pace. Irrigation development in postcolonial times began with large-scale public irrigation systems. Since the 1970s, farmers have increasingly invested in groundwater wells and pumps. Groundwater over-exploitation, water quality deterioration, and mounting electricity subsidies are among the problems that have followed. Recent trends after 20th century show signs of a slowdown in groundwater use, which may lead to a renewed interest in surface irrigation.

However, the groundwater and surface water sectors have always operated in silos and rarely interacted with farmers who, starting somewhere in the mid-1970s, took irrigation into their own hands. Traditionally, surface water has been under the purview of the Central Water Commission (CWC) and irrigation departments of different states, while groundwater assessment has been the responsibility of the Central Ground Water Board (CGWB) and state groundwater departments—with little coordination between the two. So, the recommendations of the Mihir Shah Committee on the creation of a National Water Commission (NWC) that unifies the CWC and CGWB under one umbrella organisation is both critical and timely.

---

[10] Model Bill to Regulate and Control the Development and Management of Groundwater 2005 available at http//www.ielrc.org/e0506.pdf visited on 20/04/2020.
[11] Writ Appeal No. 2115 of 2003.

Irrigation law in the country vest control and ownership over water resources, in the government. Reforms in this sector have in the past sought to address equity, right, regulation and conservation governance management, finance and water pricing. Water user association have now gained primacy within the institutional and legal reforms framework within the country. The setting up of Water User Association has been taken up with increasing the number of states has introduced Water User Association legislation. Water User Association under the State Act are set up to foster secure and equitable distribution of water amongst its members, maintain irrigation systems, and ensure efficient, economical and equitable distribution and utilisation of water to optimise agricultural production as well as protect the environment.[12]

The framework provided under the Act seeks to balance benefits and burdens. On the one hand, Water User Associations are meant to benefit from amore assured water supply and greater control over the water allocated to them. It is authority's duty to supply the amount of water they are entitled to receive. They also have the right to use the ground water in their command area top of the entitlement they receive from canals. On the other hand, the Act gives water user associations a number of powers, which are in fact responsibilities.

Conclusion

The policy and law changes outlined are not static. On the whole, they seek to redraw the regulatory framework governing control over and use of water. It is necessary to draw out the main points arising from these reforms to make sense of implications since change in the regulatory framework will probably go on, even in States that have introduced new law in recent past. In fact, institution which are spearheading water sector reforms, see specific water projects as part of long-term agenda that will take year to fully implement,[13] partly because it is understood that there will be significant resistance to a number of these reforms.

Water sector reforms are significant. One of the aims of the current water sector reform is the introduction of new water policies and laws that are different from, and sometimes oppose to, existing regimes. It is imperative that all water users should be aware of the scope of on-going and proposed reforms. Reforms in water sector are required to take into account the social and hydrological challenges that have surfaced over time.

The law and policy framework needs significant updating because it is neither adapted to existing challenges nor provides a comprehensive framework that incorporates all dimensions of water. In particular existing water laws largely fail to operationalize the human right to water, and fail to effectively addressing these challenges in the water sector. A comprehensive water rethinking of the proposed reforms is therefore necessary to ensure that any further reforms in

[12] Maharastra Management of Irrigation System by farmers Act, 2005, Section 4. Available at http//www.ielrc.org/content/e0505.pdf

[13] World Bank Project Appraisal Document on a Proposed Loan the Republic of India for the Maharastra Water Sector Improvement Project (Report No. 3, 1997-in, 2005), p. 6.

the water sector effectively benefits the poor, focus on the drinking water and the prevent the complete commercialisation of a sector directly concerned with the fulfilment of human rights.

A Path to get Accession Madrid Protocol: Ways and Process

Mr. Hemant Khosla[1]
Dr. Anurag Singh[2]

Abstract

This article attempts to evaluate the process of accession to the Madrid Protocol [3]*for International Trademarks Registration by filing Single Application through the Office of Origin by paying one-time fees in one language i.e., English or French or Spanish. The author attempts to explain the necessary steps involved and also the changes consequent to the accession to Madrid Protocol*[4]*. It will not only strengthen the competitiveness but also promote additional reforms in Trademarks Sector. It will improve work efficiency as the International Bureau (IB) of WIPO*[5] *closely works with the office of Government of India, Intellectual Property Rights, Ministry of Commerce & Industry, Department for Promotion of Industry and Internal Trade.*

Keywords: Office of Origin, Madrid Protocol, Strengthen, Accession

Introduction

When a county expresses its intent to join the Madrid System [6]WIPO will begin discussion with Government officials on how to prepare for accession. After initial assessment the preparatory work will need to undertake involves six main areas. The sequence of the tasks in the preparatory diagram (Fig.1) [7]below will vary for each potential member and some tasks may occur simultaneously.

---

[1] ***Research Scholar, Department of Legal Studies, Ch. Charan Singh University, Meerut, Uttar Pradesh, India.***
[2] ***Assistant Professor, Meerut College, Ch. Charan Singh University, Meerut, Uttar Pradesh, India.***
[3] Available on www.ipindia.ac.in
[4] Protocol Relating to Madrid Agreement Concerning International Registration of Marks, June27, 1989, S. Treaty Doc. No. 106-41, Hein's No. KAV 6242 (hereinafter Madrid Protocol).
[5] World Intellectual Property Organization.
[6] Madrid System means Madrid Agreement and Madrid Protocol.
[7] Work Book of World Intellectual Property Organization Module 2 Accession: - Specialized Course on the Madrid System Reforms in Water Law of India: Trends and Prospects Reforms in Water Law of India: Trends and Prospects Reforms in Water Law of India: Trends and Prospects Reforms in Water Law of India: Trends and Prospects

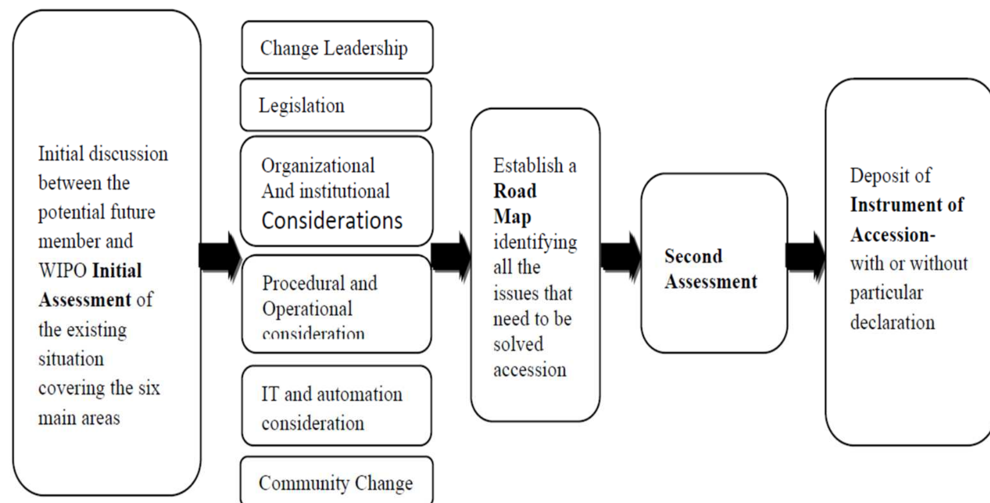

Fig.1

Initial Assessment

The main purpose of an initial assessment [8]is to obtain a clear understanding of the situation of the potential desired member concerning the current legislation, organisation of the IP office, the examination procedure and IT[9].WIPO will assist the potential member to identify areas of activity and possible gaps that need to be addressed prior to the deposit of an instrument of accession. An "Accession Team" is necessary to establish plan and timeframe for all activities that needs to be addressed before accession there can be set out in an Accession Road Maps.

The different situations are going to face by National and Regional IP offices while preparing for accession. Hence, a preliminary assessment of their needs and requirements should be conducted before meeting with WIPO.

Some points are given below for considerations: -

- The drivers of the process.
- The cause of considering the Madrid System.
- What are the impartial dates?
- Any event that may affect the possible time frame?
- Start and finish dates and project mile stone?
- Resources available to the project.
- Controlling and sponsoring the project.

[8] Carlo Cotrone, *The United States and the Madrid Protocol: A Time to Decline, A Time to Accede*, 4 Marq. Intellectual Property L. Rev. 75 (2000).
[9] Available on sagaciousresearch.com/blog/trademark-registration-under-madrid-protocol-how-the-system-works.

- Who is Authorising the project?
- Any steering committee?

WIPO can provide some information to potential members on how other members have prepared for an accession [10]and the impact of the Madrid System.

Recording Finding and Determinations
A single document is required to maintain by recording, activities and persons responsible for carrying out various activities or projects and determinations above relevant issues is called the Road Map[11].

Accession Road Map
This is the document where all the possible activities that would be necessary to undertake before an accession can take place are required to insert by the desired members[12].WIPO's example[13] Road Map includes an impact statement (the overall long-term result) and a section for each of the main preparatory work areas that may need to be addressed by a desired country's potential members: -

- Change Leadership
- Legislation
- Institutional and Organisational Consideration
- Procedural and Operational Consideration
- IT and automation Consideration
- Community Changes

The Accession Road Map will be used throughout by desired member's accession process if there are new findings or changes to the determinations, the planned work out lined in the Road Map will need to be updated. If the updating will not carry over with new findings or changes to the determination's essential tasks or the given deadlines cannot be achieved and may be missed.

Change Leadership
Leadership skill include the ability to develop an effective strategy for implementing and managing a desired members interested to a successful accession to the Madrid System and the ability to influence and advocate for the changes with different stake holders[14].

---

[10] Available on https://www.hg.org/legal-articles/india-accedes-to-madrid-protocol-30905
[11] Available on https://corpbiz.io/learning/madrid-system-a-roadmap-to-international-trademark-registration
[12] Law Of Trademarks - Including International Registration Under Madrid Protocol & Geographical Indications Hardcover – 27 June 2017 by K.C. Kailasam (Author), Ramu Vedaraman (Author).
[13] Guide to the International Registration of Marks Under the Madrid Agreement and the Madrid Protocol Paperback – Import, 6 September 2016 by Wipo (Author).
[14]Available on https://www.miic.gov.jm/content/virtual-stakeholders-webinar-madrid-protocol

An accession team is required to be formed by the IP office of desired member to manage and lead the accession process that can cover all the elements influencing internal and external stake holders. WIPO will provide assistance to the Accession team mainly support provided to IP office:-

- Changes required to their examination process.
- Provision of Training and information on how the Madrid System works.
- Legislative advice and draft provision by inclusion in their legislation.
- WIPO assistance also required in under mention areas: -
- Guidance on various logistical and administrative matters in operating with Madrid System.
- Training of Examiners assigned with Madrid System work.
- Training of Trademark attorney: IP professional and other person who they are involved with Madrid System.

Legislation

The desired country must have legislation which is compatible with the Madrid Protocol when acceding to the Madrid System. The holders of international registration[15] may not be able to enforce their rights in that territory where the legislation of that country is not Madrid Compatible at the time of accession. The Madrid System consists of two treaties, Madrid Agreement and Madrid Protocol. Under the current legal framework of the Madrid System, the Protocol is the only governing effected by or in respect of all members and users. It is not possible to become member of Madrid Agreement alone.

The extent to which domestic legislation will need to be amended will vary it should be complied with Madrid System providing sufficient authority[16] for operations. WIPO can provide legal assistance to IP office that is preparing to accede to the Madrid System. WIPO also provide a copy of model provisions and information for the implementation of the Madrid Protocol.

Organisational and Institutional Consideration

Accession to the Madrid System can have a pronounced effect on a national /regional IP office and its stakeholders. This may include changes to examination system in place, the information technology[17] used, the language used and the way stakeholders interact with the office. Any changes required the Accession team identifies, evaluates the same and make efforts to plan action for implementing the change required.

[15] LexisNexis Law of Trademarks – Including International Registration under Madrid Protocol and Geographical Indications by K C Kailasam & Ramu Vedaraman Edition 2017.

[16] Substitution of International Registration for Earlier National Registration (Guide on Madrid Agreement Concerning the International Registration of Marks.

[17] Available on www.nyulawglobal.org/globalex/International_Trademark_Law.html

Procedural and Operational Consideration

IP offices will focus on domestic registration process for procedural and operational consideration ensuring the reliability and consistently and integrated with the procedure of the Madrid System specifying how the national or regional procedures and operational transaction can be carried over. For going through the entire relevant task that an office as a member of Madrid System would be obliged to perform common understanding will emerge on how national or regional processes will fit with Madrid Processes.

IT and Automation Considerations

There must be a clear understanding of how WIPO and the national and regional IP office will communicate with each other, IP office's current information technology solutions is essential to help with determining whether the system will require modifications to handle International Application and designations through the Madrid System. Integration between the domestic system and Madrid System is essentially required in absences of the same it is difficult to meet its obligations in the Madrid System.

A member of solutions in supports the operations of national/regional office developing the countries to enable them to participate effective in the Global IP system. WIPO give support to the desired nation as they may not have the same level of IT infrastructure or automation.

Community Changes

In the change process community process is an essential element in a successful accession to the Madrid System. This particularly includes to those who work within the acceding IP office and to those who are engaged with the office such as trademark owners, local agents and other Government Departments.

Second Assessment

The second assessment[18] is a formal review of desired member (County) accession plans to make sure that all the issues as per the Road Map have been dealt with and all are expected to be finalized within their time frames. This leads a chance for WIPO and the desired member to discuss checking off all the activities and improvements as well as any new item which can be considered during the start of the process.

The future member has to deposit the instrument of accession with Director General of WIPO to accede the Madrid System may be with or without declarations an opportunity to become a party to the Protocol relating to Madrid Agreement with respect to International Registration of Marks.

Deposit an Instrument of Accession

The instrument of accession is an official paper divulging that the subsequent member put confidence in to the opportunity to become a party to the Protocol Relating to the Madrid

[18] Available on https://www.theipmatters.com/post/the-madrid-system-madrid-agreement-and-madrid-protocol.

Agreement for the International Trademarks Registration. The Instrument of Accession is signed[19] by India's Minister of Commerce and Industry Shri Anand Sharma being the Head of State, Head of Government on April 8, 2013 and India became the 90th Member. Consequently, on July 8, 2013 the treaty will enter into force because Three months after the Director General of WIPO has received the instrument of accession, the Protocol enters into force.

Conclusion

India's Minister of Commerce and Industry Shri Anand Sharma delivered a keynote address titled "Innovation and Development" the Indian Experience at the high-level policy dialogue at WIPO on April 8, 2013 and deposited his country's instrument of accession to the Madrid Protocol for the International Registration of Marks at WIPO bringing the total number of members of the International Trademarks system to 90.

The Treaty will come into force with respect to India on July 8, 2013. In his address Home Minister Shri Anand Sharma highlighted the importance of innovation and intellectual property as critical assets for country's socio-economic development. He also mentioned the consistent efforts made by Indian Government since India's independence on according a place of great importance to innovation at various levels-through institutions and specialised institutions of research and development. Hon'ble Minister also expressed the confidence that India's accession to Madrid Protocol would be beneficial for the economic development of India as well as to the brand owner around the world by extending protection in the Indian Market.

Minister said "we recognize that this instrument will provide an opportunity for Indian Companies which are increasing their global footprint to register trademarks in member countries of the Protocol through a single application, while also allowing foreign companies a similar dispensation" India is 14th of the G-20 economies to accede the Madrid Protocol Mr.Gurry WIPO Director General said " India's accession to the international trademarks system, as with the recent accession by Columbia, Mexico, New Zeeland and Philippines, signals are- era of significant geographical expansion of the Madrid System, which offers greater benefit to right holders worldwide." The system provides a cost effective and efficient way for trademark holders to secure and maintain protection for their mark, in multiple countries.

[19] Available on www.wipo.int/pressroom/en/articles/2013/article_0008.html.

Lacunas of the RTE Act, 2009

Dr. Ravindra Kumar[1]

More than 3300 years back a poet[2] had said, *"Mother and that father are enemies, who do not give education to their children."* In the recent past Nelson Mandela[3] had proclaimed, *"Education is the most powerful weapon which you can use to change the world."*

*"What must be think then, of that barbarous education which sacrifices the present to an uncertain future, which loads a child with chains of every sort and begins by making him miserable in order to prepare for him long in advance, some pretended happiness, which it is probable, he will never enjoy." --- **(Jean Jacques Rousseau)***

Introduction

The right to free and compulsory education became a fundamental right in India after six decades of independence. The right of children to free and compulsory education (RTE) Act, 2009 came into force April 1, 2010 after a century long serious of struggle, beginning with a demand for legislation for universal education initiated by Gopal Krishna Gokhale in the British era, culminating in a time bound promise under Article 45 of the Indian constitution. The RTE Act presents a unique opportunity to ensure that all Indian children enjoy their right to a quality, child-friendly and child-centred education. The RTE is anchored the belief that values of equality, social justice and democracy and the creation of a just and human society can be achieve only through the provision of inclusive elementary education to all. Thus, RTE Act promises a hope for children between 6 to 14 years to receive quality education.

The Act makes for a host of provisions that can potentially mark a turning point in the status of delivery of education in the country. While a historic step, the Act does have various lacunas, some of them are very serious. For instance, it does not include children below 6 years and above 14 years of age. The law is derived from the 86th Constitutional Amendment Act, 2002 and is, with its imperfections, a product of a hundred years of struggle.

The Act introduces remarkable changes in the education system through the school system in India. Numerous of the changes are quite revolutionary and if implemented properly, will greatly mend the system of delivering education in the country. Though the provisions of the Act have been included with noble intentions, some of them may lead to certain unintended

---

[1] ***Assistant Professor, Faculty of Law, University of Delhi, Delhi.***

[2] Baddena, *Neeti Saara or Neeti Sastra*, (Wikipedia the Free Encyclopedia). Baddena a Telugu poet (1220-1280 AD) was the composer of the most famous "Sumathi Satakam" as well as "Neeti Sastra," during the thirteenth century, *available at:* https://en.wikipedia.org/wiki/Neeti_Sastra

[3] Nelson Mandela quotes, South African Statesman First Democratically Elected State President of South Africa (1994), 1993 Nobel Prize for Peace, (b.1918) *available at:* https://en.wikiquote.org/wiki/Talk:Nelson_Mandela_ (Visited on Dec. 05, 2015). See also, Ann Kannings, "Nelson Mandela His Words," *Lulu Press, Inc.,* (22-Jan-2014).

consequences. Thus, analysis of various provisions of the RTE Act, would pin point that this Act is not complete or sufficient in terms of accomplishing its declared and most desirable goals. Further, several lacunas of the RTE Act, 2009 are examined critically, these are as follows:

Definition

The definition clause Section 2 of the RTE Act, 2009 address the child belonging to disadvantaged group[4] and child belonging to weaker section.[5] Thus RTE Act does not adequately address the issue of child labour. The Act ignores the reality that a majority of poor children who are employed in agriculture and who bear the burden of housework and sibling care. The need to categorically state that all forms of employment and engagement, which hinders the development of the child, should be banned and made a cognizable offence. The historic judgement of the Supreme Court's in *Bandhua Mukti Morcha v. Union of India and Ors*.,[6] already declared that, the 'right to live' with 'human dignity' must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, unities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity.

Meaning of Child

Section 2(c) of the RTE Act, 2009 defined the 'child' – means a male or female child of the age of 6 to 14 years. India accedes the United Nations Convention on the Rights of the Child (CRC), 1989 which mandates, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Article 21-A of the Constitution mandates, "The State shall provide free and compulsory education to all children of the age of 6-14 years in such a manner as the State may, by law, determine."[7] Article 45 inter alia provides the provision for early childhood care and education to children below the age of six years.[8] The objects and reasons of the RTE, Act 2009, which enacted by parliament and came into force April 1, 2010, mandates that, every child has a right to be provided full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards.

Thus, United Nations Convention on Rights of the Child, 1989 use the term a child means "every human being" and Article 21-A of the Indian Constitution use the term "all children" and Article 45 inter alia use the similar term "all children" further objects and reasons of the RTE Act, 2009 use the term "every child", section 3(1) inter alia uses the term "every child". Thus Section 2(c) defined the 'child' – means a male or female child of the age of 6 to 14 years. So, we find a contradiction between objects and reasons of RTE Act and definition clause 2(c)

---

[4] The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 2(d).
[5] The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 2(e).
[6] AIR 1984 802, (1984)2 SCR 67 (Supreme Court on Dec.-16-1983).
[7] Ins. By the Constitution (Eighty-six Amendment) Act, 2002, s. 2
[8] Subs. By the Constitution (Eighty-six Amendment) Act, 2002, s. 3

of the said Act. Therefore, RTE Act, 2009 does not cover every child like Hijras/Kinnar/Transgender Community (TGs).[9]

Right Of Child to Free and Compulsory Education

Sec. 3 of the Act is limited to elementary education of children between 6-14 years only.[10] This means prohibiting of children in the age of 14-18 years from the ambit of Act.[11] Hence, deprive poor children from the opportunity and eligibility for technical education and higher education.

There is ambiguity in the Act as far as understanding for the term 'child' is concerned. The International document CRC, 1989 use the term "below"18 years of age as a child, and all above National Education Policies use the term "up to" 14 years of the age of child, and also judgement of Unnikrishnan, J.P. declared the term "up to" 14 years age of the child. Whenever, the RTE Act, 2009 covers only children in the age group between 6 to 14, clearly excluding and ignoring the child of the 0-6 and 14- to 18-year-old and narrows down the definition to child between 6 to 14 years. Though the provision in the Act expresses interest in taking necessary steps in providing free pre-school education for children above three years of age but leaving out such a critical segment of the child population from the definition is perturbing.[12]

Duties Of Appropriate Government and Duties of Local Authorities

It is worth praising that section 8(c)[13] and 9(c)[14] prohibited discrimination against the children belonging to weaker section and disadvantage group from pursuing and completing elementary education on any grounds. But according to Report, 2014 of Human Right Watch (HRW) children belonging to these groups are harassing in class room continually. Such children have to compel to sit back in the classroom, this type of incidence is increasing day by day.[15]

Good Quality Elementary Education

---

[9] Ravindra Kumar, "Right to Education: Comprehensive Equal Educational Opportunity to Every Child" *FIR" a Multidisciplinary Biannual Refereed Online Research Journal* (Paper has presented in 11th National Seminar on the Child Rights and Child Protection: A Socio-Legal Perspective, held on 11th November 2016, Organized by All Indian Rights Organization (AIRO), and Baba Saheb Bhim Rao Ambedkar Law College, Lucknow).

[10] RTE Act, 2009, Section 3(1) 'Every child of the age of six to fourteen years, including a child referred to in clause (d) or clause (e) of Section 2 shall have a right to free and compulsory education in a neighbourhood school till completion of his or her elementary education'. This Section replaced by the Act No. 30 of 2012. [old provision was 'Every child of the age of six to fourteen years shall have a right to free and compulsory education in a neighbourhood school till completion of elementary education'', following Act of received the assent of the President on the 19th June, 2012 and Act published in the gazette of India (Extr.) Part II Sec. 1 dated 20-06-2012, 1-3pp.

[11] Ravindra Kumar and Dr. Preeti Misra, "Right to Education as a Fundamental Right: A Critical Evaluation" Vol. V, Issue 1, *Shodh Prerak,* 193 (January 2015).

[12] Ravindra Kumar and Dr. Preeti Misra, "Constitutional Delineation of Right to Education: A Critical Appraisal" Vol. 3, Issue I, *Journal of Legal Studies,* 122(January, 2015).

[13] The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), Ss. 8(c) and 9(c) ensure that the child belonging to weaker section and the child belonging to disadvantaged group are not discriminated against and prevented from pursuing and completing elementary education on any grounds;

[14] *Ibid*

[15] New Delhi, Agencies, "Garib Bacchon Ke Sath Hota Hai Bhed Bhaw" *Dainik Jagran*, Apr. 23, 2014, p.15

The RTE Act envisages the appropriate government shall ensure ‘good quality’ elementary education conforming to the standards and norms specified in the Scheduled,[16] and inter alia provides local authority shall ensure ‘good quality’ of elementary education confirming to the standards and norms specified in the Scheduled.[17] The RTE Act uses the word ‘good quality’ in Sections 8(g) and 9(h), and as one of its objectives of the RTE Act. The word making ‘good quality education’ available use in National Policy on Education, 1986 as modified 1992 and inter alia the word accessible ‘quality education’ use in National Policy for Children, 2013. Whenever, the word ‘good quality’ not defines in the definition clause, and Act is silent about ‘good quality’ and does not declare the meaning of ‘good quality’. Therefore, the Act fails to achieve its goals and objective properly.

Duty of Parents and Guardian

Sec. 10 of the RTE Act provides that it shall be the duty of every parent or guardian to admit or cause to be admitted his or her child or ward, as the case may be, to an elementary education in neighbourhood school.[18] Thus, this provision generally perceived in this Act, and not the intention of this provision to compel parent or guardian and children or wards, who do not wish to avail of free and compulsory education, to inevitably admit their children or wards in neighborhood school. In other word, if parent or guardians have not performed their duty, there is no provision in RTE Act, 2009 to compel them to perform their duty.

Pre-School Education

Sec., 11 of the RTE Act, refers that ‘…. appropriate Government may make necessary arrangement for providing pre-school education to prepare children’ above the age of three years for elementary education and provide early childhood care.[19] Whereas, it should be mandatory for all concerned Governments and for this purpose ‘may’ should be replaced by ‘shall’, because the word ‘may’ make this provision of the Act maim. This provision is not mandatory in this Act, without a mandatory provision, there can be no accountability and clarity that how the appropriate government can make arrangements for this provision.

Extent of School’s Responsibility for free and Compulsory Education

Section 12 of the Act provides the extent of school’s responsibility for free and compulsory education, for the purposes of this Act, a school specified in sub-clauses (iii) and (iv) of clause (n) of Section 2 shall admit in class I, to the extent of at least 25%, of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion[20]**.** The Act provides education only weaker section and disadvantage group of children admit in class I, to the extent of at least 25%, of the strength of that class, those children whom belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion. Whereas, the word ‘disability’ already has mentioned in the

[16] The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 8(g).
[17] The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 9(h).
[18] The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 10
[19] The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 11
[20] The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 12(1)(c)

definition clause[21], but missing from Section 12 of the Act. The effect of that is disabled children do not clearly get to avail 25% quota in private schools. Thus, the Act fails to provide free and compulsory education to every child.

Proof of Age

Sec. 14(2) of the RTE Act mandates that, no child shall be denied admission in a school for lack of age proof,[22] it is the duties of appropriate Government and local authorities. Migrant's children may not be able to procure birth certificate etc. sometimes, and they are protected under this Section, but it should be constructed to support orphans as well as children belonging to disadvantageous circumstances.

No Denial of Admission

Section 15 mandates that a child shall be admitted in a school at the commencement of the academic year or within the prescribed extended period,[23] but this provision of the Act does not cover private un-aided schools. Because, Private unaided schools need not be concerned about this provision, especially with respect to the 75% admission, because if they have filled all seats at the beginning of the academic year the question of any-time admission would not arise.

Prohibition of Holding Back and Expulsion

Sec. 16 of the RTE Act, 2009 mandates that No child admitted in a school shall be held back in any class or expelled from school till the completion of elementary education.[24] There is no examination and evaluation process for children in primary classes, they do not get any motivation to improve their skills and complete their elementary education. If a child does not hold back in any class and promoted to next class continuously without any test or examination, does not have enough knowledge and skill to understand the syllabus of higher class, in which he promoted.

Examination and Completion Certificate

Sec. 30 of the RTE Act, 2009 mandates that, no child shall be required to pass any Board examination till completion of elementary education,[25] inter alia provides that every child completing his elementary education shall be awarded a certificate, in such form and in such manner, as may be prescribed.[26] According to the RTE Act, 2009 if a child secure zero marks in all subjects and does not go to school even a single day should be promoted to the next class, this provision of the Act affected those children who really want to read and acquire knowledge. If a child promotes to the next class it takes away all types of motivation for those children to learn or for the teachers to teach. It is the subject of concern that due to no detention policy the child does not learn the mother-tongue, essay calculation and other fundamentals of primary

---

[21] Section 2 (ee), Ins. by Act No. 30 of 2012
[22] The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 14(2)
[23] The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 15
[24] The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 16
[25] The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 30(1)
[26] The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), s. 30(2)

classes, because it is very important for the proper development of child's mind. Therefore, the Act is working on paper work only infect it is not working on grass-root level.

Suggestions

If we want to overcome the challenges relating to children education, it would be necessary to overhaul the entire education system and the following can be suggested for bringing qualitative improvement with respect to RTE Act 2009. So, there are some suggestions as follows:

- Right to education should ensure satisfactory and qualitative education for all children in all government aided and un-aided private schools.
- Article 21-A of the Constitution should be amended and ambit up to age of 18 years as international definition of a child in the CRC, 1989.
- Article 51-A(k) of the Constitution should be amended and ambit up to age of 18 years as international definition of a child in the CRC, 1989.
- The optimum age for the right to free and compulsory education should be same as the age of right to vote, age of maturity, right to work and right to marriage, etc.
- Section 3 provides only 8 years elementary education of children between 6-14 years. It should be amended and Act ambit to the age up to 18 years to deprive poor children in technical education and higher education.
- It is clear in Sec. 11 of the RTE Act that the word 'may' is not mandatory in this Act, it should be amended immediately to word 'may' replaced by 'shall'.
- Section 11 should be amended and provide education above the age of 3 years of children and until they complete the age of 6 years because this age is very important for mental as well as physical growth of all children.
- Awareness should be spread among the rural masses about the importance of education, so that they really feel the need to send their children to school.
- Those parents/guardians, who fail to admit their child to a neighbourhood school for obtaining elementary education, should be debarred from availing total government facilities like ration card, water, electricity, LPG and job card facility, etc. and should be liable to fine for each day during which such contravention continues.
- The primary schools need to be made aware of the provisions made for 25% seats for the economically, socially weaker sections and disadvantaged groups of children of the society and the role of school managing committees in this regard.

Law and Governance for Disaster and Epidemic in India

Dr. Girish Kumar[1]
&
Mr. Ambrish Kumar[2]

Abstract

Health is an important indicator of development for any nation. Robust resilient health system and infrastructure is crucial for effective response and long-term recovery benefits from and diseases and thus pandemics. Therefore, relevant laws and good governance are necessary for robust health infrastructure, resilient health system and its management. Public health legislation plays a significant role in control or containment of any epidemic or pandemic. During a pandemic, it might be necessary to modify, amend the existing laws for the containment of the pandemic. The objective of the study is to review the existing laws and legal framework pertaining to disaster, diseases and epidemics which got emphasis after COVID-19 pandemic preparedness in India. This study is based on review where various literatures, publications, legislations related to legal and regulatory frameworks, were collected from various sources as electronic data base, websites from various Ministries and government organizations, media reporting. Owing to contain the spread of the novel Coronavirus, Government of India and state governments announced various policies like Janta Curfew, lockdown etc.;. Thus, various legislative laws were required for proper implementation of measures to control and curb pandemic. There are two pioneer acts namely The Epidemic disease act of 1897 and The Disaster management act of 2005. Under these two acts the government has laid down various rules and regulations that have to be followed during pandemic. This article describes the need for the laws required in a crisis like this and various legislations that have been implemented during pandemics.

Keywords: Health, Laws, Governance, Disaster management act, Pandemic, Diseases act, Legislations

Introduction

Health is an important indicator of development for any nation. Robust resilient health system and infrastructure is crucial for effective response and long-term recovery benefits from and diseases and thus pandemics. This is important for resource stretched, high population density and diseases prone country like India which sees recurrent emergence of diseases such as vector borne, water borne and recently corona pandemic popularly known as Covid-19. These health burden and challenges impact both health infrastructure and health outcomes. Therefore, relevant laws and good governance are necessary for robust health infrastructure, resilient health system and its management. The discussion about health and risks governance, laws and legislations got much emphasis with the emergence of Covid-19. The outbreak was declared as Public Health Emergency of International Concern (PHEIC) on 30th January, 2020 and characterized as pandemic by the World Health Organisation on 11th March, 2020[3]. In India the first case of COVID-19 was reported on 30th January 2020, it was a travel related case from

---

[1] ***Project Fellow, IUCTE, BHU, Varanasi.***
[2] ***Master of Education, MGKVP, Varanasi, U.P.***
[3] World Health Organization. COVID-19 Public Health Emergency of International Concern (PHEIC) Global research and innovation forum. (2020). Available at: https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-(pheic)-global-research-and-innovation-forum.

Wuhan, China.[4] A number of significant pandemics recorded in human history, including smallpox, cholera, plague, dengue, influenza, severe acute respiratory syndrome (SARS), tuberculosis etc; which were having a serious negative impact on health, economies, and even national security globally.[5]

Governance is the most important enabler of health system functioning. In the 21st century, health is mainly about people and how they live and create health in the context of their everyday lives. This requires a new perspective on the governance of health and well-being. Health and well-being are critical components of good governance and, as such, constitute a social value in them. This is reflected significantly in the value of universal access to health care. Social values such as human rights, social justice, well-being and global public goods also guide governance for health and provide a value framework within which to act. These are reflected in many proposed policies at the national, European and global levels.[6] Public health legislation plays an important role in the containment of both communicable and non-communicable diseases. [7],[8] In the context of pandemics, it is considered that social measures with formal law play an important role in containment of the disease along with vaccines and drugs. Swachhata or cleanliness, personal hygiene and social distancing, as in the case of Coronavirus disease not only helps to reduce numbers of cases but also slows down the spread of the epidemic and break the chain of spread.[9],[10]

Conceptual Framing

Governance for health is defined as the attempts of governments or other actors to steer communities, countries or groups of countries in the pursuit of health as integral to well-being through both whole-of-government and whole-of-society approaches.[11] Governance for health and well-being is a central building block of good governance; it is guided by a value framework that includes health as a human right, a global public good, a component of well-being and a

---

[4] Advisory for Human Resource Management of COVID-19 India. Ministry of Health and Family Welfare. Director General Health Services. 2020; Available at: https://www.mohfw.gov.in/pdf/AdvisoryforHRman agement.pdf.

[5] Qiu, W et al; The Pandemic and its Impacts. Heal Cult Soc. 2016-2017, 9-10:1-11.

[6] World Health Organization (WHO). Governance for health in the 21st century. 2012. Available at: https://www.euro.who.int/__data/assets/pdf_file/0019/171334/RC62BD01-Governance-for-Health-Web.pdf.

[7] World Health Organization (WHO). Chapter 10: Controlling the spread of infectious diseases. Advancing the right to Health; vital role law 2017; 151-64. Available at: http://apps.who.int/iris/bitstream/handle/10665/252815/9789241511384-eng.pdf;jsessionid=7115D013665951A6FBBC5D8BFDBC19F7?sequence=1

[8] World Health Organization Regional Office for the Eastern Mediterranean. Role of legislation in preventing and controlling non-communicable diseases in the Eastern Mediterranean Region. Publications. NCDs. Available at: http://www.emro.who.int/pdf/noncommunicable-diseases/publications/questions-and-answers-on-role-of-legislation-in-preventing-and-controlling-noncommunicable-diseases-in-the-region.pdf?ua=1

[9] Smith R. Social measures may control pandemic flu better than drugs and vaccines. BMJ. 2007;334(7608):1341. Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1906625/.

[10] Kumar, G. and Mohapatra, S. *Sanitation and Sustainable Development: Insights from Past to Present*. Annals of Multi-Disciplinary Research. 2018, 8 (1), 824-829.

[11] See World Health Organization (WHO). Governance for health in the 21st century. 2012. Available at: https://www.euro.who.int/__data/assets/pdf_file/0019/171334/RC62BD01-Governance-for-Health-Web.pdf.

matter of social justice. It may be key to respond in resilient manner during pandemic crisis[12]. Governance shapes the capacity of the health system to cope with everyday challenges as well as new policies and problems. The governance of a health system therefore shapes its ability to respond to the various well-documented challenges that health systems face today.[13] In any public health disaster planning, there are four phases of comprehensive emergency management which are mitigation, preparedness, response, and recovery. Mitigation involves preventive measures to reduce vulnerabilities or severity of human and material damage. In healthcare, these include structural hardening and non-structural measures such as laws, guidelines, and surveillance i.e; structural measures like infrastructure and human resource strengthening, non-structural measures like laws, guidelines, and surveillance.[14],[15]

During a pandemic, it might be necessary to modify and amend the existing laws for the containment of the pandemic. The WHO checklist for influenza pandemic preparedness has certain areas pertaining to legal framework which were proposed for the best interest of community health. These include enforcement of quarantine, use of privately owned buildings for health-care facilities, off-license use of drugs, implementation of emergency shifts in essential services, travel or movement restrictions, prohibition of mass gatherings, vaccination to all preferably health-care workers, workers in essential services or individuals at high risk (WHO, 2005[16]; Sahoo etal; 2020[17]).

Objective

Since laws and legislations are important and have a significant role in containment and controlling the disaster, diseases and epidemics the objective of the study is to review the existing laws and legal frameworks pertaining to disaster, diseases and epidemics which got emphasis after COVID-19 pandemic preparedness in India.

Discussion

This study is based on review where various literatures, publications, legislations related to legal and regulatory frameworks, were collected from various sources as electronic data base, websites from various Ministries and government organizations, media reporting.

---

[12] Ibid

[13] World Health Organization (WHO). Strengthening Health System Governance Better policies, stronger performance, 2016. Available at: https://www.euro.who.int/__data/assets/pdf_file/0004/307939/Strengthening-health-system-governance better-policies-stronger-performance.pdf.

[14] Chartoff SE, Roman P. Disaster Planning. Stat Pearls.; 2020

[15] Sahoo, D.P. et al ., COVID-19 pandemic: a narrative review on legislative and regulatory framework in India for disaster and epidemic. Int J Res Med Sci 2020;8:2724-9

[16] WHO checklist for influenza pandemic preparedness planning; Epidemic Alert & Response. World Health Organization 2005;1–39. Available at: https://apps.who.int/iris/bitstream/handle/10665/68980/WHO_CDS_CSR_GIP_2005.4.pdf?sequence=1&isAllowed=y.

[17] Sahoo, D.P. et al ., *COVID-19 pandemic: a narrative review on legislative and regulatory framework in India for disaster and epidemic*. Int J Res Med Sci 2020;8:2724-9.

This article focuses on major national acts and legislation in India, their aims related to disaster, diseases and epidemic and actions taken during Covid-19 pandemics. The public health legislations related to disaster and epidemics in light of the current COVID-19 pandemic are mentioned below in Table 1.

Table 1: Some of the existing legal frameworks and actions during COVID-19 pandemic

Legislations	Aim	Actions during COVID-19 pandemic
Epidemic Diseases Act, 1897[18]	This act was passed with the aim to provide for the better prevention of the spread of Dangerous Epidemic Diseases. Section 2 describes regulations that may be imposed by central and state governments to prevent outbreaks and section 3 states that any person disobeying any regulation or order shall be deemed to have committed an offence punishable under section 188 of the IPC. Union Cabinet in its meeting held on 22nd April 2020 has approved promulgation of an Ordinance to amend the Epidemic Diseases Act, 1897 to protect healthcare service personnel and property including their living/working premises against violence during epidemics and to ensure that during any situation akin to the current pandemic, there is zero tolerance to any form of violence against healthcare service personnel and damage to property. The amendment makes acts of violence cognizable and non-bailable offences, shall be punished with imprisonment for a term of three months to five years, and with fine. [19]	The Cabinet Secretary of India on 11th March, 2020 announced that all states and Union territories should invoke provisions of Section 2 of the Epidemic Diseases Act, 1897.[20]

[18] The Epidemic Diseases Act, 1897. Available at: https://indiacode.nic.in/bitstream/123456789/10469/1/the_epidemic_diseases_act%2C_1897.pdf.

[19] Promulgation of an Ordinance to amend the Epidemic Diseases Act, 1897 in the light of the pandemic situation of COVID-19. Available at: https://pib.gov.in/newsite/PrintRelease.aspx?relid=2 02493.

[20] To combat coronavirus, India invokes provisions of colonial-era Epidemic Diseases Act: A look at what this means. Available at: https://www.firstpost.com/health/to-combatcoronavirus-india-invokes-provisions-of- olonialera-epidemic-act-all-you-need-to-know- 8142601.html.

Disaster Management Act, 2005[21]	This act aims to provide for the effective management of disasters and for matters connected therewith or incidental thereto. Section 6 (2) i states other measures for the prevention of disaster, or the mitigation, or preparedness and capacity building for dealing with the threatening disaster situation or disaster as it may consider necessary; Section 10 (2) i states to evaluate the preparedness at all governmental levels for the purpose of responding to any threatening disaster situation or disaster and give directions, where necessary, for enhancing such preparedness. Section 51-60 states offences and penalties for obstruction, false claims, misappropriation of money or materials, false warning, offences by Dept of the Govt., failure of officer on duty, contravention of any order regarding requisitioning, offences by companies, previous sanction for prosecution and cognizance of offences.	Whereas in exercise of the power conferred by the act Ministry of Home Affairs on 24th March 2020 directed ministries / departments of Govt. of India, State and Union authorities to take effective measures so as to prevent the spread of COVID-19. Punishment and penalties for offences was also directed.[22]
Essential Commodities Act, 1955 (ECA)[23]	To provide, in the interest of the general public, for the control of the production, supply and distribution of, and trade and commerce, in certain commodities.	In exercise of the powers conferred by sub-section (2) of section 2A of the act, central government regulate the production, quality, distribution, logistics of masks (2ply and 3ply surgical masks, N95 masks) and hand sanitizers (for COVID 19 management) on 13th March,

[21] The Disaster Management Act, 2005. Government of India. 2005;1-29. Available at: https://ndma.gov.in/en/disaster.html.
[22] Annexure to Ministry of Home Affairs Order No. 40-3/2020 D dated () 24.03.2020. Available at: https://www.mohfw.gov.in/pdf/Annexure_MHA.pdf
[23] The Essential Commodities Act, 1955.2(3):1-14. Available at: http://legislative.gov.in/sites/default/files/A1955-10.pdf.

		2020 and Section 2(A)3 to regulate the price of masks and hand sanitizer.[24]
Essential Services Maintenance Act, 1981(ESMA)[25]	An Act to provide for the maintenance of certain essential services and the normal life of the community. The objectives of this act are to enforce a lockdown to curb the spread of the virus as well as to ensure that our country can navigate through the challenges brought about by such lockdown by maintaining essential goods and services	Madhya Pradesh government has invoked the Essential Services Management Act (ESMA) on 8th April, 2020. The ESMA helps state governments maintain uniformity by providing minimum conditions of essential services across the state in the backdrop of disruption caused by the Covid-19 outbreak.
The Aircraft Act, 1934[26]	An Act to make better provision for the control of the manufacture, possession, use, operation, sale, import and export of aircraft. Section 8 (B) states India or any part thereof is visited by or threatened with an outbreak of any dangerous epidemic disease, and that the ordinary provisions of the law for the time being in force are insufficient for the prevention of danger arising to the public health through the introduction or spread of the disease by the agency of aircraft, the Central Government may take such measures as it deems necessary to prevent such danger.	The Ministry of Civil Aviation invokes section 8B (1) to cease the operation of all scheduled domestic flights (except all cargo-flights) with effect from 2359hrs IST on 24th March, 2020. However this restriction shall not apply to aircraft/helicopter(s) belonging to or being operated on behalf of State/UT Governments.[27]

[24] Ministry of Consumer Affairs, Food and Public Distribution. (Department of Consumer Affairs) Notification. New Delhi, the 13th March, 2020 New. 2020;26(D):26-7. Available at: https://www.mohfw.gov.in/pdf/218645.pdf
[25] The Essential Services Maintenance Act, 1968. Available at: https://indiankanoon.org/doc/902835/.
[26] The Aircraft Act, 1934. Available at: http://legislative.gov.in/sites/default/files/A1934- 22_0.pdf
[27] Government of India. Ministry of Civil Aviation. AV.11011/1/2020-US(AG)Office-MOCA. Available at: https://www.civilaviation.gov.in/sites/default/files/Revised-COVID-19-Order under Section 8B.pdf

The Drugs And Cosmetics Act, 1940[28]	An Act to regulate the import, manufacture, distribution and sale of drugs. According to Section 26 (B), if Central Government is satisfied that a drug is essential to meet the requirements of an emergency arising due to epidemic or natural calamities and is in the public interest, it is necessary or expedient so to do, and then Government may regulate or restrict the manufacture, sale or distribution of such drug.	In exercise of the powers conferred by the act Central Government on 26th March, 2020 directs that sale by retail of any preparation containing the drug Hydroxychloroquine shall be in accordance with the conditions for sale of drugs specified in Schedule H1 to the Drugs and Cosmetics Rules, 1945.[29]
Criminal Procedure Code[30]	Section 133: Under this section, the court issues a conditional order for the removal of public nuisance. Section 144- Imposed power to the executive magistrate to restrict a particular or a group of persons residing in a particular area while visiting a certain place or area. This move was implemented to prevent a danger to human life health and safety	Section 144 was imposed for COVID- 19 pandemic and lock-down orders.
Indian Penal Code[31]	Addresses offences affecting public health and provisions relating to infectious diseases specifically. Section 188 - Disobedience to order duly promulgated by public servant, shall lead to punishment with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. Section 269- Negligent act likely to spread infection of disease dangerous to life, shall lead to punishment with	Any persons violating the containment measures will be liable to proceed under Sec.188 of IPC. Section 188, 269, 270, and 271 of IPC was imposed for the COVID-19 pandemic and lock down orders.

[28] The Drugs and Cosmetics Act ,1940. 1-42. Available at: http://legislative.gov.in/sites/default/files/A1940-23.pdf.
[29] Ministry of Health and Family Welfare (Department of Health and Family Welfare) Notification New Delhi, the 26th March, 2020. Available at: https://www.mohfw.gov.in/pdf/218927g.pdf
[30] The Code of Criminal Procedure, 1973. Available at: https://legislative.gov.in/sites/default/files/A1974-02.pdf
[31] The Indian Penal Code. 1860; Available at: https://legislative.gov.in/sites/default/files/A1860-45.pdf

	imprisonment of either description for a term which may extend to six months, or with fine, or with both. Section 270- Malignant act likely to spread infection of disease dangerous to life, shall lead to punishment with imprisonment of either description for a term which may extend to two years, or with fine, or with both. Section 271- Disobedience to quarantine rule, shall lead to punishment with imprisonment of either description for a term which may extend to six months, or with fine, or with both.	

Source: Sahoo et al., 2020[32]

After the declaration of COVID-19 as pandemic, Epidemic Diseases Act of 1897 have been invoked in some states and UT's and a nationwide lockdown was implemented on 24th March, 2020 for 21 days which was further extended till 3rd May, 2020.

What we learnt about governing the COVID-19 response: Analyzing national responses during pandemic shows the broad range of measures that countries undertook to maintain performance of the key health system functions and contain the spread of disease. It also provides an opportunity to distil the governance factors that supported (or undermined) a resilient health system response. This was also supported by drawing on or quickly developing an amending response plans and emergency legislation to give the government special powers to impose restrictions and issue guidelines accordingly.

Conclusion

Governance for health promotes collaborative action of health and non-health sectors, public and private actors and citizens for a common interest. In times of crisis and when the health systems facing scarcity, authorities and professional bodies, must make hard decisions to best ensure optimal health outcomes and fair distribution. Although governments are committed to the health of their citizens, the capabilities to protect health of citizens and availability of resources and its impact on health outcome vary.

While every country needs this, it is a particularly important consideration for developing countries because there is lack of awareness, knowledge, and health related infrastructure,

[32] Sahoo, D.P. et al ., *COVID-19 pandemic: a narrative review on legislative and regulatory framework in India for disaster and epidemic*. Int J Res Med Sci 2020; 8:2724-9.

health insurance and adequate purchasing power, making them more vulnerable to health hazards. In addition to this, the current state of a country's health infrastructure must be assessed. A review of public provision of health infrastructure provides a measure for the extent of accessibility to healthcare related services for citizen. For example, during COVID-19 there were an inadequate number of hospital beds, which required governments to convert railway coaches, stadiums and other open places and centers into makeshift hospitals.

Despite various acts and legal provisions, however, there is a need of further strengthening of legal provision. The Union Ministry of Health and Family Welfare drafted a bill Public Health (Prevention, Control and Management of epidemics, bio-terrorism and disasters) Bill, 2017 to counterstrike any emergency swiftly and will replace the Epidemic Diseases Act. There is a need of efficient and effective legislation to combat all health emergencies in India and this should be integrated from national level to local level to ensure stability during and after pandemic.

In certain emergent situations and epidemics, various legal measures are necessary to control the situation. Laws, acts and legal framework should be well understood by public health professionals for the benefit of the nation, society community at large.

Issues Relating to Enforcement of Election Manifestos

Mr. Amrendra Kumar Singh[1]

Abstract

During the election campaigning process, political parties will often publish official statements of their intended policies in the form of election manifestos. These documents address a wide range of issues and show the plans, programmes, and schemes of a political party that will be put into action if the party is voted into power. The ultimate objective of these types of policy documents is to win the support and votes of the general public. These manifestos that are being released and circulated in public are concrete proofs of the intention and plans of a political party, in contrast to the statements made in public speeches and rallies, which are typically dramatised in order to keep an audience engaged with a candidate. However, despite the legal sanctity of any document that is written and attested in black and white, election manifestos escape this liability, which results in "promises" and "freebies" mentioned in the manifestos, which are forgotten after elections. Even though certain guidelines have been put in place to prevent the manipulation of voters by false promises mentioned in election manifestos, these are not sufficient to prevent voter manipulation. It does not become an electoral issue because manifestos are frequently released prior to the beginning of elections. Because it does not become an electoral issue, the Election Commission of India has less authority over the matter. This study takes a critical look at the system that is currently in place to regulate election manifestos and discusses the various potential fixes.

Keywords: Election, Election Manifesto(s), Freebies, Policy, Promise.

Election Manifesto - Concept and Relevance

An election manifesto is a published document that contains a declaration of the ideology, intentions, views, policies, and programmes as well as the agenda of a political party or candidate. The word "manifesto" originates from the Italian word "manifesto," which in turn arises from the Latin word "manifestum," which means clear or conspicuous[2].

Generally, political parties will propagate their manifestos on the eve of elections. These documents will highlight the party's declared ideology, in overall, as well as their policies and programmes for the people and electorate, in special, with relation to the upcoming elections. The Election Manifesto is a document that acts as a reference or reference point for the public at large regarding what a political party stands for and what it offers or promises to offer to the electorate, in particular if it comes to power. This document is made available to the public. Therefore, the manifestos provide the electorate with the opportunity to weigh and analyse the relative merits of the parties and decide which of them deserves their support at the hustings in order to meet their needs and expectations.

---

[1] ***Research Scholar, Faculty of Law, BHU, Varanasi.***

[2] Rishan Mahajan & Yogesh Singh, "Election Manifesto: Legal Reality or Illusion", 1 TNNLU Law Review (2018).

In the past, political parties rarely issued manifestos for their candidates and platforms. This is a relatively new phenomenon, as numerous political parties at the national and state levels are now competing with one another to impress the electorate in order to gain power in the election contests. They do this by making more alluring offers to the people in the hopes of persuading them to vote in their favour. In this competitive race, they not only project their policies and programmes for the common good of the people in public, but they also make promises of certain tangible materials, which are now being termed to in common parlance as 'freebies.' moreover, they project their policies and programmes for the common good of the people in this race[3].

Election Manifesto Not Legally Enforceable

Lord Denning, sitting in the House of Lords observed in *Bromley London Borough Council v. Greater London Council*[4] It was said: - "A manifesto issued by a political party - in order to get votes - is not to be taken as gospel. It is not to be regarded as a bond, signed, sealed and delivered. It may contain - and often does contain - promises or proposals that are quite unworkable or impossible of attainment. Very few of the electorate read the manifesto in full. A goodly number only know of it from what they read in the newspapers or hear on television. Many know nothing whatever of what it contains. When they come to the polling booth, none of them vote for the manifesto. Certainly not for every promise or proposal in it. Some may by influenced by one proposal. Others by another. Many are not influenced by it at all. They vote for a party and not for a manifesto. It seems to me that no party can or should claim a mandate and commitment for any one item in a long manifesto. When the party gets into power, it should consider any proposal or promise afresh - on its merits - without any feeling of being obliged to honour it or being committed to it. It should then consider what is best to do in the circumstances of the case and to do it if it is practicable and fair."

The Supreme Court held in *Mithilesh Kumar Pandey v. Union of India*[5] that there is no provision in law which makes promises made by political parties in their election manifestos enforceable against them.

S. Subramaniam Balaji v. The Government of Tamil Nadu & Ors[6] The matter was taken by the petitioner to the Supreme Court. The Supreme Court, by its order dated 5 July 2013, maintained that although the law is obvious that the promise in the election manifesto cannot be construed as 'corrupt practice' under Section 123 of the Representation of People Act, 1951, the reality cannot be ruled out that distribution of freebies of any kind, undoubtedly, influences all people

Legal issues relating to enforcement of Manifesto[7]

---

[3] Available on https://indraprasthalawreview.in/wp-content/uploads/2021/09/GGSIPU_USLLS_ILR_2020_V1-I2-07-Ragini_Kanungo-1.pdf visited on 21/04/2020.
[4] 1982 (1) All England Law Reports.
[5] W.P.(C)--1950/2014.
[6] (2013) 9 SCC 659.
[7] *V.P. Ammavasai v. The Chief Election Commissioner* W.P.(MD) No.7708 of 2019.

1) Whether the promises made by the political parties in the election manifesto would amount to 'corrupt practices' as per Section 123 of the RP Act?
2) Whether this Court has inherent power to issue guidelines by application of Vishaka's principle?
3) Whether the Comptroller and Auditor General of India has a duty to examine expenditures even before they are deployed?
4) (Whether the writ jurisdiction will lie against a political party?

Whether the promises made by the political parties in the election manifesto would amount to 'corrupt practices' as per Section 123 of the RP Act[8]?

deciding the issue whether the contents of the political manifesto would constitute a corrupt practice under Section 123 of RP Act, it is imperative to refer to the intention of the legislature behind incorporating the respective section. The purpose of incorporating Section 123 of the RP Act is to ensure that elections are held in a free and fair manner

Firstly, if we are to declare that every kind of promises made in the election manifesto is a corrupt practice, this will be flawed. Since all promises made in the election manifesto are not necessarily promising freebies per se, for instance, the election manifesto of a political party promising to develop a particular locality if they come into power, or promising cent percent employment for all young graduates, or such other acts. Therefore, it will be misleading to construe that all promises in the election manifesto would amount to corrupt practice. Likewise, it is not within the domain of this Court to legislate what kind of promises can or cannot be made in the election manifesto.

Secondly, the manifesto of a political party is a statement of its policy. The question of implementing the manifesto arises only if the political party forms a government. It is the promise of a future Government. It is not a promise of an individual candidate. Section 123 and other relevant provisions, upon their true construction, contemplate corrupt practice by individual candidate or his agent. Moreover, such corrupt practice is directly linked to his own election irrespective of the question whether his party forms a government or not. The provisions of the RP Act clearly draw a distinction between an individual candidate put up by a political party and the political party as such. The provisions of the said Act prohibit an individual candidate from resorting to promises, which constitute a corrupt practice within the meaning of Section 123 of the RP Act. The provisions of the said Act place no fetter on the power of the political parties to make promises in the election http://www.judis.nic.in manifesto.

Thirdly, the provisions relating to corrupt practice are penal in nature and, therefore, the rule of strict interpretation must apply and hence, promises by a political party cannot constitute a corrupt practice on the part of the political party as the political party is not within the sweep of the provisions relating to corrupt practices. As the rule of strict interpretation applies, there is

[8] *Ibid*

no scope for applying provisions relating to corrupt practice contained in the said Act to the manifesto of a political party.

Lastly, it is settled law that the courts cannot issue a direction for the purpose of laying down a new norm for characterizing any practice as corrupt practice. Such directions would amount to amending provisions of the said Act. The power to make law exclusively vests in the Union Parliament and as long as the field is covered by parliamentary enactments, no directions can be issued as sought by the Appellant. As an outcome, we are not inclined to hold the promises made by the political parties in their election manifesto as corrupt practice under Section 123 of the RP Act. Whether the schemes under challenge are within the ambit of public purpose and if yes, is it violative of Article 14?

The concept of State largesse is essentially linked to Directive Principles of State Policy. Whether the State should frame a scheme, which directly gives benefits to improve the living standards or indirectly by increasing the means of livelihood, is for the State to decide and the role of the court is very limited in this regard.

The Hon'ble Court further stated that it has limited power to issue directions to the legislature to legislate on a particular issue. However, the Election Commission, in order to ensure level playing field between the contesting parties and candidates in elections and also in order to see that the purity of the election process does not get vitiated, as in past, has been issuing instructions under Model Code. The fountainhead of the powers under which the Election Commission issues these orders is Article 324 of the Constitution, which mandates the Election Commission to hold free and fair elections

The Supreme Court added that considering that there is no enactment that directly governs the contents of the election manifesto, the Court hereby directs the Election Commission to frame guidelines for the same in consultation with all the recognized political parties as when it had acted while framing guidelines for general conduct of the candidates, meetings, processions, polling day, party in power etc. In the similar way, a separate head for guidelines for election manifesto released by a political party can also be included in the Model Code of Conduct for the guidance of Political Parties & Candidates.

The Election Commission's Guidelines on Election Manifestos Pursuant to the above direction of the Supreme Court, the Election Commission called a meeting of all recognized national and state political parties on 12 August 2013 for consultation on the issue of framing guidelines for election manifestos of political parties. Majority of the parties opposed the idea of framing any guidelines on manifestos, considering it to be an infringement of their right to frame their policies and programmes which, in their wisdom, were best suited to meet the expectations and aspirations of the people, at large, and the electorate, in particular. While the Election Commission agreed in principle with their point of view, having due regard to the above direction of the Supreme Court, issued the guidelines to be adhered to by the political parties and candidates while releasing their election manifesto for any election to the Parliament or State Legislatures.

These guidelines were incorporated as Part VIII of the Model Code of Conduct and it was clarified that the above guidelines would be applicable from the date, a political party issues its manifesto irrespective of whether such date is before or after the date of announcement of the election schedule by the Election Commission. (Annexure XVIII) These guidelines are as follows-

1) The election manifesto shall not contain anything repugnant to the ideals and principles enshrined in the Constitution and further that it shall be consistent with the letter and spirit of other provisions of Model Code.
2) The Directive Principles of State Policy enshrined in the Constitution enjoin upon the State to frame various welfare measures for the citizens and therefore there can be no objection to the promise of such welfare in election manifesto. However, political parties should avoid making those promises which are likely to vitiate the purity of the election process or exert undue influence on the voters in exercising their franchise.
3) In the interest of transparency, level playing field and http://www.judis.nic.in credibility of promises, it is expected that manifesto also reflect the rationale for the promises and broadly indicate the ways and means to meet the financial requirement for it. Trust of voters should be sought only on those promises which are possible to be fulfilled

The Election Commission has further directed to all political parties to send a copy of their election manifestos along with Hindi/English version (if the original version is in the regional language) whenever released, within 3 days of its release, for the Election Commission's record. The political parties have also been requested to submit a declaration along with manifesto that the program/policies and promises made therein are in consonance with Part VIII of the Model Code of Conduct. The Chief Electoral Officers have been asked to obtain 3 copies of manifestos as well as declaration from the political parties/candidates within 3 days of its release and analyze such election manifestos vis-à-vis the guidelines on manifestos issued by the Election Commission, with their comments

Whether this Court has inherent power to issue guidelines by application of Vishaka's principle?

It is the stand of the Appellant that there is legislative vacuum in the given case. Hence, the judiciary is warranted to legislate in this regard to fill the gap by application of Vishaka's principle. However, learned Counsel for the Respondent made a distinction between the Vishaka's (supra) and the given case. While highlighting that in Vishaka's (supra), there was no legislation to punish the act of sexual harassment at work place, therefore, the judiciary noting the legislative vacuum framed temporary guidelines until the legislatures passed a bill in that regard. However, in the case at hand, there is a special legislation, namely, the Representation of People Act wherein Section 123 enumerates exhaustively a series of acts as "corrupt practice". Therefore, this is not a case of legislative vacuum where the judiciary can apply its inherent power to frame guidelines

Whether Comptroller and Auditor General of India has a duty to examine expenditures even before they are deployed?

As reiterated earlier, the Comptroller and Auditor General of India is a constitutional functionary appointed under Article 148 of the Constitution. His main role is to audit the income and expenditure of the Governments, Government bodies and state-run corporations. The extent of his duties is listed out in the Comptroller and Auditor General's (Duties, Powers etc.) Act, 1971. The functioning of the Government is controlled by the Constitution, the laws of the land, the legislature and the Comptroller and Auditor General of India. CAG examines the propriety, legality and validity of all expenses incurred by the Government. The office of CAG exercises effective control over the government accounts and expenditure incurred on these schemes only after implementation of the same. As a result, the duty of the CAG will arise only after the expenditure has incurred.

The law is obvious that the promises in the election manifesto cannot be construed as 'corrupt practice' under Section 123 of RP Act, the reality cannot be ruled out that distribution of freebies of any kind, undoubtedly, influences all people. It shakes the root of free and fair elections to a large degree. The Election Commission through its counsel also conveyed the same feeling both in the affidavit and in the argument that the promise of such freebies at government cost disturbs the level playing field and vitiates the electoral process and thereby expressed willingness to implement any directions or decision of this Court in this regard.

As observed in the earlier part of the judgment, this Court has limited power to issue directions to the legislature to legislate on a particular issue. However, the Election Commission, in order to ensure level playing field between the contesting parties and candidates in elections and also in order to see that the purity of the election process does not get vitiated, as in past been issuing instructions under the Model Code of Conduct. The fountainhead of the powers under which the commission issues these orders is Article 324 of the Constitution, which mandates the commission to hold free and fair elections. It is equally imperative to acknowledge that the Election Commission cannot issue such orders if the subject matter of the order of commission is covered by a legislative measure

Therefore, considering that there is no enactment that directly governs the contents of the election manifesto, we hereby direct the Election Commission to frame guidelines for the same in consultation with all the recognized political parties as when it had acted while framing guidelines for general conduct of the candidates, meetings, processions, polling day, party in power etc. In the similar way, a separate head for guidelines for election manifesto released by a political party can also be included in the Model Code of Conduct for the Guidance of Political Parties & Candidates. We are mindful of the fact that generally political parties release their election manifesto before the announcement of election date, in that scenario, strictly speaking, the Election Commission will not have the authority to regulate any act which is done before the announcement of the date. Nevertheless, an exception can be made in this regard as the purpose of election manifesto is directly associated with the election process.

Whether the writ jurisdiction will lie against a political party- It was held that the manifesto of a political party is a statement of its policy and the question of implementing the manifesto arises only if the political party forms a government and is not a promise of an

individual candidate and the provisions of the Representation of the People Act clearly draw a distinction between an individual candidate put up by a political party and the political party as such and the provisions of the Act as they exist place no fetter on the power of the political parties to make promises in the election manifesto. More importantly, it was held, "it is not within the domain of this Court to legislate what kind of promises can or cannot be made in the election manifesto

Theories of election policy and programmes

Revolving around the content of election manifestos, various theories have been propounded by scholars to analyse and understand the policies and programmes by political parties which find a place in manifestos. The said theories are as follows:[9]

1) **Spatial Theory**
   The central hypothesis of this theory developed by Anthony Downs is that there exists a reciprocal relationship between parties' policy programmes, the policies of rival parties and voters' policy preferences. However, these dynamics are significant only when public opinion is shifting away from the political party's policy position.
2) **Salience Theory**
   According to the salience theory, when political parties compete in an election, they emphasise specific policies or concerns more than others through their public statements i.e., election manifestos that correspond with the issues the public is interested in to win votes. This theory was developed by Budge and Far lie.
3) **Function Theory**
   Propounded by Benoit, the function theory holds the belief that campaign communications have certain distinct functions that ultimately desire to win the elections. These functions are achieved by election manifestos to a large extent i.e., to acclaim positions, to attack an opponent, and defend in case of a past attack. Thus, election manifestos can be considered multifunctional policy documents in accordance with this theory.

Conclusion

Election manifestos are an essential component of free and fair elections in a democratic system. They are meant to be a concrete road map that a political party intends to follow in the event that they are successful in winning elections and taking power. Because they are printed out in black and white and made available to the general public, election manifestos carry more weight than speeches that are delivered at rallies.

The significance of election manifestos must be ingrained into the structure of the electoral process in India, and political parties must prepare their manifestos in a manner that is "realistic and pragmatic." It is not a good idea to make statements and promises just for the sake of gaining attention without any intention of following through with them.

---

[9] Available on https://indraprasthalawreview.in/wp-content/uploads/2021/09/GGSIPU_USLLS_ILR_2020_V1-I2-03-Ragini_Kanungo-1.pdf visited on 1/04/2020

There is still a disconnect between electoral promise and its fulfilment, despite the fact that the actions that have been taken by the Election Commission of India in response to the order of the Honourable Supreme Court are commendable. As a result, the time has come to make certain that the guidelines on election manifestos receive legislative support and that political parties are subject to a legal obligation to produce election manifestos.

It is now up to the parties involved to keep these commitments and ensure that they are carried out. All political parties have a responsibility to uphold the integrity of election manifestos. If candidates fail to live up to the commitments made in their platforms, they should face legal repercussions in the form of restrictions on their ability to run for office. It is essential to have a clear understanding that there is a fine line separating policy pledges and promises made with the intention of buying votes. It is necessary to ensure liability and accountability for such promises in the appropriate manner.

The Immoral Traffic (Prevention) Act, 1956: An Appraisal

Mr. Ravi Ranjan Roy[1]

Introduction

On December 30, 1956, the Suppression of Immoral Traffic in Women and Children Act, 1956, received assent and became operative throughout India. As India signed the United Nations International Convention for the "Suppression of Women in Trafficking in Persons and of the Exploitation in Others" in New York on May 9, 1950, the act was created to combat immoral trafficking in women and children. The Immoral Trafficking (Prevention) Act, 1956 (hence referred to as ITPA) an act made "for the prevention of immoral traffic," underwent subsequent amendments that altered both the nomenclature of the act and the preamble. The ITPA had two changes in the years 1978 and 1986, respectively that make it more gender-neutral. With 25 provisions and one schedule, this law attempts to end prostitution and immoral trafficking in India.

No matter where it originated or why it persisted be they biological, economic, social, or psychological prostitution is a practice that predates the emergence of civilization. Even devotion to Gods, priests, and temples was connected to it. Prostitutes once had a respectable place in society and were later given legal protection, licensing, and regulation. There is widespread agreement that non-marital sex is a profession that lowers the dignity of people. The current Act was enacted by our Parliament in response to India's ratification of the International Convention on the Suppression of Trafficking in persons and the Exploitation of Prostitution by others, which was signed in New York on May 9, 1950. Human trafficking is prohibited under Article 23 of the Constitution, and any violation of the provision is a crime punishable by law. According to Article 35, such a law must be passed by Parliament as soon as possible after the Constitution takes effect. It is worth noting that neither the International Convention nor Article 23 of the Constitution mention "trafficking in women and girls." They refer to "trafficking in human beings," that include both sexes.

The Act was recently amended by Act 44 of 1986. The title of the Act has been changed from "Suppression of Immoral Traffic in Women and Girls Act" to "Immoral Traffic (Prevention) Act, 1956" and the words "persons" and "person" have been substituted for the words "women and girls" and "woman or girl" wherever they appear in the Act. The Act now prohibits all trafficking in persons, not just trafficking in women and girls. The Act does not attempt to outlaw prostitution in general, declare it to be a crime itself, or punish anyone for prostitution in which they themselves engage. The goal of the law is to prevent or make illegal the organized trafficking in human beings for prostitution as a method of organized subsistence. Several

[1] ***Research Scholar, Faculty of Law, Banaras Hindu University, Varanasi.***

provisions of the Act tend to support this point of view. However, there are some exceptions, which can be found in Sections 7 and 8 of the Act. Section 7 of the Act makes punishable the practice of prostitution in or near public places such as places of public religious worship, educational institutions, hospitals, and so on. This is an illuminating provision that sheds light on the legislative intent. This provision, therefore, inhibits a person himself from the practice of his profession in contravention of its terms and to that extent renders prostitution a penal offence. The act states the illegality of prostitution and the punishment for owning any such related establishment. Any person involved in any phase of the chain activities like recruiting, transporting, transferring, harbouring, or receiving of people for the purpose of prostitution is also liable to be punished. If a person is found guilty of involving a child in any such activity, he/she is punishable by law and may be imprisoned for seven or more.

Immoral Traffic (Prevention) Act, 1956
Brothel
Krishnamurthy alias Tailor Krishnan v. Public Prosecutor, Madras[2], An examination of the definition of brothel would undoubtedly require the satisfaction of the ingredient of the place being used for purposes of “sexual exploitation or abuse”. The phrase "for the purposes of" indicates that a single instance of sexual exploitation or abuse would not meet the requirements of Section 2. (a). Although a place used once for a prostitution may not be a brothel, it is a matter of fact whether or not to draw conclusions about a place where information had been received that it was involved in prostitution, where a person freely wants to ask for girls, where the person is shown girls to choose from, and where they engage a girl in prostitution. It is not required that there be evidence of repeated visits to the place for the purpose of prostitution. A single instance, combined with the surrounding circumstances, is sufficient to establish both that the place was used as a brothel and that the suspect was so keeping it.

In re Mangil[3], A single instance, combined with the surrounding circumstances, is sufficient to prove that the place was used as a brothel. The prosecution is not required to show that people visited repeatedly for the purpose of prostitution.

In re Dhanalakshmi[4],
Where it was clear from the prosecution's evidence that there was only one girl in the premises, and the prosecution proved only one act of prostitution, and the place inhabited by the accused was a place used once for the purpose of prostitution, the accused's house cannot be treated as a brothel kept by the accused.

Arun Kumar v. State of Bihar[5],
Without any doubt, a hotel room that is being used for prostitution falls under the definition of a "brothel."

[2] AIR 1967 SC 567.
[3] 1972 LW 185.
[4] 1974 Cri LJ 61 (Mad).
[5] 1984 (32) BLJR 291.

In re Ratanmala[6], When a single woman practises prostitution for her own income without the involvement of another prostitute or another person in the upkeep of such premises, her residence does not qualify as a "brothel."

In re Dhanalakshmi[7], in the absence of convincing evidence that the girl's prostitution was done for the benefit of another person, the premises in question cannot be characterised as a "brothel." The mere fact that the accused accepted the money and kept it in the almirah would not be enough to satisfy the ingredient "for the benefit of another person." See also a "brothel" is described as a place where two or more prostitutes work together for the benefit of another person in Section 2(a) of the ITPA. Instances of this abuse occur in places like massage parlours and hotel rooms, but the name "brothel" is too wide to cover them.

In re John[8], *In re Susila*[9], Where two girls live in a house and a man seeking the company of a girl comes there and one of the girls bargains or demands money and one of them tells the visitor he can have either of them for money and the other girl is silent without protesting that she would bargain for herself and merely allows the first girl to bargain for her as well. Finally, the visitor accepts the offer, choosing one of the girls and entering the room with her, and the money paid to the girl keeping his companion is eventually found with the other girl, it is quite a reasonable and normal inference that can be drawn from the facts that the house was being used for prostitution for the mutual gain of both of them, and as such a brothel is within the meaning of Section 2 (a).

Devadasis and joins are also not included in the Act's protections. According to the Supreme Court, it is illegal and criminal by law to engage girls in prostitution in the guise of religion, a practise that is currently common. An important step in ending this kind of sexual exploitation would be to explicitly identify established practices.[10]

Prostitution

Prior to the 1986 amendment, prostitution was defined as "the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind and whether offered immediately or otherwise," and the expression "prostitute" shall be construed accordingly. Thus, the current definition includes sexual exploitation or abuse of a male for commercial purposes as well as the act of a female offering her body for promiscuous sexual intercourse with her. Prostitution is defined by Black's Law Dictionary as "performing an act of sexual intercourse for hire, or offering or agreeing to perform an act of sexual intercourse or any unlawful sexual act for hire." The act or practise of a female prostituting or offering her body for indiscriminate intercourse with men for money or its equivalent. As to the meaning of the word “prostitute” Beaumont, C.J. has observed:“ In my opinion, a kept woman who confines

---

[6] (1962) 1 Cri LJ 162 : AIR 1962 Mad 31.
[7] 1974 Cri LJ 61 (Mad).
[8] 1966 Cri LJ 551 : AIR 1966 Mad 167.
[9] (1961) 1 Mad LJ 387.
[10] *Gaurav Jain v. Union of India* (1997) 8 SCC 114

her favours to one man, even if he is not her husband, is not a prostitute. A kept woman, like a married woman, can be a prostitute. However, I believe that prostitution entails the indiscriminate use of a woman's body for hire. The Oxford Dictionary defines a prostitute as "a woman who offers her body to indiscriminate sexual intercourse, usually for hire." I don't claim that to be a general definition, nor am I implying that a prostitute must be completely apathetic and accept the first person to offer her a fee, much like a cab driver at a stand. However, I firmly believe that prostitution goes beyond having sex with a single man.

Babibai (1942) Criminal revision No. 157 or 1942 decided by Beaumont C.J. and Wasodeo J. on June 25, 1942 (Bombay Unreported).

"Exploitation" and "Abuse"—Meaning of—Black's Law Dictionary defines the word "exploitation" to mean an act or process of exploiting, making use of, or working up . . ....Taking unjust advantage of another for one's own advantage or benefit.

As to the meaning of the word "abuse" Black's Law Dictionary says "Everything which is contrary to good order established by usage. Departure from reasonable use to immoderate or improper use, Physical or mental maltreatment, Misuse, Deception. An injury to genital organs in an attempt or carnal knowledge, falling short of actual penetration.

Lee v. State[11], But according to other authority's "abuse" is here equivalent to ravishment or rape. Any injury to private parts of girl constitutes "abuse" within the meaning of criminal statute prescribing abuse of girl under age of 12 years in attempt to have carnal knowledge of her; mere hurting of private parts of girls, even though they are not bruised, cut, lacerated or torn, is sufficient**,** *Ard. v. State*[12]*,"*

Public place

Hari Singh v. Jadu Nadan Singh Musa[13]*, Ram Karan Lal*[14]*,*

A public place is one where the general public can go regardless of whether they have the legal right to do so. Many public exhibitions are held on private property. Nonetheless, the public visits them—the public goes there.

Sabimiya,[15]*: Muhammad Khan*[16]*,*

A public place must be open to the public and have lawful access to it, whether through right permission, usage, or otherwise.

---

[11] 246 Ala. 69, 18, So. 2d 706, 707.
[12] 57 Ala. App 250, 327 So. 2d 745, 747
[13] (1916) 40 Mad 556
[14] 18 Cri LJ 650 : AIR 1916 (N) 15 (1).
[15] 81 IC 897
[16] 104 IC 230 : Sripal, AIR 1934 All 17 : 147 IC 1028

Ramjank[17], It is not required that it be public property. However, if it is private, the general public must have access to it. It is also not necessary that it is open to the public. It must be a destination for the general public.

Babu Ram[18], *Vithu*[19], *Gajju*[20], *Bashir*[21],
Meaning of the word "punishable" The phrase "shall, on conviction, be punishable for the first offence with imprisonment for a term which may extend to six months and with fine which may extend to rupees one thousand" simply means that the Court must impose a sentence that includes both an imprisoning term and a fine when finding someone guilty of violating the Act. The phrases "may extend" before "six months" and "rupees one thousand" provide the court only limited discretion over the length of the sentence to be served or the amount of the fine to be imposed. *State of Maharashtra v. Jugmarder Lal*[22], reversing Criminal Appeal No. 661 of 1963. Emperor v. Peter D' Souza[23], overruled.

When an offence is not committed

1) Prostitution by a married woman who is not doing it in a brothel or for the benefit of another person. *Ram Devi v. State,*[24]
2) Girl who is just employed in a brothel for immoral trafficking and who is unrelated to the operation of the brothel's administration and other operations. *State v. Gaya,*[25]
3) A single incident of a worker having sex with someone else within her own home. *In re Johan,*[26]
4) The evidence of pimps and prostitutes was deemed insufficient to prove the manager's guilt of operating a brothel**.** *Bhulu Mia v. State,*[27]
5) Inhabitant of a brothel. *In re Pappa,*[28]
6) Owner of an undivided half-interest in a house where another lives as a prostitute. *Padamoni Dassi v. Emperor,*[29]
7) When there was only one girl in the house and the prosecution only proved one act of prostitution. *In re Dhanalakshmi,*[30]
8) When the only evidence against the accused was that he collected rent from the inmates of the house**.** *Bhulu Mia v. State,*[31]

---

[17] AIR 1937 Pat 276.
[18] 49 All 913
[19] 21 IC 910
[20] 19 Cri LJ 917
[21] 68 IC 613.
[22] AIR 1966 SC 940 : 1960 Cri LJ 707
[23] AIR 1949 Bom 41 (FB) : 50 Cri LJ 137
[24] 1968 All LJ 894.
[25] 1960 Cri LJ 893 : AIR 1960 Bom 289.
[26] 1966 Cri LJ 551 : AIR 1966 Mad 167 : (1965) 2 Mad LJ 238.
[27] 1969 Cri LJ 1553 : AIR 1969 Cal 416.
[28] 40 Cri LJ 799.
[29] 33 Cri LJ 681.
[30] 1974 Cri LJ 61 (Mad): 1972 LW 122.
[31] 1969 Cri LJ 1553 : AIR 1969 Cal 416.

9) A woman who engages in prostitution for a living without the assistance of another. *In re Ratanmala,*[32]

Constitutional provisions

The Indian Constitution expressly or implicitly prohibits human trafficking, and several basic rights are enshrined within four corners, as well as negative and positive duties on the state to combat human trafficking and assist victims. Article 23 "prohibits human trafficking and forced labour."[33] Article 24 forbids the “engagement of minors in any dangerous occupation or in any plant or mine that is unsuitable for their age”. The language of Articles 23 and 24 imposes a clear mandate on the government to take decisive measures to end trafficking as a violation of fundamental rights. Article 14[34] provides for “equality in general”, whereas Article 15(3) provides for “special safeguards for women and children”. It states that “Nothing in this article shall prevent the State from making any special provision for women and children”. Article 16(1) addresses “equal opportunity in public employment”.

The legislation simply directs the government to give every individual a chance to succeed. Article 38 requires states to “establish and maintain, as efficiently as possible, a social order in which social, economic, and political justice informs all institutions of national life”. Article 39 enjoins that “states should direct their policies toward ensuring, among other things, the equal right to adequate means of livelihood for men and women, as well as equal pay for equal labour, regardless of their age or strength”. Article 39(f) provides that children should be “given opportunities and facilities to develop in a healthy manner and conditions of freedom and dignity and that childhood should be protected against exploitation”. Article 45 guarantees “children's right to free and compulsory education”, now widely recognized as a basic right. Furthermore, Article 46 instructs the state to “promote the educational and economic interests of women and weaker sections of the people and that it shall protect them from social injustice and forms of exploitation”.

As a result, a set of constitutional mandates places affirmative responsibilities on governments to engage constructively in support of combating human trafficking while ensuring that no one's human rights are violated.

The primary Indian law addressing human trafficking is the ITPA 1956, formerly known as the "Suppression of Immoral Traffic in Women and Children, 1956." It was passed to carry out the noble constitutional obligation as well as the "UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others, 1950". The ITPA refers to immoral human trafficking; however, the statute's scope is limited to "commercial sexual exploitation" or "prostitution." It includes punishments for those who support and encourage commercial sex exploitation in brothels. As part of its welfare measures, the legislation requires the state government to create and maintain shelters for victims of human trafficking. Though safeguards

[32] AIR 1962 Mad 31: (1962) 1 Cri LJ 162.
[33] The constitution of India, 1950. Art 23, cl.1.
[34] The constitution of India, 1950. Art 14.

were taken, the act nevertheless falls short and left much to be desired. Here is my attempt at a succinct analysis.

Even though the ITPA is a specialized piece of legislation that exclusively deals with trafficking, its main flaw is that it lacks a definition of the term. Additionally, the legislation places less emphasis on precisely defining commercial sexual exploitation and more emphasis on recognizing brothels as a site of commercial sexual exploitation and penalising those who support it. It is unclear from the law whether prostitution or prostitution for human trafficking is forbidden. This uncertainty makes it possible for numerous offenders who transport and house potential victims to escape punishment.

Initiatives to combat trafficking of Women and Children

Apart from the Immoral Trafficking (Prevention) Act, various other initiatives have been taken up by the Government and other concerned authorities. Discussed below are the same:National Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children 1998 was formulated. Ministry of Home Affairs has set up a dedicated cell for prevention of trafficking. The Ministry of Women and Child Development (MWCD) along with the Ministry of External Affairs has endeavoured to create special task forces to combat cross border trafficking. The MWCD in collaboration with NIPCCD and UNICEF has developed three manuals for 'Judicial Handbook on combating Trafficking of women and Children for Commercial Sexual Exploitation'.

To combat human trafficking several laws were enacted by the Indian government. For example, "The Immoral Traffic (Prevention) Act, 1956"[35] (hereinafter ITPA) - deals with trafficking for commercial sexual exploitation. A host of statutes including "The Bonded Labour System Abolition Act, 1976"[36], "The Child labour Act, 1986"[37] and "The Interstate Migration Workman's Act, 1979"[38] are also enacted to cover other aspects of trafficking. Furthermore, several other statutes were enacted that directly or indirectly deal with human trafficking; "The Juvenile Justice Act, 2015"[39], "Protection of Children from Sexual Offences Act, 1973"[40] and major Act like the "The Indian Penal Code,1860"[41] (hereinafter IPC) is also used to address components of offences committed during and after trafficking for commercial sexual exploitation. Moreover, Article 23 of the Indian Constitution explicitly "prohibits traffic in human beings and forced labour" and imposes negative as well as positive responsibility on the states to address the problem of human trafficking and provide support to the victims.
Despite Constitutional guarantees and a plethora of laws, trafficking continues to thrive in the country. The domestic laws dealing with trafficking are not updated to effectively combat this

---

[35] The Immoral Traffic (Prevention) Act, 1956
[36] The Bonded Labour System Abolition Act,1976, No.19, Acts of Parliament, 1976.
[37] The Child labour (Prohibition and Regulation) Act,1986, No.61, Acts of Parliament,1986.
[38] Interstate Migration Workmen (Regulation of Employment and Conditions of Services) Act, 1979, No.30, Acts of Parliament, 1979.
[39] The Juvenile Justice Act (Care and Protection) Act, No.2, Acts of Parliament, 2015.
[40] The Protection of Children from Sexual Offences, Act 2012, No.32, Acts of Parliament, 2012.
[41] Indian Penal Code,1860, No.45,1860.

modern slavery. The current legislation especially dealing with trafficking covers one aspect of trafficking i.e., Prostitution or commercial sexual exploitation. Although there is a multiplicity of laws to deal with various aspects of trafficking, the practice of this organized crime remains endemic in the country.

India signed the "Palermo Protocol"[42] in 2002 and ratified it in 5th may, 2011. However, the definition of trafficking in person has been codified in national law in 2013 by Criminal law Amendment Act, 2013 under the IPC. Two new sections, 370[43] and 370A, were added to define "human trafficking." However, it is contended that the definition was produced half-heartedly and that a significant component (a position of vulnerability as an act) was left out of its scope. In a recent development concerning human trafficking, the government solicited proposals for the "Trafficking in Persons (Prevention, Care, and Rehabilitation) Bill, 2021", which broadened the nature of trafficking offences. However, the bill is yet to become a reality. This article attempts to evaluate the working of "The Immoral Traffic (Prevention) Act, 1956".

Rehabilitation, Compensation, and Protection

The lack of a specific set of rights for victims in terms of rehabilitation and compensation is perhaps the most obvious flaw in the law. As previously stated, this comprises their detention without their consent in protective or corrective homes, but it also includes the full range of "rehabilitation services", including "relief" and "compensation". Section 2 requires the state governments to establish "protective homes". The provision of safe havens for victims of human trafficking is consistent with a welfare state's responsibilities. However, measures must be put in place to guarantee that these homes are habitable. Nonetheless, they are treated as criminals in these homes; forced to wear uniforms and provide easy access to pimps and brothel keepers. Besides due to a severe shortage of "space", "financial resources", and "trained personnel", government-run and funded shelters remain deficient. In numerous cases, such homes continue to run regardless of substantial gaps in obligatory reporting and abuse accusations, which sometimes are attributed to alleged political connections.

Furthermore, reports suggest that a major proportion of children, including trafficked victims, are subjected to physical punishment, substandard food, and insufficient medico-legal aid. Education, skill training, and other livelihood-providing facilities are also lacking, which would go a long way toward sustaining rehabilitation. It's hardly surprising, therefore, that victims are released after a time of "detention" and, more frequently than not, return to their former lives. Respectively, the absence of a clear policy to guide the finalization of the amount of compensation, as well as the process to be followed, means that victims must wait for an extended period, if at all, before getting anything.

The Immoral Traffic Prevention Act (ITPA), 1956, is the specialized legislation dealing with trafficking in India, a country that receives, supplies, and transits numerous trafficked

---

[42] UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.

[43] The Criminal Law (Amendment) Act,2013, No.13, Acts of Parliament,2013.

individuals. In spite of a few amendments to the legislation in 1986 it remains an ineffective and ideologically unsound piece of legislation to deal with trafficking.'[44]

The ITPA, enacted following the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others in New York, criminalizes the keeping of brothels (Sec. 3, ITPA), living on the earnings of prostitution (Sec. 4, ITPA), procuring and inducing a person for the sake of prostitution (Sec. ***5,*** ITPA), detaining a person in premises where prostitution is carried on (Sec. *6,* ITPA), prostitution in or in the vicinity of public places (sec. 7, ITPA) and seducing or soliciting for purpose of prostitution (sec. 8, ITPA).
However there are other sections where the Act criminalizes prostitutes thereby diffusing the focus on the exploitative elements of the process and the violations suffered by the trafficked women.

Criminalizing the act of prostitution in the Immoral Traffic Prevention Act begins in Sec. 7 where prostitution in or in vicinity of public places is punishable. Here the law is governed by a moralistic base whereby it aims to protect "public decency" aiming at the "moral clean up" of public places. The Act also defines public place in ambiguous terms and in most states is not supported by official gazette.[45] This section has been used against women in prostitution regardless of whether they have been trafficked or not.

A clear indicator of criminalizing the victim and interfering with the act of prostitution is the inclusion of Sec. 8 which punishes seducing and soliciting for the purpose of prostitution. The construction of this offence is extremely patriarchal and reflected in the "wilful exposure of her person (whether by sitting by a window or on the balcony of the building or house or in any other way) or otherwise tempts or endeavour to tempt, or attracts or endeavour to attract the attention of any person for the purpose of prostitution." When, under the so-called gender-neutral act, the same offence is committed by a man it carries much less punishment (three months compared to one year imprisonment).

Several studies across India have shown that this is the most abused section (section 8) of the ITPA, used more as a tool for harassment and extortion by the law enforcement.[46] Women are apprehended from known red-light areas whereas their brothel keepers and pimps are left untouched.

---

[44] The most comprehensive definition of Trafficking so far has been laid out in Art. 3 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.

[45] An official gazette is a document released by the Commissioner of Police or Magistrate to demark areas in a particular jurisdiction that are to be considered "public places" for the purposes of the Act. Sec. 7(b) of ITPA (prostitution in or in the vicinity of public places) requires the publication of this notification.

[46] For example, D'Cunha reports that compared to 596 brothel keepers 9,240 sex workers were arrested between 1980-87in Mumbai. Shymala Natraj's study reveals that 90 per cent of cases in Tamil Nādu were under Sec. 8. Indrani Sinha quotes 80 per cent under Sec 8 among arrests in West Bengal under ITPA in 1989.

In cases of organized prostitution, this results in continual debt bondage for the amount paid by her keepers as a fine or as a bail amount. In fact, sometimes the brothel keepers collude with policemen and arrange the arrests of "their" women so they can continue to serve in bondage. Whenever the police decide to present the woman before the courts, she is tutored by the police to plead guilty and then find anywhere from 20 rupees to 500 rupees. In some courts the women are even imprisoned for several months for the offence though it is not mandatory. Thus the Act itself directly encourages the continuation of a vicious cycle of exploitation of the woman. The increased use of this section of the Act has not changed the picture of trafficking even a little bit. Judges on the other hand are either moralistic or happy to punish these women not realizing the reality of their situations or feel sympathetic but helpless. Surprisingly Sec. 8 is also used against women removed after a raid under Sec. 15 (search without warrant). Though these women could be trafficked victims, they are treated as criminals and arrested along with the brothel keepers and the pimps. Thus, whether or not the woman may be actually soliciting, because of the very fact that she is in prostitution, she becomes a convenient target.

The Act continues to punish prostitutes by providing a corrective institution to reform the "offenders" for soliciting and for carrying on prostitution in a public place. The court has the discretion to judge the "character," "state of health," and "mental condition" of the woman to decide whether to send her to the corrective home in lieu of the prison. None of the three concepts are defined in the Act and all are extremely gender-biased. Nowhere does the Act seek to constitute specialized canters to reform traffickers or men. Release from these corrective institutions is again based on the woman's capacity to prove that she can lead a "useful and industrious' life. Thus, the victim of organized trafficking becomes an offender under the eyes of the law and is burdened to correct herself.

Nothing can be more moralistic and hate-filled against the women than Sec. 20 of ITPA where a magistrate can order an eviction from his jurisdiction of a prostitute and also prevent her re-entry for simply being a prostitute. According to this section a magistrate, upon receiving information that a woman is a prostitute, can issue notice to the woman to show cause and it is then up to the woman to prove that she is or is not a prostitute and why her existence does not damage the interests of the general public. The purpose of this section or its effect clearly has nothing to do with trafficking, whereas there is no comparable deterrent measure in the entire Act for the traffickers and their right to residence or mobility is not a cause of concern.

This section is so loosely constructed that it can be used against any woman who may have to prove that she was not engaged in prostitution (Flavia). In State of *Uttar Pradesh v Kaushaliya,*[47] in a response to the question whether Sec. 20 of ITPA infringes on Article 14 (equality) and Article 19 (freedom of movement) under the Constitution of India, the court differentiates between a prostitute "who carries on her trade on the sly or in the unfrequented part of the town . . . [and] may not be as dangerous to public health or morals" and those who carry on prostitution in a public or crowded place, and rules that the power given to the Magistrate is a reasonable restriction imposed on the freedom of movement and also justifies

[47] AIR 1964 SC 416.

deportation. This judgment alone stands as testimony to the perception of the courts of these women as criminals and immoral. It indicates a partial acceptance to the "need" (of men) for existence of prostitution but enforcing the individual women to be invisible.

The ITPA has been twisted and used against the women also by "creative" use of Sec. 4, which is supposed to penalize those who live through the earnings of sexual exploitation. But in our country, there is a tendency to arrest the victims themselves under this offence as they are seen as "consenting" parties. This implies that even if the proposed amendments to the *Act* (which include adopting the-definition of trafficking as outlined in the UN Protocol) are adopted, newer ways of interpreting and implementing the *Act* will not result in total decriminalization of the women in prostitution. It is shocking to see the inability of the courts to differentiate criminals from the victims of the crime. Thus, the trafficked women's criminal status overshadows her victim status and the onus falls on her to prove her innocence and victimhood (Sanghera). Case laws on ITPA reveal that often the terms prostitution and trafficking are used interchangeably.

Even when it is not warranted, there been a tendency for the courts to discuss the "evils" of prostitution and call for its abolition because of their moralistic attitude. For example, in *Vishal Jeet v Union of India,*[48] in responding to a writ petition on the devadai[49] system the court equates prostitution and not trafficking to a "running sore on the body of civilization and destroys all moral values" and calls for "appropriate action to eradicate this evil."

In *Gaurav Jain v Union of India,*[50] where the main issue was the rehabilitation of children of prostituted women, the court states "eradication of prostitution in any form is integral to social weal and glory of womanhood" and "the right of the child to development hinges upon elimination of prostitution." Such interchange of terminologies in the judgment is not only reflective of the mindset of the judiciary but also likely to influence the mindset of the public. Most other cases on ITPA are trapped in discussing the procedural issues laid down by the *Act* thus leaving- much to be desired for those who look up to the courts for a better understanding of trafficking.

Conclusion

The lack of understanding of trafficking by the legal system could arise from one or more of these factors: first, there is no definition of "trafficking" or "trafficker" under the Act. As a result, the police and the judiciary are completely ignorant of the complexities involved in the trafficking of women, as well as the various types of traffickers and their strategies. Neither the courts nor the investigative agencies try to listen to the trafficked woman and her experiences.

---

[48] (1990) 3 SCC 318.

[49] The devadasi system is an age-old practice in certain states in India where young women are dedicated to the Goddess Yellamma and then used in the community for sexual purposes. Though there has been legislation to prohibit this practice, it persists and these women continue to work as prostitutes.

[50] (1997) 8 SCC 114

Second, the Act also focuses on establishing "purpose of prostitution" for each crime that easily diverts attention from trafficking. For example, in order to convict a trafficker for keeping a brothel, it is necessary to establish that prostitution was taking place. So, if a trafficked woman is kept in captivity for an extended period of time, it does not constitute an offence under Section 3 unless the place meets the requirements of "brothel." Similar to this, every case involving a raid includes a detailed account of how the woman was dressed when the raiding party discovered her in order to establish beyond a reasonable doubt that she was there for the "purpose of prostitution" while getting ready for sex with the dummy witness. It appears that the adjudication process has lost sight of the concept that a woman's appearance or behaviour at that time should not be used to disprove the fact that she was a victim of human trafficking.

The Act thus overlooks what constitutes trafficking—the elements of force, deception, and coercion that occur overtly and covertly over time. Third, despite the fact that the definition of prostitution has changed from "the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind, and whether offered immediately or otherwise" to "sexual exploitation or abuse of persons for commercial purpose," there is no discernible shift in lawmakers' and enforcers' attitudes from attempting to curb prostitution to attempting to curb trafficking.

Although the current Indian Penal Code (IPC), 1 860, deals with the offences of kidnapping, abduction, and the buying and selling of minors (Sections 359-373 of IPC), there is a need for comprehensive legislation to address all aspect of trafficking in India. The IPC has a more limited jurisdiction in order to deal with the various trafficking-related activities that don't perfectly fit into the categories of "kidnapping" or "abduction." As an illustration, luring and coaxing people in vulnerable situations with false promises of better jobs, hiring domestic helpers under contract, mail-order brides, and instances where the women are sold with the consent of the parents or the husband are all examples of such practises. The IPC is therefore less skilled in handling the complexities inherent in organized trafficking.

The new legislation must therefore define trafficking as something other than prostitution and encompass trafficking for other objectives, such as domestic work, marriage, slavery, servitude, practices similar to slavery and removal of organ, etc. It must also consider the many human rights violations that take place over the course of trafficking (and occasionally even during attempts at rescue), offer compensation to the victims, and guarantee access to fundamental freedoms. The burden of proof under this new law is on the accused to show that they are not involved in human trafficking.

To deal with the complexity of trafficking offences, the judiciary needs to be educated and trained. More importantly, the new legislation must be supported by a comprehensive strategy to combat trafficking that includes prevention, rescue, repatriation, reintegration, and rehabilitation. This strategy must be based on international standards and principles stated in conventions and treaties, such as the Human Rights Standards for Treatment of Trafficked Persons published by the Global Alliance against Trafficking in Women, and it must be accompanied by state regulations that will take into account local realities.

It is unfortunate that the legislation intended to stop trafficking already lacks a proper view of the issue. This is evident in the judicial decisions that penalize both traffickers and prostitutes. It is necessary for Indian courts to develop comprehensive jurisprudence on trafficking. Instead of disempowering women, the Act should aim to serve them justice and prevent further exploitation. Since the existing Act has a moralistic basis, It is imperative that we create a different legislation addressing trafficking alone. In this sense, traffickers rather than victims must be criminalized.

Reservation: A Need or A Political Agenda

Dr. Vikas Sisodia[1]

Reservation issue has been remained more a matter of political than social interest if seen in the context of post independence India, Basically, the concept of reservation is meant for upliftment of backwards both educationally and socially according to India constitution. Article 16 contain sub-clauses to empower the perennially exploited and oppressed lot of society. The idea was to bring these communities to the mainstream of society. Crucially, the initial time frame was just 10 years. But this time frame has been extended time and again by 10 years subsequently.

What's the need of reservation? Why we talked about reservation, is we really need it, what's the purpose behind creating a criterion for reservation? So many questions raise in my mind when I thought that, it really reservation necessary for the upliftment of socially and educationally backward people. Article 16 of the Indian Constitution embodied the general rule which empowers the stat e to make special provision for the reservation of appointment of posts in favour of any backward class of citizen which in the opinion of the state are not adequately represented in the services under the state.

In Balaji's Case the Supreme Court has held that the 'caste' of a person cannot be the sole fest for ascertaining whether a particular class is a backward class or not. Poverty, occupation, place of habitation may will be relevant factor to be taken into consideration.

However, the court said that it does not mean that once a caste is considered backward class then it should continue to be backward for all the time. The government should review the test and if a class reaches the state of progress where reservation is not necessary it should delete that class from the list of the Backward classes. It means that the Government have opportunity to decide who is a backward and in my view a government cannot decides it fairly in favour of general interest whose first policy always remained to maintain his own political agenda and reputation after all it’s all a political issue.

Had the reservation concept implemented in true spirit and not just in words the situation or profile of the intended targets would have much better than their current status in society. Reservation has assumed a new that is political dimension, which has been consistently invoked upon by an array of political parties when the parliamentary and Assembly elections

[1] ***Assistant Professor (Law), Puspa Devi Law College, Mirjapur, Uttar Pradesh, Email id v.sisodia@yahoo.com***

were round the corner. This is not to say, that the political system of our nation has altogether dispensed with the real intention of the constitution makers. It is only to emphasise that the issue has not been given the attention- both in terms of direction and pace that it deserved.

The supreme court has time and again issued various ruling pertaining to the perplexed reservation issue. Most important among these are: Indira Sawney (also known as Mandal case) ruling in 1993 has introduced the creamy layer concept. The purpose of the reservation to the really backward section among the different tiers of OBC's. There is a political background to this issue, which has got several facets. A party who belongs to Dravidian, Dalit, left parties or Muslim always demand for reservation to their caste. It is fair? I think, no? interference of politicians should be stopped in matter of reservation. Reservation is necessary for those who are socially educationally and economically weaker whether they belong to SC, ST or OBC's Reservation is a need or a basic ground for upliftment of vulnerable people and those who are in a dark place, the ambit of our great leader like NehruJi, and Baba Ambedkar opposed to it and mentioned that reservation should be limited.

A several steps taken by supreme court on time to time must be welcomed by us in regard to reservation through several cases. From a long time, supreme Court ruled as a safe guard and protect the interest of general people in a respect of their admissions in educational institutions, jobs respect of their admissions in educational institutions, jobs in government enterprises etc.......*Inamdar v. State. of Maharashtra* (2005) TMA foundation vs. state of Karnatka has included the notion that reservation minorities in minority institutions may not be more than 50% generally.

Constitutional Provision

Article-340 of the constitution says that the president may be order appoint a commission consisting of such person as he thinks fit to investigate the condition of socially and educationally backward classes within the territory of India.

Article-341 of the constitution says that president's order shall specify the list of Caster included in this category and any other caste may be included in it if sufficient evidence is produced in this favour. It is possible that before including a name in the fist, the president may hold some kind of inquiry into the matter.

In pursuance of Article 340 the Government of India appointed a Backward classes commission in 1953 under the chairmanship of KaKa Saheb Kalekar which submitted its report in 1955. The committee adopted a four-point Criteria:

- Low social position in the traditional Caste hierarchy of Hindu society.
- Lake of general educational advancement among the major sections of a caste or community.
- Inadequately or no representation to government services.
- In adequate representation in the field of trade, commerce and industry.

It treated all women as backward class and desired reservation of 70% of seats in all technical and professional institutions for qualified students of backward classes.

The Second Backward Commission was setup in 1978 by the Janata Government under the chairmanship of B.P. Mandal which submitted its report in 1980. it adopted a set of eleven indications in the social, educational and economic spheres for the de termination of backwardness.

The Sachar Committee report, although not explicitly recommends for reservation of Muslim community in government jobs.

The 77th Amendment related to providing reservation to the SC's and the ST's in promotion. The 81st Amendment permits the state to treat separately the backlog vacancy for the reserved categories and not count them for the purpose of applying the 50% ceiling of backlog vacancies both of the entry level and promotion to be filled in a year. The 82nd Amendment permits the state to relax the qualifying marks for the SC's and The ST's in any examination. The 85th Amendment provides for giving them consequential seniority in promotion.

Thus, in order to maintain the formal equality between the backward classes on the one hand and the general categories on the other, the quantities limit of 50% shall be the binding rule. The most point in the whole issue is applicability extent of the creamy layer concept of OBC's in the arena of SC's and ST's.

One may find three rational behind the reservation issue.

- To ensure political success,
- To achieve economic growth; and
- To promote moral basis of the constitution.

The Creamy Layer Category

The concept of creamy layer was first introduced by the supreme court in the Mandal judgment delivered in Nov. 1992 to indicate an elite group among the OBCs. The Court asked the Government to exclude the 'Creamy layer' from the purview of quotes to ensure that only the neediest among the OBC's benefited by reversion.

Some categories, thus, exempted from reservation are:

The children of constitutional functionaries - including the President, Judges of supreme Court and High Court's members of the Union Public Service Commission, Group A and B or class I or II officers of the All India Central and State Services and children of Public Sector employees.

- Child of armed forces and Paramilitary personnel in the rank of colonel or above.
- Children of professionals such as layers, chartered accountants, doctors, financial and management consultants, engineers, film artists, authors and playwrights.
- Children of all OBC's whose gross annual income is more than Rs. 2.5 Lakh.

If the SC's and ST's are to be categorized in the above manner, in order to retrain the elite group in these various indicators, namely, their economic status, under the extent of representation in public service and promotion so on, need to be evolved keeping the administrative efficiency intact i.e. not affected adversely due to reservation.

Recently, the Supreme Court by the majority decided that Creamy Layer should be out of OBC quota. After coming-out of this decision the government has decided to exclude the 'Creamy Layer', the socially and economically advanced among the OBC;s from the ambit of 27% quote for them in higher educational institutions. It means that the 1993 order defining the Creamy Layer will be applied to OBC admissions to the Central universities and medical and technology schools. At least this year, the existing Creamy Layer criterion of 1993 amended in 2004, would be persisted with. It would mean that OBC admissions would be minus creamy, as decreed by the Supreme Court.

Reservation will it discourage Talent?

In my view yes, a student who work hard, high in merit as the scholastic performance, academic rank, marks etc., and rot get admission in higher educational institution or in job only because of reservation ground, the definition of merit started becoming vaguer and vaguer. Talent is the patent and permanent argument against
reservation.

Conclusion

Reservation work as a backbone for those who are socially, educationally and economically weaker. Reservation should know their limits, get it all under one roof. The court, should be free from bias. There should be no interference of government, recently when supreme court give his decision it seems that the court become bias & the interference of Government, in the Court of lord become effective, but before it would happen that people have lasted their faith in the court, something should be done. A court is a temple and judge are a lord and one cannot blame to their lord In his own decision one's the supreme court cited that "Sympathy or sentiment should not allow the Court to have any effect in its decision making". Last but not the least, the present reservation ceiling of 50% need to be scrupulously followed. The creamy layer concept can be applied to the SCS and STS in a fashion similar to the OBC's. reservation is not a life insurance policy which once started could not be stopped. Reservation policy followers carefully where it needed.

The Finance Act, 2017 in Conflict with the Rule of Separation of Power: An Analysis

Mr. Ankit Yadav[1]

Abstract

The Separation of Powers in a check and balance form is very important to a democratic country for the smooth running of the government to protect individual liberty and to avoid confrontation among the legislative, executive, and judiciary so that three organs cannot trespass with the confined area of the other. However, in a rigid sense, it is impossible, and in a check and balance form, it is quite possible, allowing filtration of the arbitrariness of the powers of others, as if any organ obtains the three powers, it becomes absolute and despotic, causing hardship for individuals in a country and jeopardising the idea of democratic value and constitutionalism. The Finance Act, 2017, was passed as a money bill that attempted to rationalize the functioning of multiple tribunals. The current situation of the emergence of collusion, complicity, connivance and incestuous institutions in myriad ways shows powerful administrative tribunals and assumed powers to appoint and remove their chiefs, triggering fears that the move will undermine the authority and independence of these quasi-judicial institutions. There were concerns that the Finance Act violates the separation of powers doctrine and impinges upon the judiciary's independence.

Keywords: Separation of Power, Finance Act, Tribunals, Money Bill, etc.

Introduction

The government of India after assuming the welfare state focused more on the passing of welfare enactments where decision-making power was vested in the hands of the administration. One of the innovative provisions adopted by the Forty-Second Amendment of the Constitution was the provision for the setting up of Administrative Tribunals. The main objective of establishing tribunals is to provide a speedy and inexpensive trial. The other significant ground for the institution of tribunals was that ordinary courts are habituated to deal cases according to law with complex formalities. While adjudication of disputes is not necessarily based on technical questions of law in administrational issues, but the need of the hour requires consideration of the public interest.

Further, tribunals are bodies having technical expertise dealing fairly with the issues by following the principles of natural justice. The technicalities, inadequacy and effectiveness of the judicial system lead to a multiplicity of administrative tribunals. These quasi-judicial powers acquired by the administration must maintain inevitably procedural safeguards & transparency while arriving at their decisions and observing the Principles of Natural Justice. These administrative bodies which are established in the public interest have been comprehensively modified in Finance Act, 2017. As Justice Blackstone said it is precisely in situations such as these that the subdivision of power into different channels was designed to prevent power from rushing down in one single torrent, sweeping away all it encounters in its wake.

[1] ***B.A.LL.B (Hons.), Law School, Banaras Hindu University, Varanasi, Email Id: ankitydv.law@gmail.com.***

On March 31, 2017, the Finance Bill, 2017 which aimed at merging as many as eight tribunals with other tribunals received the assent of the President, thus giving birth to the Finance Act, 2017,[2] one of the most controversial pieces of legislation in recent times. When the Bill was tabled before the Lok Sabha, it was voted to be a money bill and was approved by the Lok Sabha.[3] The Finance Act, 2017 made amendments to the Companies Act, 2013, Competition Act, 2002, Industrial Disputes Act, 1947, Employees' Provident Funds and Miscellaneous Provisions Act, 1952, Copyright Act, 1957, Trademarks Act, 1999, National Green Tribunal Act, 2010 among other legislations so as to provide for the merger of certain tribunals and lay down the conditions of service of members of such merged tribunals.[4] The Finance Act has provided for the merger of the Competition Appellate Tribunal ('COMPAT') with the National Company Law Appellate Tribunal ('NCLAT'). The provisions regarding this amalgamation of tribunals were made effective from May 26, 2017, through a notification of the Ministry of Finance.[5] Further, on June 1, 2017, the Ministry of Finance also notified The Tribunal, Appellate Tribunal and Other Authorities (Qualifications, Experience and Other Conditions of Service of Members) Rules, 2017[6] ('Rules') which gives undue power to the government for the appointment, control and disqualification of the members of the merged tribunals.[7]

Many legal practitioners and academicians have expressed their reservations against this merger of tribunals on constitutional and practical grounds. Additionally, this Act has also been challenged before the Supreme Court of India ('SC'),[8] as well as several High Courts including the Madras High Court,[9] Delhi High Court, and the Punjab and Haryana High Court.

This article is an attempt to analyse the practical, constitutional and procedural implications of the Finance Act, 2017. It also analyses the flawed approach of the government in classifying the Finance Bill, 2017 as a money bill. Further, this project also discusses the constitutional challenge to the Finance Act on the ground of the separation of powers doctrine. By focusing on the amalgamation of the COMPAT with the NCLAT an attempt has been made to analyse

---

[2] The Finance Act, 2017.

[3] Sruti Radhakrishnan, *The Finance Bill, 2017: the far-reaching Consequences of a Lok Sabha Majority*, THE HINDU, March 25, 2017, available at: <http://www.thehindu.com/news/national/the-finance-bill-2017-a-brute-majority-and-its-far-reaching-consequences/article17663444.ece> (Last visited on December 02, 2019).

[4] The Finance Act, 2017, Part XIV.

[5] Ministry of Finance, Department of Revenue, Notification, S.O. 1696 (E) (Notified on May 26, 2017) available at: <http://dor.gov.in/sites/default/files/Commencement%20of%20Finance%20Act.pdf> (Last visited on November 19, 2019).

[6] Ministry of Finance, Department of Revenue, Notification, G.S.R. 514 (E) (Notified on June 1, 2017) available at: <http://dor.gov.in/sites/default/files/Rules%202017.pdf> (Last visited on November 19, 2019).

[7] *See generally* The Tribunal, Appellate Tribunal and Other Authorities (Qualifications, Experience and Other Conditions of Service of Members) Rules, 2017.

[8] The Indian Express, *Supreme Court Notice to Centre on Plea Challenging Finance Act*, July 29, 2017, available at: <http:// _indianexpress.com/article/india/supreme-court-notice-to-centre-on-plea-challenging-finance-act-4772155/> (Last visited on November 20, 2019).

[9] Bar & Bench, *Finance Act Provisions on Tribunals Challenged; Madras High Court Issues Notice to* Centre, June 17, 2017, available at: <https://barandbench.com/madras-high-court-finance-act/> (Last visited on November 16, 2019).

the practical implications of such a move and assess whether this amalgamation would risk the effectiveness of adjudication of competition law disputes in India.

The Constitution of India, being a product of the philosophy of the welfare state, was bound to recognize the existence of tribunals. Therefore, Tribunals were added in the Constitution by the Constitution (Forty-second Amendment) Act, 1976 in Part XIV-A, in two Arts. i.e., 323-A and 323-B. While Art. 323-A deals with Administrative Tribunals; Art. 323-B deals with tribunals for other matters. In a general sense, the *"tribunals"* are not courts of normal jurisdiction, but they have a very specific and predefined work area.[10] The basic objective of the administrative tribunals is to take out certain matters of disputes between the citizen and government agencies of the purview of the regular courts of law and to reduce the pressure on the Civil Courts, to make the dispute redressal process quick, less expensive and relatively free from technical procedures. Tribunals have grown in response to the need to provide for specialized forums of dispute settlement that would possess some expertise and policy commitment.

Doctrine of Separation of Powers

The central institutional feature of the Constitution is the separation of powers which means limited government. It would prevent a single branch from consolidating strength to act tyrannically. The best protection was the interest of each branch in jealously defending its prerogatives. That is what the framers naturally assumed. Some of the articles in the Indian constitution, which emphasize the separation of powers, are the following:

Art. 50 put an obligation on the state to separate the judiciary from the executive.[11] However, Art. 50 falls under the Directive Principles of State Policies (*DPSPs*) and hence is not enforceable.

The legislatures cannot discuss the conduct of a judge of the High Court or Supreme Court. They can do so only in matters of impeachment.[12] The courts cannot inquire about the validity of the proceedings of the legislatures.[13] The President and Governors enjoy immunity from court proceedings.[14]

As the doctrine of separation of powers is not codified in the Constitution, there is a necessity that each pillar of the State to evolve a healthy trend that respects the powers and responsibilities of other organs of the government. The doctrine of separation of powers is a part of the basic structure of the Indian Constitution even though it is not specifically mentioned in it. Hence, no law or amendment can be passed violating it. The system of checks and balances is essential for the proper functioning of the three organs of the government. Different organs of the state impose checks and balances on each other. Checks and balances act in such a way that no organ

---

[10] H.M. Seervai, *"Constitutional Law of India"*, Universal Law Publishing, 4th ed. (2015); C.K. Thakker, *"Administrative Law"*, Eastern Book Company, 2nd ed. (2012).
[11] Art. 50, The Constitution of India, 1950.
[12] Arts. 121 and 211, The Constitution of India, 1950.
[13] Arts. 122 and 212, The Constitution of India, 1950.
[14] Art. 361, The Constitution of India, 1950.

of the state becomes too powerful. The constitution of India makes sure that the discretionary power bestowed upon any organ of the state does not breach the principles of democracy. For instance, the legislature can impeach judges but as per the condition i.e. two-thirds majority.[15]
"The doctrine of the separation of powers was adopted....not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction....,to save the people from autocracy."

It is precisely in situations such as these that the subdivision of power into different channels was designed to prevent power from rushing down in one single torrent, sweeping away all it encounters in its wake.

The Tribunalisation And Finance Act, 2017

Under Article 323-B tribunals for other matters have been constituted each under different enactment. The Finance Act, 2017, being passed as a money bill attempted to rationalize the functioning of multiple tribunals. The current situation of the emergence of collusion, complicity, connivance and incestuous institutions in myriad ways shows powerful administrative tribunals and assumed powers to appoint and remove their chiefs, triggering fears that the move will undermine the authority and independence of these quasi-judicial institutions. The government has restructured and merged certain existing tribunals in pursuant to the Finance Act, 2017:[16]

1. The Competition Appellate Tribunal has been merged with the National Company Law Appellate Tribunal;
2. The Airports Economic Regulatory Authority Appellate Tribunal and the Cyber Appellate Tribunal have been merged with the Telecom Dispute Settlement and Appellate Tribunal;
3. The National Highways Tribunal has been merged with the Airport Appellate Tribunal;
4. The Employees Provident Fund Appellate Tribunal has been merged with the Industrial Tribunal;
5. The Copyright Board has been merged with the Intellectual Property Appellate Board;
6. The Railways Rates Tribunal has been merged with the Railways Claims Tribunal; and
7. The Appellate Tribunal for Foreign Exchange has been merged with Appellate Tribunal (constituted under relevant foreign exchange manipulation legislation).

As a result, what used to be 26 tribunals are now down to 19. The rationalization has raised questions about the independence of these adjudicatory bodies. The qualifications, tenure, conditions of service, removal and emoluments of the chairpersons and members of these tribunals will all be under the control of the Centre While several of these mergers appear to have merit on grounds of functional similarity; there are few mergers, which might raise eyebrows. It's not immediately apparent, for example, *Why the Airports Economic Regulatory Authority Appellate Tribunal is to be merged with the Cyber Appellate Tribunal and the*

---

[15] Ernesto P. Maceda Jr., *"Requiem for Separation of Powers"*, Search for Truth, (The Philippine Star); Available at: <http://www.philstar.com/opinion/2017/06/03/1706080/requiem-separation-powers> (Last visited on December 07, 2019).
[16] The Finance Act, 2017.

Telecom Dispute Settlement and Appellate Tribunal? Questions have also been raised on the constitutionality of merging these tribunals through a Finance Act, 2017.[17]

Classification as Money Bill: Procedural Illegality

On more than one instance, the Government has faced wrath for pushing laws as money bills when they were clearly not one. The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 was also voted by the Lok Sabha to be a money bill.[18] This classification of law such as the Aadhaar Bill as a money bill was challenged by Mr. Jairam Ramesh through a writ petition before the SC.[19]

The scope of money bills, which are a genre of financial bills, is limited by Article 110(1) of the Constitution of India. Art.110(1) provides that a bill would be considered to be a money bill "only" if it deals with taxation, financial obligations of the government, custody and appropriation of money from the Consolidated Fund of India, declaration of an expenditure to be charged under the Consolidated Fund of India, receipt of money on account of Consolidated Fund of India or the public account of India or such matters which are incidental.[20] Additionally, Article 110(3) mandates that in cases of a question regarding a Bill being a money bill, the decision of the Speaker of the Lok Sabha would be final.[21] Any ordinary bill or constitutional bill has to be approved by both the Lok Sabha and the Rajya Sabha.

However, the only exception to this rule is a money bill which can be enacted as a law without the approval of the Rajya Sabha.[22] By way of the Finance Act, 2017, the government is amending specific statutes which deal with the creation of tribunals and are entirely unrelated to the budget or even financial matters. The Finance Act has amended legislations such as National Green Tribunal Act, 2010, Companies Act, 2013, Competition Act, 2002, Industrial Disputes Act, 1947, Employees' Provident Funds and Miscellaneous Provisions Act, 1952, Copyright Act, 1957, Trademarks Act, 1999. These amendments have not only led to the elimination of many tribunals and the creation of newly merged ones but have also revised the conditions of services and terms of appointment and disqualification of the members of the various merged tribunals.

The subject matter of these provisions of the Finance Act, 2017 does not fall under the scope of Art. 110(1) of the Constitution. Neither does it affect any of the fiscal statutes. This practice is an attempt to circumvent the amendments made by the Rajya Sabha and a clear contravention

---

[17] Ran Chakrabarti, Anubha Sital and Shringarika Priyadarshini, *"India: The Finance Act, 2017 - Implications & Constitutionality?"*, IndusLaw, April 2017.
[18] Amber Sinha, The Aadhar Act is Not a Money Bill, THE WIRE, April 24, 2016, available at: <https://thewire.in/31297/the-aadhaar-act-is-not-a-money-bill/> (Last visited on December 03, 2019)
[19] Pratik Datta, Shefali Malhotra & Shivangi Tyagi, *Judicial Review and Money Bills* (NIPFP Working Paper Series, Paper No. 192 of 2017) available at: <http://www.nipfp.org.in/media/medialibrary/2017/03/WP_2017_192.pdf> (Last visited on November 16, 2019).
[20] The Constitution of India, 1950, Art. 110(1).
[21] *Id.*, Art. 110(3).
[22] *Id.*, Art. 109(5).

of the Constitution and parliamentary process. Hence, it can be inferred that the Finance Act is subject to judicial review as it is hit by procedural illegality. The SC has distinguished procedural irregularity from procedural illegality by holding that the latter is satisfied when there is a breach of constitutional provisions. Since the wrong classification of the Finance Bill as a money bill is in clear violation of the Constitution, it can be inferred that the Finance Act should be struck down on account of procedural illegality.

Rationalising Tribunals

Analysis rationalizing tribunals would lead to efficiency, will speed up dispute resolution and curb wasteful expenditure and ensure uniform service conditions. May prevent overlap *e.g.,* the Competition Appellate Tribunal will be merged with the National Company Law Appellate Tribunal. Since both deal with similar matters, it will particularly help in cases where a single transaction is overseen by both. *e.g.,* the Idea - Vodafone Merger.

The important issue is the doctrine of separation of powers whether violated. Rationalizing tribunals might lead to overburdening the tribunals with more cases than they could handle. Allowing the executive to determine the appointment, reappointment and removal of members might affect the independent functioning of the Tribunal and could pose a conflict of interest. Tribunals are constituted for want of expertise and this would be defeated. They are judicial in the sense that the tribunals have to decide facts and apply them impartially, without considering an executive policy. They are administrative because the reasons for preferring them to the ordinary courts of law are administrative reasons.

Hon'ble Supreme Court in *Jaswant Sugar Mills vs. Lakshmi Chand,*[23] laid down the test to determine whether an authority is a tribunal or not: Power of adjudication must be derived from a statute. Tribunals are not bound by strict rules of evidence and must possess the power to summon witnesses, administer an oath, compel the production of evidence, etc. They are to exercise their functions objectively and judicially and independently of executive policy, immune from any administrative interference in the discharge of their judicial functions.

The National Green Tribunal was set up as a part of India's commitment under the Rio Declaration. In addition, it was to guarantee the legal right to the environment which is a part of the Right to Life under Art. 21 of the Constitution as decided in a number of Supreme Court decisions. The Supreme Court issued various guidelines for the appointment of judicial members in tribunals and maintained that by snatching away the power of appointment from the judiciary, the Centre aims to centralize power which shall be unconstitutional and in violation of the doctrine of separation of powers and independence of the judiciary.

The Central Government, through the Finance Act, 2017[24], by a seemingly innocuous but very insidious amendment, has altered the very foundation of the National Green Tribunal.

---

[23] Jaswant Sugar Mills *vs.* Lakshmi Chand AIR 1963 SC 677.

[24] The Rules called The Tribunal, Appellate Tribunals and Other Authorities (Qualifications, Experiences and other conditions of service of members) Rules, 2017 ("New Rules")

Increasing control of the Centre over tribunals will be contrary to the Hon'ble Supreme Court's order in the case of the Madras Bar Association *vs.* Union of India,[25] which held appointments to appellate tribunals and must be free of executive interference.

Violation of the Doctrine Of Separation of Powers

As soon as the Finance Act was notified, there were concerns raised that it violates the separation of powers doctrine and impinges upon the judiciary's independence.[26] Sec. 417A has been introduced in the Companies Act, which provides for the qualifications and terms and conditions of services of the Chairperson and Members to be governed by Sec. 184 of the Finance Act. Therefore, according to the new legal position as per Sec. 184 of the Finance Act and the Rules framed thereunder, the Government has the power to *"make rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service"*[27] for the tribunal members. Therefore, the Government has primacy over all appointments to tribunals. In the writ petition filed by Mr. Jairam Ramesh before the SC, he has argued that Sec. 184 of the Finance Act and the Rules framed thereunder give the Government unrestricted power with respect to the determination of service conditions of members of tribunals, specifically the National Green Tribunal, violates the doctrine of separation of powers, a part of the basic structure of the Constitution.[28]

In a similar manner, by way of a writ petition instituted by the Madras Bar Association, the merger of tribunals has been challenged before the Madras High Court in *Madras Bar Association vs. Union of India*.[29] One of the contentions of the petitioner is that §184 of the Finance Act and the relevant Rules are unconstitutional as they violate the basic structure doctrines of separation of powers and the independence of the judiciary. According to the petitioner, by empowering the Government to make rules related to the appointment, qualification, removal, and other conditions of services of tribunal members, an excessive delegation of judicial functions takes place without there being any guidelines for the same.[30] Therefore, the same would violate Article 50 of the Constitution, as the executive gets wide powers in respect of bodies that essentially perform judicial functions. In an interim order passed on June 28, 2017, the Court has held the Rules to be prima facie violative of the directives issued by the SC in *Union of India vs. R. Gandhi, President, Madras Bar Association,*[31]('R.

[25] Madras Bar Association *vs.* Union of India, 2014 10 SCC 1.
[26] Hindustan Times, *Finance Bill: Govt. Merges 'Autonomous' Tribunals, Assumes Power to Appoint Chiefs*, April 14, 2017, available at: <http://www.hindustantimes.com/india-news/finance-bill-2017-govt-merges-top-tribunals-assumes-power-to-ap _point-chiefs/story-ZWwZId9GgPW50u0KYxbTnN.html> (Last visited on November 21, 2019).
[27] The Finance Act, 2017, Sec. 184.
[28] The Times of India, *Finance Act 2017 Emasculates the National Green Tribunal : PIL in SC,* August 5, 2017, available at: <http://timesofindia.indiatimes.com/india/finance-act-2017-emasculates-the-national-green-tribunal-pil-in-sc/articleshow/59928357.cms> (Last visited on December 22, 2019).
[29] Madras Bar Association *vs.* Union of India, W.P. 15147 and 15148 of 2017.
[30] Madras Bar Association *vs.* Union of India, *Affidavit on behalf of the Madras Bar Association*, W.P. 15147 and 15148 of 2017, ¶24.
[31] Union of India *vs.* R. Gandhi, President, Madras Bar Association, (2010) 11 SCC 1.

Gandhi') followed by itself in *Shamnad Basheer vs. Union of India* ('Shamnad Basheer').[32] The Court also held that the appointments made by the Government under the Rules would be subject to its final decision. In these cases relied on by the Court, the courts unequivocally held that appointments to tribunals must be made by committees that predominantly consist of members of the judiciary.[33] The rationale behind this is that tribunals are considered to be almost on par with high courts in terms of their powers and functions, and tribunal appointments by the judiciary would secure the independence of tribunals and protect them from government interference. This principle of non-intervention by the executive was also upheld by the SC in the recent case of the *Madras Bar Association vs. Union of India*.[34]

Dealing with the question of appointment of tribunal members, R. Gandhi struck down the provisions related to the National Company Law Tribunal because there was only one member from the judiciary in the selection committee out of five members, with the remaining four belonging to the executive.[35] In addition to the requirement of at least an an equal number of members from the judiciary and the executive in the selection committees, the Court directed that the nominee of the Chief Justice on the committee should have a casting vote. Following the decision of R. Gandhi, the Madras High Court in Shamnad Basheer struck down selection committees in charge of making appointments to the Intellectual Appellate Property Board. Basing the decision on the basic structure doctrine, Chief Justice Kaul held that the selection of members of tribunals performing judicial functions cannot be left to the executive. Apart from this, the petitioners are arguing that the Finance Act flouts other guidelines issued by the Court in R. Gandhi. One of these relates to the removal of tribunals members.

The parent statutes establishing several tribunals provide for the removal of tribunal members only after an inquiry is conducted by a judge of the SC.[36] For example, under Sec. 10(2), National Green Tribunal Act, 2010, it is provided that *"The Chairperson or Judicial Member shall not be removed from his office except by an order made by the Central Government after an inquiry made by a Judge of the Supreme Court in which such Chairperson or Judicial Member has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges."*[37] Even though the ultimate decision lies with the Government, an inquiry by a judge of the SC serves as an appropriate check on the

---

[32] Shamnad Basheer *vs.* Union of India. MANU/TN/0501/2015 (Madras H.C.).

[33] SpicyIP, *Breaking News: Madras High Court Cautions Government Against Tribunal Appointments!*, June 28, 2017, available at <https://spicyip.com/2017/06/breaking-news-madras-high-court-cautions-government-againsttribunal-appointme _nts.html> (Last visited on December 14, 2019).

[34]Madras Bar Association *vs.* Union of India, (2014) 10 SCC 1.

[35] Umakanth Varottil, *Supreme Court Paves the Way for Company Law Tribunal*, IndiaCorpLaw, May 15, 2015, available at: <https://indiacorplaw.in/2015/05/supreme-court-paves-way-for-company-law.html> (Last visited on December 13, 2019).

[36] Madras Bar Association *v.* Union of India, *Affidavit on behalf of the Madras Bar Association*, W.P. 15147 and 15148 of 2017, ¶24.J (Madras H.C.).

[37] National Green Tribunal Act, 2010, Sec. 10(2).

Government's powers.[38] However, Rules 7 and 8 of the Rules eliminate the inquiry by a judge, and vests the power of removal solely with the Government. According to Rule 8, on a complaint being received by the Government against any tribunal member, the ministry under which the tribunal is established is supposed to scrutinise the complaint.[39] If the ministry believes that there are reasonable grounds for making an inquiry, it can make a reference to the committee formed under Rule 7.[40]

This committee is formed by the parent ministry under which the tribunal functions.[41] If the committee recommends removal, the Government would have the right to remove the member from the tribunal. Therefore, the current legal position can lead to a situation where the Government can remove a judge who is the chairman of a tribunal on the recommendation of a committee formed by the parent ministry, which could be seen as a violation of the separation of powers doctrine, enshrined under Art. 50 of the Constitution. For example, if a complaint is filed against a member of the Income Tax Appellate Tribunal, a scrutiny of the complaint will be conducted by the Ministry of Finance, which in itself is questionable because it is the function of the tribunal to hold the Ministry accountable by adjudicating disputes in which the Ministry is a litigant. In R. Gandhi, the SC expressed displeasure even at the dependence of tribunals on their respective parent departments for administrative support.[42] This makes it very likely that the Court will not treat with deference provisions which vest the power of scrutinising complaints and removal of members from the government. Therefore, given the past precedents of the SC and the recognition of the principle of separation of powers and the independence of the judiciary under the basic structure doctrine, it is extremely likely that the relevant provisions and Rules in question would be struck down by the Court.

Compat to NCLAT: A Welcome Move?

With the passing of the Finance Act, the appellate function conferred on the COMPAT under the Competition Act has ceased to exist, and the same has been vested with the NCLAT. This has been done through Part XIV of the Finance Act, which has replaced the COMPAT with the NCLAT by amending Secs. 2(ba) and 53A of the Competition Act and Sec. 410 of the Companies Act.[43] Correspondingly, various provisions relating to the COMPAT have been omitted from the Competition Act. The amalgamation of the COMPAT, among other appellate tribunals, with NCLAT, has raised many issues; primarily regarding the different approaches to be adopted for the regulation of disputes. NCLAT, which was constituted under the Companies Act, 2013, has been dealing with company law disputes since June 1, 2016, and insolvency and

---

[38] Prashant Reddy, *Has the Government Signed the Death Warrant for The Judicial Independence of 19 Tribunals?*, SCROLL,,June 5, 2017, available at: <https://scroll.in/article/839588/has-the-government-signed-the-death-warrant-for-the-judicial-independence-of-19-tribunals> (Last visited on November 21, 2019).
[39] The Tribunal, Appellate Tribunal and Other Authorities (Qualifications, Experience and Other Conditions of Service of Members) Rules, 2017, Rule 8(1).
[40] Id., Rule 8(2).
[41] Id., Rule 7.
[42] Union of India *v.* R. Gandhi, President, Madras Bar Association, (2010) 11 SCC 1, ¶23.
[43] The Finance Act, 2017, Secs. 171(a), 171(c), 172(a).

bankruptcy disputes since December 1, 2016.[44] Post the Finance Act, 2017, the appeals against the orders of the CCI also lie before the NCLAT with effect from May 26, 2017.[45] However, a common appellate tribunal for the two might not be beneficial for the stakeholders. This is due to the fact that the objectives of the Companies Act, 2013 and the Competition Act, 2002 are reasonably distinct. While the Companies Act is a procedural domestic legislation, Competition Act deals with offences of economic nature which have potential ramifications on the public within and outside the country. Some practitioners have argued that such amalgamation is a welcome move since a transaction having both company law and competition law issues can be overseen by the same tribunal.[46] However, this rationale is flawed as even though certain aspects such as combinations and mergers might be similar to both, horizontal and vertical anti-competitive practices and abuse of dominance by the companies is a completely distinct element of competition law. With this background in mind, it might be difficult for a common appellate board to harmonise the objectives of these two legislations.

Additionally, another issue that arises due to this commonality of tribunals is the fact that the members who are well-trained in handling company law disputes might not be well-conversant with the intricacies of competition law. While adjudicating competition law disputes, it is crucial that the adjudicating body comprises at least a few experts. This is evident from the fact that the Competition Act mandates that the Chairperson and other members to be appointed to the CCI or the COMPAT should have specialised knowledge and professional experience in international trade, economics, commerce, and competition law matters among other things.[47] However, now that the NCLAT is bestowed with powers to adjudicate competition law disputes, it would become difficult for the members of the NCLAT who lack expertise in such areas to form an opinion on this highly specialised area of law. This goes against the very purpose of the creation of tribunals, which was to ensure that there are experts, in addition to judicial members for dealing with highly specialised areas of law.48 Moreover, due to the merger of eight tribunals into the NCLAT, the NCLAT is likely to be overburdened with cases considering that it has already been burdened with insolvency and bankruptcy disputes.

However, presently, NCLAT has only two members, one retired SC judge as the Chairperson, and the other being a technical member.[48] This composition makes it impossible for effective adjudication of disputes relating to highly specialised areas of law such as competition law. Considering that now NCLAT would be dealing with almost three different areas of law, more members should be appointed to the board. Another major concern regarding this transition is that the National Company Law Appellate Tribunal Rules, 2016 provide for the procedural

---

[44] National Company Law Appellate Tribunal, *About NCLAT*, available at: <http://nclat.nic.in/about-nclat.html> (Last visited on December 18, 2019).

[45] The Companies Act, 2013, Sec. 410 as amended by Sec. 172 of the Finance Act, 2017.

[46] The Hindu Business Line, Merger of Tribunals to Rationalise Working, March 23, 2017 available at: <http://www.thehindub _usinessline.com/economy/policy/merger-of-tribunals-to-rationalise-working/article9598534.ece> (Last visited on November 19, 2019).

[47] The Competition Act, 2002, Sec. 8(2), 53D(2).

[48] National Company Law Appellate Tribunal, *NCLAT Members*, available at: <http://nclat.nic.in/members.html> (Last visited on December 20, 2019).

formalities to be followed by the NCLAT in dealing with corporate law matters.[49] These rules are however specific to the Companies Act, 2013 and need to be amended to be in consonance with the Competition Act, 2002. For example, as per the present rules, the fee for appeal and the process fee has to be paid to the Ministry of Corporate Affairs.[50] This stipulation would have to be amended duly for the cases of competition law disputes.

Thus, these oversights of the legislature in dealing with the amalgamation of the COMPAT with NCLAT pose serious threats to the functioning and effectiveness of the tribunal adjudicating competition law disputes.

[49] National Company Law Appellate Tribunal Rules, 2016, available at: <http://www.mca.gov.in/Ministry/pdf/Rules_2207201 _6.pdf> (Last visited on November 18, 2019).
[50] National Company Law Appellate Tribunal Rules, 2016, Rule 55(2).

Inter-Country Adoption and Its Judge-Centric Approach in The Indian Legal System

Apoorva Bhardwaj[1]

Abstract

Inter-Country Adoption is the most debatable issue in the current Private International Law regime. This concept has helped needy children by providing them homely environment, which is an essential aspect for the proper growth and welfare of the children. With the worldwide recognition of Inter-country adoption, the time has come to validate and legalize the concept in India too. The Indian judiciary has taken a proactive approach in highlighting the pros and cons of inter-country adoption. With the recent judgment and development in Indian Law, it can be noticed that the Indian judiciary as well as the lawmakers are determined to work for the welfare and interest of the child. Various landmark judgments have created a ray of hope in the life of needy children, who may once again sit into the laps of the new parent and enjoy the same life, the same culture and the sense of familyhood.

Keywords: Inter-Country Adoption, Children, Judiciary, Life, etc.

Introduction

Inter-country adoption is the most sensitive, controversial and complex aspect of adoption.[2] It truly depicts the concept of *"Home to Homeless and Child to Childless"*. Time and again, it is said that children are the most important asset of the nation.[3] The prospective potential and strength of a nation depend on the growth and development of children. Allowing Inter-country adoption in no way is going to help an over-populated country like India. It is axiomatic that Indian families hardly adopt any child from foreign agencies. It merely poses threat to the life of an adoptive child and makes their future bleak. Though, the Supreme Court judgment is highly appreciable in this regard that it totally rejected the transfer of a child who has a natural guardian.

Presently, the whole world recognizes inter-country adoption as *"a placement of the displaced, orphaned and abandoned children"*. It significantly emerged as the most debatable issue in the field of Private International Law. As quoted by Alstein and Simon in their book named *"Inter-country Adoption"* it began primarily as a North American philanthropic response to the devastation of Europe in World War II that resulted in thousands of orphaned children.[4] The need for inter-country adoption was initiated in order to find families for the abandoned, displaced and orphaned children after the Second World War. Justice P.N Bhagwati also in Lakshmikant Pandey's Case observed that the falling fertility rate in the west

---

[1] ***5th Year, B.A.LLB Course, Faculty of Law, Banasthali Vidyapith University, Jaipur; Email Id:apoorvabhardwaj1997@gmail.com.***
[2] See: 153rd Law Commission Report on "*Inter-Country Adoption*" dated 26th Aug., 1994.
[3] *Laxmikant Pandey v. Union of India,* AIR 1992 SC 118.
[4] Prof. Lakshmi Jambholkar, *Select Essays on Private International Law*, Edn 2011,Universal law Publishing Co. Pvt. Ltd., New Delhi at p.138.

and the unavailability of domestic children have driven foreign parents to adopt children from the foreign state.[5]

International Recognition

International standards for inter-country adoption are found in a number of international instruments. These are *the Geneva Declaration on the Rights of the Child, 1924; the UN Declaration on the Rights of the Child, 1959; the Hague Convention on Private International Law,1965; the UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally,1985; the Hague Convention on Protection of Children and Co-operation, 1965.*

In 1986 the General Assembly of the United Nations[6] adopted the *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally.* Article 17[7] states that Inter-country adoption may be considered an alternative means of providing the child with a family. The General Assembly adopted the *Convention on the Rights of the Child,1989* which is also treated as the Magna Carta of Child Rights. The Convention is the leading international treaty on the rights of children and has been ratified by all UN Member States except for Somalia and the United States. In 1992, Ireland ratified the Convention.

The Hague Convention on Inter-country Adoption

The Hague Convention is the first international instrument formulated in the year 1993 that endorses the practice of inter-country adoption and lays down the comprehensive framework for addressing the issues surrounding inter-country adoption.

It sets out a framework to ensure that inter-country adoptions are carried out with the best interests of the child and respect his fundamental rights[8]. The Convention envisages a system of cooperation between the child's country of origin or the "sending country", and the country to where the child will live with its adoptive parents, or the "receiving country". The Convention has been described as a practical expression of the fundamental principles set out in the *United Nations Convention on the Rights of the Child, 1989.*[9]

Regional Recognition

---

[5] *Lakshmikant Pandey v. Union of India,* AIR 1984 SC 469.

[6] See. UN General Assembly Resolution No.41/85 dated 3rd Dec., 1986.

[7] I*d*. at Art. 17: If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family.; See also. UN General Assembly Convention on Rights of the Child, Art.21(b).

[8] Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, 1993. Art.1(a): "to establish safeguards to ensure that inter-country adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law."

[9] Consultation Paper, "Aspects of Inter Country Adoption", Law Reform Commission, Ireland dated March 2007 at p.13.

Inter-country Adoption was defined in the *European Seminar on Inter-country Adoptions, 1960* as *"adoption in which the adopters and the child do not have the same nationality as well as in which the habitual residence of adopters and the child is different."* The European Convention on Adoption, 1967 does not explicitly deal with inter-country adoption but it establishes the principle that adoption should not be made unless it is in the best interests of the child.[10]

In *Pini and Others v. Romania,*[11] the European Court of Human Rights dealt with the inter-country adoptions of two Romanian girls by the applicants, who were two couples from Italy. In this case, a conflict of interests existed between the wishes of the children and the applicants. The European Court of Human Rights decided that the wishes of the children and their best interests carried significant weight. The European Court of Human Rights stated that Article 8 of the Council of Europe's *Convention for the Protection of Human Rights and Fundamental Freedoms, 1950* does not guarantee a right to adopt and that adoption aims to provide a child with a family. Moreover, it has also been held by the court that *"family life"* exists between adopted children and adoptive parents.[12]

The European Commission and Court of Human Rights have tried to evolve the concept of inter-country adoption through Articles 8, 12 and 14 of the European Convention for Human Rights and Fundamental Freedom.[13]

Legal Provision in India

Indian legislation does not have any specific provision that lays down a principle for inter-country adoption. Even, the Supreme Court in the absence of any law regulating inter-country adoption refers to Articles 15, 24 and 39 of the Constitution and Sections 7 to 9 of the Guardian and Wards Act, 1890 for issuing directions to regulate inter-country adoption.
The Government of India under Clause 23[14] and 24[15] of the Adoption of Children Bill, 1980 tried to insert a provision for inter-country Adoption for the first time and treated it as an

---

[10] Art. 8(1). This is enshrined under Section 2 of the *Adoption Act 1974* as the welfare principle.
[11] [2004] EHRR 275.
[12] *X. v. United Kingdom*, Application No. 7626/76.
[13] I*d.* at p.146.
[14] Adoption of Children Bill,1980. Clause 23: (1)Except under the authority of an order under section 24, it shall not be lawful for any person to take or send out of India a child who's a citizen of India to any place outsde India with a view to the adoption of the child by any person.(2)Any Person who takes or sends a child out of India to any place outside India in contravention of Sub-section(1) or makes or takes part in any arrangements for transferring the care and custody of a child to any person for that purpose, shall be punishable with imprisonment for a term which may extend to six months , or with fine or with both.
[15] Adoption of Children Bill,1980. Clause 24: (1) if upon an application made by a person who is not domiciled in India, the district court is satisfied that the applicant intends to adopt a child under the law of or within the country in which he is domiciled, and for that purpose desires to remove the child from India,either immediately or after an interval, the court may make an order (in this section referred to as a provisional adoption order) authorizing the applicant to remove the child for the purpose aforesaid and giving to the applicant the care and custody pending his adoption aforesaid
Provided that no application shall be entertained unless it is accompanied by a certificate by the central government to the effect that:

unlawful act but it failed due to the unacceptance of some provisions of the bill by Muslims. The Central Government intended to frame a uniform civil code which was ultimately rejected. The Law Commission of India in its 153rd report recommended for Inter-Country Adoption Act in the year 1994 but was never put into consideration.

The Central Government dated 24th June 2011 notified the Guidelines issued by the Central Adoption Resource Authority (CARA) to provide for the regulation of the adoption of orphans, abandoned or surrendered.

Judicial Recognition and Development

The Supreme Court and the High Courts in India have acknowledged that adoption offers remedial measures for the development of neglected, orphaned and abandoned children both in terms of physical requirements and emotional needs.

In re Rasikalal Chhaganlal Mehta,[16] the Gujarat High Court stated that inter-country adoption might have a slight reflection of international racket trading of children and selling them out at profit but sanctioning inter-country adoption would be a hurried step. The Court directed to observe guidelines laid down by reputed and recognized national and international organizations. Moreover, Justice Divan and Justice P.D. Desai in this case stated that it is essential to have legally valid adoption as per the laws of both countries if not then either it will be an "**abortive adoption**" which has no validity in either of the countries or a "**limping adoption**", which has recognition in one country but have no validity in another. Later on, The Supreme Court in a landmark judgement of Lakshmikant Pandey's case for the first time laid down a guideline for inter-country adoption.[17]

Analysis of *Lakshmikant Pandey v. Union of India*

Lakshmikant Pandey, a practising Lawyer in the Supreme Court complained about malpractices indulged in by social organizations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents in the case of *Lakshmikant Pandey v. Union of India*[18] and sought relief restraining Indian based private agencies from carrying out a further activity of routing children for adoption abroad. He also asked for direction from the Government of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to carry out their obligations in the matter of the adoption of Indian children by foreign parents. The Supreme Court treated this as a writ petition and laid down the procedure for the adoption of children by foreigners.

I: the applicant is in its opinion a fit person to adopt the child.
II.the welfare and interests of the child shall be safeguarded under the law of the country of domicile of the applicant.
III. the applicant has made proper provision by way of deposit or bond or otherwise in accordance with the rules made under this act to enable the child to be repatriated to India, should it become necessary for any reason.

[16] AIR 1982 Guj 193.

[17] *Lakshmikant Pandey v. Union of India,* (1984) 2 SCR 785.

[18] AIR 1984 SC 469.

It was also stated in the case that the law of the country of the prospective adoptive parent shall permit legal adoption of the child and that no such legal adoption being concluded, the child would acquire the same legal status and rights of inheritance as a natural born child and would be granted citizenship in the country of adoption and it should file along with the application for guardianship, a certificate reciting such satisfaction[19].

Various Child Welfare agencies contemplating the judgment of the abovementioned case filed a writ petition under Article 32 of the Constitution of India[20] considering various grounds:

1. The adopted children shall be allowed to retain their citizenship till they attain the age of majority.[21]
2. Birth certificates have to be issued on the basis of attested copies of the Court's certificate (decree), adoption deed or affidavits of the officials of the licensed agencies.
3. The quota fixed for the placement of children with Indian families shall be quashed.
4. Show cause notice needs to be issued before the cancellation of registration/license to the registered agency.
5. The setting up of CARA should be stayed.
6. To enable the agencies to maintain high standards of care for the children, expenses by about 25% are to be revised and an annual escalation of 10% be made.
7. Transfer of children from Statutory homes to recognised agencies for placement be allowed.

Contentions by the petitioner

1. The Petitioners tried to highlight malpractice on the ground of the child being adopted and contended that All Government/juvenile homes, nursing homes and Hospitals (Government or private) will apply for the declaration of a child as abandoned and free for placement and thereby driving the wrong practice and if the parents of the child are not known, such children should be transferred to the recognised institution/placement agency.[22]

   While declaring the child abandoned, Juvenile Welfare Boards or Courts should not disturb the custody of children abandoned directly with the recognised placement agencies and such orders may be passed *ex parte* and confirmed after notice to the concerned parties.
2. The quota fixed by the Central Government for the transfer of children to Indian families is contrary to Lakshmikant Pandey's Case[23]. The court may direct to exclude children with handicaps, medical problems and other drawbacks from counting in case of fixing up of quota.

---

[19] I*d.* at ¶23.
[20] *Laxmikant Pandey v. Union of India,* AIR 1992 SC 118 ¶ 3.
[21] I*d.* at ¶ 3(e)
[22] I*d.* at ¶ 3(a)(i).
[23] *Lakshmikant Pandey v. Union of India,* AIR 1984 SC 469.

3. The State Governments and the various Union Territories should be directed to issue birth certificates based upon attested copies of the Court's certificate (decree), adoption deed or on the basis of affidavits of officials of the licensed agencies.[24]
4. The Petitioner sought to enable the agencies to maintain high standards of care for the children, expenses by about 25% to be revised and an annual escalation of 10% be made.[25]
5. The adopted children shall be allowed to retain their citizenship till they attain the age of majority.[26]
6. Central Adoption Resource Agency (CARA) is no longer required in view of the fact that many private agencies were not available to monitor the programme and hence, the setting up of CARA[27] should be stayed.
7. Show cause notice needs to be issued before the cancellation of registration/ licence to the registered agency. The Central Government should be directed to act by itself or through the State/Union Territory Governments to issue a show cause notice before refusing to extend recognition arid grant personal hearing before taking official action and reasoned orders should be made in support of such action.

Observation of Supreme Court on various grounds:

1. It was stated that allowing citizenship till the attainment of majority may create hurdles in the early cementing of the adopted child into the adoptive family.[28]
2. The birth certificate of the adopted child shall be obtained on the basis of the application of the society sponsoring adoption which will be subjected to magisterial order.
3. The affidavit of the Union Government indicates that it never intended to fix any quota for the purpose of allowing renewal of registration or licence. However, it is not the policy of the Government of India to mandate the agency to satisfy the condition of any quota.
4. The Supreme Court took an affirmative approach on this ground and held that Registered societies can renew their licence if they exhibit their involvement in the process of adoption and the authority should have evidence to satisfy that the agency is really involved in the activity and have proper child care facilities.[29]
5. The Supreme Court justified the idea of setting up of Central Adoption Resource Agency (CARA) on the ground that an institution like CARA would be an organization of primacy and would work as a useful agency in the field. Although there should be no keen competition for offering adoptions, regulated competition may perhaps keep up the system in a healthy condition.[30]
6. Considering the general rise in the cost of living, an escalation by 30% is allowed and the escalation of expenses will be reviewed once in three years.[31]

---

[24] I*d*. at ¶ 3(c).
[25] I*d*. at ¶ 3(d).
[26] I*d*. at ¶ 3(e).
[27] Central Adoption Resource Agency.
[28] I*d*. at ¶ 9.
[29] I*d*. at ¶¶ 10,12.
[30] I*d*. at ¶12.
[31] I*d*. at ¶13.

7. The Supreme Court expressed a strong opinion on the transfer of children for placement and stated that children whose parents are not known, orphans and abandoned can be transferred for the purpose of placement.[32] Various states do not have any statutory homes and even Juvenile Boards have not been properly functioning. Some recognized agencies also do not have the facility for child care. In these circumstances, order transfer of children from statutory homes to recognized agencies can indeed not be accepted as a rule.
   "*Considering the interest of the Children, Straight jacket formula may be injurious.*"

Post-Laxmikant Pandey Case (1992)

In *Karnataka State Council for Child Welfare v. Society of Sisters of Charity St. Gerosa Convent*,[33] the Apex Court reiterated the guidelines laid down in the Laxmikant Pandey case while dealing with an application for inter-country adoption under Section 7 read with Section 17 of the Guardian and Wards Act, 1890.

In *Sumanlal Chhotelal Kamdar v. Asha Trilokbhai Saha*,[34] the Court observed that the authority permitting adoption did not take precautions to explain the effect of adoption on the biological parent of the child.

In *Anokha v. State of Rajasthan*,[35] the apex court stated that the guideline prescribed by the Ministry of Welfare, Government of India is not applicable in a case where the biological parents are willing to give their child to a known foreign couple.

In *St. Theresa's Tender Loving Care Home v. State of Andhra Pradesh,*[36] Justice Pasayat states that the welfare of the child is the guiding factor in the process of adoption and if the courts are satisfied that foreign adoptions will take care of the child to be adopted, will provide opportunities for their development and will give them a sense of security, parenthood and homely and family atmosphere, they should grant the permission for adoption and even ignore the technicalities of law, if they come in the way of welfare of the child to be adopted.

In *Craig Allen Coates v. State & Anrs.,*[37] the Supreme Court of India took a bold step and adoption of Indian mentally disabled child was allowed to the US woman on the ground of her professional experience. This recent development reflects that the Indian courts on the ground of the welfare of children can exercise their discretionary power to any extent.

As the Supreme Court declared that foreigners can legally adopt children through licensed welfare agencies[38] and thereby justifying inter-country adoption which is a highly

---

[32] I*d*. at ¶14.
[33] AIR 1994 SC 658.
[34] AIR 1995 SC 1892.
[35] AIR 2004 SC 2820.
[36] (2005) 8 SCC 525.
[37] 2010(11) SCR 102.
[38] *Lakshmikant Pandey v. Union of India*, (1984) 2 SCR 785.

controversial issue. Now, the problem before Indian courts is to identify a variety of principles and procedures regarding migration, citizenship, the socio-economic situation of adoptive parents with the child and acceptance of the child in a different community and culture.

Conclusion

In the year 1984, the Supreme Court accepted the concept of Inter-country Adoption which means any foreign parents can adopt a child as per the procedure laid down by the court and the guideline framed by the CARA. The Apex court delivered this judgment on the ground of welfare and the proper form of rehabilitation for abandoned children. But, in the year 1991 when matter concerned about the citizenship of an adopted child, the Apex Court denied giving citizenship and stated that "*allowing citizenship till the attainment of majority may create hurdle in early cementing of the adopted child into the adoptive family*". The Apex court failed to demystify the kind of hurdle that might be created with the recognition of citizenship. The Apex Court must have to elucidate the consequences and opportunities of child exploitation with regard to inter-country adoption and detailed explanation of not providing citizenship to the adopted child.

The main problem with such concept is the unavailability of specific legal provisions and also non-compliance with the existing statutes. Children are treated as saleable goods. There has to be a proper legal framework for the specific performance of a contract. Now, The Government of India considers adoption as the best non-institutional support for the rehabilitation of such children because only a family environment can provide them with the best opportunity to fulfill their potential. However, it is not hidden that children are taken abroad for domestic services under the garb of adoption.

Implementation of a Uniform Civil Code in India

Manisha Batwal[1]

Abstract

Uniform Civil Code resonates with one country one rule, to be applied to all religious communities. The term, 'Uniform Civil Code' is explicitly mentioned in Part VI, Article 44 of the Indian Constitution. Article 44 says, "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." As it is incorporated in DPSP they are neither enforceable in the court nor has any political discrepancy been able to go beyond it because minorities mainly Muslims felt that their personal laws are violated or abrogated by it. Then a series of Bills were passed to codify Hindu laws in the form of the Hindu Marriage Act, 1955, The Hindu Succession Act, 1956, The Hindu Minority and Guardianship Act, 1956 and the Hindu Adoption and Maintenance Act, 1956, are collectively known as Hindu Code Bill (covers Buddhist, Sikhs, Jains as well as different religious denominations of Hindus) which allows right to divorce and inheritance to women, made caste irrelevant to marriage and abolished bigamy and polygamy. India has a unique blend of codified personal laws of Hindus, Muslims, Christians, and Parsis. There exists no uniform family-related law in a single statute book for all Indians which is acceptable to all religious communities who co-exist in India. However, a majority of them believe that UCC is definitely desirable and would go a long way in strengthening and consolidating Indian nationhood. The differences of opinion are on its timing and the manner in which it should be realized. Instead of using it as an emotive issue to gain political advantage, political and intellectual leaders should try to evolve a consensus. The question is not of minority protection, or even of national unity, it is simply one of treating each human person with dignity, something which personal laws have so far failed to do.

Keywords*:* Constitution, Uniform Civil Code, Personal Laws, etc.

Introduction

The Constitution of India is regarded as the supreme document of the country. By the virtue of being supreme, it is equally applicable to all, irrespective of class. At the core of the Constitution, the preamble talks about equality, fraternity, integrity, and liberty to all, but India being a diverse country has an enormous number of religions and communities in the various parts of the country, it led to different treatment to meted out to different sections of society. There are different laws for different communities for a Hindu, Hindu Marriage Act is applicable, whereas for Christians Indian Divorce act is applicable. These personal laws deal with the personal matters of an individual including matters of marriage, divorce, succession, adoption, and inheritance. But they face a major difficulty in the distribution of justice.

The question of justice with regard to personal law came at the Constituent Assembly in 1947, where the proposition of a Uniform Civil Code enshrined under article 35 (now article 44) was in debate. While the motion was strongly opposed by Muslim fundamentalists like Poker Saheb, the founding father of our constitution and Chairman of the Constitution Draft Committee, Dr.

[1] ***Advocate, High Court of Judicature at New Delhi; Email Id: batwal.manisha26@gmail.com***

B.R. Ambedkar, along with eminent nationalists like Gopal Swamy Iyenger, KM Munshiji, and many others favoured the inclusion of the Uniform Civil Code in the Constitution.[2]

Historical Perspective of Uniform Civil Code
The debate for a uniform civil code dates back to the colonial period in India.

Pre-Independence (Colonial Era)
- The Lex Loci Report of October 1840 - Stressed the importance and necessity of uniformity in the codification of Indian law, relating to crimes, evidence and contract. But, it also recommended that the personal laws of Hindus and Muslims should be kept outside such codification.
- The Queen's 1859 Proclamation- It promised absolute non-interference in religious matters.

So while criminal laws were codified and became common for the whole country, personal laws continue to be governed by separate codes for different communities.

Post-Colonial Era (1947-1985)
- During the drafting of the constitution, prominent leaders like Jawaharlal Nehru and Dr B.R Ambedkar pushed for a uniform civil code. However, they included the UCC in the Directive Principles of State Policy (DPSP, Article 44) mainly due to opposition from religious fundamentalists and a lack of awareness among the masses during the time.

Some of the reforms of this period were *The Hindu Code Bill* drafted by Dr. B.R. Ambedkar to reform Hindu laws, which legalized divorce, opposed polygamy, and gave rights of inheritance to daughters. Amidst intense opposition to the code, a diluted version was passed via four different laws. *The Hindu Succession Act, 1956*, originally did not give daughters inheritance rights in ancestral property. They could only ask for a right to sustenance from a joint Hindu family. But this disparity was removed by an amendment to the Act on September 9, 2005. *The Hindu Marriage Act, Minority and Guardianship Act, Adoptions and Maintenance Act, Special Marriage Act***:** It was enacted in 1954 and provided for civil marriages outside of any religious personal law.

Article 44 *VS.* Article 25 of the Constitution - A Debate
The preamble of the Indian Constitution enshrines the words Secular, Democratic, and Republic. This implies that the state has no religion of its own, it shall not discriminate against any religion. The term religious right was discussed in the Constituent Assembly Debates wherein it came out that religious rights are recognized by the constitution and nobody could hinder a person from professing, practising, and propagating from the religion of his choice. But in the judgment of *S.R. Bommai v. Union of India*[3], Justice Reddy held that religion is a matter of individual faith and choice which cannot be intermingled with secular activities regulated by the state by enacting any law. A religion concerns only with the relation of a man

[2] Constituent Assembly Debates, Vol. VII, (1949), p. 545.
[3] (1994) 3 SCC 1.

with his god, which implies that religion should not interfere with the mundane life of an individual.

The uniform civil code and secularism are so closely connected with each other as like a cause and effect. India follows the concept of positive secularism contrary to the secularism accepted in European and American countries. Positive secularism separates spiritualism from individual faith. In the western world, countries have been through stages of revolution such as the renaissance, reformation and thus have the capacity to enact laws stating that the state shall not interfere with religion. While on the contrary, India has not gone through any such stages, and therefore the complete responsibility falls upon the state to interfere in the matter of religion.

Though the word Secularism was added in the preamble by 42nd Amendment Act, the spirit was felt throughout the constitution from its inception. There were a number of laws that were based on the foundation stone of secularism, Fundamental rights including equality before the law i.e. Article14, Prohibition to discrimination on the grounds of religion, race, caste, sex, place of birth i.e. article 15; Freedom of conscience and free profession, practice and propagation of religion i.e. article 25; Universal adult suffrage i.e. article 325. Article 27 makes the situation clear that the state is prohibited from patronizing and supporting a particular religion. It is evident from the article that no one shall be compelled to pay taxes whose proceeds are used for the promotion of any particular religion.

Article 25 guarantees the right to religious freedom. But the right is subject to part III of the Constitution and is subjected to public morality, public order and health. Article 25 also provides that the state can restrict any political, financial economic and other secular activity associated with religious practices and also provide social welfare and reforms. The question of the scope of the religious matter came up in the case *Acharya Jagdishwaranand Avadhut v. Commissioner of Police, Calcutta.*[4] The court held that doctrine of belief extends to the acts done in pursuance of religion, which would contain the right to observe rituals, ceremonies and different modes of worship, which are an integral part of that particular religion. Hence a narrow interpretation was given to the scope of the doctrine of belief and the personal laws including laws related to marriage, inheritance was not included.

In the context of the principle laid down in the above case uniform civil code does not oppose secularism and does not violate the right to religion under Articles 25 and 26 of the Constitution. Article 44 is based on the premise that religion and personal laws are two separate identities and one cannot be treated as a subsidiary of the other. The matters of marriage, succession, inheritance, and maintenance are secular in nature and can be regulated by law, thus the state is empowered to make law in such matters. Justice Khare in the case of *John Vallamattom v. Union of India*[5] said that "It is no matter of doubt that marriage, succession and the like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution."

---

[4] (1984) 4 SCC 522.
[5] AIR 2003 SC 2902.

Need for the Unifrom Civil Code - Human Rights and Constitutional Guarantee

Equality, fairness and non-discrimination are considered to be essential parts of human rights, but in India, there is a constant discourse between these principles and personal laws. These principles are also reflected in the Indian Constitution in the Preamble, Fundamental Rights and Directive Principles of State Policies. Article 14 of the constitution talks about the doctrine of equality, which embodies substantive and real equality i.e. it strikes out at all the inequalities on the account of socio-economic, customary and historical differentiation. Article 15(3) empowers the state to make special provisions for women and children, while Article 25(2) mandates that social reform and welfare can be provided irrespective of the right to freedom of religion. These laws protect the interest of women from being discriminated against in the private sphere of their community and empower the state to bring in legislation for the uplift of the discriminated class of people. Therefore Article 44 can be regarded as a cornerstone for women's equality and should be implemented to eliminate discriminatory rules and laws in religious laws.

In 1979, the United Nations to ensure, assert, protect and promote women's rights came up with *The Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). The convention expressly states that discrimination against women in the public or private sphere should be stopped. CEDAW affix the responsibility upon the state for the actions of private actors, including those violating these rights within a community. The state which does not act against a such pattern of discrimination would lead to condonation of the violation. CEDAW has significantly impacted the setting of the new standards for human rights to be followed today.

India has ratified the convention declaring to limit its obligations related to the change in discriminatory cultural practices within the community. Considering Articles 5(a) and 16(1) of the Convention, India declares that *"it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent"*. State interference from the customary laws and practice is an unqualified exemption to the convention. The state's reluctance to fulfilling the obligations and objectives of the convention can be attributed to the utter lack of political will of the State. The political environment is more of a diplomatic stand on uniform code, which is a big concern for the country.

After the recent judgment of the *Right to Privacy* [6], the right to privacy has been recognized as a Fundamental right of an individual. In the entire judgment, the word 'consent' had been used 32 times. This clearly emphasizes that individual consent should be taken in the matters which affect him. If he/she refuses to do a certain act then he/she cannot be compelled to do it. Similarly, if an individual wants that he should not to be governed by his personal laws, he cannot be compelled to do so. It is his personal choice and is guaranteed by the right to privacy. Although it may be a possibility that after the introduction of a uniform civil code, an individual

[6] *Justice K.S. Puttaswamy and Anr. v. Union of India*, AIR 2017 SC 641.

opt to follow his personal laws, for that matter he would have an option to go for a uniform code as well, which would be gender neutral and just.

It is not completed upon the Parliament to introduce a uniform civil code when it deems fit, there has been a constant approach by the way of petitions to the Apex Court for directing the State to enact a Uniform Civil Code. In the case of *Maharshi Avadhesh v. Union of India*[7], where the petitioner approached the Supreme Court by filing a writ petition under Article 32 of the Constitution, asking the court to declare the Muslim Women (Protection of Rights on Divorce) Act, 1986 as unconstitutional. The court dismissed the petition while holding that such matters are purely the concern of the legislature and the judiciary cannot decide upon such matters.

Judiciary's stand on the Uniform Civil Code

The debate on article 44 has a long history to trace. The question of a secular uniform code came up in the landmark judgment of *Shah Bano*[8], where the court regarded article 44 as a dead letter. It was also discussed that introduction of a uniform civil code would help the cause of national integration by removing the disparities in various personal laws which have conflicting ideologies. It is the duty of the state to bring out a conducive environment for the implementation of a uniform civil code. Although courts have a huge role to play as a reformer piecemeal attempts by the court cannot be regarded as a permanent solution to the problem, as "Justice to all is a far more satisfactory way of dispensing justice than justice from case to case". Therefore the legislature has to assume its role in order to bring justice to different sections of society.

In the landmark judgment of *Sarla Mudgal v. Union of India*[9], the court came across various facets of article 25 of the Constitution, and its debate with article 44 of the constitution. While deciding the judgment the court discussed the purview of the word 'religion' used in article 25. The Constitution protects freedom of conscience ensuring the inner aspect of religious belief while the guarantee of the right to freely propagate, practice and profess ensures the external expression of it. Marriage, inheritance of property, and divorce are as much a matter of religion as much as any other belief or faith in the religion. Although they are violative of basic human rights they are part of their belief, for which reform has to take place. The court cited the example of Sati Abolition, where Raja Ram Mohan Rai brought out the atmosphere which paved the way for Sati abolition, and linked it with the current and urgent need for a uniform civil code and the role of the government to induce such an environment. The introduction of a uniform code would promote national unity and solidarity and would protect the oppressed.

The landmark judgment of the *Triple Talaq case*[10], where the validity of Talaq-e-biddat was in question, was placed before 5 judge constitutional bench. The court while deciding the matter

---

[7] (1994) Suppl. (1) SCC 713
[8] *Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945.
[9] AIR 1995 SC 1531.
[10] *Shayara Bano v. Union of India*, AIR 2017 SC 629.

in paragraphs 94 and 95 of the judgment, discussed the need for a uniform civil code. The discussion at the Constituent Assembly Debates was taken into consideration. The majority quorum was favoring the introduction of the civil code while Chief Justice J.S. Kehar felt that personal laws are a matter of religion and the judiciary should not intervene in it as interfering with personal law implies interference with their personal life.

The Supreme Court has often been seen as paralyzed to the concept of public-private dichotomy by restricting itself against the personal laws which govern the private domain of an individual, but nonetheless, the court has intervened piecemeal while deciding matters related to personal laws. In several instances, the court has struck down and declared particular provisions of personal law as unconstitutional and void by interpreting such impugned provisions in such a way that relief could be granted to the aggrieved party. The court has however at many instances addressed discrimination in the public domain. The court gave guidelines in the field of sexual harassment at the workplace. The court had in certain cases lifted the status of certain Directive Principles to that of Fundamental Rights, such as the Right to Education. But such an approach was not observed in Article 44, though the court had asked the government to take necessary steps for the same. The court also observed that government attempts to reform personal laws have not gone beyond Hindus as they are more tolerant of such initiatives.

In *Daniel Latifi Case*[11] Muslim Women's Act (MWA) was challenged on the grounds that it violated the right to equality under Articles 14& 15 as well as the right to life under Article 21. The Supreme Court while holding the law as constitutional, harmonised it with section 125 of CrPC and held that the amount received by a wife during the iddat period should be large enough to maintain her during iddat as well as provide for her future. Thus under the law of the land, a divorced Muslim woman is entitled to the provision of maintenance for a lifetime or until she is remarried.

Again in *John Vallamattom Case*[12], a priest from Kerala, John Vallamattom challenged the Constitutional validity of Section 118 of the Indian Succession Act, which is applicable to non-Hindus in India. Mr Vallamatton contended that Section 118 of the act was discriminatory against Christians as it imposes unreasonable restrictions on their donation of property for religious or charitable purposes by will. The bench struck down the section as unconstitutional.

GOA Civil Code[13]

Goa is the only Indian state to have Uniform Civil Code in the form of 'Common Family Law'.The Portuguese Civil Code that remains in force even today was introduced in the 19th century in Goa and wasn't replaced after its liberation. There are the following features of the Goa Civil Code:

- The Uniform Civil Code in Goa is a progressive law that allows equal division of income and property between husband and wife and also between children (regardless of gender).

[11] *Danial Latifi & Anr v. Union of India* (2001) 7 SCC 740
[12] AIR 2003 SC 2902
[13] Avilable on https://www.indiacode.nic.in/bitstream/123456789/8312/1/ocrportuguesecivilcode.pdf

- Every birth, marriage and death has to be compulsorily registered. For divorce, there are several provisions.
- Muslims who have their marriages registered in Goa cannot practice polygamy or divorce through triple talaq.
- During the course of a marriage, all the property and wealth owned or acquired by each spouse is commonly held by the couple.
- Each spouse in case of divorce is entitled to half of the property and in case of death, the ownership of the property is halved for the surviving member.
- The parents cannot disinherit their children entirely. At least half of their property has to be passed on to the children. This inherited property must be shared equally among the children.

However, the code has certain drawbacks and is not strictly a uniform code. For example, Hindu men have the right to bigamy under specific circumstances mentioned in Codes of Usages and Customs of Gentile Hindus of Goa (if the wife fails to deliver a child by the age of 25, or if she fails to deliver a male child by the age of 30). For other communities, the law prohibits polygamy.

Consequences of Implementation of the Uniform Civil Code

The Uniform Civil Code has been the solution to the discriminatory customary laws in a community, but there have been certain critiques of the uniform civil code. There has been a debate over the implementation of the uniform code over the decades; therefore in this section, I would discuss the arguments for and against the introduction of a uniform civil code. So proceeding with the arguments for the implementation of the Uniform Civil Code:

- The uniform civil code would bring the matters like marriage, inheritance, divorce, and succession of property under one roof creating space for practising such matters in a just manner and would also integrate the ideals and values of humanism.
- There has been always an argument that the uniform civil code is in contradiction with article 25, but under article 25 itself in clause 2, it has been specified that this article shall not affect the operation of any existing law, therefore provides room for the introduction of uniform civil code.
- The Fundamental Rights under Articles 14 and 18 *i.e.,* the right to equality and discrimination on the grounds of sex and religion are violated. It is evident that many of the personal laws are biased towards the patriarch thus being unjust to women.
- It creates unavoidable division on the basis of religion when certain persons are given special status. It becomes very difficult to preach equality among the citizens. An ambiguity is created because of different personal laws governing different individuals, especially in the cases of polygamy and divorce.
- All other laws governing the citizens of the country are uniform, such as penal laws irrespective of the religion, race, or caste of the person. Although such matters were earlier governed by personal laws only. Hence there is a need for the codification of personal laws

as well so that injustice caused to women could be ceased, and everybody could be treated equally.

There have been numerous arguments against the implementation of a uniform civil code. One of the major reasons is due to the inability of the country at this time to adapt itself to such an environment. But there have been several other arguments such as:

- Almost all the personal laws are in some way or another other unjust to women and children, majorly due to the patriarchic mindset. These can be changed not on the basis of uniformity but on the principles of equality and justice. If the injustices are removed, uniformity will inevitably come out. Therefore there is a need for just a civil code and not a uniform civil code.
- The motive behind the uniform civil code is Equality, and the state's paramount concern is equality. Many communities are educationally and economically backwards. The state should work on social welfare to bring out the educationally and economically backward section of society at par with others rather than touching on the emotional issue of a uniform civil code.
- The most prominent argument by the All India Muslim Personal Law Board is that Sharia law is an integral part of Islam, and introduction to a uniform civil code would mean depriving Muslim and other communities of their right to religion and personal laws. Sharia law is made by the god and not by humans; therefore it cannot be intervened into by the human, not even a Muslim.
- The principle of Secularism as enshrined in the Constitution cannot be achieved until and unless the right to religion is guaranteed. It is the utmost requirement of the present time to achieve uniformity and harmony in social relations, which would be the foundation of the integrated, unified and strongest democracy in the world. First, these objectives are to be fulfilled after which the question of a uniform civil code could be considered.

It is evident that the major debate over Uniform Civil Code is over the interpretation of article 25 of the Constitution. Do right to religion under article 25 of the Constitution covers personal laws through which an individual is governed. As discussed above the Apex court has taken both instances where in the *Acharya Jagdishwaranand Avadhut v. Commissioner of Police, Calcutta*[14], the court held that matter of marriage, divorce, inheritance, and succession does not fall within the purview of the Right to religion. While in the case of *Sarla Mudgal v. Union of India*[15], the court took the contrary view that marriage, inheritance of property, and divorce is as much a matter of religion as much as any other belief or faith in the religion. But in recent trends of judgment, the court has taken the stance that personal laws are part of one's religion and the judiciary can intervene to a limited extent in such matters.

Conclusion

[14] (1984) 4 SCC 522.
[15] AIR 1995 SC 1531.

The Constitution of India provides for a secular state, guaranteeing the Right to religion to every citizen of the country, however subject to certain limitations. Similarly, the state is also forbidden from promoting or propagating any religion, but it can provide welfare policies such as constituting a general fund through taxation for the promotion and maintenance of all religions, and to provide aid in suitable cases, without discrimination. Religion plays a significant role in certain aspects of an individual life, and certain communities believe that their personal laws are being governed by their religion and are given by their gods, like in the Case of Muslim laws, therefore bringing a uniform civil code for all religion would be an arduous task for the legislature. India has to develop and adopt the philosophy of coexistence. The existence of two factors is necessary – a high degree of tolerance by the people of different religions and secondly the adherence to the principles of equality, justice and non-discrimination, which are the Constitution.

There have been various judicial pronouncements where the court had suggested the state government introduce a uniform civil code as soon as possible to eliminate injustice caused to a particular section of the society, but there is no substantial progress from the Parliament. At this juncture, Justice Kuldip Singh's candid observations accorded a red-carpet welcome. He stated that:

"The traditional Hindu law - personal law of the Hindus - governing and marriage was given a go by as back 1955-56 by codifying the same. whatsoever in delaying indefinitely the introduction of uniform personal learned judge proceeded further to observe that those who preferred to partition, were aware of the fact that Indian leaders did not believe in the nation theory and also that in the Indian republic there would be only one national community could make a claim to be a separate entity on the basis of the lawman, even a layman, appreciate this judgment."[16]

For the introduction of the Uniform Civil Code, it is necessary that law should be divorced from religion. All the citizens of the country are not governed by common law in all the spheres of our lives. Bringing in existing common laws did not at any instance cause unification among the people of India. In furtherance of Article 44, the Parliament introduced the Special Marriage Act, of 1954. The code provides that the people who have objections to their personal laws can opt for the Special Marriage act and their succession rights would also be governed by the Indian Succession Act, as per section 21A of the Special Marriage Act. But still, it does not solve the problem, if one of the spouses wants to solemnize his marriage under the Special Marriage Act and the other under his personal laws, there is no way out. Hence there is a lot of ambiguity pertaining to the Special Marriage Act, which can be solved by the introduction of a Uniform Civil Code.

At last, it is upon the government's urge to bring in a uniform civil code. For instance, if wearing a helmet while driving is made compulsory then will it ask Sikhs to take off their turbans? Or if abortion is legalized to control the growth of the population, will Christians accept it? Religion

[16] *Mohd. Ahmed Khan v. Shah Bano Begum*, 1985 (2) SCC 256.

is and has been a sentimental issue in India. The state should analyze everything before doing anything. The government should implement a uniform civil code without delay and should take some concrete action in this matter rather than dodging the responsibility for short-term political gain. But this cannot be done at once, a slow, persuasive and steady approach would be required while introducing the uniform civil code. While it should also be kept in mind that such legislation should not jeopardize the distribution of legislative powers described in the VII Schedule of the Constitution. It is correctly quoted that *Justice delayed is Justice denied,* but if *Justice is hurried then, Justice may be buried.*