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EDITOR IN-CHIEF'S PAGE

It is my pleasure and privilege to present Volume II of the Delhi Journal of Contemporary Law. It carries e-ISSN Number 2582-4570. The journal is peer-reviewed journal with annual periodicity that ensures to make a significant contribution to explore, disseminate the legal research and findings in rapidly changing scenario. The Journal gives an ideal forum to academicians, researchers, judges, advocates, students and others to express their profound thoughts, legal analysis and information to broaden spectrum of any legal contemporary issues in various forms such full length research articles, notes, comments. The Volume II of Delhi Journal of Contemporary Law features several contemporary areas such as Idea of Common Market, Geographical Indications, Legal Aid for Immigrants, Indian Competition Law, Muslim Personal Laws, Rehabilitation of Acid Attack Survivors, CSR, Juvenile Justice Act, NALSA judgement, etc. I take this opportunity to thank all authors, editorial committee members and anonymous peer-reviewers, to contribute to the success of the journal.

Prof. (Dr.) V.K. Ahuja
Editor in-Chief

EDITOR'S NOTE



Law journals provide a platform for interpreting, reflecting and expressing upon the existing literature in the legal field. It has been our endeavor to publish articles highlighting the latest development in diverse areas ranging from competition law, rights of migrants, juveniles, transgender, restorative justice, personal laws and many more.

Scholarly articles presenting an objective analysis of the conflicting ideas, have been chosen through an intense peer review screening. I congratulate our authors for their erudite contributions. The journal stands testimony to the committed and concerted efforts of our editorial team towards a meticulous compilation and editing of the articles. The work was delayed due to the unprecedented crisis faced by humankind in form of Covid-19, however our dedicated team toiled hard to bring out the journal. I express my gratitude to our Prof-in-charge, Prof. (Dr.) VK Ahuja for his unabated support and encouragement at every level of the work.

The response to our maiden volume was overwhelming. I acknowledge and expect the continued patronage of our readers. With great pleasure, I present to you the second volume of Delhi Journal of Contemporary Law, the online journal of Law Centre-II, Faculty of Law, DU.

Happy Reading!

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DELHI JOURNAL OF CONTEMPORARY LAW VOL. II

ARTICLE	AUTHOR	PAGE No.
Tracing the Idea of Common Market: Historical and Constitutional Perspective	Uday Shankar & Niladri Mondal	1-16
Geographical Indications: Ambiguity in Legal Provisions in India	Gargi Chakrabarti	17-23
From Civil Death to Civil Life: The Crisis of Legal Aid for Immigrants around the World	Shreya Bansal & Amita	24-39
Indian Competition Act: Deficiencies and Suggestions	Raj Kumar Singh	40-48
Mainstreaming Misconceptions - Demonizing Muslim Personal Law: A Comment on the Muslim Women (Protection of Rights On Marriage) Act, 2019	Saadiya	49-59
Insanity as a Defense to Criminal Charge – An Analysis	Vageshwari Deswal	60-69
A Restorative Justice Model for Rehabilitation of Acid Attack Survivors	Ayush Jha & Simona Sahira Waheed	70-76
Need for Registration and Promotion of Indian Geographical Indications in Foreign Countries: Issues and Challenges	Jupi Gogoi	77-82
An Exploratory Study of Mandatory CSR Spending in Select Indian Companies	Jyotika Bahl	83-95
Law Relating to Divorce by Mutual Consent: Contemporary Developments	Kusum Lata Bawlia	96-102
Implementation of the Juvenile Justice Act, 2015: A Study of Observation Home in Faridabad	Rekha Parmar	103-107
Transgender Rights Before and after the NALSA Judgment	Monika Singhal	108-117



TRACING THE IDEA OF COMMON MARKET: HISTORICAL AND CONSTITUTIONAL PERSPECTIVE

Uday Shankar * & *Niladri Mondal* **

Abstract

A country comprising of a large demography brings the inherent benefit of creation of a big market for the consumption of goods, delivery of services and mobility of the workers. India is blessed to have a large boundary which is divided into States and Union Territories. The Constitution of India mandates the creation of a common market by ensuring free trade throughout the territory of India. The research gets guidance from the preservative character of the Indian Constitution whereby the past practices have facilitated in the formulation of the 1950 Constitution. The paper delves into the past to understand the functioning the trade in the pre-constitutional era. The research work details out the position that prevailed in ancient India, during the Mughal period and during the colonial rule. To conclude, it has been argued that the decentralization initiated during the imperial rule should strengthen the autonomy of the States without compromising on the idea of common market.

I. INTRODUCTION

Recently in the NITI Aayog's governing council meeting, the Prime Minister has announced the target of a 5 trillion-dollar economy for India to be achieved by 2024¹ The ambitious plan of the government requires consolidation of the internal market exits in the country. The large volume of the market clubbed with voluminous consumer base can lead to higher economic growth. The large territory with a big population creates a big market for the traders. The advantage of the large market could be realised with barrier free trade across the regions in the country. A barrier free market will convert the large market into a common market wherein there would be free flow of goods, services and labour.

The notion of a common market² grows from the possibilities presented by the adoption of a common external tariff. The benefit of the increase in the free flow of trade results into an integrated market. This results in sustained pressure to reduce the costs of transporting finished and semi-finished goods between the states participating in the integration project. The solution is the harmonisation of border procedures, which in its ultimate form, leads to the virtual elimination of boundaries as internal barriers to trade and the formation of a free-flowing regional economic space. A concomitant change with this complete opening of internal trade is a liberalisation of labour mobility, allowing the inhabitants of one state to work in all the other states of the region. Thus, common market should rightly envisage not for a loose confederation of states but a closely knit organisation. The design of common market needs to

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¹ Available at: <https://www.narendramodi.in/pm-s-opening-remarks-at-fifth-meeting-of-governing-council-of-niti-aayog-545292>. (last accessed on 22nd July' 19).

² A common market is an extension of the customs union concept, with the additional feature that it provides for the free movement of labour and capital among the states.

be built on the integrated economic interest across the region without compromising the autonomy of the constituent political units.

The idea of trade is considered to originate with human communication and civilization in prehistoric times which took place all through much of recorded human history. The main facility of the prehistoric people was trading by bartering goods from each other before the innovation of the modern day currency. Trade is sometimes loosely called commerce or financial transaction or barter. A network that allows trade is called a market. The original form of trade was barter, the direct exchange of goods. Later, one side of the barter became the metals, precious metals (coins), bill, and paper money. Modern traders instead generally negotiate through a medium of exchange, such as money. Trade can be broadly understood as a form of exchange involving the movement of commodities with fluctuating values conditioned by a wide range of economic, environmental, geographical, social, cultural, and religious factors.³ Though the word ‘business’ is ordinarily more comprehensive than the word ‘trade’, the one is used synonymous with the other. So used, trade or business would mean some real, substantial and systematic course of activity or conduct with a set of purpose.⁴

The Constitution of India also gives apt focus on ‘barrier-free trade’ by providing a set of provisions for guaranteeing free trade and commerce. This article unravels the historical background in detail, starting from its very inception to constitutionalisation of the provisions under the Indian Constitution. The article arranges the discussion in six parts wherein a discussion has been made about the position prevailing during ancient time and how it has been carried forward during imperial rule. It traces the development of trade and commerce in different phases of the history in order to identify the role of the state/ruler. Further, the paper also presents the insight of the development after commencement of the Indian Constitution. Finally, it argues that the country has a potential of achieving that target of becoming one of the largest economies of the world provided it consolidates the existing opportunities as envisaged by the makers of the Constitution. The paper presents a comprehensive narrative on the role of the state in promoting the idea of common market since ancient time. The authors have made a conscious decision to not to examine the judicial pronouncements on the common market as it requires a dedicated approach to understand the approach of judiciary on the matter of free trade under the Constitution.

II. TRADE AND COMMERCE IN ANCIENT INDIA

Some scholars trace the origin of corporate life in the time of *Rig Veda*. R C Majumdar is of the opinion that the *Panis* of the Vedic Times were well organised and in their organisation one may find the trace of the guilds mentioned in the *Jatakas*.⁵ But as corporate activity in economic life generally takes place during a late phase of a civilization and is subject to certain peculiar opportunities and circumstances, the *Rig Vedic* period would be too early a period for

³ Neelis Jason., “Trade Networks in Ancient South Asia” in Jason Neelis, *Early Buddhist Transmission and Trade Networks: Mobility and Exchange within and beyond the North-western Borderlands of South Asia* 183-228 (Brill Leiden, Boston, 2011) pp. 183–228. Also available at: www.jstor.org/stable/10.1163/j.ctt1w8h16r.9 (last visited on December 15, 2019).

⁴ *Narain Swadeshi Weaving Mills v. Commr. of Excess Profit Tax*, AIR 1955 SC 176.

⁵ R. C. Majumdar, *Corporate life in Ancient India* 2 (The Oriental Book Agency, Poona, 1922).

the origin of trade-guilds in India. The *Rig Vedic* evidence about the *Panis*, though indicative of their trade influence on the society,⁶ does not suggest the existence of the guilds in them .

By the sixth century B.C. there was a great rise in the volume of the trade in India. Increase in the trade needed an organised and planned production and quick distribution. This was possible only through efficient system of financing. Kings in ancient India and their governments had taken upon themselves the duty to patronise trade by providing capital to help in production and also to safeguard the routes to enable quick distribution.⁷

The existence of economic guilds in ancient India is also proved by the epigraphic evidences.⁸ Two Nasik inscriptions mention the guilds of weavers and potters respectively. Similarly, the inscriptions of *Junnar* record the existence of the guilds of bamboo-workers, braziers, as well as corn dealers. These inscriptions indicate that these guilds acted as modern banks and received deposits of public money on regular interest and lent out money to the people. A guild of *Samitikara Sreni* is mentioned in a *Mathura* inscription of the *Kusana* period. This refers to a wheat flour guild.⁹

As laid down by Manu, regulation of purchase and sale of all marketable goods was done by the King. It was done after considering their source, destination, the period of detention, the margin of profit and the loss of the traders.¹⁰ The general rate of profits should be fixed by the superintendent of commerce. It recommended profits at five per cent over and above the fixed price of local commodities, and ten per cent on foreign produce. A profit beyond this limit was a punishable crime. This principle of fixing the rate of profit on local and foreign commodities seems to have continued up to the third century A. D. A substantial amount of profit accrued from state-trading by restricting and restraining the sale of certain commodities and creating an artificial situation of demand. The traders and the superintendent of commerce regularly studied the condition of sale which was an important factor in creating profits for determining the scope of sale and purchase of a commodity, the next factor was the condition of the demand and supply Thus, if it was found that the merchandise was widely distributed, the state adopted measures to centralise the commodities and created an occasion for enhancing the price. Once the enhanced prices were popular, the state again found an occasion to introduce revised rates of prices, with a view to gain more profit. But it must be noted that such restrictions were not imposed on the commodities of daily necessity as it would have harmed the interest of the people Thus, Kautilya says that there should be no restriction on the time of the sale of those commodities for which there is frequent demand, nor should they be subjected to the evil of centralisation.¹¹ Manu says that “having well considered the rates of purchase and of sale, the length of the road, the expense, for food, the charges of securing goods, let the King make traders pay duty.”¹²

The significance of the trade in generating revenue for the state and creating opportunities for the people were very much visible in the ancient time. In order to maximise

⁶ *Id.*, 17-20.

⁷ B. Srivastava, *Trade and Commerce in Ancient India* 205 (The Chowkhambha Sanskrit Studies, Varanasi, 1968).

⁸ *Id.*, 214.

⁹ *Ibid.*

¹⁰ *Id.*, 233

¹¹ *Id.*, 234.

¹² *Id.*, 245.

the benefit, the ruler had attempted to institutionalise the process of trade in the terms of financing, profit and production. Trade appeared to be a vital part of the state activities in ancient time. The state used to enjoy monopoly on the issue of regulation of the trade.

III. TRADE AND COMMERCE DURING THE MUGHAL ERA

North India saw radical changes in socio-cultural, and political environment after the conquest by the Mughals. The multi-state system of the Sultans was replaced with a centralised political organization controlled by a powerful monarch. As a consequence of the Mughal conquest of India, a large number of immigrants and many celebrities came to the India from Central Asia and Persia and settled down in Delhi and other cities. Many foreigners including merchants contributed in the state administration and the economic setup of the Mughals.¹³ During the medieval period, the whole of Northern and Western India had commercial relations with West Asia and extending through it to the Mediterranean world, as also to Central Asia, South-East Asia and China both oversea and overland routes.¹⁴

The period from fifteenth to seventeenth century A.D. of the Mughal age was a renaissance in India. The trade and industry flourished, fine arts like sculpture, music, painting reached perfection.¹⁵ During the Mughal rule there was huge growth in trade and commerce in India. There was a high consumption in the market due to the much wealth of Mughal aristocracy. There was a large body of consumers who were able to buy above the line of necessity. A uniform tax was levied on goods at the point of their entry into the empire. Road cess or *rahdari* was declared illegal, though it continued to be collected by some of the local *rajahs*. The traders of Mughal age who were involved in large scale business enterprises such as export and import controlled the entire business world of India.¹⁶ Therefore, during the Mughal rule India was highly developed trading centre.

The Mughals had bestowed more confidence on centralisation of the regulation of the trade. The Mughal regime had attempted to introduce features related to free trade which allowed the local traders to freely engage in trading activities with traders in abroad. Perhaps, the large territory appropriated by the Mughals also played an instrumental role in improving the trade and commerce during that time.

IV. TRADE AND COMMERCE UNDER BRITISH RULE

With the advent of the English, things began to change. The Rule of the Company was anything but wise, it was rigorous, it gave security but destroyed property. The scheme of administration was far from perfect. Adam Smith characterizes the “Company of Merchants” as “incapable of considering themselves as sovereigns, even after they have become such” and says, “Trade or buying in order to sell again, they will consider as their principal business, and by a strange absurdity, regard the character of the sovereign as but an appendix to that of the merchants, as sovereigns, their interest is exactly the same with that of the country which they govern. As merchants, their interest is directly opposite to that interest.”¹⁷

¹³ S.S. Kulshreshtha, *Development of Trade and Industry under the Mughals* 1 (Kitab Mahal, Allahabad, 1964).

¹⁴ Moosvi Shireen, “Production, Consumption and Population in Akbar’s Time”, 10(2) *IESHER* 99 (1973).

¹⁵ Vasant Moon (ed.), *Dr. Ambedkar: Writings and Speeches* 2 (Dr. Ambedkar Foundation, Delhi, 2002).

¹⁶ Ratnakar D Hosmani, “Trade and Commerce in Mughal Period”, 3(6) *IJSR* (2014).

¹⁷ *Ibid.*

The East India Company and the British Parliament, discouraged Indian manufacturers in the early years at British rule in order to encourage the rising manufacture at England. Their fixed policy during the last decade of the eighteenth century was to make India subservient to the industries of Great Britain. They imposed unreasonable restrictions on trade and emphasised only on production of raw materials in order to supply the materials for the looms and manufacture of Great Britain.¹⁸ The policy was pursued with unwearied resolution and total success order were sent out to force Indian artisans were legally vested with extensive power over villages and commodities of Indian weavers, prohibitive tariffs excluded Indian silks and cotton goods from England. English goods were admitted in India free of duty on payment of a nominal duty.¹⁹ However, the Company obtained a royal order exempting their export and import trade from these payments. The goods which the company imported from Europe and those which produced in India for export to Europe were thus permitted to pass through the country without duties. The battle of Plassey in 1757 and the battle of Wandewash in 1761 gave the British supremacy in Bengal and Madras respectively and they turned both of these victories to their account. As a result, while the Company was only engaged in activities related with trade and commerce, which the British later initiated the path to colonization after the battle. The company's interest in conquering Bengal was two-fold, i.e., protection of its trade and control over Bengal's revenue, later on paved the way for their conquest of the whole of India.²⁰ The deterioration in the administration provided a chance to the English Company to play a significant job in the politics. It paved the way for the establishment of the British supremacy in India. Initially, the British Empire gave undue advantage to the British traders in comparison to the local traders with intent to boost the industry back in Britain.

Freedom of Trade and Commerce under Charter Acts

The trading rights of the East India Company granted in 1773 were renewed in 1793 again in 1813 and then again in 1833 and 1853. The measures passed to the effect are known as Charter Acts. The Act of 1793 did not make any significant change to the freedom of trade and commerce. It only extended the period of commercial monopoly for freedom of trade and commerce and political power of the company for another twenty years. The monopoly was hardly serving its ostensible purpose viz. the reservation of the entire profit for the shareholders of the company. As a matter of fact, the Indian ports were crowded with the ships of other European nations and large amount of profit went to the servants of the company.

The East India Company's monopoly was first abolished when the Charter was renewed in 1813. Once private trade was being admitted there was increase in volume of trade, while the Company's trade declined. The private merchants of British were permitted to settle in India and introduce severe competition in trade which prior to this was entirely in the company's hands. Accordingly, the Company's trade was abolished altogether in 1833, and from that date they stood forth simply as administrators of India, drawing their dividends from the revenues of India.

¹⁸ Keith, A.B. Keith, *Constitutional History of First British Empire* 26-32 (Clarendon Press, Oxford, 1930).

¹⁹ R.C. Dutt, *Economic History of India: Early British Rule From the rise of the British Power in 1757 to the accession of Queen Victoria in 1837* 236 (Kegal Paul, London, 1956).

²⁰ Hareet Kumar Meena, "How the Riches of Bengal Laid to the Consolidation of British Empire in India", 18(1) *AJRHASS*, 81-85 (2017).

Trade and Commerce under the Government of India Act, 1919

The British administered their territories in India through separate administrative machinery for each province called the local government. Each province called the administrative unit was appointed the Governors in council to administer the governmental functions. The idea of provincial autonomy was given a fuller expression on the Indian Constitutional Reforms, 1918, which is commonly known as the Montagu Chelmsford Report. The report mentioned that the eventual future of India was to become “a sisterhood of States, self-governing in all matters of purely local or provincial interest”.²¹ Before the establishment of the Indian Federation, there was no scope for any Free Trade Clause. Although for the first time, a full fledged federal structure was envisaged only under the Government of India Act, 1935, experimentation in that direction had already started under the Government of India Act, 1919.²² The constitutional experiment that was made in the provincial sphere was known as ‘diarchy’²³. It was realised that the commercial activities should not get affected on account of local politics, thus it was placed among the central subjects.

All the important means of communications, customs, excise duties, income tax and other sources of all-India revenues were among the Central subjects²⁴ and on a declaration by the Central Government, the control of production, supply and distribution of any articles as well as the development of any industries could become Central subjects.²⁵ There was no mention of trade or commerce among the Provincial subjects, though on a declaration by the Central government any matter falling within a Central subject could be converted into a Provincial subject if it was “of a merely local or private nature within the Province.”²⁶

But even with this arrangement the provincial legislatures were not free to pass any law in any manner, and ultimate authority to negative any provincial law always vested in the central government. Nevertheless, this arrangement served as a prelude to the later constitutional development.²⁷ The Government of India Act introduced a novice idea of autonomy to provinces subjugated by the Crown. The autonomous character was operative under a very controlled system, particularly in relation to trade and commerce. Almost, every subject matter related to commerce was assigned to the centre and a very minimal space was given to the provinces subject to the approval of the Governor-General.

Simon Commission Report 1930

Indian Statutory Commission was appointed by the British Government in the year 1927 due to the shortcomings of the Government of India Act, 1919. The Commission presided over by Sir John Simon published its report in 1930. The Commission recommended a federation for the whole of India. The commission asserted:

²¹ The Report on Indian Constitutional Reforms, 1918 Para 349.

²² M.P.Singh, *Freedom of Trade and Commerce in India* 10 (Deep & Deep Publication, New Delhi, 1985).

²³ System under which the provincial administration was bifurcated into two halves.

²⁴ Schedule 1 to the Devolution Rules, 1919 of the Legislative List, entries 5,6,10 and 11 of Part I.

²⁵ *Id.*, entries 19 and 20.

²⁶ *Id.*, entry 50 of Part II.

²⁷ *Supra* note 37 at 11.

The ultimate Constitution of India must be federal, for it is only in federal Constitution that units differing so widely in constitution as the Provinces and the State can be brought together while retaining internal autonomy.²⁸

With the recommendation to create a federal structure comprising of the provinces under British India and other Indian states, the Commission stressed upon the need to bring in economic unity for India. Wherein the report stated that:

Economic forces are such that States and British India must stand or fall together. The steady growth of transport facilities has inevitably brought the states into closer contact with British India and with each other, while the forces at work in the modern world are such as to effect even the remotest and the primitive State... In such vital matters as communications (rail, road or postal), customs, monetary policy and labour regulation, co-operation is becoming essential. The fact that the majority of States are land locked places then in a position of reliance on British India for their communication with the rest of India and the outside world, while the existence of ports in some other States has already caused complications. While the Central Government was autocratic, the possibilities of divergent interests might be more easily avoided but with the advent of a measure of a popular control at the Centre one-fifth of the people of India is potentially in economic subordination to the remainder. The point is well illustrated by the effect on the States of the adoption, at the wish of the Assembly, of an extended protective tariff. This body, legislating professedly only for British India, has in effect indirect taxation on the inhabitants of the States. The States have their own tariff policies, and there is serious possibility that, unless provision can be made for the reconciliation of divergent interest, numbers of tariff wall will be perpetuated in an area where fiscal unity is most desirable.”²⁹

The Report highlights the need for minimal barrier for better trading relationship between the states. It also aptly pointed out that protective tariff by the provinces would be detrimental to the overall interest of the British India. Thus, it was suggested to build a framework so that the divergent interests of the states would be addressed without compromising the economic interest of the units. As Indian States were already enjoying internal autonomy, no such solution was provided. A Committee under the leadership of Sir Harcourt Butler started investigating the relationship between the Paramount Power³⁰ and the

²⁸ Report of the Indian Statutory Commission (1930), vol. II, para 21.

²⁹ *Id.*, para 17.

³⁰ The Paramount Power means the Crown acting through the Secretary of State for India and the Governor-General in Council who were responsible to the Parliament of Great Britain. Until 1835, the East India Company acted as trustees of and agents for the Crown; but the Crown was, through the Company, the Paramount power. The Act of 1858 which put an end to the administration of the Company, did not give the Crown any new powers which it had not previously possessed. It merely changed the machinery through which the Crown exercised its powers.

Provinces on fiscal matter. The report also suggested about “Zollverein”³¹ while dealing with the financial and economic relation between British India and the States that:³²

Undoubtedly the ideal solution would be a Zollverein combined with the abolition of internal customs in the states themselves. There would then be free transit of goods over India once they had paid maritime customs. During Lord Reading's viceroyalty a suggestion for such a Zollverein was drawn up, but not put forward on the following lines:

- 1) The adoption of a common tariff administered by the officers of the Government of India even in the maritime States;
- 2) The abolition of all inland customs;
- 3) The division of the customs revenue among British India and different Indian States with the Indian Legislature in the determination of the policy.

The committee pointed out that due to various customs duties in the states, free flow of trade and commerce was not possible. In order to do away with these trade barriers, the committee suggested for the above recommendation though it was not unique. The above recommendation was made keeping in mind that the British India and the States are necessarily dependent one another although the suggestion put forward by the Butler Committee could not be implemented, because the majority of Indian states were not ready to join a custom-union. They feared that it might take away their internal autonomy. It also accepted the fact that the States are a heterogeneous body at varying stages of development, conservative and tenacious of traditions in an unusual degree.

Further, the second Round Table Conference³³ pointed out clearly in para 11 of the proceedings that in the general interest of economic unity and to facilitate trade, a tax would be imposed on the Federation as a whole in order to relieve the inhabitants of the States. The abolition of these taxes must therefore be left to the discretion of the States, to be effected in course of time as alternative source of revenue become available. Suggesting one such possible source is the terminal tax subject to examination by the Expert Committee.³⁴

The Government of India, on the other hand, have pointed out the difficulties which beset this proposal. Therefore, Sir Walton agreed that, if such taxes were levied, the proceeds should go to the provinces and the States. In any case both the rates and the general condition under

³¹ German customs union established in 1834 under Prussian leadership. It created a free-trade area throughout much of Germany and is often seen as an important step in German reunification.

The movement to create a free-trade zone in Germany received great impetus from economists such as Friedrich List, its most active advocate in early 19th-century Germany. In 1818 Prussia enacted a tariff law abolishing all internal customs dues and announced its willingness to establish free trade with neighbouring states. A decade later Prussia signed the first such pact with Hesse-Darmstadt. In 1828 a customs union was set up in southern Germany by Bavaria and Württemberg, joined in 1829 by the Palatinate; also in 1828 the central German states established a similar union, which included Saxony, the Thuringian states, electoral Hesse, and Nassau. In 1834 these were among the 18 states that joined in the Zollverein. Hanover and Oldenburg joined in 1854; the two Mecklenburgs, Schleswig-Holstein, Lauenburg, and Lübeck joined in 1867; and thereby all Germany outside Austria was included except Hamburg and Bremen, which adhered in 1888, 17 years after the establishment of the German Empire. Also available at: <https://www.britannica.com/topic/Zollverein> (last visited on 25 June, 2019).

³² *Infra* note 51 at para 83.

³³ Indian Round Table Conference, 7th Sept. 1931-1st Dec. 1931

³⁴ *Id.*, 955

which such taxes would be imposed should be subject to the control of the federal Government and the Legislature. Transit duties whether in the Province or in the federating States should be specifically forbidden. Also, levying of internal customs should be debarred by the Province.³⁵

Therefore, by debarring the provinces from levying internal customs it is in the general interest of the economic unity and to facilitate trade. Internal customs tariff which states may levy at their frontiers would be economically undesirable from the point of the view of federation as a whole.

In the Third Round Table Conference, it was stated that the general scheme of the federal finance outlined by the sub-committee of the Second Round Table Conference, the transfer to the Provinces of almost the whole proceeds of taxes on income (other than corporation tax) has subsequently been criticised on the ground that it jeopardizes the solvency of the federation.³⁶ It also suggested regarding legislative procedure that the legislation for the corporation tax and for the operation of special power should be entirely federal.³⁷ Legislation for the rates of Provincial surtax would be entirely provincial. All other legislation for the imposition of tax on income, whether affecting the basis of assessment or the rate of tax, would be uniform, and would be affected by the Federal Legislature with the leave of Governor General given after consultation with a council of representative of the units and of the Federal Government.³⁸

The aim was to provide all the Provinces start with a reasonable chance of balancing their budget, to afford them the prospect of revenue sufficiently elastic for subsequent development, to assure the solvency of the federation and to ensure that after an initial period the federal source of revenue shall be derived from British India and the States alike.

Finally, these conferences provided a frame for the future Constitution of India through a white Paper proposal published in 1933 which appointed a joint committee on Indian Constitutional reform to examine the working basis of the new Indian Constitution. Thus the joint committee aiming at economic unity and to protect inter-state trade and commerce recommended that:

It is greatly to be desired that states adhering to the Federation should, like the provinces, accept the principle of Internal freedom for trade in India and that the Federal Government alone should have the powers to impose tariffs and other restrictions on trade. Many States, however, derive substantial revenues from customs duties levied at their frontiers on goods entering the States from other parts of India. These duties are referred to as internal custom duties, but in many of the smaller states are often more akin to octroi and terminal taxes than to customs. In some of the larger States the right to impose them is specifically limited by treaty. We recognize that it is possible to deprive States of revenue upon which they depend on balancing their budgets and that they must be free to alter existing rates of duty to suit varying

³⁵ *Id.*, 956.

³⁶ Indian Round Table Conference 46 (third Session, 1932), para 1.

³⁷ Para 9 of the proceeding states that in addition to the normal powers of the Federal Government, special powers designed to meet such a situation as might arise if the federal budget, initially balanced by the amount retained from the Provinces, failed to remain balanced despite increased taxation upon existing sources and the development of new sources of revenue permanently allocated to the Federation. It is implicit in the scheme that the Federal Government should do its utmost to develop its permanent resources from the outset.

³⁸ *Infra* note 57 at 50.

condition. But internal custom barriers are in principle inconsistent with the freedom of interchange of a fully developed Federation, and we are strongly of the opinion that every effort should be made to substitute other forms of customs. The change must, of course, be left to the discretion of the States concerned as alternative source of revenue become available. We have no reason for thinking that the States contemplate any enlargement of the general scope of their tariffs and we do believe that it would be in their interest to enlarge it. But in any case we consider that the accession of a state to the Federation should imply its acceptance of the principle that it will not set up a barrier to free inter-change so formidable as to constitute a threat to the future of the Federation.

Though the Committee did not advise for complete abolition of internal customs duties which being important source of revenue but suggested to have milder approach in imposing such duties. Making its proposal on financial relations between the Centre and the units the committee re-emphasised that the Indian States should accept the “internal freedom for trade in India and that Federal Government alone should have the power to impose tariffs and other restrictions on trade.” The Report very succinctly highlights the adverse effect of internal custom duties on establishing a robust market at the federal level. It was suggested to look for an alternative to augment the requirement of revenue by the states in place of imposition of penalising internal duties. That internal custom has been a matter of concern for creation of open market in the pre-independence era.

The Government of India Act, 1935

The Government of India Act, 1935 was the result of four main key sources which are Simon Commission Report, discussions at the third round table conference, the white paper of 1933 and the Reports of the joint select committees. The Act of 1935 proposed to set up all India Federation comprising of the British Indian provinces and princely states. Regarding distribution of the legislative powers, the Act drew three lists of the entire legislative subject with 59 entries in List I³⁹, 54 entries in List II⁴⁰ and 36 entries in List III.⁴¹ On trade and commerce within the provinces, the tax entries were separate from general entries and there was no entry on tax in List III. None of the three legislative lists provided for power over inter-provincial trade and commerce. But Interprovincial trade and commerce could be regulated by the Governor-General under the residual powers, vested in him by section 104⁴² of the Government of India Act, 1935.

There was one most important clause which was introduced for the purpose of prohibiting certain restrictions on internal trade. For the first time in the constitutional history of India, a

³⁹ Matters enumerated in List I in the seventh schedule in this Act exclusively called the Federal Legislative List (s. 100(1)) of the Government of India Act, 1935.

⁴⁰ Matters enumerated in List II in the seventh schedule in this Act exclusively called the Provincial Legislative List (s. 100(3)) of the Government of India Act, 1935.

⁴¹ Matters enumerated in List III in the seventh schedule in this Act exclusively called the concurrent legislative list (s. 100(2)) of the Government of India Act, 1935.

⁴² The Governor General may by public notification empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the list in the Seventh Schedule to this Act, including a law imposing tax not mentioned in a such list, and the executive authority of the Federation or of the Province, as the case may be

provision was made for the protection of inter-provincial trade and commerce. The provision which provided for free movement of trade and commerce under the Government of India Act, 1935 was section 297 which constituted a limitation not only on the taxation power but also the trade and commerce power of the provinces.⁴³ The provinces were not only given powers over trade and commerce within the provinces but also taxation powers which in some measure, involved regulation of trade and commerce. They could put restrictions on inter-provincial trade. In order to prohibit the states from imposing restrictions harmful to economic unity and trade and commerce, a protection clause was necessary. This shows that the British Parliament wanted the free trade clause to constitute a limitation not only on the taxation power but also the trade and commerce power of the provinces.

Therefore, this section tries to achieve “as far as possible free trade within India” by imposing limitations on the legislative and executive powers of the provinces. Another provision of this Act which has some relevance to freedom of trade and commerce was section 298 which prohibited discrimination on the grounds of religion, place of birth, descent, colour or any of them in matter of carrying on any occupation, trade, business or profession.⁴⁴

These sections put fetters on the commerce power of the Provinces in two directions. It banned restrictions at the frontiers of the Provinces on the entry and export of goods. Further, as regards tariff-walls, it prohibited discrimination, in the taxation of goods, between goods manufactured and produced in the Province and goods not so manufactured or produced. It should be noted that this section applied only to Provincial Governments and Provincial Legislatures, while the Centre or the Native States did not come within the purview of this section. Thus, India was still lacking a free trade clause applicable throughout the territory of India.⁴⁵

The Act proved to be a watershed moment on integrated market. It initiated a process of constitutionalisation on barrier-free trade so that executive fiat would not be an obstacle for

⁴³ The provision of s. 297 was as follows:

1. No provincial Legislature or Government shall:
 - a) by virtue of the entry in the provincial Legislative List relating, to trade and commerce within the province, or the entry in that list relating to the production, supply and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from, the province of goods of any class or description;
 - b) by virtue of anything in this Act have powers to impose any tax, cess, toll or due which, as between goods manufactured or produced in the province and similar goods not so manufactured or produced, discriminates in favour of the farmer, or which, in the case of goods manufactured or produced outside the province, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality.
2. Any law passed in contravention of this section shall, to the extent of the contravention, be invalid.

⁴⁴ The provision of s. 298 was as follows:

- 1) No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the crown in India or be prohibited from acquiring on any occupation, trade, business or profession in British India.
- 2) Nothing in this section shall affect the operation of any law which-
 - (a) Prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land situate in any particular area, and owned by a person belonging to some class recognised by the law as being class of persons engaged in or connected with agriculture in that area, to any person not belonging to any such class; or
 - (b) Recognises the existence of some right, privilege or disability attaching to members of a community by virtue of some personal law or custom having the force of law.

⁴⁵ Shiva B. Rao, *The Framing of India's Constitution-A Study* 699 (Universal Law Publishing Company, New Delhi, 2004).

realisation of the benefit of large market. The provinces were restricted to enact discriminatory laws on the matter of tax on goods in relation to other provinces. Non-discriminatory taxes had laid down the foundation of cooperation between the provinces in the matter of trade and enabled the traders to look beyond the province. However, the Government of India Act 1935 had introduced several features which form the nucleus of our Constitution.

Freedom of Trade and Commerce since Independence

With the introduction of provincial autonomy in April, 1937, it was considered necessary to place this matter on a statutory basis. Accordingly, section 297 of the Government of India Act, 1935, prohibited Provincial Governments from imposing barriers on trade within the country; nor could they levy any tax, cess, toll or other due which discriminated between goods manufactured in one locality and similar goods manufactured elsewhere. On the other hand, this was far from ensuring freedom of internal trade throughout the sub-continent. Indian States could, and very often did, levy export and import duties at their frontiers, and some of them derived considerable revenue from this source.⁴⁶

A Committee was appointed to suggest an adequate solution to the problem of trade barrier on 29th August 1947. Perhaps, the Committee felt that the subject was of such vast importance that it should be considered by a separate sub-committee. The sub-committee after prolonged discussions put the protection clause under the heading of "Fundamental Rights" in Clause 10. While presenting the report of the Advisory Committee Sardar Vallabhbhai Patel, Chairman, pointed out that in dealing with that clause, they had taken into account, the fact that among Indian States depend upon internal customs for a good part of their revenue and that it would be responsible on the part of the Union to enter into an agreement with such States by which internal customs could be eliminated and complete free trade established within the Union.⁴⁷

The Interim Report under Clause 10 proposed the following arrangements:

Subject to regulation by the law of the Union trade, commerce and intercourse among the units by and between the citizens shall be free; Provided that any unit may by law impose reasonable restrictions in the interest of public order, morality or health or in an emergency;

Provided that nothing in this section shall prevent any unit from imposing on goods imported from other units the same duties and taxes to which the goods produced in the unit are subject;

Provided further that no preference shall be given by any regulation of commerce or revenue by a unit to one unit over another.⁴⁸

Commenting on the clause when the draft of the sub-committee's report was under consideration, Ayyar Alladi Krishnaswami suggested that:

- i) goods entering a particular unit from other units of the Union should not escape duties and taxes to which goods produced in the concerned unit itself were subject;
- ii) it must be open to a unit in an emergency to place restrictions on inter-State trade and commerce;

⁴⁶ *Ibid.*

⁴⁷ Interim Report of the Advisory Committee on Subject of Fundamental Rights 21 (1948).

⁴⁸ Draft Report, April 3, 1947. *Supra* note 45.

- iii) the freedom of trade guaranteed in the clause should specifically cover coastal trade; and
- iv) it should be clearly laid down that this right would not extend to non-citizens carrying on trade.⁴⁹

These suggestions were accepted by the sub-committee and incorporated in its report submitted to the Advisory committee on April 16, 1947. When the clause came up for consideration in the Assembly on May 1, two amendments were moved by Munshi. The first amendment sought to make the right of the units to impose reasonable restrictions on freedom of trade and commerce less qualified by deleting the word “reasonable”. The second amendment provided that the right of a unit to tax the goods coming from other units would only be exercised under regulations and conditions which were non-discriminatory. Both the amendments and the clause as amended thereby were adopted by the Assembly without much discussion.

The Draft Constitution of India, 1948 provided freedom of trade, commerce and intercourse in its article 16, which provided that subject to the provisions of article 244 of this Constitution and of any law made by Parliament, trade, commerce and intercourse throughout the territory of India shall be free. article 243 of the Draft Constitution prohibits discrimination between States while making any law or regulation relating to trade. Article 244 permits the State to impose similar tax on goods imported from other States and goods so manufactured or produced within the State and a reasonable restriction can be made on freedom of trade on the ground of public interest. Article 245 empowered Parliament to appointment an appropriate authority for the carrying out of the provisions of articles 243 and 244.⁵⁰ The Drafting Committee was of the opinion that it would be more appropriate to provide for the appointment of an authority by law instead of providing for an inter-State commission with limited powers as such a commission, if appointed with powers only to adjudicate disputes as to trade or commerce, might not have sufficient work to do.⁵¹

When the Draft Constitution was published and circulated for eliciting opinion, Alladi Krishnaswami Ayyar commented that the power of imposing reasonable restriction on inter-state trade envisaged in draft article 244 was so drastic in scope that it might practically nullify the freedom of trade secured under draft article 16, for the expression ‘in the public interests’ was vague and uncertain and could not be the subject of judicial review. The West Bengal Legislative Assembly also shared this view and pointing out that the provision was too wide, recommended the power of limiting the power of the States to impose restrictions on the power of trade and commerce. While B. N. Rao justified the retention of the provision on the ground that that it might be necessary for a State to restrict the freedom of intercourse with the inhabitants of a neighbouring State on the outbreak of an epidemic disease like plague.⁵²

⁴⁹ Ayyar Alladi Krishnaswami’s note on the Draft Report, April 14, 1947, Select Documents II, 4(v) 159-160, see *Supra* note 45 at 700.

⁵⁰ Art. 16 was retained in the Fundamental Rights Chapter in the Draft Constitution of February 1948 and art. 243-245 appeared under a separate heading “inter-State trade and commerce” in Part IX of the Draft Constitution dealing with relation between the Union and the States.

⁵¹ *Supra* note 45 at 702.

⁵² Committee and Suggestions on the Draft Constitution. Select Documents IV, 1(i) 328-31.

However, draft articles 243, 244 and 245 came up before the Assembly on June 12, 1949 but their consideration was held over on suggestion from T. T. Krishnamachari.⁵³ These suggestions were accepted on 8th September, 1949. Draft article 16 was put in a new Chapter, X-A, exclusively devoted to “trade, commerce and intercourse within the territory of India”. Its purpose, as Dr. Ambedkar explained, was to assemble under a single part all the provisions on the inter-state trade and commerce scattered in different parts of the Draft Constitution. Part X-A contained five new articles, namely, articles 274-A, 274-B, 274-C, 274-D and 274-E.⁵⁴ The new article 274-A virtually repeated the content of article 16 laying down the general principles of trade, commerce and intercourse; article 274-B empowered Parliament by law to impose restriction in the public interest; article 274-C prohibited Parliament and the State Legislature from making any law giving any preference to one state over another, or making any discrimination between one state and another, except when the Parliament found it necessary to do so to deal with a situation arising from the scarcity of goods in part of India; article 274-D vested in the State legislature the power to impose non-discriminatory taxes on good imported from other States and reasonable restriction on inter-state trade, commerce and intercourse in the public interest; and article 274-E provided that Parliament might establish an appropriate authority for carrying out the purpose of article 274-A to 274-D. the idea of the framers was that the proposed authority might be something like the Inter-State Commission in the United States. The article did not mention any such authority as it was thought desirable to give Parliament full freedom to establish such kind of authority as it might deem fit.⁵⁵

The new articles 274-A to 274-E stumble upon severe criticism. Thakurdas Bhargava considered any restrictions on the freedom of inter-state trade and commerce except in emergencies is derogatory to the very concept of that freedom. He suggested that the word ‘restrictions’ in article 274-B should be qualified by ‘reasonable’ so as to enable the judiciary to adjudicate on the reasonableness of the restrictions on inter-state trade and commerce that might be imposed by the Parliament in the public interest. By another amendment he sought to replace the phrase ‘in the public interest’ in article 274-B and article 274-D under which the Union and the State Legislatures could impose restrictions on the freedom of inter-state trade in the public interest- by what he called the more comprehensive phrase ‘in the interest of general public’. P. S Desmukh, who was critical of what he considered involved drafting, suggested that the entire question of trade and commerce, not only of the entire Union or in regard to any particular State or States, but so far as all States and their trade and commerce inter-se was concerned, should be subject to determination of policy in that regard by a future Parliament.⁵⁶

Replying to the criticism of Bhargava, T.T. Krishnamachari and Krishnaswami Ayyar dealt at length with the arguments. Krishnamachari said that regarding whittling down of discretion given to Parliament and State Legislature could not be done without rendering the future economic progress of the country well-nigh impossible. In this connection he referred to the experience of Australia, where section 92 of the Commonwealth Constitution, which guaranteed an omnibus right of inter-state trade and commerce, had stood in the way of many

⁵³ C.A.D. Vol. VIII, 819.

⁵⁴ *Id.*, Vol. IX at 1124.

⁵⁵ *Id.*, 1123-24.

⁵⁶ *Id.*, 1125-33

measures of economic reform undertaken by the Government. With regard to the suggestion of using 'reasonable' he said, such a change would open the flood gates of litigation over every fiscal policy of the Union Government.⁵⁷ The subject of freedom of trade and commerce again came up before the Assembly on October 13 and 16 when two more articles were proposed to be added i.e. article 274-DD and article 274-DDD⁵⁸ and article 16 was proposed to be deleted therefrom. The new article 274-DD sought to provide that any of the Indian States which was levying any tax or duty on inter-state import or export of goods might, by agreement with the Union Government, continue to do so for a maximum period of ten years, subject to the power of the President to terminate or modify such an agreement after a period of five years and subject to the consideration of the report of the Finance Commission constituted under draft article 260.⁵⁹

Proposing the deletion of article 16, Krishnamachari pointed out that the substance of the article having been covered by article 274-A, the former had become superfluous. Subsequently while revising the Draft Constitution as adopted by the Assembly, freedom of trade, commerce and intercourse was put in a new Chapter, viz. XA consisting articles 274A to 274DDD. When the final draft came before the Constituent Assembly the draft provisions of Part XA were reshaped and finally put in Part XIII consisting of articles 301-307, without any change in the scheme.

V. CONCLUSION

From the foregoing discussion, we can see that the period of ancient time and that following thereto was an age of economic self-sufficiency and all the rural centres were self-supporting. The scope of trade was very much occasional and limited. The great Indian epics clearly show the socio-economic relation between state and individual, and restrictions over trade by the state to make possible the all-round prosperity in the interest of all classes and their harmonious development.

It is also seen that the provision of freedom of trade exists in India from the establishment of the Indian federation, since, prior to it there was no scope for any provision of free trade in India. Although for the first time a full fledged federal structure was envisaged only under the Government of India Act, 1935, experimentation in that direction had already been started under the Government of India Act, 1919.

That trade has been a significant activity for building of a nation. It has led to centralisation of the power structure so that the unitary system should have greater role in controlling the economic activities of the regions. Gradually, under the imperial ruler, there was a proposition to enable the provinces to raise revenue with necessary control with the central government. In independent India, there was comprehensive framework designed with an idea to accord autonomy to the provinces with necessary power to the centre.

⁵⁷ *Id.*, 1138-43.

⁵⁸ Art. 274-DDD laid down that the new art. 274-A to 274-C, which enunciated the general principle of freedom of trade and commerce and prohibited the Union and the State Legislatures from discriminating between one State and another, would affect the provision of any existing law except in so far as the President might by order otherwise provide.

⁵⁹ The corresponding provision in the Constitution is art. 280.

The constitutional arrangement made in the 1950 Constitution promises free trade within the territory of India without compromising the autonomy of the provinces. The autonomy accorded to the provinces play a significant role in improving quality of life of the people. It facilitates the provinces to commit to the responsibility assigned under the Constitution with the necessary support of the Centre. Therefore, any compromise with the idea of common market as envisaged in the Constitution would have adverse impact upon the constitutional goals of better living and freer trade in the country.

The aim to become a prominent player in the global economy could be achieved by striking out the discriminatory practices related to trade amongst the provinces in India. Also, the provinces need to be accorded autonomy to design the trade policy so that they could fulfil the responsibilities entrusted in the Constitution. The autonomy would give necessary leeway to the provinces to attract investment and encourage the mobility of human resources. The abuse of autonomy would adversely affect the benefit of the big market. Therefore, there is a need to integrate internal market with necessary autonomy to the provinces in order to make quality of life better for millions living in the country.



GEOGRAPHICAL INDICATIONS: AMBIGUITY IN LEGAL PROVISIONS IN INDIA

*Gargi Chakrabarti**

Abstract

Geographical indications is an intellectual property which is unique in nature, as it is not a private right, like patent, trademark, copyright or design right, but a community right; it is owned collectively by all the producers. The fundamental concept behind geographical indications is that the product quality which is coming from the specific geographical location, either due to the geographical factors like soil quality, temperature, humidity etc, or due to the traditional or cultural factors, cannot be replicated anywhere else. The Geographical Indications of Goods (Registration and Protection) Act, 1999 (hereinafter, GI Act 1999) has been passed by the Government of India. Indian legal regime for geographical indications is unique in nature as it includes different categories of goods into its purview, like natural goods, agricultural products, food stuffs, manufactured goods and the handicrafts. The applicants are either government institutions or association of producers, but these are clearly suggesting that if the association of producers become applicant of the geographical indications and involved actively in the supply chain management, the utilization of geographical indications can be maximized. It may be inferred that when the producers themselves are involved as applicant into the process of registration of geographical indications, they can create the better value chain and can maintain it in post-registration phase, hence they gain maximum economic benefit from the commercial utilization of their goods. There are other ambiguities in the GI Act. The use of different terms like ‘producer’, ‘registered proprietor’, ‘authorised user’, etc are used randomly in the Act, rule and the Manual of geographical indications in India and also their inclusion in Part A and Part B of the Register; which is the source of huge confusion. This paper will discuss the key aspects of these source of ambiguity, will look into the applicants in the GI applications and their list of authorised users, analysing the applications to look into the root cause of the confusion, and will try to come up with suggestions and recommendations as possible solution which can be forwarded to the appropriate authority for implementation.

I. INTRODUCTION

Geographical indications is an intellectual property which is unique in nature, as it is not a private right, like patent, trademark, copyright or design right, but a community right; it is owned collectively by all the producers. Like trademark it used to provide protection to the products and its reputation; but unlike trademark, geographical indications identifies a product originating from a particular region, and the characteristics and particular quality of the product is attributable to that geographical location. The fundamental concept behind geographical indications is that the product quality which is coming from the specific

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geographical location, either due to the geographical factors like soil quality, temperature, humidity etc, or due to the traditional or cultural factors, cannot be replicated anywhere else. That makes the quality and characteristics of the specific product unique, and that is protected under geographical indications. Provisions of geographical indications under different international agreements, provisions of European Union and Indian statute will be considered and the ambiguities in Indian legal regime will be discussed, with specific suggestions and recommendations to resolve those ambiguities.

Protection of Geographical Indications in International Agreements

The TRIPS Agreement sets out the standard of protection for all intellectual property rights. But prior to the TRIPS Agreement some international agreements had provisions related somehow to geographical indications. The Paris Convention, 1883 was the first international agreement to mention specific provisions for geographical indications, it included the geographical indications as a subject of industrial property; but instead of using the term 'geographical indications' it used the term 'appellations of origin' which was one of the categories of indication of source of the goods. The Madrid Agreement, 1891 under the Paris Convention was the first international agreement which provided the specific provisions for false and deceptive indications of source. The Lisbon Agreement, 1958 was dedicated for the protection of appellations of origins. The TRIPS Agreement, 1995 sets out the minimum standard of protection for geographical indications; and for the first time the quality, reputation and other characteristics of the goods were connected with the geographical location.

II. PROTECTION OF GEOGRAPHICAL INDICATIONS IN INDIA

The Geographical Indications of Goods (Registration and Protection) Act, 1999 has been passed by the Government of India. The said Act was passed with the object of providing protection, as a Geographical Indication, to any agricultural goods, natural goods or manufactured goods or any goods of handicraft or goods of industry including food stuff. Indian legal regime for geographical indications is unique in nature as it includes different categories of goods into its purview, like agricultural products, food stuffs and the handicrafts. Protection of traditional cultural expression is not yet available in India, hence the traditional cultural goods and handicrafts (including textiles, paintings, artefacts, jewellery etc) have got a platform of protection in this way. Geographical indications, being a community right, seem to be very effective in providing economic benefit for the group of producers and the upliftment of brand value of the products. But if the success stories of geographical indications are analyzed, two different sets of pictures will be found, which are poles apart. The success stories of Darjeeling tea, *Makrana* marble, *Kesar* mango or Nasik grapes and Nasik valley wine show the expected increment in export and profit, and establishment of brand value after protection of geographical indications; on the other hand stories of textile products like *Bagru* print, *Sanganeri* print, or *Kota Doria* are much meagre and hopeless than the other stories. One significant difference in these cases is very specific, i.e. the applicant for geographical indications in Darjeeling tea, *Makrana* marble, *Kesar*

mango or Nasik grapes and Nasik valley wine are group of producers themselves; but the applicant of geographical indications of certain products is the government departments, as in these cases there is no association of producers and the producers are not equipped enough to get into the legal process of registration of geographical indications. According to the statutory provisions, “any association of persons or producers or any organization or authority established by or under any law for the time being in force representing the interest of the producers of the concerned goods, who are desirous of registering a geographical indication in relation to such goods shall apply”¹ for geographical indications. Indian farmers, artisans, and other producers are not always well versed with the legal provisions and complex application procedures, so the provision is kept in the statute that “any organization or authority established by or under any law for the time being in force representing the interest of the producers of the concerned goods” can apply on behalf of the producers. In reality there exist three categories of people who is found to be involved as the applicant, namely the actual producers of good (as in case of *Thewa Art* and *Kesar mango*), the Association connected with producers (like Tea Board, or *Makrana marble*) and non-connected entities like governmental departments. These examples are clearly suggesting that if the association of producers become applicant of the geographical indications and involved actively in the supply chain management, the utilization of geographical indications can be maximized. It may be inferred that when the producers themselves are involved as applicant into the process of registration of geographical indications, they can create the better value chain and can maintain it in post-registration phase, hence they gain maximum economic benefit from the commercial utilization of their goods. But when any governmental department come up as an applicant for geographical indications, the actual producers remain uninvolved with the process and in such cases those producers fail to establish proper value chain in post-registration phase and cannot gain proper economic benefit out of it. So, it is better for the government not to get involved in the process as applicant to help the producers; the case study of *Bagru print*, *Sanganeri print*, or *Kota Doria* is suggestive of the fact that in such cases the producers get disconnected and finally the utilization of the intellectual property right does not provide them enough economic incentive.

Here ‘producer of the goods’ term is used to comprehend the group of people or the community who are producing the goods in concern, but there is a gross confusion in the terminology used in the statute of geographical indications in India, and the demarcation of Part A and Part B of register for geographical indications. Different terms like ‘producer’, ‘registered proprietor’, ‘authorised user’, etc are used randomly in the Act, Rule and the Manual of geographical indications in India; which is the source of huge confusion. According to section 2 of The Geographical Indications of Goods (Registration and Protection) Act, 1999, following are the definitions of each term:

“Producer” in relation to goods, means any person who if such goods are agricultural goods, produces the goods and includes the person who processes or packages such goods; if such goods are natural goods, exploits the goods; if such goods are handicraft or industrial

¹ The Geographical Indications of Goods (Registration and Protection) Act, 1999, s. 11(1).

goods, makes or manufactures the goods, and includes any person who trades or deals in such production, exploitation, making or manufacturing, as the case may be, of the goods;

“Registered proprietor”, in relation to a geographical indication, means any association of persons or of producers or any organisation for the time being entered in the register as proprietor of the geographical indication; and

“Authorised user” means the authorised user of a geographical indication registered under section 17. According to section 17 “any person claiming to be the producer of the goods in respect of which a geographical indication has been registered under section 16 may apply in writing to the Registrar in the prescribed manner for registering him as an authorised user of such geographical indication.”²

Registration of geographical indications is for 10 years.³ During the end of that 10 years time period, the Registrar shall send a notice to the ‘registered proprietor’ or the ‘authorised user’, as the case may be, regarding the date of expiration and renewal of registration.⁴ In the similar way, the terms ‘registered proprietor’ and ‘authorised user’ are used together in various other sections of the statute, like in section 21 (rights conferred by registration) and section 22 (infringement). In the GI Rule, in several places the terms ‘applicant for registration of a geographical indications’ or ‘an authorised user’ are mentioned in different perspectives, such as in rule 15 for particulars of address of applicants and other persons, rule 16 for statement of principal place of business in India, rule 17 for address for service, rule 18 for address for service in application and opposition proceedings, rule 25 for statement of user in application and rule 29 for transliteration and translation. In other places ‘registered proprietor’ is used in rule 53 where registration is discussed. According to the definition, the ‘registered proprietor’ is the producer or association of producers who used to produce (in case of agricultural goods like Darjeeling tea and *Kesar* mango) or make/manufacture (in case of handicrafts or industrial goods like *Thewa* art, *Bagru* print and *Kathputli*) or exploits (in case or natural goods like *Makrana* marble) the goods. ‘Registered proprietor’ may be involved in the process of registration of geographical indications as the applicant or someone else can be the applicant on their behalf. On the other hand, ‘authorised user’ by the literal meaning should be the ‘users’ of registered geographical indications with permission from the ‘registered proprietor’ or the ‘right holders’. Part A of the register of geographical indications contains particulars of the registered geographical indications and Part B of the register contains the particulars of the registration of authorised users.⁵ According to literal understanding the ‘registered proprietors’ or ‘producers’ will produce or manufacture or exploits the goods in the respective geographical location, they may do the packaging on their own, they may also do the marketing by themselves (like Tea board); in such instances the retailers of packaged goods including end users should be the ‘authorised users’ and should be incorporated in Part B of the register. There may be situations where ‘registered proprietors’ or ‘producers’ will produce or manufacture or exploits the goods in the respective geographical location, but they may not be doing the packaging and marketing

² *Id.*, s.17(1).

³ *Id.*, s. 18(1).

⁴ *Id.*, s.18(4).

⁵ *Id.*, s. 7.

and may have given the packaging and marketing responsibility to some third party, in such cases any other entity doing the packaging and marketing and the retailers of packaged goods including end users should be the 'authorised users' and should be incorporated in Part B of the register. In both instances, however, there is clear cut demarcation between 'registered proprietors' or 'producers' and the 'authorised users'. In practicality, the 'producers' of the registered geographical indications are all listed in Part B of the register as the 'authorised users' and the certificate provided to them as 'authorised users' after the registration. This is evidently seen in the geographical indications workshop in National Law University, Jodhpur, Rajasthan where all Rajasthan state GI holders had come with their certificates; it was jointly organized by IPR Chair National Law University and Department of Science and Technology, Government of Rajasthan. This certificates and the Part B register is ambiguous and creating a lot of confusion. Moreover, the GI holders require huge capacity building regarding their legal rights and the advantages of registration of geographical indications, otherwise they are disconnected and not able to utilize their rights to gain economic incentive.

III. SUGGESTIONS AND RECOMMENDATIONS: THE WAY FORWARD

- i. Government departments should not come forward as an applicant to help the producers of the geographical indications, instead the relevant departments should take initiative to do the capacity building in such a way that the producers or their association can be well versed with the legal formalities and procedure of application and registration of geographical indications. In that way they will be involved in the whole process, they can find their way out to establish the value chain, and hence can utilize their legal rights to maximize the economic benefit in post-registration period.
- ii. Ambiguity in the Part A and Part B of the register should be rectified with an immediate effect. Part A of the register should include the 'registered proprietors' or 'producers' who are the right holders of geographical indications. Part B of register on the other hand should include the 'authorised users' who after getting permission will be involved in the packaging and/or trading and marketing, including the end users (e.g. small retailers). Producers should do the production on their own, also preferably the packaging to maintain the characteristics and the specified quality of the product; if production also handed over to the third party, then chances of dilution of quality will be there, and products will lose their authenticity and credibility. Empirical study done with GI holders in Bihar, Maharashtra, and Rajasthan and it was found that the holders in all places feel threatened by the producers outside the community and worried about the diluted quality of products produced by such producers. Quality assurance will be much more for the GI protected products by limiting the production of goods by the original GI holders. Statutorily, the 'registered proprietors' or 'producers' and the 'authorised users' have co-equal rights in terms of obtaining the

relief in respect of infringement of the geographical indications⁶ and that will be helpful in gaining maximum commercial benefit.

- iii. Packaging of the goods under registered geographical indications are very important and should be done under strict supervision with all relevant information regarding the mention of authenticity of the product. All 'authorised users' should carefully carry out the business with properly packaged goods and should showcase the registration certificate of the relevant goods under registered geographical indications. Packaging should be ideally done by the 'registered proprietors' or 'producers' themselves, or it should be done under strict rules and guidance, if it is done by any third party. European Union established use of mandatory logos for 'Protected designation of Origin' (PDO) and for 'Protected Geographical Indications' (PGI) for agricultural products and the foodstuffs.⁷ Similar kind of concept can be introduced for the Indian registered geographical indications, which will be mandatorily appeared in the packaging, and which will help in differentiating the registered geographical indications from the fake/counterfeit products. With this system, not only producers and authorised users will be benefitted, but also the customers will be able to get the authenticated registered geographical indications products.
- iv. Quality management process is another check point which is done very carefully by European Union for their registered geographical indications. In European Union, joint management system is made by private and public stakeholders to ensure the quality of the concerned products. The association of producers are primarily responsible for defining the content of the goods under registered geographical indications; control bodies (may be private or public) are responsible for quality check and verification of the compliance; finally competent authorities from public sector of the member state are responsible for the official control of the reputation and authenticity of the goods under registered geographical indications.⁸ Random quality check is done for maintenance of the quality of the products under registered geographical indications. Similar mechanism can be started by the state governments in India, for which again the capacity building at all level is essentially required, right from the grass root level.
- v. It is difficult to find out all the producers of certain goods undergoing registered geographical indications, more so in cases of goods of handicrafts and artefacts of traditional cultural expression. In those circumstances identifiable producers need to be given quite some time to identify all the other producers. When all the producers are identified, who are pioneers in their field, should be involved into making the association of producers. As is already mentioned, all of the members of such

⁶ *Id.*, s. 21.

⁷ The rules regarding the PDO and PGI logos were defined in Commission Regulation (EC) n°2037/93 which has been replaced by Commission Regulation (EC) 1898/2006 (art.14 and annex V). This Regulation was modified by Commission Regulation (EC) N°628/2008 which introduced a different colour code in order to make easier for consumers to distinguish between the two concepts, Protected Designation of Origin (PDO) and Protected Geographical Indication (PGI).

⁸ Thual D. & Lossy F., Q&A Manual, European Legislation on Geographical Indications, 2011, *available at*: www.ipr2.org (last visited on December 10, 2019).

vi. association should be included in Part A of the register as the right holders. Then Part B of the register, as also mentioned earlier, contains the list of authorised users, who are involved into the packaging and/or marketing, in both domestic as well in international market. GI being a community right hence non-transferrable, so the ‘authorised users’ cannot be given license or assignment from the holders; in that case if they are engaged into packaging and/or marketing the issue of profit sharing is uncertain. No statutory guidance is given in the Act, or in the Rule or in Manual of GI, but for all practical purposes the specific legal provision of benefit sharing is urgently required in such cases. Percentage of benefit sharing may vary in case-by-case basis, but some guidance is required in the Rule or in the Manual which can be followed during such commercial exploitation of GI protected goods. Not only that, IP valuation of GI products also to be done, before fixing the benefit sharing in each case. Traditional cost method or market method of valuation may not be useful for valuation of goods under GI, which is an unconventional IP; a more complex method like intrinsic value method may be helpful for GI valuation. Economic certainty for the producers can be ascertained by this way for the GI holders, and the actual holders, who has nurtured the process may be for hundred years, will be benefitted maximally.

India is a huge multi-cultural country with more than 300 registered geographical indications, and with many more goods with the potential for getting registered geographical indications. The advantages of registered geographical indications are many fold, if the aggressive marketing can be done like trademark protected products, the economic benefit for the registered geographical indications holders will be immense. The involvement of associations of producers with proper capacity building will ensure the proper establishment of value chain system. Involvement of relevant government departments is essential for necessary amendments in the legal regime as well as formation of quality control bodies for ensuring the characteristics and authenticity of the goods under registered geographical indications. Promotion and awareness of registered geographical indications is very much needed, along with that provision of all the above mentioned factors like demarcation of Part A and Part B of register, management of systematic value chain, establishment of quality control mechanism, IP evaluation of goods under registered geographical indications, and benefit sharing mechanism, together will create the holistic development of registered geographical indications.



FROM CIVIL DEATH TO CIVIL LIFE: THE CRISIS OF LEGAL AID FOR IMMIGRANTS AROUND THE WORLD

Shreya Bansal* & Amita**

Abstract

There is an enormous unmet need for immigrant legal aid in the United States. Demographic changes over the past decades have forced a strong connection between the rights of the immigrants and the legal aid or the legal services as a policy and practice. Legal aid of immigrant is in crisis. The immigrants not only suffer from the same range of potentially devastating legal problems as citizens—eviction, fraud, discrimination, and domestic abuse—but also face a uniquely draconian penalty reserved for them alone: deportation. There is an enormous unmet need for immigrant legal aid in India. There is a need to expand immigrant access to counsel. There is a need of anatomizing some of the socio-economic and legal constraints faced by immigrants in India by dividing them into three different categories- illegal immigrants, legal immigrants, and refugees to work out two issues based on needs and requirements of different categories of immigrants; first, what are the legal aid requirements of immigrants and whether they are entitled to get legal aid. Second, whether legal immigrants are entitled to get legal aid in cases of refusal of citizenship and how far this is possible keeping in view section 14 of the Citizenship Act, 1955. As there is a turnaround in the human rights law at international level, hence, there is a need to study the international perspective and also to draw parallel with the Indian Law which may suit the Indian legal fabric. Therefore, it is the ripe time, as the tremendous and harmful effects of immigration enforcement and anti-immigrant policies around the world requires the immediate attention towards providing legal aid to the mixed-status immigrant families, therefore, avoiding pervasive and intense trauma and hardship faced by them. However, the step towards providing legal aid to immigrants would be a long-drawn process which would require specific legislation, discussions as to the range of supports required, possible risks and a comprehensive oversight mechanism. This is just the starting point of the debate – there is yet a long way to go and a lot to achieve.

I. INTRODUCTION

“The way a government treats refugees is very instructive because it shows you how they would treat the rest of us if they thought they could get away with it”

--Tony Ben¹

Immigrant legal aid is in crisis. Poor immigrants not only suffer from the same range of potentially devastating legal problems as citizens - eviction, fraud, discrimination, and domestic abuse²—but also face a uniquely draconian penalty reserved for them alone: deportation. According to the 2001 census, around 6,166,930 people migrated to India from other countries, based on place of birth. As per the last place of residence, the number came

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¹ Former Member of the European Parliament.

² Andrew F. Moore, Fraud, “The Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants”, 19 *Geo. Immigr. L.J.* 1-2 (2004).

out to be 5,155,423.³ India is amongst the 10 countries with the largest immigration in the world, a significant number of which is illegal. For a nation which is largely made up of old immigrants, as observed by Markandey Katju and Gyan Sudha Misra, JJ., denying basic rights to the immigrants isn't what the nation stands for.⁴ At present, the Legal Services Authorities Act, 1987 fails to secure the rights of the immigrants. The preservation of the legitimate interests of such people must be considered in consonance with the cultural fabric of India. This can only be achieved when they may receive adequate protection of our rights, a thought so recognized by the Hon'ble Apex Court in *The Railway Board v. Chandrima Das*,⁵ and countless judicial precedents eschewing a similar strain of rights. Presently, there is no specific provision of the Act to provide foreigners, grappling with Indian citizenship, the privilege of a good legal defense in the court of law. A provision in the law guaranteeing the same shall be manifestly allowing for the acquisition of citizenship for well-meaning people living within the territory of India and similarly grant them the rights that are deservedly, universal.

The question of citizenry resolves itself over long periods of time, especially when pertaining to the acquisition of citizenship *via* naturalisation. But an even bigger preliminary issue faced by them is the provision restricting their access to courts in the very first place under section 14 of the Citizenship Act, 1955. To balm the wounds of those embroiled in these long legal battles, an amendment should provide for free legal aid and mark the way for harboring India's identity as a safe haven for immigrants.

The research paper thus employs the applied research methodology to work out two issues based on needs and requirements of different categories of immigrants; first, what are the legal aid requirements of immigrants and whether they are entitled to get legal aid. Second, whether legal immigrants are entitled to get legal aid in cases of refusal of citizenship and how far this is possible keeping in view section 14 of the Citizenship Act, 1955. For this purpose the paper is divided into three parts; the first part gives a broad overview by briefly discussing the history and the of the of the problems they face; the second part inquires into the adequacy of some of the provisions; the final part lists out the recommendations keeping in view the international perspective and the Indian scenario.

II. THE HISTORICAL EVOLUTION OF LEGAL AID FOR IMMIGRATION IN INDIA

Historically, India has never been averse to the idea of providing legal aid. It has, in fact, been a part of our cultural fabric since the Vedic age. India has viewed a person's ability to gain access to court as a fundamental element of our democracy.

Vedic Period

The origin of Vedas can be traced as far back as the 1500 BCE. It started when a large group of nomads known as the Aryans, crossed into the Hindu Kush Mountains, thus becoming part of one of the largest migration movement. It is nothing short of an irony that how a nation whose earliest known history bespeaks of immigration shall be so indifferent to their cause.

³Census of India 2001 report, *available at*: at http://censusindia.gov.in/Census_And_You/migrations.aspx (last visited on December 4, 2017).

⁴*Kailas v. State of Maharashtra* (2011) 1 SCC 793.

⁵2000 (2) SCC 465.

The source of all knowledge in India is considered to be derived from Vedas. They hold so much importance that this 3500 year old document is still referred to in all social, economic, and legal aspects. It is in Vedas itself that we find the traces of elements of legal aid. In the *Rig Veda* it is provided that aid and assistance should be provided in the form of strength and monetary help to those fearing or facing attacks. This is considered a form of 'danna'.⁶

Medieval Period

Vakils were appointed and directed to give free legal aid and advice the poor free of cost on any legal issue. This practice gained momentum during the reign of Shahjahan and Aurangzeb who created a special position for such advocates and they were known as *vakil-e-sarkar* or *vakil-e-sharai* and these appointments were made by the Chief *Qazi* or the Chief Justice.⁷

Vikramaditya Period

Vikramaditya has gone down in history as the king who uprooted cruel justice system and introduced, for the first time, legal aid known in the modern sense of the term. The judges of the highest order were paid as much as five thousand silver coins and were also given a furnished home free of charge. There existed an advanced law of administration similar to the one prevalent in modern India and the common man did not have to spend a penny for seeking justice. The panchayat system ensured that justice reached the doors of the poorest.⁸ Never in Indian history has the claim for justice by a citizen distinguished from that of an alien. It is merely a modern construct which is amusing since there has never been a more dire need than today for a system of justice that doesn't differentiate.

III. CONCEPTUALISING LEGAL IMMIGRANTS, ILLEGAL IMMIGRANTS AND REFUGEES

Before an argument is made in favor of or against immigrants it is necessary to define the line that separates their different categories. Immigrants predominantly belong to three different categories: Legal immigrants, illegal immigrants, and refugees. Each has their own rights in the international and domestic sphere, some of which have their origin in law and some in social justice. Since they have different rights they have different aspirations from the law. Neither immigrant nor refugee has been defined under Indian statutes. Terms such as "aliens" and "foreigners" are used as a blanket term to define all three categories of people:

Legal Immigrants

In the most ordinary words, legal immigrants can be defined as any person who come to a country, not being a citizen of that country, carrying valid travel documents. Such individual's legal status extends only so far as the validity of his/her travel documents and a continuation of settlement in the country any longer than authorized, no matter how short, shall fall in the realm of illegality. The *Oxford dictionary* defines it as "A person who has been

⁶ Govind Singh, *Hindi Translation of Important Parts of Rig Veda* 31 (Sadhna Pocket Books, New Delhi, 1992).

⁷ Raj Kumar (ed.), *Essays on Legal Systems in India, Judicial Systems in Medieval India* 41-62 (Discovery Publishing House). ; Report of the Expert Committee on Legal Aid, 1973, *Processual Justice to the People*

⁸ Evolution, Growth at Development of the Legal Aid System in India, Ch. 5 available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/12650/9/09_chapter%205.pdf (last visited on December 4, 2017).

granted official permission to reside in a foreign country; opposed to illegal immigrant."⁹ Legal immigrants pose no immediate threat to the nation and are their entry is therefore encouraged as it aids in the GDP growth and overall economic development of the country.

Refugees

Article 1 of the Convention Relating to the Status of Refugees, 1951 defines the term “refugee” as any person who has

a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Illegal Immigrants

The reason that so little has been done to counter illegal immigration more efficiently, while simultaneously reinforcing respect for basic human rights of immigrants, is because of the prevalence of certain myths amongst the public and the parliamentarians alike, the most common of them, which makes people averse to the idea of allowing immigrants into a country is that immigrants do not pay taxes and still get benefits. Undocumented immigrants don't pay taxes but still get benefits. On the contrary, all immigrants, whether legal or illegal pay indirect taxes and many illegal immigrants even pay income tax, even though they can't benefit from most Central and State programs. Due to prevalent mistrust and no adequate data available there's a false belief amongst the people that illegal immigrants do not pay taxes. *Au Contraire*, illegal immigrants pay taxes even though they are not eligible to claim and social or economic benefits.¹⁰

Donald Trump's attempt to reinvent the immigration laws in America is well-known. His recent attempt to tighten border security courted a controversy resulting in worldwide debate; the main takeaway from this debate on illegal immigration is that its effect on economy is actually a sham. Most economists have agreed that illegal immigration is neither beneficial, nor harmful to any significant degree. For example, the Bangladeshi immigrants in the north-east of India have played their part in the rise in agricultural productivity. Problem arises because of State's inability to collect taxes. But a man cannot be made to pay for the incompetence of the Government. With all the resources at their disposal the prerogative is theirs alone.

⁹ English Oxford Living Dictionary, *available at*: https://en.oxforddictionaries.com/definition/legal_immigrant (last visited on December 4, 2017).

¹⁰ Alexia Fernández Campbell, “Trump says undocumented immigrants are an economic burden. They pay billions in taxes”, *available at*: <https://www.vox.com/2018/4/13/17229018/undocumented-immigrants-pay-taxes/> (last visited on December 4, 2017).

IV. THE CURRENT STATE OF IMMIGRANT LEGAL AID AT GLOBAL LEVEL: EXCEPTION AND ACCOMODATION

None of the enactments in India make any distinction between the different categories of immigrants, thus putting well-meaning immigrants at risk of arrest by the immigration authorities and of their prosecution if their entry into India is found to be devoid of a valid passport or travel documents. Once a refugee is detained by the authorities for illegal entry into the country he is taken to the police to register a First Information Report against him. At this stage the individual may be forced to deport if found guilty. Alternatively, he may be held back for interrogation until the authorised officer arrives at a final decision with respect to a plea for asylum. The Registration of Foreigners Act, 1939 under section 5 provides for a penalty of imprisonment of up to one year or with a fine extending up to one thousand rupees or with both.¹¹

Since a majority of the immigrants coming to India are poor they do not have a strong enough economic footing to pursue a legal remedy in case something was to transpire resulting in some injury. So, effectively, if an immigrant were to fall victim to rape they would be at the mercy of the State or an advocate to take notice of their case so as to approach the court or be economically sound enough to pursue the case themselves. Attacks against African nationals in India is not something that's not heard of. March, 2017 itself witnessed attack on several African nationals in Noida. Before that, in 2014, an official himself led a mob attack against African women.¹²

In 2015, 365 cases of crimes were reported against foreigners. Maximum cases were reported under thefts accounting for 61.1% (223 out of 365 cases) followed by assault on foreign woman with intent to outrage her modesty (23 cases), forgery (15 cases), rape (12 cases), robbery (10 cases) and cheating (9 cases).¹³ These figures are, of course, not accurate representation of the true accounts since a large majority of these cases are never reported. The report also does not disclose any data on the number of cases of murders or homicides or of grievous hurt any many other offences. But the absence of such data cannot be concluded to mean the absence of such cases.¹⁴ An immigrant who has been forced to deport, or who has been refused citizenship has no right against such decision of the authorities who can dismiss an application without even giving any reason.¹⁵

This situation is further complicated by institutionalised racial and cultural biases. New immigrants face the additional burdens of language barriers that often lead to misunderstandings, a lack of knowledge of the legal system and their rights in it.

¹¹ S. 5: Any person who contravenes, or attempts to contravene, or fails to comply with, any provision of any rule made there this Act shall be punished, if a foreigner, with imprisonment for a term which may extend to one year or with fine which may extend to one thousand rupees or with both, or if not a foreigner, with fine which may extend to five hundred rupees.

¹² J. Balaji & Kritika Sharma, "FIR against 'unknown persons' for raid on African women", *The Hindu*, January 19, 2014.

¹³ National Crime Records Bureau, Ministry of Home Affairs, Compendium on Crime against Foreigners, Crime in India, Chapter-25, 2015.

¹⁴ Initiative on Rohingya Refugee, Human Rights Law Network, *available at*: <http://www.hrln.org/hrln/refugee-rights/the-initiative-.html>, (last visited on December 4, 2017).

¹⁵ Citizenship Act, 1955, s. 14

V. INADEQUATE PROVISIONS IN INDIA: LEGAL SERVICES AUTHORITIES ACT, 1987 READ WITH ARTICLE 39A

Every year a plethora of changes are made to the laws in India, new statutes are added, old statutes are made redundant, amendments are introduced, add to that the judgments of the apex Court interpreting and reinterpreting the laws, even legal professionals have a hard time keeping themselves abreast with these changes. Then what about the poor, ignorant, uncared for 'little Indians'?¹⁶ If we read this observation one step ahead, it is even more difficult for an immigrant to be well versed with the laws of this land. Ignorance of law may not be an excuse when a person is guilty of its violation, but their ignorance cannot become an excuse for someone else to violate the law.

The Constitution (42nd Amendment) Act, 1976 added a significant provision which is article 39A of the Constitution of India.¹⁷ The use of the word "citizen" instead of "person" makes it clear that article 39A is applicable only so far as citizens are concerned. Since, the Legal Services Authorities Act, 1987 flows from this article, immigrants cannot be read into section 12 by necessary implication. This should also be avoided since the legal aid requirements of immigrants are different from citizens given that immigrants are not entitled to all the rights to which a citizen is entitled.

The rulings of the Apex Court have also limited the ambit of article 39A to citizens only when read with article 21 which is applicable to citizens as well as non citizens alike. This can be inferred from the ruling in the case of *Manoharan v. Sivarajan*.¹⁸ However in *NHRC v. State of Arunachal Pradesh*¹⁹ the Apex Court recognized a foreigner's right to life guaranteed under article 21 which could not be violated by an act of the Government. This was a case where the Government exercised its absolute right to expel a foreigner but such cases of forced eviction were held to be violative of article 21.²⁰

VI. LEGAL AID: INTERNATIONAL PERSPECTIVE

Canada

Those people detained in matters related to immigration have a right to be represented by a counsel or receive legal aid if they qualify for the same. Such persons have to be informed about legal aid services available to them.²¹

¹⁶ P. Leelakrishnan, "Access to Legal Service and Justice", 6 *Cochin University Law Review* 473-483(2017).

¹⁷ Constitution of India, art. 39A provides for equal justice and free legal aid— The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

¹⁸ (2014) 4 SCC 163.

¹⁹ (1996) SCC (1) 742.

²⁰ *Louis De Raedt v. Union of India*, MANU/SC/0422/1991.

²¹ Canada Border Services Agency, "Information For People Detained Under The Immigration And Refugee Protection Act" 2, available at: <http://www.cbsa-asfc.gc.ca/publications/pub/bsf5012-eng.pdf> (last visited on December 4, 2019).

France

France recognized the right to an attorney as a basic principle as far back as in 1976.²² This right is also guaranteed under European Convention on Human Rights.²³ French law allows a person to apply for financial assistance if such person does not have the economic standing to hire a lawyer and does not differentiate between a citizen and a non-citizen.

Germany

The right to legal representation is guaranteed to everyone and not just German citizens by application of rule of law, known as *Rechtsstaatsprinzip*. This principle has found its way into the German Basic Law in article 2.²⁴

South Africa

The South African Constitution provides the right to access to courts to every person whether citizen or immigrant²⁵. Clause (1) of article 34 reads as follows:

(1) Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or tribunal or forum or where appropriate, another independent and impartial court, tribunal or forum.²⁶

United Kingdom (UK)

UK's Legal Aid Agency provides free legal aid to those embroiled in matters of immigration and do not have enough means to seek a professional legal assistance.²⁷

United Nations

The United Nations too supports the cause of legal aid. It regularly makes recommendations on how to empower and strengthen the capacities of rights holders, particularly for the poor and the marginalized groups. UN encourages nations to take up legal aid programmes, setup legal aid clinics and carry out public outreach campaigns. Apart from this, the UN has also launched a Global Study on Legal Aid, in order to collect data to assess the global legal aid situation.

The UN has acknowledged that access to justice is the basic principle of the rule of law. Without this right people are refused many other rights which flow from it such as right to be heard, right against discrimination and cannot hold the authorities accountable for their actions or inaction.

²² Constitutional Council, Decision No. 76-70 of December 2, 1976, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1976/76-70-dc/decision-n-76-70-dc-du-2-decembre-1976.7477.html> (last visited on December 11, 2019).

²³ European Convention on Human Rights, art. 6, Nov. 4, 1950, 213 U.N.T.S. 221, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf (last visited on December 11, 2019).

²⁴ Basic Law for the Federal Republic of Germany, unofficial English translation, available at: http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf (last visited on December 11, 2019).

²⁵The Constitution of the Republic of South Africa 1996, art. 34.

²⁶ *Ibid.*

²⁷ Legal Aid Agency “What We Do”, available at: <http://www.gov.uk/government/organisations/legal-aid-agency> (last visited on December 11, 2019).

The Declaration of the High-level Meeting on Rule of Law has, once again, emphasised the right of equal access to justice for all thus endorsing the commitment of member States to take steps which are necessary for the effective exercise of this right.

VII. SECTION 14 OF THE CITIZENSHIP ACT, 1955

Section 14 of the Citizenship Act, 1955 lays down that any disposal of an application under sections 5 and 6 shall be presented to the prescribed authorities or the Central Government who can decide such applications without giving any reason for grant or refusal. Such decision is final and cannot be challenged in Court.²⁸

Constitutional Validity

The Constitution concedes a certain measure of overlapping in the performance of functional action among the three organs of the State in order to eliminate the possibility of a loophole in the system which may be taken advantage of and result in considerable hardships to those on its receiving end. What the makers of the Constitution envisaged was that wherever there appears to be a gap one of the three organs must step up to fill it. By virtue of the principle of separation of power, it is known that the Legislature enacts the law, the executive implements it and the Court interprets it and, and thus, decides on the validity of executive action and, under our Constitution, even judges the validity of the legislation itself. However, section 14 of the Citizenship Act, 1955 lays down a bar on that very basic structure by preventing the Courts from adjudicating on the actions of the Executive taken in exercise of its power under section 14 of the Citizenship Act, 1955. It infringes upon a person's fundamental right of access to justice guaranteed by article 14 and article 21 of the Indian Constitution. Since both articles have conveniently substituted the word 'citizen' with 'person' it must, by necessary implication, mean that this fundamental right extends to non-citizens just as much. Right to protection under arbitrary arrest (article 22), right to protect in respect of conviction of offences (article 20), right to approach Supreme Court for enforcement of Fundamental Rights (article 32) are some other fundamental rights available to non-citizens as well.

Immigrants are pushed into a "legal limbo" deprived of the "right to have rights" despite the presence of international humanitarian actors and the entitlements enshrined in international law. Courts are under to duty to ensure that the Government functions according to rule of law and cannot be allowed to misuse their power under the cover of 'finality' or 'ouster' clauses.²⁹

Rule of Law

The principle of rule of law endows an aggrieved person to approach a Court of law for redress. However, post independence history of our nation reads as a lesson on administration's attempt to gather absolute power for itself while at the same time excluding the review by courts. The growth of administrative tribunals itself is often quoted as an example of Government's attempt to exclude the jurisdiction of the judiciary. But the judiciary has been firm in upholding its position and not let it get sidelined because in a democratic state Courts

²⁸ *Supra* note 16, s. 14.

²⁹ M.P.Jain, "Judicial Response to Privative clauses In India, 1 *JILI* (1980).

are seen as the organ which extends its hand to all those who are aggrieved. This sentiment is well expressed by Romer, L.J as follows: "The proper tribunals for the determination of legal disputes in this country are the courts and they are the only tribunals which by training and experience and assisted by properly qualified advocates, are fitted for the task".³⁰

The Apex Court made a strong argument against section 14 in one of its judgments³¹ when it observed that no authority exercising statutory or executive power could be allowed to act arbitrarily or whimsically and that such a requirement did not arise out of the affected party being a citizen of this country. But instead it arose out of the nature of power being exercised by the authority in a country that is governed by rule of law with the power of judicial review vested in the judiciary. It further observed that arbitrariness or non-application of mind are an antithesis to the Constitutional creed and even when a foreigner may have no fundamental right to settle in this country, he still enjoys the right to demand a fair and proper consideration of his request according to law of the land.³²

Scope of Mr. Louis De Raedt's Judgment

The 1991 judgment of Supreme Court in the case of *Mr. Louis De Raedt v. Union Of India*³³ is often cited when the scope of exercise of power by the Executive is in question as in this case the Court decided to take a narrow view purposefully excluding its jurisdiction from certain administrative decisions. The relevant portions of the judgment have been referred.³⁴

The scope of this judgment comes into question for several reasons. First, when the court observes that "there is no provision in the Constitution fettering this discretion", when in fact there are several Constitutional provisions which come to the aid of those who fall victim to the arbitrary decision of the authorities, namely, right to equality (article 14), right to life and personal liberty (article 21), right to protection under arbitrary arrest (article 22), right to protect in respect of conviction of offences (article 20), right to approach Supreme Court for enforcement of Fundamental Rights (article 32), are as much available to non-citizens, as they are to citizens.

The second issue arises with respect to the judgment when it recognises the right of a person to be heard but fails to recognise the fact that a person cannot be said to have been allowed that opportunity if his case has no guarantee of being decided on merits. The way section 14 works is that it allows the Executive to dismiss an application for citizenship without affording any reason. One may argue that it cannot simply be presumed that the Executive will exercise its discretion in an arbitrary manner. But that's not the only concern such a provision brings. A lot of immigrants coming to India are poor, uneducated and have no knowledge of the administrative system. When an application is refused without any reasons they cannot reasonably exercise their right to re-apply for citizenship. Not to mention the cost involved in

³⁰ *Lee v. Women's Guild of Great Britain*, (1952) 1 All. E.R.1175, 1188.

³¹ *Azimusshan Haider v. Union of India*, (2008) 104 DRJ 604.

³² *Ibid.*

³³ MANU/SC/0422/1991.

³⁴ "The power of the Government in India to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering this discretion. It was pointed out that the legal position on this aspect is not uniform in all the countries but so far the law which operates in India is concerned, the Executive Government has unrestricted right to expel a foreigner."

making such application which runs into a few thousand, may not be economically viable for them.

The third argument advanced against the tenability of this judgment based on some of the later decisions of the Supreme Court in *Azimushan Haider v. Union of India*³⁵. Thus, even though the court refused to comment upon the constitutional validity of section 14, it exercised its power of judicial review, the one excluded by application of section 14, and held the decision of the authorities unsustainable.

In *Maneka Gandhi v. UOI*³⁶ again the Court observed that "...no person can be deprived of his right to life or personal liberty except according to procedure established by law. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary."³⁷

In *David John Hopkins v. The Union of India*³⁸ the Madras High Court was presented with the question as to the validity of section 14 in which regard it observed that section 14(1) of the Act was not ultra vires because foreign nationals had no fundamental right that guarantees grant of citizenship.³⁹

What is being contested, however, is not a foreigner's right to get citizenship but foreigner's right to a fair chance of getting citizenship. When the Court observed that the Government has the absolute authority to refuse citizenship it cannot be read so as to allow for even arbitrarily exercised discretion.⁴⁰

VIII. WHEN CITIZENSHIP IS REFUSED: INTERNATIONAL PERSPECTIVE

The laws and conventions on refugees and immigrants are based on humanitarian principles founded on historical experience. For example, had the Jews not kept perpetually migrating starting with their expulsion by the Babylonians and Assyrians, and then the Romans and czars and Nazis, they would probably be extinct today. So would the Gypsies.⁴¹

³⁵ 2008 (104) DRJ 604, "No authority exercising statutory or executive power can act arbitrarily or whimsically. That requirement does not arise out of the affected party being a citizen of this Country. It arises out of the nature of power being exercised by the authority in a country that is governed by the rule of law with the power of judicial review vested in the judiciary. Arbitrariness or non-application of mind is an antithesis to the Constitutional creed and even when a foreigner may have no fundamental right to settle in this country, he still enjoys the right to demand a fair and proper consideration of his request according to law of the land. That is the glory of the system prevalent in this Court which upholds the basic tenets of fair play and probity in public administration no matter the person complaining of the breach is a non-citizen. Viewed thus the rejection order passed by the Government of India is unsustainable not because the Government have not given reason in support of the order but because the reason given is not tenable."

³⁶ (1978) 2 S.C.R. 621.

³⁷ (1978) 2 S.C.R. 621.

³⁸ AIR 1997 Mad 366.

³⁹ *Ibid.*

⁴⁰ *Louis De Raedt v. Union of India*, MANU/SC/0422/1991.

⁴¹ Inderjeet Badhwar, "Immigrants have rights", Feb 18, 2017, India Legal, available at: <http://www.indialegallive.com/letter-from-the-editor-inderjit-badhwar/immigrants-have-rights-20259> (last visited on December 13, 2019).

Canada⁴²

If the application for citizenship is refused, the person may seek judicial review of the decision by the Federal Court of Canada other than filing or a new application. The limitation period for filing for a review is thirty days from the date of refusal. However, the applicant must satisfy the Court that the application:

- i. raises a serious issue; or
- ii. raises an arguable issue upon which the application might succeed.

If an arrest or detention is involved in an immigration context, the right to counsel is constitutionally guaranteed by section 10(b) of the Canadian Charter of Rights and Freedoms.⁴³ Section 10(b) stipulates that upon arrest or detention, everyone has the right “to retain and instruct counsel without delay and to be informed of that right.”

France

The French National Assembly in 2015 approved legislation on immigration which addresses the issue of illegal immigrants and how to better protect their fundamental rights, amongst other things.⁴⁴ While a detailed study on the legislation is beyond the scope of this paper, what's of importance is the provision which provides for a fifteen day period of limitation to file an appeal before a court against the rejection of an application for asylum.

An application for citizenship is made to the "Court of First Instance". If the application for citizenship is refused, a disciplinary complaint may be made before the Ministry of Justice. Alternatively, an appeal may be filed before the Court of Appeals and consecutively to the final court of Appeal i.e. The French Supreme Court of Judicature.

France recognized the right to an attorney as a basic principle as far back as in 1976.⁴⁵ This right is also guaranteed under European Convention on Human Rights.⁴⁶ French law allows a person to apply for financial assistance if such person does not have the economic standing to hire a lawyer and does not differentiate between a citizen and a non-citizen.

United Kingdom (UK)

An appeal can be filed against any decision made by Secretary of the State under section 40 of the British Nationality Act, 1981.⁴⁷

Immigration Courts known as the First-tier Tribunal (Immigration and Asylum) have been established to deal with issues related to decisions made by the Home office for:

- i. permission to stay in the UK

⁴²Refugee Appeal Division, Government of Canada, *available at*: <http://www.cic.gc.ca/english/refugees/reform-rad.asp> (last visited on December 11, 2019).

⁴³ Canadian Charter of Rights and Freedoms Section 10(b), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.), *available at*: <http://laws-lois.justice.gc.ca/eng/Const/page-15.html#h-40>, *available at*: <https://perma.cc/CPJ2-X9CD> (last visited on December 15, 2019).

⁴⁴The Library of Congress, Global Legal Monitor, *available at*: <http://www.loc.gov/law/foreign-news/article/france-national-assembly-adopts-immigration-bill/>; *available at*: <http://www.avocat-tall.com/obtaining-french-citizenship.html> (last visited on December 15, 2019).

⁴⁵Constitutional Council, Decision No. 76-70 of December 2, 1976, *available at*: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1976/76-70-dc/decision-n-76-70-dc-du-2-decembre-1976.7477.html> (last visited on December 15, 2019).

⁴⁶European Convention on Human Rights art. 6, Nov. 4, 1950, 213 U.N.T.S. 221, *available at* http://www.echr.coe.int/Documents/Convention_ENG.pdf (last visited on December 15, 2019).

⁴⁷British Nationality Act, 1981, s. 40A; *The Secretary of the State v. Abdul Waheed Pirzada* (2017) UKUT 00196.

- ii. deportation from the UK
- iii. entry clearance to the UK

In addition to this, applications for grant of bail in immigration matters for people detained by Home Office is also decided. At Immigration Removal Centres, legal clinics are held on a regular basis and each detainee is entitled to thirty minutes of free legal advice.

United States of America (USA)

The right to petition the government is guarantee of the First Amendment: "Congress shall make no law... abridging... the right of the people ... to petition the Government for a redress of grievances."⁴⁸

All immigrants whether present legally or illegally are entitled to due process of law in USA. Under this reasoning, the court decisions in *Arteaga v. Allen*,⁴⁹ *Prassinios v. District Director of Immigration and Naturalization Service*,⁵⁰ recognized an immigrant's right to sue as an integral part of due process. The court opined that to deprive an alien of this right because of a violation of the immigration laws would not only deny him due process of law but would also impose upon him a severe penalty in addition to those actually prescribed by the Immigration and Nationality Act.⁵¹

The Immigrants' Rights Project was conceived in USA and implemented a nationwide strategy for litigation with the help of which denial of judicial review could be challenged. It was in the case of *Magana-Pizano v. INS*⁵², that the Court decided that the elimination of all judicial review of executive detention violates the Constitution.⁵³

If a person applies for citizenship by naturalization and Immigration Services denies his/her application, the authorities are required to supply a written denial letter explaining why the application was rejected. Apart from this a leave to request a hearing against the denial is also granted. Half of the States in USA have provided for free legal aid for such people.

Special courts known as the Immigration Courts have been established to deal with immigration related issues and ensure speedy justice. The Judges have regularly upheld immigrant's right to fair process before facing deportation. The U.S. Supreme Court ruled that individuals who seek to reopen their deportation orders, on the ground of change in circumstances; have the right to appeal to the Federal Courts if the Immigration Court refuses to hear the appeal. This decision of the Court⁵⁴ ensures that a relationship of healthy checks and balances, on the exercise of power by government, is maintained.⁵⁵

⁴⁸The First Amendment states: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

⁴⁹99 F.2d 509, 510 (5th Cir. 1938).

⁵⁰366 U.S. 966 (1961).

⁵¹Peter S. Munoz, "The Right of an Illegal Alien to Maintain a Civil Action", 63 *Cal. L. Rev.* 762 (1975), available at: <http://scholarship.law.berkeley.edu/californialawreview/vol63/iss3/6> (last visited on December 11, 2019).

⁵²200 F.3d 603, 614 (9th Cir. 1999) (Last visited on 18th December,2019).

⁵³ACLU History: Access To The Courts: The Right To Judicial Review, available At: <https://www.aclu.org/other/aclu-history-access-courts-right-judicial-review> (last visited on December 11, 2019).

⁵⁴*Kucana v. Holder* 558 U.S. 233(2010).

⁵⁵Center for Immigration Studies, Immigration Courts, available at: <https://cis.org/Immigration-Courts> (last visited on December 11, 2019).

International Conventions

Two main treaties govern immigrant protection, the Convention Relating to the Status of Refugees which lays out the major rights and obligations in refugee protection, and the Protocol Relating to the Status of Refugees. The 1951 Refugee Convention grants refugees equal access to important state institutions including courts.

Articles 10 of the UDHR declares that everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his legal rights and obligation and of any criminal charges against him.

Articles 14(1) of the international covenants on civil and political rights provide that all people shall be equal before the court and tribunals.

Article 16 of Convention relating to status of refugees ensures the right to access to courts:

- i. A refugee shall have free access to the courts of law on the territory of all Contracting States.
- ii. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautiojudicatum solvi*.
- iii. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

IX. RIGHT TO ACCESS TO COURTS

Blackstone has stated that it is the function of the common law to "protect the weak from the insults of the stronger".⁵⁶ To ensure that this protection is accorded to the people, is why Courts are established in the very first place and when a community, group or an individual's access to a court is cut grave injustice is caused.

Chief Justice Marshall in *Marbury v. Madison*,⁵⁷ described the ability to obtain civil redress as the "very essence of civil liberty."⁵⁸ This principle has been followed thereafter in most countries, including India. This idea also resonated in the Fourteenth Report of the Law Commission.

Justice V.R. Krishna Iyer in a Report⁵⁹ expressed the view that as far as non-citizens are concerned, so long as they are within Indian territory they are, supposedly, entitled to the protection of laws prevalent in India and have equal access to courts.⁵⁹ While the Report acknowledges the State's power to deport or expel a foreigner, the power extends only so far as such a person is a threat to the security of the country and even then such an individual is entitled to a remedy against any injustice remitted to him in exercise of such procedure just as

⁵⁶Blackstone, *Commentaries on the Laws of England* (Oxford University Press, London).

⁵⁷ 5 U.S. (1 Cranch) 137 (1803)

⁵⁸ *Ibid.*

⁵⁹ Report of Expert Committee on Legal Aid, *Processual Justice To The People* May (1973) 43, "...equality is the basis of all modern systems of jurisprudence and administration of justice.... In so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal ad laws which are meant for his protection have no meaning and to that extent fail in their purpose. Unless some provision is made for assisting the poor man for the payment of court fees and lawyer's fees and other incidental costs of litigation; he is denied equality in the opportunity to seek justice."

much as in case of assault or theft. The only precondition is the satisfaction of the three tests laid down⁶⁰ be it for citizens or non-citizens.⁶¹

Accordingly, the National Commission for Review the Working of Constitution has recommended insertion of article 30A on the following terms:

"30A: Access to Courts and Tribunals and speedy justice

(1) Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before an independent court or, where appropriate, another independent and impartial tribunal or forum.

(2) The right to access to Courts shall be deemed to include the right to reasonably speedy and effective justice in all matters before the courts, tribunals or other fora and the State shall take all reasonable steps to achieve the said object."⁶²

X. RECOMMENDATIONS AND CONCLUSION

"MENEDEMUS- Chremes, have you so much leisure from your own affairs that you can attend to those of others – those which don't concern you? CHREMES- I am a man⁶³, and nothing that concerns a man do I deem a matter of indifference to me."⁶⁴

My research findings suggest that there is an immediate need to re-invent the system so as to make the administrative process more in consonance with the principles of natural justice and the rule of law. Two amendments in the system have become long drawn. First, in the Legal Services Authorities Act, 1987, by the addition of section 12A along with two schedules which will allow the authorities to exercise the necessary discretion but within the four walls of the Constitution. Second, in section 14 of the Citizenship Act, 1955, which is an unnecessarily harsh provision granting unfettered discretion to the Government, thus running the risk of being exploited arbitrarily. Whether or not it culminates into arbitrary action is not the question because "justice must not only be done; it must appear to have been done".⁶⁵

Recommendations

What's recommended is not geometrical congruence to the rights of the citizens for that is something that the Constitution has not visualised. But the encouragement of drafting of provisions which aid the immigrants in continuing their life with dignity and not let them be victims of their circumstances. If we do not stand for what's right today we are in effect digging an abyss for ourselves. No words can express these sentiments better than the words of Martin Niemöller:⁶⁶

⁶⁰Means test, prima facie test, and reasonableness test.

⁶¹Report of Expert Committee on Legal Aid, Processual Justice to The People May (1973) 43.

⁶²Law Commission of India, 189th Report on Revision of Court Fee, Feb, 2004.

⁶³"Homo sum: humani nihil a me alienum puto." St. Augustine says, that at the delivery of this sentiment, the Theatre resounded with applause; and deservedly, indeed, for it is replete with the very essence of benevolence and: disregard of self. Cicero quotes the passage in his work *De Officiis*, B. i., c. 9.

⁶⁴P. Terentius Afer (Terence), *Heautontimorumenos: The Self-Tormenter*. Henry Thomas Riley, (ed.), available at: <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0115%3Aact%3D1%3Ascene%3D1#note2>(last visited on October 19, 2018).

⁶⁵*Aravali Power Company Pvt. Ltd. v. M/S. Era Infra Engineering Ltd.*, MANU/SC/1139/2017; *Ashok Kumar Yadav v. State of Haryana*, 1985 SCR Supl. (1) 657: AIR 1987 SC 454.

⁶⁶*Martin Niemöller* (1892–1984), German theologian.

"First they came for the Socialists, and I did not speak out— Because I was not a Socialist. Then they came for the Trade Unionists, and I did not speak out— Because I was not a Trade Unionist. Then they came for the Jews, and I did not speak out— Because I was not a Jew. Then they came for me—and there was no one left to speak for me."

In 1930, the League of Nations established the Nansen Office after the death of Fridtjof Nansen⁶⁷. The Nansen Office issues a *Nansen passport* which is a certificate issued for refugees as an international substitute for a passport, which allowed stateless persons or those deprived of their national passports to enter and transit other countries. A provision for issue of a similar passport could be incorporated in the Passport Act to be issued to illegal immigrants after a certain period of time as may be prescribed.

Section 14 of the Citizenship Act, 1955 may be amended so as to incorporate a provision for revision by a Court. A tribunal may be established for this purpose in order to ensure fast disposal of applications. It should be made mandatory for the authorised officer or the Central Government to give reasons before rejection of an application.

A new section, section 12A, may be added to the Legal Services Authorities Act, 1987 to specify under what circumstances an immigrant may be able to avail the service of free legal aid. This decision should be left to the discretion of an officer authorised in this regard who shall inquire into the following conditions, these may be added by way of a schedule to section 12A.

Discretionary Legal Aid

Free legal aid cannot be demanded as of right by immigrants and may be made the discretion of the authorised officer upon being satisfied that the conditions prescribed under the statute are fulfilled. A foreigner who is an immigrant in India may be provided legal aid upon application provided that he or she:

- i. has not been sentenced for an unlawful act and is not subject to any court order imposing a measure of reform and prevention due to lack of criminal capacity;
- ii. is a minority group facing prosecution threats in his or her own country;
- iii. has not found a dwelling of his/her own or accommodation; and
- iv. Is unable to support himself or herself and his or her dependents.
- v. The requirements stipulated in this section may be waived on grounds of public interest or in order to avoid special hardship.

Legal Aid shall not be allowed if:

- i. There are justifiable grounds to assume that the immigrant is pursuing or supporting or has pursued or supported activities aimed at subverting the free democratic constitutional system, the existence or security of India or at illegally impeding the constitutional bodies of India or the members of said bodies in discharging their duties or any activities which jeopardize foreign interests of the Government of India through the use of violence or preparatory actions for the use of violence, or
- ii. he or she has been sentenced to at least two years of imprisonment for one or more intentionally committed offenses and the order has attained finality (an order shall be

⁶⁷Fridtjof Nansen (1861-1930), recipient of the Nobel Peace Prize for 1922.

said to have attained finality only after the decision of the High Court, unless no appeal has been preferred within one year of the decision of the lower court), or convicted of smuggling, or

- iii. convicted of a crime under section 172,⁶⁸ section 177,⁶⁹ section 182,⁷⁰ section 186,⁷¹, section 188,⁷² of the Indian Penal Code, 1860, or
- iv. convicted under the Narcotic Drugs and Psychotropic Substances Act, 1985, or
- v. facts justifiably lead to the conclusion that he or she belongs to or has belonged to an organisation which support terrorism or supports or has supported such an organisation; (cases of conviction under Juvenile Justice Act shall also be covered).

⁶⁸ Indian Penal Code, s.172- Absconding to avoid service of summons or other proceeding.

⁶⁹ *Id.*, s.177- Furnishing false information.

⁷⁰ *Id.*, s. 182- False information with intent to cause public servant to use his lawful power to the injury of another person.

⁷¹ *Id.*, s. 186- Obstructing public servant in discharge of public function.

⁷² *Id.*, s. 188- Disobedience to order duly promulgated by public servant.



INDIAN COMPETITION ACT: DEFICIENCIES AND SUGGESTIONS

Raj Kumar Singh*

Abstract

An effective and modern Competition Law regime is essential to ensure economic efficiency, optimal allocation of resources and equitable outcome for consumers. The Act was enacted to achieve the stated purpose through establishment of Competition Commission of India (CCI) that has an amalgam of regulatory, advocacy, investigative and adjudicatory functions. The experience gained from the enforcement of the provisions of the Act has brought to the forefront some of the deficiencies (concerning both substantive and procedural aspects) in the present scheme of Act. There are instances of legislative oversight, anomaly, absence of definition of important expressions, *etc.* The provisions concerning inter-regulatory coordination are deficient to resolve the potential conflicts. Stale information(s) can be filed in absence of any period of limitation being provided. The Act does not envisage establishment of prosecution wing of CCI. The concept of *locus standi* in respect of appeals before Supreme Court is diluted. These concerns need redressal not only for ensuring effective implementation of the Act but also to prepare for future challenges in enforcement of the Competition Law regime.

I. INTRODUCTION

The Parliament of India passed the Competition Act, 2002 (in short, the Act) in December 2002, to which the President accorded assent on 13th January, 2003. It replaced The Monopolies and Restrictive Trade Practices Act, 1969. The objective of the Act may be gathered from its Preamble which states as follows: ‘An Act to provide, keeping in view the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.’ Section 18 of the Act casts a duty upon a Commission called Competition Commission of India (CCI) to attain the aforesaid objectives.

The Act was first amended *vide* Competition (Amendment) Act, 2007 and subsequently in year 2009 *vide* Competition (Amendment) Act, 2009. Recently, the Act was again amended by the Finance Act, 2017. Despite these amendments, it is noticed that there still remain certain deficiencies in the Act which may pose difficulties in the enforcement of the Act. Few of them are discussed herein below along with suggestions.

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II. 'SOVEREIGN FUNCTIONS' IS NOT DEFINED

The term enterprise has been defined in section 2(h) of the Act in a broad manner. However, it excludes from its purview the activities of the government relating to the sovereign functions. The term 'sovereign functions' has neither been defined in the Act nor has it been interpreted definitively and authoritatively as yet by the courts. In any event, it is not safe to place reliance upon the decisions of the courts interpreting the term in different contexts. Thus, it is desirable that the Parliament either defines the said term under the Act or provides some legislative guidelines in this regard.

Accordingly, it is suggested that the Act may be suitably modified so as to clearly reflect the legislative intent as to what constitutes sovereign functions. In particular, it should be clarified through legislative amendment whether welfare functions/commercial functions discharged by the State are covered within the term sovereign functions.¹

However, at this stage of defining the term "sovereign function", a caveat needs to be entered. Sovereign function is a dynamic concept which keeps on changing with the passage of time in the light of the new economic policies pursued by the government of the day. What, at one point of time, was considered to be the exclusive and inalienable function of the State, has become a matter of market competition at the hands of the private enterprises. Earlier, even aviation and telegraph services were considered to be the exclusive domain of the government. However, today the skies have been sold and the spectrum or air waves have been allocated to the private sector to provide IT services. Even though, there are some core activities of the State which are still considered to be the sole and whole domain of the government being the primary, inalienable, inescapable and non-delegable functions of a constitutional government viz., defence, policing and justicing.

¹ Alternatively, without amending the definition of the term "enterprise", the following definition of the term sovereign functions, which is illustrative and not exhaustive, may be added. Though, it may be noted that this term has not been defined under any other Act leave alone any *pari materia* Act or even under the General Clauses Act, 1897. A look at the judicial pronouncements on the subject is also not very useful and particularly, it may be pointed out that in the case of *State of U.P. v. Jai Bir Singh*, (2005) 5 SCC 1, a five judge bench of the Hon'ble Supreme Court referred for consideration, *inter alia*, the issue of sovereign activities in the context of the Industrial Disputes Act, 1947 by a larger bench. The matter is pending for adjudication before the Hon'ble Supreme Court of India which may revisit the extant jurisprudence on the meaning of sovereign function as laid down in the *Bangalore Water Supply case*. However, based on the present state of law as judicially pronounced, the following definition of the term sovereign function may be inserted in s. 2 of the Act. S. 2 (va) "sovereign function" includes any activity of the government which relates to the primary and inalienable functions of the State but does not include the welfare or commercial activities of the Government.

III. DEFINITION OF RELEVANT MARKET

The definition of relevant market is provided in section 2(r) of the Act and the same is quoted below:

"relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.

Further, section 19(5) of the Act states as follows:

For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market" and "relevant product market"....

Thus, it is desirable that the aforesaid provisions dealing with relevant market be reconciled and be aligned by suitable amendments.

Accordingly, it is suggested that the definition of the relevant market as given in section 2(r) may be amended in the following terms:

"relevant market" means the market which may be determined by the Commission with reference to the relevant product market and the relevant geographic market.

IV. DEFINITION OF TRADE ASSOCIATION

A number of cases have come up before the Commission involving the role of trade associations, particularly in the boycott call matters. A definite meaning of the term 'trade association' may help the Commission in determining the rights and liabilities of such associations. Presently, the term 'trade association' has not been defined in the Act and therefore, the term may be defined as a body of persons (whether incorporated or not) which is formed for the purpose of furthering the trade interests of its members or of persons represented by its members.

V. INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW

The Act exempts intellectual property rights in so far as they impose reasonable conditions. This is provided in section 3(5)(i) of the Act which seeks to strike a fine balance between the Competition Law concerns and rights of intellectual property holders by excluding the embargo imposed by section 3 of the Act. The said section exempts a case involving competition concerns if a holder of intellectual property rights exercises his right to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting his rights which have been or may be conferred upon him under the listed IPR statutes.

No such act of balancing has been explicitly provided in section 4 of the Act. Though, the essential facility doctrine and other attendant case law from foreign jurisdictions may help achieve the said purpose, a legislative clarity on the subject is desired. Hence, section 4 of the

Act may be suitably modified in a manner to provide for a similar balance between the requirements of innovation and competition concerns.

In this connection, it may also be further pointed out that section 3(5)(i) of the Act is exhaustive of statutes in relation to which the IPR may be exempted from the purview of section 3 of the Act. Thus, the provision is exhaustive in nature and it does not include all extant IPR laws such as the Protection of Plant Varieties and Farmers' Rights Act, 2001.

Further, it may be pointed out that the Protection of Plant Varieties and Farmers' Rights Act, 2001 was enacted, *inter alia*, to provide for the establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants. This Act no doubt precedes the passage of the Act. However, on detailed and closer examination of the parliamentary debates on the Competition Bill, 2001 it is manifest that no discussion took place on the issue of either inclusion or exclusion of the Protection of Plant Varieties and Farmers' Rights Act, 2001 in the proposed Bill. Thus, the non-inclusion of the Protection of Plant Varieties and Farmers' Rights Act, 2001 in the Act appears to be a case of legislative oversight on the basis of reasons of parity *qua the* other IPR laws which have been included in section 3(5) of the Act. Hence, it is necessary that the Protection of Plant Varieties and Farmers' Rights Act, 2001 may also be proposed to be included in section 3(5) of the Act.

Hence, the provision may be proposed to be suitably modified to incorporate such IP laws which are presently not incorporated therein. Besides, it is necessary to constantly update the Competition Law in the light of the legislative developments whereby new forms of intellectual property rights are conferred such as the Seeds Bill, 2019 etc.

Thus, section 3(5) of the Act may be made exhaustive of the extant IPR laws by insertion of the following clauses after the present last clause, *i.e.*, (f) of section 3(5) of the Act.

VI. ANOMALY IN THE TEXT OF SECTION 21A OF THE ACT

The provision of reference by Commission under Section 21A of the Act currently reads as under:

Reference by Commission

21A. (1) Where in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of this Act whose implementation is entrusted to a statutory authority, then the Commission may make a reference in respect of such issue to the statutory authority:

Provided that the Commission, may, *suo moto*, make such a reference to the statutory authority.

(2) On receipt of a reference under sub-section (1), the statutory authority shall give its opinion, within sixty days of receipt of such reference, to the Commission

which shall consider the opinion of the statutory authority, and thereafter give its findings recording reasons therefor on the issues referred to in the said opinion.

It is obvious from the highlighted portion above that there is an apparent drafting error as may be noted from the context and scheme of the provision. Thus, it may be proposed to be amended as follows:

VII. AMENDMENT FOR SECTION 26 OF THE ACT

Under the present scheme of section 26 of the Act which governs the procedure for inquiry, it may be pointed that if the report of the DG recommends that there is a contravention of any of the provisions of the Act and the Commission after hearing the parties in the matter, is of the opinion that there is no contravention of the provisions of the Act and no provision exists which enables the Commission to pass the necessary order to close the matter.

This appears to be a legislative oversight. This omission is further reinforced on perusal of section 53A of the Act. It may be noted that under this section *inter alia* the orders passed by the Commission under section 26(2) and 26(6) are appealable. Neither section 26(2) nor section 26(6) relate to situation where the DG has recommended contravention but the Commission disagrees and wishes to close the matter.² Accordingly, it is proposed that section 26 of the Act may be suitably modified. Consequential amendment may also be made in the provisions of section 53A(1)(a) to provide for an appeal to the Appellate Tribunal against the order of the Commission passed under the proposed sub-section (11) of section 26 of the Act.

Deletion of the word “the Registrar” from the Act

Since, the Secretary has been appointed under the Act instead of the Registrar as originally proposed and accordingly the term “Registrar” may be deleted from the Act wherever it appears [section 51(2)(a) *etc.*].

² Accordingly, it is proposed that s. 26 of the Act may be suitably modified by incorporating the following proposed sub-sections (9) to (11) in s. 26 of the Act.

(9) If the report of the Director General referred to in sub-section (3) recommends that there is a contravention of the provisions of this Act and the Commission is of the opinion that no further inquiry is called for under sub-section (8), the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.

(10) Where the Commission has called for further inquiry under sub-section (8), on completion of such further inquiry, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.

(11) If, after consideration of the objections and suggestions referred to in sub-section (9) or sub-section (10), if any, the Commission does not find a contravention of the provisions of this Act, it shall close the matter forthwith pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the Statutory authority or the party concerned, as the case may be.

VIII. APPEALS FROM THE ORDERS/DECISIONS OF THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

It is important to point out that section 53T of the Act provides for an appeal to the Supreme Court to any person aggrieved by *any decision or order* of the National Company Law Appellate Tribunal (in short, the ‘Appellate Tribunal’). This seems to be a very wide provision which provides for statutory appeals as a matter of right to the Supreme Court in respect of each and every order passed and/ or decision made by the Competition Appellate Tribunal.

In this connection, attention may be drawn to section 53B of the Act which provides for an appeal to the Appellate Tribunal against the orders passed and/or decisions made by the Commission with regard to specified direction or decision as provided in the said section only, which essentially are final or substantial orders of the Commission.

Accordingly, it is desirable that only final determinations and not all orders of the Appellate Tribunal be made appealable to the Supreme Court and a suitable amendment of section 53T of the Act may be proposed.

Further, under sections 53B (1) and 53T of the Act, the right to prefer an appeal should be confined to the parties to the proceedings only. The provisions, as they stand today, enable any person to file an appeal before the Appellate Tribunal.³

IX. LIMITATION PERIOD NOT PROVIDED UNDER THE ACT

No period of limitation has been provided in the Act for filing of information before the Commission for contravention of provisions contained sections 3 and 4 of the Act. As a result thereof, stale claims/information are being filed/may be filed before the Commission with respect to the matters which otherwise have become time barred before the civil court/consumer *fora* etc. Hence, it is necessary to provide for a reasonable period of limitation for filing of information for contravention of sections 3 and 4 of the Act.⁴

³Hence, it may be proposed that s. 53 B (1) which stands today as follows: The Central Government or the State Government or a local authority or enterprise or any person who is party to the proceedings, aggrieved by any direction, decision or order referred to in clause (a) of s. 53A may prefer an appeal to the Appellate Tribunal. Further, s. 53T which reads as follows: The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them;

Provided that the Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days.

⁴Accordingly, it is suggested that a new section, i.e. 65A may be inserted in the Act in the following terms:

Limitation period. (1) The Commission shall not admit an information or a reference alleging contravention of the provisions contained in sub-section (1) of s. 3 or sub-section (1) of s. 4 unless the information is filed or the reference is made within two years from the date on which the cause of action has arisen.

(2) Notwithstanding anything contained in sub-section (1), an information or a reference may be entertained after the period specified in sub-section (1), if the informant or the Central Government/State Government/statutory authority satisfies the Commission, that it had sufficient cause for not filing the information or for not making the reference within such period, as the case may be.

Provided that no such information or reference shall be entertained unless the Commission records its reasons for condoning such delay.

X. POWERS OF THE DIRECTOR GENERAL (DG)

Section 41(3) of the Act *inter alia* provides that the provisions of section 240 and 240A of the Companies Act, 1956 shall apply to an investigation made by the DG or any other person investigating under his authority, as they apply to an inspector appointed under that Act. Furthermore, Explanation (a) to the section 41 of the Act provides that for the purposes of this section the words ‘the Central Government’ under section 240 of the Companies Act, 1956, shall be construed as the Commission. Explanation (b) to the section 41 of the Act further provides that the word ‘Magistrate’ under section 240A of the Companies Act, 1956 shall be construed as ‘the Chief Metropolitan Magistrate, Delhi’⁵.

Thus, it can be immediately noted that by virtue of Explanation (b) to section 41 of the Act, the provisions contained in section 240A of the Companies Act, 1956 have been made applicable to an investigation made by the DG in such a manner that for carrying out search and seizure operations, the jurisdiction of the Chief Metropolitan Magistrate, Delhi has been extended to the whole of India. This seems to be a legislative oversight and accordingly any challenge to the search and seizure operations conducted by the DG outside Delhi may be rendered vulnerable if a party challenges the legal validity of such extra- territorial jurisdiction of the Chief Metropolitan Magistrate, Delhi.

Accordingly, it may be proposed to suitably amend the provision. It would be desirable if the powers of the Chief Metropolitan Magistrate to order search and seizure etc. are conferred upon the Commission itself. Alternatively, the original scheme of section 240A of the Companies Act, 1956 may be retained which gives these powers to the jurisdictional Magistrate.

⁵ The Companies Act, 1956, s. 240A: Seizure of documents by inspector.

(1) Where in the course of investigation under s. 235 or s. 237 or s. 239 or s. 247, the inspector has reasonable ground to believe that the books and papers of, or relating to, any company or other body corporate or managing director or manager of such company or other body corporate, may be destroyed, mutilated, altered, falsified or secreted, the inspector may make an application to the Magistrate of the First Class or, as the case may be, the Presidency Magistrate, having jurisdiction for an order for the seizure of such books and papers.

(2) After considering the application and hearing the inspector, if necessary, the Magistrate may by order authorise the inspector—

(a) to enter, with such assistance, as may be required, the place or places where such books and papers are kept;

(b) to search that place or those places in the manner specified in the order; and

(c) to seize books and papers he considers necessary for the purposes of his investigation.

(3) The inspector shall keep in his custody the books and papers seized under this section for such period not later than the conclusion of the investigation as he considers necessary and thereafter shall return the same to the company or the other body corporate, or the managing director or the manager or any other person, from whose custody or power they were seized and inform the Magistrate of such return:

Provided that the inspector may, before returning such books and papers as aforesaid, place identification marks on them or any part thereof.

(4) Save as otherwise provided in this section, every search or seizure made under this section shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898 (5 of 1898) to searches or seizures made under that Code.

XI. ADVISORY ROLE OF THE COMMISSION MAY BE STRENGTHENED / COMPETITION AUDIT

The Commission is conferred with enforcement powers as incorporated in sections 3, 4, 5 and 6 of the Act. Thus, the Commission can examine the matters which are brought before it. However, it is felt, the Commission may further the cause of competition in a much more effective way through its advisory role on competition policies, particularly by way of competition audit of laws, policies etc.

The extant provisions in this regard as incorporated in section 49 of the Act are not sufficient and do not provide for any effective role for the Commission in this regard.⁶

It may be proposed that the Commission may be conferred *suo moto* powers to advise the government on competition policy or any other matter. This would greatly enable the Commission to discharge its competition audit functions effectively and would help making policies/laws etc., competition compliant.⁷

XII. POWER OF SURVEY ETC.

Under the Act no officer of the Office of the DG or the CCI has any power to visit any premises for the purpose of investigation or enquiry. Thus, it is desirable that suitable amendments may be made in the Act to confer the power of survey upon the officers of the CCI and /or the Office of DG. It may be pointed out that survey is different from search and seizure in as much as the power of search and seizure is a very drastic action. For the effective

⁶ The Competition Act, 2002, s. 49. Competition advocacy

(1) The Central Government may, in formulating a policy on competition (including review of laws related to competition) or any other matter, and a State Government may, in formulating a policy on competition or on any other matter, as the case may be, make a reference to the Commission for its opinion on possible effect of such policy on competition and on the receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, or the State Government, as the case may be, which may thereafter take further action as it deems fit.

(2) The opinion given by the Commission under sub-section (1) shall not be binding upon the Central Government or the State Government, as the case may be, in formulating such policy.

(3) The Commission shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.

⁷ Hence, it is proposed that the above provision may be amended to the following effect:

S. 49. Competition advocacy

(1) The Central Government may, in formulating a policy on competition (including review of laws related to competition) or any other matter, and a State Government may, in formulating a policy on competition or on any other matter, as the case may be, make a reference to the Commission for its opinion on possible effect of such policy on competition and on the receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, or the State Government, as the case may be, which may thereafter take further action as it deems fit.

Provided that the Commission may, on its own, for the purpose of discharging its duties or performing its functions under the Act, give its opinion to the Central Government or State Government as the case may be, with respect to the matters specified above.

(2) The opinion given by the Commission under sub-section (1) shall not be binding upon the Central Government or the State Government, as the case may be, in formulating such policy.

(3) The Commission shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.

investigation/enquiry, it is absolutely necessary to confer power of survey in addition to the power of search and seizure which has already been conferred.

Lack of prosecuting agency

As the Act stands, it provides for an investigating mechanism through the agency of the Office of the DG. Further, the adjudication part is vested in the Commission. Thus, the Act, in terms, does not provide for any prosecuting agency and resultantly, during the adjudication process, the parties are left to argue the matter in the adversarial manner leaving no scope for any prosecuting agency. It is therefore, desirable that prosecution wing may be proposed to be constituted to participate in the proceedings before the Commission so that the reports of the DG may be defended/explained/clarified. As the matters stand today, the Commission has to order a re-investigation even for small matters to seek clarification from the DG. This only delays the proceedings and results into unnecessary wastage of time whereas if the DG is present at the proceedings in its prosecutorial role, such clarifications may be supplied during the course of the proceedings only.

Accordingly, it may be proposed that a separate prosecuting wing be constituted for the above purpose. Alternatively, the DG may be vested with the prosecuting powers as well in addition to his investigating functions.

XIII. INTER –REGULATORY CONFLICTS

As the jurisdiction of the CCI is overarching and therefore, the Commission has to enquire into matters relating to different sectors. The Commission has in the past year examined various informations relating to different sectors *viz.*, aviation, banking, insurance, electricity, telecommunications, petroleum & natural gas, capital markets etc. which have raised some serious jurisdictional and inter-regulatory coordination issues.

In this connection, it may be pointed out that the inter-regulatory coordination provisions as incorporated in the mirror image provisions of sections 21 and 21A of the Act are not sufficient to address inter-regulatory conflicts and overlapping/parallel jurisdictional issues leave alone any resolution thereof between the Commission and the sectoral regulators. Thus, in the event of conflict over jurisdiction between the Commission and the sectoral regulators, no effective mechanism has been provided under the existing legal framework.

Thus, to *resolve* potential disputes with the sectoral regulators, it is essential that a suitable mechanism through statutory amendments may be provided for. Hence, a suitable mechanism need to be provided by amending the Act for effective inter-regulatory coordination as also for resolution of inter- regulatory conflicts.

It is pertinent to mention that the Act is still at an evolving stage and therefore, further changes may be required in the Act keeping in view the developments taking place in the field. Hence, these suggestions are not exhaustive of the issues and the consequent amendments that may be required to fine tune the Act.



MAINSTREAMING MISCONCEPTIONS - DEMONIZING MUSLIM PERSONAL LAW: A COMMENT ON THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019

Saadiya*

Abstract

The media is awash with reports portraying an immensely inhuman picture of Muslim Personal Law which treats women like objects, devoid of any rights. Deeply embedded misconceptions in the media about marriage and divorce, together with legislations based on flawed understanding of Islamic law have led to demonizing of Muslim Personal Law and othering of Muslims in the society. The objective of the paper is to firstly, dispel misconceptions perpetuated by mainstream media and secondly, to critically analyse the Muslim Women (Protection of Rights on Marriage) Act, 2019. The paper is schematically divided into two main parts. The idea of marriage and divorce under Islamic law is discussed first. Thereafter, the problem as projected by the media and the solution provided in the form of legislation by the state is critically analysed. A conclusion is arrived at on the basis of the discussion in the two parts.

I. INTRODUCTION

In 1982, B R Chopra's family drama *Nikaah* released and triggered drawing room discussions on the demonic concepts of Muslim Personal Law like *talaq* and *nikah halala* in the country. Thirty-seven years later, the discussions continue to grow and feature prominently in the media with far greater intensity than ever. Scanning through the media news reports of the past few years, one cannot escape noticing portrayal of an immensely inhuman picture of Muslim Personal Law which treats women like objects, devoid of any rights. The news of the AIMPLB taking a stand against outlawing *nikah halala* had not died down when another report of issuance of a fatwa against a woman in Bareilly for speaking against triple *talaq* surfaced.¹ All news debate starting from the Bill criminalizing triple *talaq* to *nikah halala* and polygamy present an image of Muslim personal law which is unjust, barbaric and perpetuating inequality, misogyny and patriarchy. Sensationalising news headlines, of the AIMPLB's statements as *nikah halala* being a *Quranic* practice which cannot be questioned by any court of law² or issuance of *fatwa* denying

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¹ See "AIMPLB against outlawing of 'nikah halala', but wants it to be discouraged" July 17, 2018, available at http://timesofindia.indiatimes.com/articleshow/65016748.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited on July 15, 2019). Also see, Avaneesh Mishra, "Fatwa against two Bareilly women for 'speaking out against Islamic practices' July 22, 2018, available at <https://indianexpress.com/article/cities/lucknow/fatwa-against-two-bareilly-women-for-speaking-out-against-islamic-practices-5269546/> (last visited on July 15, 2019).

² See Parbina Purkayastha, "Muslim Law Board Endorses Nikah Halala, Says It Is Quranic Practice And Cannot Be Challenged" July 15, 2018, available at <https://www.indiatoday.in/india/story/muslim-law-board-endorses-nikah-halala-says-it-is-quranic-practice-and-cannot-be-challenged-1286497-2018-07-15> (last visited on July 15, 2019).

religious burial in case of death for simply speaking against triple *talaq*,³ play to a gallery which views issues pertaining to Muslims only with a political lens, completely ignoring the legal as well as the social aspects of the issue at hand. Meaningless debates by fake *mullahs* and aspiring politicians abound,⁴ there has not been an iota of effort by either the Muslim community (intelligentsia, laymen and religious scholars) or the liberal non-Muslims to address the problem from a non-political perspective, especially in the media. The misconceptions deeply embedded in the media about the Muslim Personal law are further solidified by the legislative efforts of the Central Government. The Muslim Women (Protection of Rights on Divorce) Act, 1986 and the Muslim Women (Protection of Rights on Marriage) Act, 2019⁵ being the prime examples of legislations based on flawed understanding of Islamic law that are ignited by populist agendas and drafted with political objectives, perpetuating misconceptions and ignorance in the society.

For anyone not familiar with the Islamic belief system, understanding Islamic law and the insistence of Muslims in wanting to be governed by the same can be extremely perplexing. There is however a pressing need to discuss the same at length. I have argued elsewhere that the notions of gender inequality being perpetuated by Muslim Personal Law is mis founded and it is the deep rooted cultural patriarchy, together with discriminatory laws which is responsible for the sorry state of affairs of Muslim women who are ignorant about *usul-ul-fiqh* and the rights guaranteed to them by Islam.⁶ Extending the same argument, in this article, my objective is twofold. *First*, to dispel the misconceptions perpetuated by mainstream media either due to sheer ignorance about Islamic law or due to political agendas. *Second*, to critically analyse the Muslim Women (Protection of rights on Marriage) Act 2019 and see if it would in any ways help alleviate gender inequality.

The paper is schematically divided in to two main parts. The idea of marriage and divorce under Islamic law is discussed first. Thereafter, the problem as projected by the media and the solution provided in the form of legislation by the state is critically analysed. A conclusion is arrived at on the basis of the discussion in the two parts.

³ See Abhishek Chakraborty , “No Medicine, No Burial At Graveyard: "Fatwa" Against Triple *Talaq* Victim” July 17, 2018, available at <https://www.ndtv.com/cities/no-medicine-no-burial-at-graveyard-fatwa-against-triple-talaq-victim-1884603> (last visited on July 15, 2019).

⁴ Most television debates operate with the objective to shock, sensationalize and scandalize for the sake of TRP. The idea remains to create further controversial content to discuss and hype rather than having a meaningful dialogue. See for instance “Maulana Ejaz Arshad Qasmi arrested for slapping advocate Farah Faiz on Live TV: Twitter reacts” July 18, 2018, available at <https://www.dnaindia.com/india/report-maulana-ejaz-arshad-qasmi-arrested-for-slapping-advocate-farah-faiz-on-zee-hindustan-live-tv-debate-twitter-reacts-2638590> (last visited on July 10, 2019).

⁵ The Muslim Women (Protection of Rights on Marriage) Bill was finally passed by the Rajya Sabha on July 30, 2019 after a contentious chequered history and shall replace the Ordinance after receiving assent from the President.

⁶ Please see “*Muslim Personal Law and Gender Equality Concerns In India*” presented at 1st International Conference on Law and Justice (ICLJ 2017) organized by Faculty of Shariah and Law, State Islamic University (UIN) Syarif Hidayatullah, Jakarta held in BSD-City, South Tangerang, Indonesia, November, 7-8, 2017, available at <https://www.atlantis-press.com/proceedings/iclj-17/25891413> (last visited on June 15, 2019).

II. DECODING MARRIAGE AND DIVORCE IN ISLAM

Before starting the discussion on Muslim Personal Law, it is imperative for us to be kept in mind is that the Muslim community in India is not homogenous in nature. Even though, the *Quran* commands the believers not to be divided into various sects,⁷ Muslims are divided not only on the basis of various schools of thoughts but also on the basis of caste, culture and geography.⁸ Muslims from North India are culturally different from Muslims in the Southern states and the same holds true for Muslims from East and the West. Within a state too, there are noticeable dissimilarities between the Muslims. For Example, Muslims from Bengal are different than their brothers in UP and within UP, *Shias* and *Sunnis* have their conspicuous differences. Again, within Sunnis, *Barelwis* and *Deobandis* are visibly different in their practice of Islam. As far as the differences on the basis of school of thought is concerned, majority of the *Sunnis* in India are *Hanafi* and majority *Shias* are *Ithna Ashari*. Even though ordinary Muslims are ignorant about the nuances of *usul-ul-fiqh* in general and not well versed with the differences between various school of thoughts, the practical result of *ulemas* of a given school sticking to patriarchal interpretations and refraining from *ijtihad* becomes an important reason for spreading ignorance and misconceptions about the law on dissolution of marriage.⁹

Muslims, generally, in the Indian subcontinent and especially in India are heavily influenced by the Hindu culture which is evident in all walks of life, particularly family life. Joint family system, the concept of *suhagan*, societal disapproval of divorcees and their remarriage, especially women, are some examples of cultural influences in Muslim community in India. Since family is the basic unit of society which is founded by the institution of marriage, it is very important to understand what place marriage has in a Muslims' life according to *Sharia* before we discuss divorce.

Marriage in Islam, unlike Hinduism, is not an eternal bond. It is more in the nature of a contract though not purely so. The institution of marriage, as visualized in Islam, is rooted in pragmatism. While taking into consideration, the complexities and frivolities of life, marriage is made easy, so is divorce. Happiness and peace in marriage is conceptualised as important as it brings one closer to Almighty. Marriage in Islam is *sunnah*, a way of completing a believers' *deen*. The whole purpose of marriage is to attain tranquillity and peace¹⁰ Consequently, if any of the spouse is unhappy in marriage or the marriage has broken down even without any fault of the other spouse, they have a right to dissolve the marriage and move on with their lives. This right of dissolution, contrary to the popular misconception is with both husband and the wife. *Talaq* is not the only way to dissolve a marriage. Broadly, there are four modes of dissolving a Muslim

⁷ See verse 3:103 and 6:159 *Al Quran*.

⁸ See Umar Faruq Abd-Allah, "Islam and the Cultural Imperative", 8 *J. Islamic L. & Culture* 89 (2003) for a better understanding of interplay of culture and Islam.

⁹ For example, the patriarchal interpretation of *hadith on khula* in India. For details see my work titled "Understanding *Khula*: A Muslim wife's Right to Divorce" in Furqan Ahmad (ed.), *Dispelling Rhetorics: Law of Divorce and Gender Inequality in Islam* (ILI Publications, New Delhi, 2019).

¹⁰ See, 30:21 *Al Quran* "And of His signs is that He created for you from yourselves mates that you may find tranquillity in them; and He placed between you affection and mercy. Indeed in that are signs for a people who give thought."

marriage- *Talaq* (from husband's side), *Khula* (from wife's side), *Mubbarat* (by mutual consent) or *faskh* (by *qazi*). Both *talaq* and *khula* are unilateral dissolutions at the instance of husband and wife respectively. Even though consent of husband is required in the instance of *khula* but that consent is not more than a mere formality for deciding the actual moment from which the *khula* becomes operational as the husband has no choice but to say yes to the wife's demand.¹¹

This very idea of unilateral dissolution of marriage at the instance of one of the spouses appears a little hard to digest to a majority of Indians, especially Hindus, for whom marriage is a *sanskar* and an eternal bond. Divorce was not even available as an option before the enactment of Hindu Marriage Act, 1955 for Hindus who view marriage as an eternal bond. The original Act of 1955 provided for dissolution of marriage only on fault grounds and no-fault divorce by mutual consent was added as a ground for divorce only in 1976 (section 13B of the HMA, 1956). The ground of irretrievable breakdown of marriage though judicially recognized¹² has still not found place in the statute. This ground of irretrievable breakdown of marriage which the Supreme Court has time and again recognised as a ground for dissolution of marriage in order to do complete justice in a matter is akin to *talaq* and *khula* as unilateral dissolution of marriage at the instance of one of the spouses when the other spouse is not willing to end the matrimonial relationship.

Thus, we see that in Hindu personal law, the movement has been from viewing marriage as an unbreakable bond, to recognizing divorce on fault grounds, to divorce by mutual consent and then finally, irretrievable breakdown of marriage. It is pertinent here to remember that this progressive growth in Hindu law, guaranteeing rights to hapless married women to come out of the shackles of bad marriages, was a result of codification. The codification process took a long time and was met with a lot of resistance from the orthodox and patriarchal forces within the Hindu community. Even after almost seventy years of codified Hindu law giving the right to remarry, divorced women still find it difficult to tie the knot again due to societal disapproval of the same. It is also imperative to note that despite the codified law guaranteeing Hindu women space to exit bad marriages by recognising marriage to be a breakable bond, the popular media portrayal of marriage especially in television and movies is that of marriage as an eternal bond.¹³

At this juncture, it is important to note two things: *first*, Islamic law, from the beginning provides a window for dissolution of marriage, thereby, providing a remedy to unhappy spouses in the form of *talaq* and *khula*; *second*, that second marriage is encouraged by the teachings of *Quran* in case of dissolution of marriage either by death or divorce¹⁴. It is worth remembering that Prophet *Muhammad (PBUH)* was married monogamously to *Khadija (RA)*, a businesswoman, 15 years older than him and who had been married twice earlier.

¹¹ For a detailed discussion on law regarding *Khula*, see *supra* note 9.

¹² See, *V. Bhagat v. D. Bhagat* AIR 1974 SC 710, *Jorden Diengdeh v. S.S. Chopra* AIR 1985 SC 935, *Chanderkala Trivedi v. Dr. S. P. Trivedi*, II(1993) DMC271SC, *Naveen Kohli v. Neelu Kohli*, AIR 2006 SC 1675.

¹³ The contribution of Balaji telefilms in this regard is undeniably huge with characters like *Tulsi* and *Parvati* in iconic serials like *Kyunki Saas bhi kabhi Bahu thi* and *Kahani ghar ghar ki* being portrayed as the epitome of perfect Indian wife.

¹⁴ See Verses 2:232, 2:234, 2:235 and 2:240 *Al Quran*.

While deliberating upon marriage and divorce in Muslim Personal law, there are three very important interlinked key concepts which need to be understood. *First*, unlike Hindu belief system, marriage does not sever a woman's bond from her natal family. A married Muslim woman remains as much as her father's daughter and is not supposed to take up her husband's surname as name identifies lineage¹⁵ and is entitled to inheritance.¹⁶ Marriage does not in any which ways affect the share in inheritance of a daughter/sister/mother. It is astonishing to think that 1400 years ago, Islamic law guaranteed Muslim women right of inheritance which their Hindu sisters could get only in the year 2006 after a long struggle. *Second*, with respect to law on maintenance, a stipulated time after the dissolution of marriage, it is the responsibility of the parents or siblings to maintain the woman. *Third*, on marriage, a woman's personality is not merged with that of the husband. She is her own person, independent to hold property and independently liable for her deeds as a Muslim. There is no concept of vicarious liability in Islam. Every person is responsible for his or her own deeds. No bearer of burdens can bear the burden of another.¹⁷ A Muslim couple before being husband and wife are at first individuals, striving to attain the higher end of achieving nearness to God. Since, believing in One God and returning to that one Supreme power on the day of judgment remains central to the Islamic thought, marriage becomes just a part of a believer's sojourn in this world and not the ultimate goal of his/her existence. Understanding these three concepts is central to the whole debate on Muslim personal law and uniform civil code in general and *talaq* in particular.

III. THE PROBLEM

Demonizing Muslims by Mainstreaming Misconceptions in the Media

Propagation of misconceptions by mainstream media by ways of movies, television serials and the news media has led to the 'othering' of Muslims in the society. Muslim men are portrayed savages or lechers having insatiable sexual appetite who are not satisfied with one woman. The portrayal of *Alaudin Khilji* by Ranveer Singh in the Sanjay Leela Bhansali period drama *Padmavat* being the prime example on point. Polygamy is portrayed to be a norm in Muslim community in both television serials as well as film media. For example, in the popular television show *Beintehaa* aired on Colors, the main protagonist *Zain's* elder brother, *Fahad* has two wives who live in the same house and keep on bickering while the husband keeps on shuttling between the two of them. In the movie *Gullyboy*, the main protagonist *Murad's* father *Aftaab* played by Vijay Raz casually

¹⁵ Verse 33:5 *Al Quran* "Call them by [the names of] their fathers; it is more just in the sight of Allah." Even though this verse is specifically with respect to adopted sons, the underlying idea remains that of identifying lineage. The daughters of the Prophet were known by his name and the Prophets' wives by the name of their fathers.

¹⁶ Verse 4:11 *Al Quran* "Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt."

¹⁷ Verse 6:164 "And every soul earns not [blame] except against itself, and no bearer of burdens will bear the burden of another." also see 35:18 and 53:38 *Al Quran*.

marries again and brings the new wife to the same house where he is residing with his family that includes his mother, wife and two sons. *Murad* and his mother though upset, accept the fact that *Aftaab* has married again and continue with their lives. *Aftaab's* mother appears to be totally unaffected by the fact that her son has married again and in fact is unhappy when her grandson *Murad* shifts to another house with his mother to save her from the abusive husband.

Contrary to what is generally propagated, polygamy is not the rule but an exception in Islamic law to be exercised subject to condition of treating both the wives equally¹⁸ with God Almighty stressing that “*Ye are never able to be fair and just as between women even if it is your ardent desire..*”¹⁹ It becomes amply clear from a plain reading of the Quranic verses that monogamy is the rule and polygamy is an exception but since we live in a patriarchal society where men boast of having multiple sexual partners,²⁰ the exception is propagated as a rule both with sneer and envy. Muslim women are constantly portrayed as oppressed and victims of domestic/sexual abuse who have resigned themselves into submission of slavery by men in the house and are constantly living in fear of divorce.

Acting upon the abysmal portrayal of Muslim Women in the media, with reports of incidences of *triple talaq* across the country, despite the Supreme Court holding *triple talaq* as unconstitutional,²¹ the Central Government took to itself the cause of criminalizing *Talaq* by passing an Ordinance when the Bill couldn't be cleared in Rajya Sabha. The Bill was finally passed in Rajya Sabha in its third attempt on July 30, 2019, nineteen long months after the first attempt made in December 2017. The Bill, once it gets the formal assent of the President shall become the law of the land.

The media is gloating in the victory of Muslim women from decades of oppression and misery inflicted upon them at the hands of cruel husbands taking recourse to demonic Islamic law.²² The media hype of the new founded freedom from unjust practice of *triple talaq* conveniently overlooks the fact that it is well accepted by the majority of school of thoughts that *triple talaq* or *talaq-ul-biddat* is un-Islamic as being in stark opposition to procedure of *talaq*

¹⁸ See verse 4:3 *Al Quran* “And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hand possesses. That is more suitable that you may not incline [to injustice].”

¹⁹ Verse 4:129 *Al Quran*

²⁰ In Raju Hiran's movie *Sanju*, the main protagonist *Sanju* boasts of having slept with 308 girls in front of his wife. Casual objectification of women as sexual objects has been a constant part of the talk show *Koffee with Karan* where the host Karan Johar regularly probes his male guests with questions about their sex life.

²¹ *Shayara Bano v. Union of India*, 2017(9) SCALE 178.

²² See generally “Passage of Triple Talaq Bill a moment of great import for India's legislative history” available at: <https://economictimes.indiatimes.com/opinion/et-view/et-view-passage-of-triple-talaq-bill-a-moment-of-great-import-for-indias-legislative-history/articleshow/70459771.cms> (last visited on July 15, 2019); Shashwati Das, “In victory for NDA, Rajya Sabha passes bill to ban instant triple talaq”, available at <https://www.livemint.com/politics/news/in-victory-for-nda-rajya-sabha-passes-bill-to-ban-instant-triple-talaq-1564492574995.html>. (last visited on July 15, 2019); “Muslim women thank PM Modi on passage of Triple Talaq Bill”, available at: <https://timesofindia.indiatimes.com/india/muslim-women-thank-pm-modi-on-passage-of-triple-talaq-bill/articleshow/70464189.cms> (last visited on July 15, 2019).

prescribed in the Holy Quran.²³ The Supreme Court with *Shayra Bano* had already held triple *talaq* to be unconstitutional.²⁴ Earlier the Delhi High court in 2009 in *Masroor Ahmad v. NCT of Delhi*,²⁵ had held that triple *talaq* or three pronouncements of *talaq* given in one sitting would be counted as one. Back in 2002, the Supreme Court in *Shamim Ara v. State of U.P.*,²⁶ had already clarified that for a valid *talaq*, it is mandatory to follow the pre *talaq* process prescribed by the *Quran*.

We are living in sad times when news reporting has been reduced to nothing but mockery of journalism. Wardrobe malfunctions, celebrity affairs and breakups, celebrity deaths and mourning are being sensationalised, so are reports pertaining to rapes. Reports of women being raped in the name of *nikah halala* makes for sensational headlines because nothing shocks more than sexual perversion in the name of religion.²⁷ Story of a daughter-in-law being forced to marry the father-in-law, who would divorce after raping her so that the son can marry her again, is vilely sensational and thus, more newsworthy than the headline reporting a woman being raped by the father-in-law. The question of validity of a *Nikah* with father-in-law is simply lost in the process of painting a demonic picture of Muslim Personal law.

From B. R Chopra's *Nikaah* to Sony's *Hina* and Color's *Beintehaa*, the struggle of a remorseful husband in finding the perfect second husband for marrying off the divorced wife with pre condition of divorce has been a tried and tested successful plot in television and movies alike. The simple fact that a *Nikah* with the idea of getting divorced in future is not a valid *Nikah* at all, is completely immaterial for anyone concerned in the making of the movie/television show.²⁸ With minimal censorship requirements for web-based streaming platforms, a series based on *Nikah halala* provides a perfect platform for depicting sex scenes for voyeuristic consumption.

Nikah halala is not a custom tailored for sexual exploitation of woman. It is a simple permission given to the now divorced spouses to re-marry provided the second marriage of the woman is dissolved due to death or divorce²⁹. It is important to note that the process of *talaq* which is prescribed by the Quran allows for contracting a fresh *nikah* with the wife after divorcing

²³ For detailed discussion on *Triple Talaq* see Samreen Hussain, "Triple Talaq: A Socio-Legal Analysis *ILI Law Review* 130 (2010) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1597858 (last visited on July 15, 2019).

²⁴ *Shayara Bano v. Union of India (UOI)*, 2017(9) SCALE 178.

²⁵ (2007) ILR 2 Delhi 1329.

²⁶ AIR 2002 SC 3551.

²⁷ PTI, "Woman alleges 'forced to undergo *nikah halala*', raped by father-in-law; 5 booked", Sept 03, 2018, available at <https://www.hindustantimes.com/india-news/woman-alleges-forced-to-undergo-nikah-halala-raped-by-father-in-law-5-booked/story-huKME0br0bvm85TMDJPXxL.html> (last visited on July 15, 2019). Also see Mirror now, "Another *nikah-halala* horror! Woman gang-raped by husband, father-in-law, uncle and 2 clerics" September 03, 2018, available at <https://www.timesnownews.com/mirror-now/crime/article/woman-forced-to-undergo-nikah-halala-gangraped-by-father-in-law-husband-his-uncle-and-two-clerics/278939> (last visited on July 15, 2019). It is important to mention here that *nikah* with father of divorced husband is not valid in Islamic law.

²⁸ Even though a marriage contract may stipulate conditions for maintenance and protection of rights in case of divorce in future, it cannot stipulate a provision of divorce in advance.

²⁹ See verse 2:230 which reads "And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him. And if the latter husband divorces her [or dies], there is no blame upon the woman and her former husband for returning to each other if they think that they can keep [within] the limits of Allah. These are the limits of Allah, which He makes clear to a people who know."

her twice but not after the third pronouncement which makes the divorce irrevocable. Remarrying the first husband after dissolution of second marriage is just an option available to the woman and cannot be forced upon her.³⁰

Sadly, ignorance of *usul-u-fiqh* in Muslims and misinformation propagated by the news & entertainment media has led to demonization of Muslim personal law whose only objective seems to be sexual exploitation and oppression of women. A rape is what it is- a heinous crime against the person of a woman and should be dealt like a crime. Sensationalising rape by citing senseless religious justifications given by the accused is akin to mocking the whole system while belittling the agony of the woman.

Mainstreaming misconceptions by legislation

The Muslim Women (Protection of Rights on Marriage) Act, 2019 is a small piece of legislation with just eight sections in total but is bound to have large ramifications for a simple reason. It brings in criminal law into the horizons of family law. How far the law goes in alleviating the Muslim women is a question that can only be answered with the help of an impact study done in future. At present, the analysis of the law can only be rooted in theory and whatever little data is available on the subject.

The Act is applicable to the whole of India except the State of Jammu & Kashmir. Section 2 specifies that “unless the context requires otherwise the term “electronic form” has the same meaning as in the IT Act, the term “magistrate” means a Judicial magistrate of the First Class and most importantly “*talaq*” means *talaq-e biddat* or any other similar form of *talaq* having the effect of instantaneous and irrevocable divorce pronounced by the husband.

Chapter II of the Act contains two provisions. Section 3 makes the pronouncement of *talaq* as void and illegal and section 4 makes any such pronouncement an offence attracting three years of imprisonment along with fine. Chapter III of the Act is titled “Protection of Rights of Muslim Women” and deals with two specific rights- one that of subsistence allowance and custody of minor children. Section 5 provides that “Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom *talaq* is pronounced shall be entitled to receive from her husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate.” Section 6 provides that “Notwithstanding anything contained in any other law for the time being in force, a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of *talaq* by her husband, in such manner as may be determined by the Magistrate.” Section 7 makes the offence of pronouncing *talaq* a cognizable and compoundable offence and bail is made conditional on first providing a hearing to the woman on whom *talaq* has been pronounced.³¹

³⁰ 2:230 *Al Quran*

³¹ Section 7 reads- Notwithstanding anything contained in the Code of Criminal Procedure, 1973,— (a) an offence punishable under this Act shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom *talaq* is pronounced or any person related to her by blood or marriage; (b) an offence punishable under this Act shall be compoundable, at the instance of the married Muslim woman upon whom *talaq* is pronounced with the permission of the Magistrate, on such terms

Criminalization of pronouncement of *talaq* by section 4 is the core of controversy for the simple reason that it defies the settled principles of criminalization like principle of legality,³² proportionality³³ and principle of minimal criminalisation.³⁴

Principle of Legality

The Act penalizes pronouncement of *talaq* without clearly codifying the process of a valid *talaq*. In the absence of codification of the process of *talaq* by the legislature it is only the scattered judgements of the Supreme Court from *Shamim Ara* to *Shayara Bano*, which discuss the process of *talaq* along with the traditional texts used by the *Ulemas* for the purpose of disposing matters between the divorcing couples. *Ulemas* across wide spectrum of sects do not have uniformity on the process of *talaq* and the judgments of the Supreme Court which are in English language not easily comprehensible to general Muslims.³⁵ Confusion is bound to occur in the interpretation of the term “*talaq*” despite a half-hearted attempt to define *talaq* in section 2 of the Act. The definition of “*talaq*” makes it amply clear that *ahsan talaq* is outside the ambit of the Act as it is *talaq-e-sunnat* and a single revocable divorce. However, confusion may still arise in case of *hasan talaq* which though not instantaneous is irrevocable in nature. Question may also arise with regard to the interpretation of “*talaq- e biddat*” itself, which as clarified by the Delhi High Court in *Masroor Ahmad* and also according to various schools of thoughts³⁶ is to be counted as a single revocable *talaq*.

Principle of Proportionality

According to this principle, the punishment has to be in proportion with the seriousness of the offence and to deal with the same a way of grading the seriousness of harm suffered by the victim needs to be done.³⁷ In assessing the degree of harm, one has to first determine the interest of the victim that have been interfered with and then considering the extent of the interference. Pronouncement of triple *talaq* is generally understood to be an arbitrary act and this arbitrary act is void in the eyes of the civil law. This act interferes with the right of the woman to reside with

and conditions as he may determine; (c) no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom *talaq* is pronounced, is satisfied that there are reasonable grounds for granting bail to such person.

³² According to the principle of legality, the law must be clear, capable of being obeyed and be readily available to the Public. See Jonathan Herring, *Criminal Law: Text, Cases and Materials* 9 (7th ed., Oxford University Press, Oxford, 2016).

³³ According to the principle of proportionality, the sentence accorded to a crime should reflect the seriousness of the offence. See *id.* at 13.

³⁴ According to the principle of minimal criminalization, criminal law should prohibit something only if absolutely necessary. See *id.* at 10. Also see Andrew Ashworth, “Is Criminal Law a Lost Cause?”, 116 *Law Quarterly Review* 225 (2000).

³⁵ Given the dismal state of affairs of English education in the Muslim community. See A Report on Social, Economic and Educational Status of the Muslim Community of India by Prime Minister’s High Level Committee Cabinet Secretariat Government of India November, 2006 available at http://mhrd.gov.in/sites/upload_files/mhrd/files/sachar_comm.pdf (last visited on July 10, 2019).

³⁶ According to the *Shia* schools and the *Ahl-e Hadith* sect amongst the Sunnis.

³⁷ See Jonathan Herring, *Criminal Law: Text, Cases and Materials* 13 (7th ed., Oxford University Press, Oxford, 2016).

the man peacefully in the matrimonial home and seek maintenance for herself. Penalizing the act of pronouncing *talaq* does not remedy the loss of residence of the wife but only provides for seeking of subsistence allowance for herself and the minor children. The question that arises now is that - how would the guilty husband provide for her subsistence while being imprisoned. In absence of the penalty of imprisonment, it would make sense that the husband would be in a position of providing subsistence allowance to the wife and children.

Logically, if triple *talaq* is considered to be a single revocable *talaq*, the chances of reconciliation between the spouses are higher as the wife is entitled to live in the matrimonial home during the period of *iddat* according to the Islamic law. In case of non-conciliation, provision of maintenance until the woman remarries after *talaq* would have been a better option. Such a provision would also have been at parity with section 25 of the Hindu Marriage Act and section 125 of the Cr.Pc, thereby negating any questions about disparity of treatment of divorcing Hindu and Muslim husbands. In the current state of affairs, if a Hindu husband secures a divorce decree on the judicially recognized ground of irretrievable breakdown of marriage, where the wife is not at all willing to end the marriage, he is only liable under civil law to provide maintenance and does not attract the criminal sanction of three years imprisonment. On the other hand, a Muslim husband exercising his right to unilateral divorce under the personal law, in case of breakdown of marriage, would attract a jail term along with fine and somehow would also be expected to make the arrangements for providing subsistence allowance to the wife and minor children from the prison.

Principle of minimal criminalisation

According to this principle, law should provide for criminal sanction only when absolutely necessary and the conduct in question is sufficiently serious to warrant intervention by the criminal law.³⁸ The question that need to be answered in light of this principle is that- whether the practice of triple *talaq* is so rampant in the society so as to warrant criminal sanction for the same? According to the census of 2011, divorce rate in India is 0.24% with divorce rate among Muslims at 0.56% and 0.76% for Hindus. According to the census, 0.49 % of Muslim women had been divorced in general with no data pointer for the type of divorce.

A study conducted by Sreeparna Chattopadhyay to assess whether divorce puts Muslim women at a greater disadvantage, highlights a very interesting finding.³⁹ States which have positive gender indicators like better female literacy, less skewed sex ratio, have lower or similar rates of divorce among Hindu and Muslim women. In states where women's lives are marked by extensive inequities, a higher rate of divorce among Muslim women is seen, suggesting that a husband's unilateral right to divorce may be increasing the percentage of women in a regime of more intense patriarchy.⁴⁰ Thus, focussing on improving gender indicators like female literacy, employment would help in alleviating gender inequality and also reduce the divorce rate at the same time.

³⁸ See, Andrew Ashworth, "Is Criminal Law a Lost Cause?", 116 *Law Quarterly Review* 225 (2000).

³⁹ See, Sreeparna Chattopadhyay, "Muslim Women and Divorce in India: Insights from Census 2011" working paper 2017, available at https://www.researchgate.net/publication/316876926_Muslim_women_and_divorce_in_India-Insights_from_Census_2011. DoI 10.13140/RG.2.2.31147.44327 (last visited on July 5, 2019).

⁴⁰ *Ibid.*

In absence of any specific empirical study conducted by the Government on Triple *talaq*, it can safely be inferred from the census data that triple talaq is not an epidemic plaguing Muslim woman and criminalizing triple talaq is encroachment of criminal law in the family arena.

IV. CONCLUSION

Though the term “demonization” might appear to be a bit of an exaggeration as the process of propagating misconceptions about Muslims is subtle when not sensationalized; it is nonetheless used in this article as the portrayal achieves the same goal- demonizing an entire community based on stereotypes and sheer ignorance to suit the political narratives. It is important to question in a free society based on democratic principles, the absence or existence of political undertones of such a demonic media portrayal of Muslims in the name of journalistic and artistic freedom. *Nikah* is not a joke, neither is *talaq*. Unfortunately, that is what it has been reduced to by the mainstream media, politicians and fake *mullahs* accentuated by ignorance of general public.

By no stretch of imagination am I arguing for censorship of any kind of news reporting on issues of relevance. What I am arguing instead is a sensible and informed discourse on *usul-u-fiqh* and the codification of Muslim law in light of the same, without any political agendas. Non-Codification of Muslim personal law holistically and distrust of the judicial system created by the fake *mullahs* and politicians posing as guardians of the oppressed community as witnessed in the aftermath of *Shahbano*, is a major problem faced by Muslims in India. Uninformed debates on *triple talaq* after *Shayara Bano* and criminalizing of *talaq* by the Muslim Women (Protection of Rights on Marriage) Act, 2019 without an iota of understanding the institution of marriage in Islam have further aggravated the distrust of the government which in all probability would continue to grow. The criminalisation of *talaq*, in the name of protection of Muslim women, in absence of codification of rights and duties in a marriage, serves no purpose other than politics. It is just a political gimmick which violates the basic principles of criminal law and would go a long way in further alienating the Muslim community from the mainstream.



INSANITY AS A DEFENSE TO CRIMINAL CHARGE – AN ANALYSIS

Vageshwari Deswal*

Abstract

Persons suffering from unsoundness of mind are incapable of committing a crime as they lack the mental capacity to develop the required mental element, which is an essential ingredient to constitute any crime. Law exempts such persons from criminal liability provided they are incapable of understanding the nature, wrongfulness or illegality of such act. This article seeks to analyse the various tests applied by courts in determining liability of such persons and the procedure for their trial, detention and discharge.

I. INTRODUCTION

Unsoundness of mind is an absolute defence to any criminal charge as persons suffering from unsoundness of mind are deemed incapable of possessing the necessary *mens rea* to commit a crime. Section 84¹ of the Indian Penal Code, 1860 exonerates from criminal liability, a person of mental incapacity who does a criminal act. The settled position of law is that every man is presumed to be sane and to possess sufficient degree of reason to be responsible for his act unless the contrary is proved. The burden of proof that the mental condition of the accused was, at the crucial point of time, such as is described by section 84, lies on the accused who claims the benefit of this exemption *vide* section 105 of the Indian Evidence Act, 1872. The defence has to prove that unsoundness of mind was present to such an extent at the time of commission of the offence that the doer of the act could not know the nature of the act he was committing. The accused has to merely probabilise his defense by preponderance of probabilities.

II. RATIONALE BEHIND EXEMPTION

A person suffering from unsoundness of mind cannot control his will or regulate his conduct. Such persons are mentally incompetent to understand their actions or judge properly the repercussions of their acts therefore they cannot be held legally responsible for their actions. Punishment serves no purpose in case of such persons as they are incapable of understanding why they are being punished or that they are being punished at all.

The defence under section 84 of the Code is based on the principle that in order to constitute crime, the act should have been committed with 'guilty' intention, and if the doer of the act not knowing the nature of the act; the wrongfulness of the act; or the illegality of the act committed the same, he cannot be held responsible for it.

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¹ Indian Penal Code, s. 84. Act of a person of unsound mind- "Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law".

III. PRE REQUISITES FOR CLAIMING BENEFIT OF EXEMPTION UNDER SECTION 84 IPC

Unsoundness of mind

A person suffering from unsoundness of mind is *Non compos mentis* i.e. ‘not of sound mind’. *Compos mentis* means a composed mind. *Non compos mentis* means not having control or composure over one’s mind. Unsoundness of mind may be temporary such as in case of lunatics, permanent (idiocy), natural or supervening, by birth or by illness, e.g., Schizophrenics, and sometimes also by extreme consumption of, or addiction to alcohol or drugs.

Unsoundness to exist at the time of the commission of the offence

Whenever a plea of legal insanity is set up, the court has to consider whether at the time of commission of the offence, the accused was suffering from unsoundness of mind or not. The crucial point of time for ascertaining the state of mind of the accused is the material time when the offence takes place. In the case of *Amrit Bhushan Gupta v. Union of India*,² it was held that “unless the Court comes to the conclusion that the accused was insane at the point of time he committed the offence he cannot be absolved of the responsibility of the offence even if it is found by the Court that he was insane either earlier or in the later point of time of the commission of offence”. If the accused is at that crucial moment found to be laboring under such a defect of reason as not to know the nature of the act he was doing, or that even if he knew it, he did not know it was either wrong or contrary to law then section 84 applies. The state of mind which entitles the accused to avail the benefit of Section 84 of the Indian Penal Code is to be established from the circumstances which preceded, attended and followed the crime. There is a duty on the defence to prove the unsound state of mind of the accused at the time of commission of the offence. One who is subject to recurring fits of insanity will be entitled to exemption from criminal liability only if he was subjected to such a fit at the time of the commission of the crime. If he was capable of understanding the nature and consequences of his actions at the time when he committed the offence, he would not be entitled to the protection of Section 84 and would be liable to punishment.

Incapacity in the accused person to know

The words ‘incapable of knowing’ clarifies that an accused has to prove that he was rendered incapable of understanding his actions owing to unsoundness of mind. The capacity to know a thing a quite different from what a person knows. Whether he knew the nature his actions or not is immaterial because what is protected under Section 84 is an inherent or organic incapacity and not a wrong or erroneous belief which might be the result of perverted potentiality.

² AIR 1977 SC 608.

This incapability may be due to arrested development of the mind, sudden fit of insanity or delusion or some other medically accepted ground.

In the case of *Lakshmi v. State*,³ the Court observed, “A person might believe so many things. His beliefs can never protect him once it is found that he possessed the capacity to distinguish between right and wrong. If his potentialities lead him to a wrong conclusion, he takes the risk and law will hold him responsible for the deed which emanated from him. What the law protects is the case of a man in whom the guiding light that enables a man to distinguish between right and wrong and between legality and illegality is completely extinguished. Where such light is found to be still flickering, a man cannot be heard to plead that he should be protected because he was misled by his own misguided intuition or by any fancied delusion which had been haunting him and which he mistook to be a reality. Our beliefs are primarily the off springs of the faculty of intuition. On the other hand the content of our knowledge and our realization of its nature is born out of the faculties of cognition and reason. If cognition and reason are found to be still alive and gleaming, it will not avail a man to say that at the crucial moment he had been befogged by an overhanging cloud of intuition which had been casting its deep and dark shadows over them.”

Knowledge of nature of the act

Nature of the act refers to the physical nature and quality of the act, rather than the moral quality. It covers those situations wherein the doer does not know what he is physically doing. For example, a person who cuts another's finger under the delusion that he is chopping a vegetable; or a person who strikes another, and in consequence of an insane delusion thinks he is breaking a jar. In both these examples the accused is not aware of the nature of his act.

In the case of *Chirangi v. State*,⁴ the accused, Chirangi, Lohar, a 45 year old widower who was very much devoted to his 12 year old son, was tried for killing his son with an axe while they had gone to Budra Meta atop a hillock. In defence he pleaded that he killed his son under a delusion believing him to be a tiger who was about to attack. Medical testimony showed that it was possible for Chirangi, who was suffering from bilateral cataract prior to the relevant date, to have because of this disability mistaken 'bona fide' his son for a tiger. There was an abscess in his leg could have produced a temperature which might well have been responsible after the fall for a temporary delirium which might have created a secondary delusion to magnify the image created by the defect in vision. Chirangi suffered from cardio-vascular disease which would have resulted in temporary confusion, and the injury to his eyebrow could have caused a state of concussion during which he might have inflicted the injuries on his son without being conscious of his actions. All this showed clearly enough that Chirangi's fall combined with his existing physical ailments could have produced a state of mind in which he in good faith thought that the object of his attack was a tiger and was not his son. The appellant's conduct after the occurrence

³ AIR 1959 All 534.

⁴ 1952 CriLJ 1212.

was in consonance with that estimate, and it was manifest that he had had no intention of doing wrong or of committing any offence. Thus he was acquitted.

Knowledge of wrongfulness of act or the act being contrary to law

Knowledge of wrongfulness of act implies the lack of substantial capacity in the accused person to know or appreciate that his conduct is wrong. Section 84 applies where a person, as a result of mental disease or defect, lacks substantial capacity to know or appreciate either that the conduct was against the law or that it was against commonly accepted moral principles, or both. For example:

- (i) A person may kill a child under an insane delusion that he is saving him from sin and sending him to heaven. Here he is incapable of knowing by reason of insanity that he is doing what is morally wrong; or
- (ii) A person may under insane delusion believe an innocent man whom he kills to be a man that was going to take his life in which case, by reason of his insane delusion, he is incapable of knowing that he is doing what is contrary to the law of the land.⁵

In the case of *Ashiruddin Ahmed v. The King*,⁶ the accused had a dream in which he was commanded by someone in paradise to sacrifice his own son of five years. The next morning the accused took his son to a mosque and killed him by thrusting a knife in his throat. He then went straight to his uncle, but, finding a *chaukidar* nearby took his uncle to a tank at some distance and slowly told him the story. On these facts it was held by a Bench of the Calcutta High Court that the accused did not know that his act of killing his son was wrong as he was labouring under a belief that his dream was a reality. Acting under delusion of his dream, he made this sacrifice believing it to be right. Thus he was granted the defence of insanity under Section 84.

However, the above judgment has been criticized in later judgments. In *Lakshmi v. State*,⁷ the court observed, “We find ourselves unable to endorse this view of section 84, I.P.C., and must therefore, express our respectful disagreement with it. We are further of opinion that once this view is accepted to be correct, it will lead to serious consequences as it will be open to an accused in every case to plead that he had dreamt a dream enjoining him to do a criminal act, and believing that his dream was a command by a higher authority, he was impelled to do the criminal act, and he was therefore, protected by section 84. We are of opinion that such a plea would be untenable, and would not fall within the four corners of section 84.”

⁵ *Queen Empress v. Kader Nasyer Shah* (1896) ILR 23 Cal. 60.

⁶ AIR 1919 Cal 182.

⁷ AIR 1959 All 534.

IV. BURDEN TO PROVE INSANITY LIES ON THE ACCUSED

The doctrine of burden of proof in the context of the plea of insanity was stated by the Supreme Court in the case of *T.N. Lakshmaiah v. State of Karnataka*,⁸ in the following propositions:

- i. The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea* and the burden of proving that always rests on the prosecution from the beginning to the end of the trial.
- ii. There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by section 84 of the Indian Penal Code. The accused may rebut it by placing before the court all the relevant evidence - oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon party to civil proceedings i.e. on a preponderance of probabilities.
- iii. Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including *mens rea* of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged.

In the case of *Butu @ Madhu Oram v. State*,⁹ the Court explained that accused is not to be called upon to prove the ingredients of section 84, IPC beyond reasonable doubt in order to get an acquittal. Though the burden lies on the accused to prove his insanity at the time of occurrence it will be sufficient if the materials on record lead to an inference that the requirements of section 84, IPC may be reasonably probable. Such an inference can be drawn from materials on record, past history of the accused, conduct of the accused during the occurrence and thereafter. Absence of motive though not a *sine qua non*, is a relevant factor for consideration.

V. 'MCNAUGHTEN RULES', THE 'IRRESISTIBLE IMPULSE TEST' AND THE 'DURHAM RULE'

McNaughten rules¹⁰ are principles expounded in 1843 by a panel of fifteen judges in the House of Lords in response to five hypothetical questions asked by the Lord Chancellor to understand the application of law to determine the liability for crimes committed by mentally challenged people. These principles lay down a standard to test the criminal liability of persons of unsound mind. The McNaughten rules also known as the "right-wrong" test, required the acquittal of defendants who could not distinguish right from wrong.

In 1929, the District Court of Columbia developed the "irresistible impulse" test which allowed a jury to inquire as to whether the accused suffered from a "diseased mental condition"

⁸ AIR 2001 SC 3828.

⁹ 1985 (II) OLR 398.

¹⁰ (1843) 8 E.R. 718.

that did not allow him or her to resist an insane impulse. It required a jury's determination that the accused was suffering from a mental disease and that there was a causal relationship between the disease and the act.

In the year 1954, the Durham rule was adopted by an American Court in the case of *Durham v. U.S.*,¹¹. Popularly known as the 'product test' the rule lays down that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect". This rule perpetuated the dominant role of expert testimony in determining criminal responsibility instead of a jury. However, in subsequent cases the courts overturned this rule and it was rejected by the federal courts, because of its broad spectrum and range which helped people such as alcoholics and drug addicts to seek exemption from criminal liability. The Indian law on insanity contained in section 84 of the IPC is loosely based on the McNaughten's principles.

VI. ASCERTAINING UNSOUNDNESS

When a Magistrate holding an inquiry has reason to believe that the person against whom the inquiry is being held is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness of mind, and shall cause such person to be examined by the civil surgeon of the district or such other medical officer as the State Government may direct, and thereupon shall examine such surgeon or other officer as a witness and shall reduce the examination to writing.¹² The words "reason to believe" mean a belief which a reasonable person would entertain on facts before him. The burden lies on the accused to establish that he was suffering from the unsoundness of mind. The provisions regarding the enquiry in the unsoundness of mind are mandatory and the Magistrate is bound to enquire before he proceeds with the case. Such enquiry is to be held at the threshold.¹³ The plea of medical insanity must first be determined by recording the medical evidence.¹⁴ The mandate of Section 329 of the Code is that when the plea of insanity is raised before a Court it shall try the fact of unsoundness of mind and incapacity of the accused in the first instance. Sub-section (2) of this section makes, the preliminary trial, of this fact, a part of the trial before the Court.¹⁵

According to Section 2(w) of the Mental Healthcare Act, 2017 "prisoner with mental illness" means a person with mental illness who is an under-trial or convicted of an offence and detained in a jail or prison. The conduct of the accused, from the time of the commission of the offence upto the time the proceedings commenced, is relevant for the purpose of ascertaining as to whether the plea of unsoundness raised was genuine, bona-fide or an after-thought. Courts usually rely on the following to ascertain the state of mind of the accused at the time of offence.

- i. Presence or lack of motive.
- ii. Deliberation and preparation
- iii. Manner in which the crime was committed.

¹¹ 214 F.2d 862.

¹² Code of Criminal Procedure (CrPc), s. 328(1).

¹³ *Dr. Jai Shanker v. State of HP*, AIR 1972 SC 2267.

¹⁴ *Gurjit Singh v. State of Punjab*, CrLJ 1505 (P&H).

¹⁵ *Ibid.*

- iv. Nature of weapon used.
- v. Attempt at concealment of the dead body, weapon of offence or other telltale signs.
- vi. Efforts to avoid detection or evade apprehension by authorities.
- vii. Conduct of the appellant immediately before the incident, at the time of the incident and shortly after the incident.
- viii. Subsequent conduct of the appellant and his conduct during the trial of the case.
- ix. Previous history if any of attacks of insanity, hospitalization or treatment of insanity.
- x. Family history of unsoundness if any as sometimes heredity plays a part.

In the case of *Raghu Pradhan v. State Of Orissa*,¹⁶ the accused pleaded unsoundness of mind as a defence to the charge of murdering his wife and minor children. He was also tried for assaulting a neighbor who tried to intervene and the constable who came to apprehend him. It was clear from the evidence of the witnesses and the discharge certificate that prior to the occurrence the appellant was becoming insane periodically and during that period he was assaulting persons at random for which he was being treated medically. It had also been proved that there was absence of motive for commission of such crime as he had cordial relations with his wife. PW 2 had categorically deposed that at the time of occurrence the accused was behaving like a mad man. The evidence of the A. S. I. (PW 16) also disclosed that immediately after the occurrence when he reached the place the accused was in a violent mood. Accused was sent for medical examination as his behaviour was abnormal. The opinion of the Doctor (PW 19), the medical report and opinion of D. W. 1 proved that immediately after the occurrence there was contusion in the brain of the accused which is one of the symptoms of insanity. Thus after considering all the materials on record, the Court concluded that when the appellant committed the offence, he was not in a position to understand the nature of his act owing to insanity at the crucial point of time. The facts, evidence and circumstances, indicated above would clearly make out a case of legal insanity as provided in section 84 of the Code.

VII. PREMENSTRUAL STRESS SYNDROME AS A DEFENSE TO CRIMINAL CHARGE

"Premenstrual stress syndrome (PMS syndrome) is a disorder afflicting many women.' The symptoms of PMS syndrome include excessive thirst and appetite, bloating, headaches, anxiety, depression, irritability, and general lethargy. Diagnosis depends on the timing of the symptoms rather than on their type, number, or severity; not all patients experience all possible symptoms. The symptoms develop and increase in intensity from seven to fourteen days prior to the onset of menses and disappear rapidly thereafter. PMS syndrome can range in severity from mild to incapacitating, in both a physical and psychological sense.¹⁷

Hormonal changes can cause women to commit crime during menstruation. Premenstrual tension is often accompanied by irritability, lethargy, depression and water retention, and these symptoms alone may be responsible for certain crimes, for example, irritability and loss of temper may lead to violence and assault, lethargy may lead to child neglect, and depression may

¹⁶ 1993 CriLJ 1159.

¹⁷ Marc P., "Premenstrual Stress Syndrome as a Defense in Criminal Cases", 32(1) *Duke Law Journal* 176 (1983).

lead to suicide.¹⁸ Menstrual psychosis is a term describing psychosis with a brief, sudden onset related to the menstrual cycle, often in the late luteal phase just before menstruation. The symptoms associated to it are dramatic and may include delirium, mania or mutism.¹⁹ Premenstrual dysphoric disorder (PMDD) is a very severe form of premenstrual syndrome (PMS), which can cause many emotional and physical symptoms every month during the week or two before you start your period.

In the matter of *Regina v. Craddock*,²⁰ the accused Sandie Craddock was an East London barmaid with 45 prior convictions. She was accused of stabbing a fellow barmaid thrice in her chest, in a fit of rage. She pleaded diminished responsibility owing to premenstrual stress syndrome. Craddock was convicted only of manslaughter and released on probation. A year later Craddock was re-arrested for an attempt to murder a policeman. Convicted on three new charges, Craddock again argued premenstrual stress syndrome to mitigate her sentence and again received probation which was also upheld in appeal. The Indian law on PMS induced insanity is not well developed. However in the case of *Kumari Chandra v. State of Rajasthan*,²¹ three children were taken by the accused who was their *bhua* (aunt) from school on the pretext of showing them a temple. She further instructed them to follow her so as to show them the well of Nasia also. Thereupon, she took all the three at the well and then pushed them into the well. Two children could be pulled out alive while one drowned. In appeal against the judgment of a trial court convicting her under sections 302 and 307 IPC, she pleaded insanity triggered by premenstrual stress syndrome. The court ruled that, “The appellant has been able to probabilize her defence that at the time of incident she was suffering from unsoundness of mind and was labouring under a defect of reason triggered by premenstrual stress syndrome. Even if the material placed before the court is held to be not sufficient to discharge the burden under Section 105 of the Evidence Act,²² it still raises a reasonable doubt as to the existence of *mens rea* on the part of the accused-appellant, thus making out a case for extending benefit of doubt to her.”

VIII. LEGAL INSANITY DIFFERENT FROM MEDICAL INSANITY

Every person suffering from mental disease cannot be allowed to avoid responsibility for a crime by invoking the plea of insanity. A person whose cognitive faculties are so impaired as to make it impossible for him to know the nature of his act or that what he was doing was wrong

¹⁸ Dalton K., “Menstruation and acute psychiatric illnesses”, 1(5115) *Br Med J*. 148–149 (1959).

¹⁹ Brockington IF, “Menstrual psychosis: a bipolar disorder with a link to the hypothalamus”, 13(1) *Current Psychiatry Reports* 193–7 (2011).

²⁰ 1981, 1 C.L. 49

²¹ Criminal Appeal No. 44/1987, High Court of Rajasthan, Date of Decision: 01.08.2018

²² S. 105. Burden of proving that case of accused comes within exceptions.—When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, (45 of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustration (a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A.

or contrary to law, is exempted from criminal responsibility and comes within the purview of legal insanity.²³

Legal insanity means incapability of a person to understand the nature or consequences of his actions at the time of the commission of the offence. Medical insanity deals with a person's behavior and conduct at all times. A person subject to fits of insanity will be termed as medically insane. Mere abnormalities of mind, partial delusion, irresistible impulses or compulsive behavior of psychopaths all constitute instances of medical insanity. It includes cases where insanity affects the emotions and the will subjecting the offender, while the cognitive faculties are left unimpaired. A person subjected to fits of insanity will get the defence of legal insanity only if he was subjected to the fit of insanity at the time of the commission of the crime. It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground for exemption from criminal liability. In order to constitute legal insanity the nature and extent of the unsoundness of mind required is such as renders the offender incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law. It is only legal insanity that is a total defence to a criminal charge. Medical insanity needs to be accompanied by legal insanity in order to be accepted as a defence.

IX. CONCLUSION

Insanity does not render a person inhuman. Human rights continue to vest in all human beings irrespective of their mental condition. Persons of unsound mind who commit a criminal act are not criminals. They do not deserve punishment, however, they require medical help. They can be a source of threat to the society and to their own selves, thus it is important to keep them under supervision. Punishment cannot reform them so they are to be placed either in safe custody or delivered to some relative or friend or be kept in an asylum.

Whenever a person is acquitted on the grounds of insanity, the court shall specifically state its findings whether the act had been committed by the accused or not.²⁴ Upon acquittal such persons are to be kept in safe custody in such place and manner as the court deems fit. Some friend or relative may be allowed to keep the person upon their making an application and furnishing security to the Court that such person shall be properly taken care of and prevented from doing injury to himself or any other person.²⁵ But, where it is not possible for a mentally ill person to live with his family or relatives, or where a mentally ill person has been abandoned by his family or relatives, the appropriate Government shall provide support as appropriate including legal aid and to facilitate exercising his right to family home and living in the family home.²⁶ Under Section 27, a person with mental illness shall be entitled to receive free legal services to exercise any of his rights given under the law and it shall be the duty of magistrate, police officer, person in charge of such custodial institution as may be prescribed or medical

²³ *Shama Tudu v. State* (1986) (I) OLR 506.

²⁴ *Supra* note 12 at s.334.

²⁵ *Id.*, s. 335.

²⁶ The Mental Healthcare Act, 2017, s.19(2).

officer or mental health professional in charge of a mental health establishment to inform the person with mental illness that he is entitled to free legal services under the Legal Services Authorities Act, 1987 or other relevant laws or under any order of the court if so ordered and provide the contact details of the availability of services.²⁷

²⁷ *Id.*, s. 27.



A RESTORATIVE JUSTICE MODEL FOR REHABILITATION OF ACID ATTACK SURVIVORS

Ayush Jha & Simona Sahira Waheed***

Abstract

Amidst many other crimes, acid attack is one of the most heinous and has devastating and near-permanent effects. It not only causes physiological, but also psychological losses to the victims, which are long lasting. Statistics suggest that the proximity of the perpetrator and the survivor leads to self-blaming and seclusion from the society. While the new provisions under criminal justice system provide for compensation as a remedy, it appears to be insufficient to redress the losses fully. There is a need for effective and adequate remedy in cases of acid attacks involving all the stakeholders in the process. The authors in the present paper have suggested a Restorative Justice Model to provide such a remedy so as to wipe off the harmful effects of the acid-attack which will enable effective rehabilitation and reintegration of the survivors into society, in addition to the existing provision of damages. The authors also make suggestions of reforming the existing provisions to address the issues pertaining to remedies to be provided in cases of acid attacks.

I. INTRODUCTION

“Every citizen must remember that something which has happened to acid attack victim may also happen with his family members.”¹

The above observation by the Hon’ble High Court of Uttarakhand in a recent case paints a horrific picture of the harsh reality that pervades the Indian society currently. The necessary implication of the aforesaid is that acid attacks in our ‘mother-land’ are so rampant nowadays, that such incidents may happen to anyone. The court in its observation is appealing to the consciousness of the people of this country that there is a need to empathise with the victims and feel the plight which they are going through.

Recent judgments by the Apex Court and various High Courts have acknowledged the same and have endeavoured towards achievement of relief and rehabilitation of acid attack survivors. However, it is true that only the person (in India’s case it is mostly women) who is the victim of such a heinous offence is in a position to say what remedy could wash off the pain with which he/she is spending his/her life. The efficiency of the model on which the compensation and rehabilitation schemes are based still needs to be tested.

The authors in the present paper have made an attempt to look at rehabilitation and restoration of the victims through restorative justice model instead of merely providing for compensation and punishment. Doing so will render only half a remedy to the victims in such cases. The hidden violations of rights also need to be addressed which are rooted in the societal

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¹*State of Uttarakhand v. Ajam*, Govt. Appeal No. 12 of 2011.

bases. There is a need to provide justice not only for the material or physical losses but also the mental and psychological losses suffered by the acid attack survivors.

The authors have also made an endeavour to suggest the ways in which the perpetrators can be included in the justice dispensation mechanism so as to provide full and effective remedy to the victims which also include expiatory justice.

II. EFFECTS OF ACID ATTACK

Acid attack is an act of administering acid, with intention of or with knowledge of it resulting into permanent or partial damage or deformity or disfiguration to any part of the body of victim.² Such attacks can most commonly be characterized by the fact that the acid, which is usually Sulfuric or Hydrochloric acid or the acid from vehicle batteries, is typically thrown onto face of the victim. It is disturbing that such potentially dangerous products are so easily accessible despite the Supreme Court's ruling regarding its restriction in selling acid over the counter, in *Laxmi v. Union of India*.³

The incidents of acid attacks in India have increased manifold. In 2015 close to 250 cases of acid attacks were reported. However, according to an independent agency Acid Survivors Foundation India (ASFI) the actual cases may be more than 1000 as many of them went unreported.⁴ In an incident concerning a 23 year old married girl and her 2 little girls, belonging to slum area of Agra, whereby the husband became vindictive for not having a male offspring, poured acid on all three while they were sleeping.⁵ The victim reported the incident initially but dropped the charges later to void the wrath of her husband.⁶

The reasons for such horrendous events are manifold; jilted lovers, failed demand of dowry, family conflicts, revenge, etc. However, the results are almost similar in all the cases of acid attacks, such as burning of skin where the acid was thrown, blindness, disfigurement and even death in some cases. But there is more than what meets the eyes. The victims in all the cases face a tremendous amount of stigma, low self-esteem, Post Traumatic Stress Disorder, and similar psychological harms.⁷ The victims need constant medical attention because of the long lasting effects of the acid administered.⁸ Various surgeries are performed to give the victim

² Prevention of Offences (by Acids) Act 2008 (National Commission for Women - Draft Bill), available at http://ncw.nic.in/pdffiles/offences_by_acids.pdf, last accessed 22nd June 2019.

³ *Laxmi v. Union of India* (2014) 4 SCC 427.

⁴ Sujoy Dhar, "Acid attacks against women in India on the rise; survivors fight back", USA Today, July 27, 2017, available at: <https://www.usatoday.com/story/news/world/2017/07/27/acid-attacks-women-india-survivors-fight-back/486007001/> (last visited on June 23, 2019).

⁵ Zacharie Rabehi, "The Stories of India's Acid Attack Survivors", The Citizen, May 22, 2016, available at: <http://www.thecitizen.in/index.php/en/NewsDetail/index/7/7761/The-Stories-Of-Indias-Acid-Attack-Survivors> (last visited on June 23, 2019).

⁶ *Ibid.*

⁷ Ambika R Nair, "Acid Attack -Violence Against Women 'Need of The Hour'", 1(1) *Journal of Innovative Research and Solution* (Jan-Jun, 2014), available at: <http://www.jirasindia.com/Publication/Vol-1-Iss-4/JJL-004-2014-FP.pdf> (last visited on June 24, 2019).

⁸ *Supra* note 2.

relief from the physiological effects of the offence.⁹ But the victimization doesn't stop at tarnishing the physical appearance of the victim, rather it has devastating effects on the inner self of him/her. In one instance, an 18 year old victim hailing from Bihar committed suicide in year 2016, by deliberately electrocuting herself, after she failed to cope with the stigma attached with the acid attack she faced two years prior to her untimely demise.

The victimisation occurs at two stages- firstly when the actual offence has taken place and secondly by the societal entities after the incident.¹⁰ The secondary victimisation is a result of actions of societal entities such as police, hospitals, family, friends and colleagues.¹¹ It adds further to the agony of the victims whereby they face multitude of challenges ranging from access to justice, rehabilitation in society, regaining their identity, making their mental peace with the incident, social acceptance etc.

III. NEED FOR AN ADEQUATE AND EFFECTIVE REMEDY IN ACID ATTACK CASES

It is pertinent to note that violence against women in general, and acid attack in particular, violates a plethora of human rights of the victims. And as a matter of law, any violation of rights requires provision of effective and adequate remedy. In law of torts there is a principle of *ubi jus ibi remedium* meaning "where there is right there is a remedy". The same principle is also applicable in the field of human rights.¹² In fact, Right to effective remedy is an inherent right within other basic human rights.

The UN Human Rights Committee has identified that under article 2 (3) of International Covenant on Civil and Political Rights (ICCPR) the State parties are obliged to provide reparations to the victims of violation of rights recognized in the ICCPR, without which there can't be fulfillment of State's duty to provide effective remedy under the article.¹³

Remedy is defined as "the means by which a right is enforced or the violation of a right is prevented, redressed or compensated."¹⁴ Right to effective remedy includes right to: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm

⁹ *Ibid.*

¹⁰ Dheerendra Kumar Baisla, "Secondary Victimization Under the Criminal Justice System", available at <http://jlsr.thelawbrigade.com/wp-content/uploads/2016/06/Dheerendra-Kumar.pdf> (last visited on July 22, 2019).

¹¹ *Ibid.*

¹² Dinah Shelton, "Reparations for human rights violations: how far back?", available at: sas-space.sas.ac.uk/3525/1/1269-1326-1-SM.pdf (last visited on June 23, 2019).

¹³ UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13. Article 2 (3) of ICCPR provides that "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."

¹⁴ H.C. Black, *Black's Law Dictionary* 1294 (Springer, New York, 1990).

suffered; (c) Access to relevant information concerning violations and reparation mechanisms.¹⁵

Reparation as part of the term remedy connotes substantive aspect while the latter term signifies both procedural and substantive aspects.¹⁶ The dictionary meaning of reparation is “the action of making amends for a wrong one has done, by providing payment or other assistance to those who have been wronged.”¹⁷ It also means ‘to repair’ something.¹⁸ In simple words reparation means ‘undoing any harm done or making it good’. The following words, *viz.*, ‘reparation’, ‘redress’ and ‘remedy’ may be treated as synonymous for the purposes of providing relief to acid attack survivors.

The concept of reparations, usually applied to breaches of international obligations,¹⁹ can also be used as a means to redress human rights violations. Therefore, States are liable not only to repair harms against other States, but also liable to provide effective and adequate relief in cases of Human Rights violations. States are liable to repair such violations not only when they are perpetrator, but also when the wrong is committed by non-state entities, especially when a criminal wrong is committed. If a State is not able to protect such violations, then it is also partner in crime at least on a moral ground.

This has been supported by various jurists and authors, such as Buyse. He starts with three basic assumptions:²⁰

- i. Every violation of a substantive rule of international law requires a remedy.
- ii. States are obliged to respect and ensure human rights.
- iii. Individuals are the beneficiaries of the human rights obligations.

On these assumptions he concludes that the International Law Commission (ILC) articles on State Responsibility can be applied to human rights violations analogously.²¹ An act of reparation must be adequate and effective.²² A remedy can only be adequate if it nullifies all the harm inflicted upon victims.²³ In order to be an effective remedy it must be efficient enough to restore the *status quo ante*.²⁴ Such a remedy must also be proportionate to the level of harm

¹⁵ Para 11, Annex, UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147.

¹⁶ F. Lenzerini, “Reparations for Indigenous Peoples in International and comparative law: An Introduction” in F. Lenzerini, *Reparations for Indigenous Peoples: International and Comparative perspectives* 9 (Oxford University Press, New York, 2008).

¹⁷ Available at: <http://www.oxforddictionaries.com/definition/english/restitution> (last visited on July 10, 2019).

¹⁸ *Ibid.*

¹⁹ *Supra* note 16 at 10.

²⁰ A. Buyse, “Lost and regained? Restitution as a remedy for human rights violations in the context of international law”, available at: <http://dspace.library.uu.nl/handle/1874/32809> (last visited on July 11, 2019).

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

done to the victims subject to the specific cases²⁵ which must also be accepted as an adequate and effective remedy by the victims.²⁶

IV. THE RESTORATIVE JUSTICE APPROACH

Under traditional notions of criminal jurisprudence, the stakeholders involved in the criminal justice dispensation process were the State and the offender. State being the representative of the society at large tries to bring justice for an offence is deemed to be against society. However, with the changing times the need to involve victims in the process was felt. The victims required attention while a perpetrator is punished for the wrong. Giving punishment to the offender only gave a partial relief to the victim while the latter was suffering from injustice.

The restorative justice approach attempts at bringing all the aforementioned stakeholders together in the process of achieving real justice.²⁷ The other competing doctrine in this regard is corrective justice which seeks to rectify the past wrongs by providing compensation or punishment for the act of perpetrator.²⁸ The assumption under this principle is that when the victims are provided with compensation or restitution, it acts as a sanction upon the wrongdoer and creates deterring effect for future acts.²⁹

Galaway and Hudson, in the context of restorative justice, afford three features of restorative justice with regard to criminal justice system:

- i. Crimes are conflict between individuals resulting into injuries.
- ii. The criminal justice system must proceed with reconciliation and redress for such injuries in order to achieve peace in the society.
- iii. The victims, wrong-doers and the society- all must be actors to bring about permanent solutions to conflicts.³⁰

This model of restorative justice can also be applied to provide redress to acid attack survivors. What is required is that the policy makers and legislators should provide them to take part in the process of redress. In other words, it should not be a one sided decision.

Roy Brooks gives an “atonement model” of restorative justice, which requires acknowledgement of guilt and apology to the victims for committing the injustices in past along with compensation in money and in kind to make such an apology effective and acceptable to the communities.³¹

²⁵ *Supra* note 16 at.11.

²⁶ *Ibid.*

²⁷ *Supra* note 20.

²⁸ KD Logue, “Reparations as Redistribution” 84 *Boston L Rev* 1319 (2004).

²⁹ Dinah Shelton, *Remedies in International Human Rights Law* 291 (OUP, New York, 2005).

³⁰ B Galaway & J Hudson (eds), *Restorative Justice: International Perspectives* (Criminal Justice Press, New York, 1996). Also see, Antonio Buti, “Reparations, Justice Theories and Stolen Generations”, available at: <http://www.austlii.edu.au/au/journals/UWALawRw/2008/7.pdf> (last visited on June 23, 2019).

³¹ RL Brooks, “Getting Reparations for Slavery Right: A Response to Posner and Vermeule”, 80 *Notre Dame L Rev* 251 (2005).

Another dimension which can be added to the restorative justice process is the role of forgiveness in effecting psychological reparations. This forgiveness may include towards victims and offenders both.³² In serious offences such as acid attacks the trauma and shock faced by the survivors lead them to social isolation, embarrassment and distrust. They may often self-blame for the incident for the attacker in most of the cases is known to them. The aim of restorative justice ought to be ‘reiterative-shaming’ of the offender.³³ In addition to the existing compensation scheme, a ‘restorative conference’ or ‘restorative mediation’ between the victims (sometimes the family of victims too) and the offender can be arranged on a “voluntary basis” where the survivor may express their agony in front of the person who led them to the same. This will allow the survivors to get detached from the negative feelings and let them move on with their life.³⁴ This will not only give relief to the survivor but also, it will provide an opportunity to the offender to introspect and seek expiation in the process of punishment. All what is required is to distinguish the offence with offender.

However, this must be borne in mind while applying such a measure is that it is case sensitive. An impact assessment shall be made, with the help of experts, before proceeding with such a conference taking into account prior relation of survivor with perpetrator and also the psychological aspects involved in the process which shall include assessing the mental state of the survivor.

Another thing which must be kept in mind is that such a reparative measure, in no way, undermine the role of monetary and punitive reparation. It must be conducted along with providing the existing monetary compensatory schemes and the punitive sentences. (Emphasis supplied).

Other measures under restorative justice, which are there under the Indian legal system, are rehabilitative homes for the survivors. In order to provide effective and long lasting rehabilitation in rape and other cases the Department of Women and Child Development in 2001 have come up with ‘Swadhar–A Scheme for Women in Difficult Circumstances’. This scheme was revived in 2015 to remove the existing lacunas. This scheme encapsulates the objectives of providing primary needs of the women who do not have any social and economic support, regain emotional strength, legal aid and guidance, economic and emotional rehabilitation and support system for various requirements.

Therefore, it also has the basis in principles of morality. It not only seeks to redress material harm but also non-material or psychological harm. This makes the restorative theory much wider in its approach and application. This theory takes note of the fact that, merely providing the monetary compensation may be insulting to acid attack survivors by ignoring the aspects of respect and concern.³⁵ The most significant feature of restorative justice is that it

³² Joanna Shapland, “Forgiveness and Restorative Justice: Is It Necessary? Is It Helpful?”, 5(1) *Oxford Journal of Law and Religion* 1 (February, 2016), available at: <https://academic.oup.com/ojlr/article/5/1/94/1752338> (last visited on July 23, 2019).

³³ John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, Cambridge, 1989).

³⁴ *Supra* note 32.

³⁵ M Urban Walker, “Restorative Justice and Reparations”, 37 *J Social Philosophy* 377 (2006).

seeks to create a direct dialogue between victims and perpetrators so that the injustices and their effects can be discussed by giving the opportunity to victims to explain their case.³⁶

Because restorative justice seeks to harmonise the future social relationships, it becomes the responsibility of the community as a whole and not only of the direct perpetrators to correct the injustices.³⁷

V. CONCLUSION AND SUGGESTIONS

An overall perusal at the aforementioned schemes and guidelines and the judgments rendered by Apex Court gives a comprehensive idea about the ‘on paper’ arsenal to safeguard rights of acid attack survivors. It looks attractive and lustrous. However, the efficacy of laws are always in question due to the indifference of the society in general towards such people.

The doubts still persist on implementation aspect. In words of Trupti Panchal, a member of special cell formed under Tata Institute of Social Sciences (TISS), “the scheme rings a bell, but in the absence of substantial groundwork, it is currently just on papers”.

The victimization of acid attack survivors doesn’t stop at the offence, rather is prolonged till the summation of the proceedings. The insensitivity of media and society in general leads to further victimization. Mere legal framework cannot provide effective relief and rehabilitation to these unfortunate souls. They need support and assistance from the friends, family, counsellors, government and its agents including the most abrupt and vile police. There is a need to educate these so called protectors of the rights of the individuals and rest of the ‘responsible’ members of the society so that they can become sensitive to a like issue such as acid attack. And top of all, there is a need to create a dialogue between the perpetrator and the survivor so as to effect and adequate and full remedy. Mediation houses, anonymous groups, support groups and relief centres should be established which must involve all the stakeholders. The administration should be overseen by the statutory bodies such as National Commission for Women in collaboration with the governmental and non-governmental agencies. Awareness campaigns and sensitization programs shall be frequently conducted so as to prevent future offences. Last, but not the least, social inclusion by the society is the need of the hour for these survivors who can only stand again with the love and support of their family members, friends, colleagues and the members of society.

³⁶ *Ibid.*

³⁷ H Zehr, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2002). Also see, Antonio Buti, “Reparations, Justice Theories and Stolen Generations”, available at: <http://www.austlii.edu.au/au/journals/UWALawRw/2008/7.pdf> (last visited on June 23, 2019).



NEED FOR REGISTRATION AND PROMOTION OF INDIAN GEOGRAPHICAL INDICATIONS IN FOREIGN COUNTRIES: ISSUES AND CHALLENGES

Jupi Gogoi*

Abstract

The GI Act came into force in India sixteen years back in 2003 and hence it is time to assess whether the Act has been successful so far or not. The Preamble of the Act states two purposes of the legislation, firstly, to register GIs and secondly, to provide better protection to GIs. The first part of the Act is implemented to a certain extent, but there are serious doubts on the implementation of the second part of the preamble of the GI Act. The second part will be fulfilled only if the GI product is able to fetch a premium price, thereby, bringing socio-economic development of the producer and other stakeholders of the product. Targeting foreign markets specially that of developed countries is vital as the consumers in those countries have the financial capacity and are willing to buy an expensive product if it is of a good quality. Hence it is important to introduce, promote and register Indian GIs in those countries. This paper briefly discusses some of the issues and challenges that Indian GI products face in their way to the foreign markets.

I. INTRODUCTION

The TRIPS Agreement defines Geographical Indications (GI) as an indication which identifies a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.¹ As an obligation to the TRIPS Agreement, India enacted the Geographical Indications of Goods (Registration and Protection) Act in 1999,² which came into force in 2003. Since then, 343 goods have been registered under the Act in India.³ The main aim of the GI law is to help producers to fetch a premium price for their goods. However, that purpose in India seems to have taken a back seat for now. The whole *hullabaloo* in India is till the good is registered as a GI, after that the product falls into oblivion. However, it is time to focus on the main aim of the legislation and registration has to be seen only as the first step towards the goal of fetching premium price for the goods. To achieve this goal, a proper plan for registration and brand building domestically as well as in foreign countries has to be laid down. This paper discusses the importance of registering and promoting Indian GI products in foreign countries.

The paper is divided into three parts, the first part looks at GI law as a tool for fetching premium price and the importance of promoting Indian GI products in the foreign market. The next part looks into the issues and challenges before the Indian GI products in the registration

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¹ TRIPS Agreement, art. 22, *available at*: https://www.wto.org/english/docs_e/legal_e/27-trips_04b_e.htm (last visited on December 1, 2019).

² Hereinafter GI Act.

³ GI Registry, Registration Details of Geographical Indications, *available at*: http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/GI_Application_Register_10-09-2019.pdf (last visited on November 30, 2019).

process in foreign countries. This part examines that there is a lack of international instruments to ease the process of registration in foreign countries, for example a mechanism where a single application is sufficient for registration in multiple countries. Also, the other issues and challenges highlighted are ignorance of stakeholders, lack of funds and lack of interest of government as major obstacles for foreign registration of Indian GIs. The last part of the paper emphasises the need for India to sign the Geneva Act⁴ of the Lisbon Agreement⁵ which is expected to come into force in the near future, as well as the need of funds for promotion and brand building of Indian GI products in the foreign markets.

II. GI AS A TOOL FOR FETCHING PREMIUM PRICE

The Preamble⁶ to the GI Act states that the Act was enacted to serve two purposes, one was to register GIs and the other was to give better protection to the GIs. The first purpose of registering GI is going on in a rampant manner in India. At times, it has been criticised⁷ by scholars citing that in the process of quick registration of GI, the applicant as well as the GI authorities have not done a proper assessment about the feasibility of the product as a GI. However, the second purpose is overlooked. The second purpose is to provide better protection to the GIs. The meaning ‘to provide better protection of GIs’ is not defined anywhere in the Act and can be understood as a means to help producers of GI goods to fetch premium price.⁸ GI tag serves as a marketing tool and can help in creating a brand image. Ultimately, the GI Registration should lead to socio-economic development of producers as well as the local, tribal and indigenous communities who produce the GI product.

As mentioned earlier, the primary purpose of registration of a GI good is to help the producers fetch a premium price for their product. The essential ingredient of a GI product is its superior quality, owing to its geographical origin. The soil, water, other climatic conditions and sometimes the expertise of people of a particular area play an important part in making the quality of the product premium. GI is an instrument which ensures the consumer a good quality product, owing to its geographical origin.

Importance of Promotion of Indian GI Products in Foreign Market

GI is aimed at cashing on a simple consumer psychology, that is, the willingness to pay a higher price owing to the better quality of the product. Keeping in mind, as much as the consumers in India may want to buy a GI good, they might not have enough financial capacity to do so. Hence, for GI products to be successful it becomes extremely important to introduce and popularise them in the foreign markets, especially the developed countries where consumer

⁴ Lisbon Agreement for the Protection of Appellation of Origin and their International Registration, 1958, available at: https://www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.html (last visited on November 29, 2019).

⁵ Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, available at: https://www.wipo.int/edocs/lexdocs/treaties/en/lisbon/trt_lisbon_009en.pdf (last visited on November 29, 2019).

⁶ The Preamble states: An Act to provide for the registration and better protection of geographical indications relating to goods.

⁷ Yogesh Pai and Tania Singla, “Vanity GIs: India’s Legislation on Geographical Indications and the Missing Regulatory Framework” in Irene Calboli & Ng-Loy Wee Loon (ed.), *Geographical Indications at the Crossroads of Trade, Development, and Culture* (Cambridge University Press, Cambridge, 2017).

⁸ Owing to the fact that that the product has a reputation being a high quality product and the quality is owing to its geographical origin.

have the financial capacity to pay a higher price. For example, in India, the consumers might want to buy alphonso mangoes because of its superior quality but they might not be able to afford it. The same is the case of fine woven carpets that India is famous for.

However, the challenge that lies is to create awareness of these products, its specialties, followed by various steps of brand building in those countries. Brand building includes advertisement and other marketing strategies. There has to be sufficient funds to do so. Initial investments in brand building will go a long way in fetching premium price of the products. Finally, it will be important that the GI is registered in that country.

III. ISSUES AND CHALLENGES IN REGISTERING AND POPULARISING INDIAN GI PRODUCTS IN FOREIGN COUNTRIES

Lack of Instruments for International Registration

The Lisbon Agreement for the Protection of Appellation of Origin and their International Registration is the only international agreement which deals with international registration of Appellation of Origin (AOO), a neighbouring concept of GI. However, it is important at this juncture to mention that all AOO are GIs but all GIs are not AOO. The definition of AOO as given in the Lisbon Agreement is that it is the name of a particular territory, locality, region or country and it is used as a designation to indicate that the good has originated in such a place and the quality and other characteristics of the good can be linked to the geographical environment, whereas, Agreement of Trade Related Aspects of Intellectual Property Rights (TRIPS) states that GIs are indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. To be a AOO, firstly it has to be a name of a place (for example, Basmati Rice will not be a AOO as it is not the name of a place) and either the quality and other characteristics of the good has to be linked to its geographical territory, whereas, in case of GI, it is not necessary that it has to be the name of a place, it can be any indication which identify that the goods come from a particular place and one of the three characteristics, quality, reputation and other characteristics has to be due to the geographical origin. That means, a good which has only a reputation that it comes from a particular place but does not have any quality or special characteristics as it comes from that place will be a GI but won't be an AOO.

This Lisbon Agreement provides a mechanism for obtaining protection in foreign countries through a single application form. However, those countries have to be member countries of the Agreement. The procedure is that the AOO has to be first registered in the country of origin. Then through the authority in the country considered, an application has to be forwarded to WIPO's International Bureau (IB). The WIPO IB will consider the application for international registration as requested by the authority of the country concerned. Then, it is notified to those countries where protection is sought. It is published in the official bulletin of the Lisbon system. In case a member nation does not register it, it has to notify within one year and state the reasons for the same. Once registered, the appellation shall be protection against imitation (even words like type, kind etc. cannot be used) and usurpation. Also, it shall not be deemed generic so long as it is protected in the country of origin.

Drawbacks of the Lisbon system

There were certain disadvantages of the Lisbon Agreement.⁹ The first one is that only the geographical names will be protected. Other names which are not geographic will not be protected, for e.g., Basmati will not qualify under the Agreement as it is not a geographic name. Secondly, the indications which are based on the reputation due to involvement of the human factors and has nothing to do with the geography including factors such as, soil, climatic factors will not be protected under this Agreement. For e.g., watches ‘Made in Switzerland’ will not qualify. Thirdly, it is important that the names which are to be protected have to be registered in the country of origin.¹⁰ It is important to note that under the Agreement, member states are obliged to protect even though the name has become generic in their respective countries.

The Geneva Act of the Lisbon Agreement

The Geneva Act was enacted in 2015 to reform the Lisbon Agreement. The EU acceded to the Act on November 26, 2019, hence the Act will come into force in February 2020.¹¹ While the Lisbon Agreement applies only to AOO, the Geneva Act extends protection to GIs covered under the TRIPS Agreement. Some of the highlights of the Geneva Act are that with the help of a single application, a person can seek registration in all the member nations of the Act. Under the Act, countries can jointly file for registration of the goods (there are certain GI good which transcends national boundaries, for example, Basmati Rice, which is grown both in India and Pakistan). The protection offered for such AOO or GI is against same kind of goods not originating in the same geographical area or not complying with the requirements for using the GI or AOO and also on goods that are not of the same kind or on services, if such use would indicate or suggest a connection between those goods or services and the beneficiaries of the GI or AOO concerned, and would be likely to damage their interests, or, where applicable, because of the reputation of the GI or AOO in the relevant country, such use would unfairly dilute or take advantage of, that reputation. Moreover, unlike the TRIPS Agreement, it does not favour just wines and spirits,¹² but the protection is offered against any such use which amounts to imitation even if the true origin of the goods is indicated or the GI or AOO is accompanied by terms such as “style”, “kind”, “type”, “make”, “imitation”, “method”, “as produced in”, “like”, “similar” or the like.

The Geneva Act will come into force in the near future (February 2020) and India should definitely deliberate on joining it especially because some of the GI products are premium export products, such as Indian handicraft items, tea, basmati rice etc. GI tag will help consumers identify the genuine product and help in making purchasing decisions.

⁹ Also see, Intellectual Property Watch, *Q&A with The EU on the Benefits of Amending the Lisbon Agreement*, 2015, available at: <https://www.ip-watch.org/2015/05/05/qa-with-the-european-union-on-the-benefits-of-amending-lisbon/> (last visited on November 29, 2019).

¹⁰ *Id.* at 19.

¹¹ WIPO, EU Joins Geneva Act of Lisbon Agreement, Enabling entry into Force, November 26, 2019, available at: https://www.wipo.int/pressroom/en/articles/2019/article_0015.html (last visited on November 30, 2019).

¹² Special protection for wines and spirits is included in art. 23 of the TRIPS. It means that all member-states of TRIPS must grant owners of GI of wines and spirits the right to file action against use of any GI to indicate wines and spirits which does not originate from a protected geographical territory. It is also applicable in those cases wherein the actual origin of the wine and spirit is provided or even in those cases where the indication is followed by words such as similar to or imitation of protected GI.

Other Issues and Concerns

GI Registration is seen as an end in itself

There are many other issues and concerns with regard to registration and brand building of Indian GI goods in foreign countries. Firstly, it is sad that the very purpose of the GI Act is not understood by the implementing bodies. GI Registration is seen as an end in itself whereas it is a means to an end. The most common mistake is that the Act is looked as a tool for registering GIs and nothing else. However, registering is one small part of the Act or the first step in popularising the product and then fetching a premium price for its quality or uniqueness. So, until and unless, the other steps of popularising, brand building and ultimately fetching a premium price for the GI product is not achieved, the registration cannot be seen as a success.

Lack of initiatives on Brand Building

Most GI proprietors in India have taken very little or no steps for brand building. They cite lack of funds as the main hindrance for advertisements and other brand building mechanisms. It is important to understand that without brand building, GI will never be a success.¹³ Hence the proprietor has to figure out a way to find funding. They should ideally find ways in the beginning of the registration process because if they do not have funding later, the entire purpose of GI fails. The GI Registry should harp on the funding requirements when the process of GI registration is going on.

Lack of government initiatives

Lack of interest of government is another major obstacle. The poor farmers and producers of the goods can't be expected to popularise and register the Indian GIs abroad. The role of government in this regard is pivotal and they have to provide the proprietors all the required aid in doing it. Since maximum GI proprietors in India are government bodies or semi government bodies,¹⁴ granting them funds and encouraging them to popularise and register them at foreign markets will prove extremely fruitful.

IV. CONCLUSION AND RECOMMENDATIONS

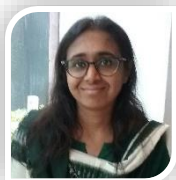
It is indeed sad that even after sixteen years of the enforcement of the GI Act in India, the purpose behind the Act could not be realised. In India, GI registration in most cases is seen as the end in itself and this approach will never lead to the true realisation of the purpose of the law. Keeping in mind the main aim of the law, that is, to fetch a premium price of the GI products thereby benefiting the producers, promoting and registering the GI products abroad is

¹³ WIPO, Making the Origin Count: The Colombian Experience, *available at*: <https://www.wipo.int/ipadvantage/en/details.jsp?id=2617> (last visited on December 3, 2019). Also see, Nadja El Benni & Sophie Reviron, "Geographical Indications: Review of seven case-studies world wide", *available at*: https://www.researchgate.net/publication/265618582_Geographical_Indications_review_of_seven_case-studies_world_wide?enrichId=rgreq-042038603a7007f3678c84100385d069-XXX&enrichSource=Y292ZXJQYWdlOzI2NTYxODU4MjU3MDgyNTQ1OTcxMjZAMTQ1NDY2NjMwNzg2OA%3D%3D&el=1_x_3&_esc=publicationCoverPdf (last visited on December 3, 2019).

¹⁴ Prashant Reddy, "Nationalisation of Geographical Indications in India", February 12, 2012, *available at*: <https://spicyip.com/2012/02/nationalization-of-geographical.html> (December 1, 2019).

extremely important. However, as aforementioned, there are many hindrances. However, the GI proprietors, other stakeholders and the government has to overcome these hurdles. Firstly, the problem of funds has to be looked into and remedied since funds are very important in promoting the GI products. The government has to play an important role in it by offering financial aid as well as by creating avenues through which the producers of India can showcase their products at international platforms. Saying this, there are few goods which are already popular and some are slowly making its entry in foreign markets. To protect the interest of such goods, GI registration in those foreign countries is very important, firstly, to help consumers identify the product as well as protect them from imitation and other infringements. Hence, it is time that India seriously deliberate the joining of the Geneva Act of Lisbon Agreement once it comes into force, especially now, when the limitations¹⁵ of the earlier system have been done away by the new Act.

¹⁵ Refer, Part III of this article, *Disadvantages of the Lisbon System*.



AN EXPLORATORY STUDY OF MANDATORY CSR SPENDING IN SELECT INDIAN COMPANIES

Jyotika Bahl*

Abstract

The introduction of Section 135 in Companies Act 2013 is a game changer as it requires companies to mandatory undertake CSR function. The legislation provides a meaning to corporate social responsibility by spelling out the activities considered as CSR in schedule VII, requiring formation of CSR committee for selection and execution of CSR projects and allocation of 2% of the average profits of past three years into social responsibility. This paper attempts to understand the trend of CSR practice post the mandatory legislation for top six CSR spending companies and draw inferences. The results of the analysis reveal that (i) the presence of unspent CSR expenditure is due to lack of experts for planning and executing CSR projects and varying duration (long term or medium term) of CSR projects, (ii) there is concentration of CSR effort in the geographic presence of the companies, thus ignoring the backward states, (iii) companies lack a balanced approach in selecting a mix of CSR activities from schedule VII, thus there is concentration in few activities only like education, health care, environmental sustainability. The Government should ensure training of corporate personnel for planning, execution and evaluation of CSR projects, government should ensure that corporates maintain a balance in selection of activities and geographic area of coverage.

I. INTRODUCTION

Corporate Social Responsibility (CSR) became mandatory with the insertion of section 135 which required companies having a net worth of five hundred crore or more, or turnover of one thousand crore or more, or net profit of five crore or more during any financial year to spend 2% of its average profits of the preceding three years as CSR expenditure.¹ Additionally the mandatory CSR provision provided a list of activities in Schedule VII considered as CSR. The intent of the legislation was to urge the corporates to engage in their social responsibility and supplement the government effort towards inclusive growth and welfare of marginalised sections of the society.² The mandate of corporate social responsibility is justified as interest of all stakeholders is incorporated in the business decisions³ rather than only that of shareholders,⁴ thus legitimising their existence.

Prior to the mandate the adoption of corporate social responsibility remained in infancy stage partly because of voluntary nature and partly for the evolving dimensions of the concept. Only some enlightened Indian businessmen engaged in their philanthropic responsibility. This

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¹ The Companies Act 2013, s. 135(1).

² Report of High Level Committee, Ministry of Corporate Affairs, Government of India, September 2015, Guidelines on CSR and Sustainability for Central Public Sector Enterprises, Department of Public Enterprises, 2014.

³ P. McGuinness (*et.al.*), "The role of board gender and foreign ownership in the CSR performance of Chinese listed firms", 42 *Journal of Corporate Finance* 75-99 (2017).

⁴ Friedman, M., "The social responsibility of business is to increase its profits", *The New York Times Magazine*, Sept.13, 1970.

paper attempts to understand the trends in CSR practice of six top CSR spending companies and draw inferences.

II. METHODOLOGY

This exploratory study has been undertaken to understand the CSR practice and trends of top six CSR spending companies listed on National Stock exchange (NSE Nifty 500) and Bombay Stock Exchange (BSE S&P 200). From a total of 249 companies complying with CSR mandate top six companies namely Reliance industries Ltd., Oil and Natural gas, NTPC, ITC Ltd., Infosys and HDFC have been selected on the basis of average amount spend on CSR. For this study the data is extracted from annual reports, national CSR portal and CSR reports of the six respective companies for a sample period of 2014-2019.

Table1: Details of the selected six companies

Company	Incorporated Year	State Registered	Industry Group
Reliance Industries Ltd.	1973	Mumbai	Refinery
Oil and Natural Gas Corporation Ltd.	1993	Delhi	Crude Oil & Natural Gas
NTPC	1975	Delhi	Conventional Electricity
ITC	1910	West Bengal	Tobacco Products
Infosys	1981	Karnataka	Software Solutions
HDFC	1994	Maharashtra	Banking Services

III. ANALYSIS AND INTERPRETATION

Mandatory CSR spending

The Companies Act 2013 requires every company which has a net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more, or net profit of rupees five crore or more, during any financial year to constitute a CSR committee and spend in every financial year at least 2% of the average net profits of the company made during the three immediately preceding financial years.⁵ Table 2 below presents the CSR spending of the top six companies.

⁵ *Supra* note 1.

Table 2: CSR spending of six companies

Company	Year	Average Net Profit for the last three Financial Years	Prescribed CSR expenditure	Spent amount
RIL	2014-15	26,648 crore	532.96 crore	532.96 crore
	2015-16	27,889 crore	557.78 crore	651.57 crore
	2016-17	31,020.50 crore	620.41 crore	659.20 crore
	2017-18	35154.19 crore	703.08 crore	745.04 crore
	2018-19	-	811 crore	849 crore
ONGC	2014-15	33,030 crore	660.61 crore	495.23 crore
	2015-16	296,848 million	5,937 million	4210 million
	2016-17	267,834.60 million	5,356.66 million	5259 million
	2017-18	24,351.97 million	4840.8 million	5034.4 million
	2018-19	240,103.90 million	4802.10 million	6146.44 million
NTPC	2014-15	14,173.78 crore	283.48 crore	205.18 crore
	2015-16	13,567.43 crore	271.35 crore	491.80 crore
	2016-17	11,392.68 crore	227.85 crore	277.81 crore
	2017-18	11037.30 crore	220.75 crore	241.54 crore
	2018-19	11850.34 crore	237.01 crore	285.46 crore
ITC	2014-15	10,646.11 crore	212.06 crore	214.06 crore
	2015-16	12,338.22 crore	246.76 crore	247.50 crore
	2016-17	13,763.29 crore	275.27 crore	275.96 crore
	2017-18	14523.40 crore	290.47 crore	290.98 crore

	2018-19	15327.74 crore	306.55 crore	306.95 crore
Infosys	2014-15	12,133 crore	243 crore	239.54 crore
	2015-16	12,800 crore	256.01 crore	202.30 crore
	2016-17	14,371 crore	287.42 crore	289.44 crore
	2017-18	15513 crore	310.25 crore	312.60 crore
	2018-19	17018 crore	340.35 crore	342.04 crore
HDFC	2014-15	9,856.35 crore	197.13 crore	118.55 crore
	2015-16	12,385 crore	248 crore	194.81 crore
	2016-17	15,200 crore	304 crore	305.42 crore
	2017-18	18,246 crore	365 crore	374 crore
	2018-19	21,960.4 crore	439.2 crore	443.8 crore

(Source: National CSR Portal, Annual reports, CSR reports for the sample period for the six sample companies under study)

ONGC, NTPC, HDFC, Infosys were unable to spend the prescribed amount in CSR activities for the initial period of mandatory CSR for two main reasons. Firstly, companies engage in long term and medium term projects which require more than one year for completion with payments distributed for each stage of completion.⁶ Secondly, companies lack the expertise to plan, select and execute CSR projects as they were not engaged in CSR function prior to the mandate.⁷ Thus, the selection of CSR projects and intermediaries (like NGOs) to assist in execution of CSR activities cause delay. Reliance Industries and ITC spent more than the prescribed amount probably because they were already engaged in philanthropic activities prior to the mandatory legislation.

Comparative analysis

A comparative analysis of the top CSR spending companies on thematic areas (selection of CSR activities from Schedule VII), geographic coverage and investment in government schemes is attempted in Table 3 to understand the trend of CSR practice post the mandate.

⁶ CSR reports of ONGC, NTPC, HDFC, Infosys.

⁷ *Ibid.*

Thematic Focus

Companies have concentrated their major CSR effort in the area of Education, Environmental Sustainability, Art and Culture and Health Care. NTPC focused on Education sector only in 2014-15 but diversified into other activities provided in Schedule VII in following years. ITC has made contribution to Prime Ministers National Relief Fund in two years 2014-15 and 2015-16. In 2015-16, companies make a substantial spending in Government schemes for example, ONCG invests in Swachh Bharat Abhiyan and Swachh Vidyalaya Abhiyan and Infosys allocated funds to Swachh Bharat. In 2016-17 also ONCG invested in government schemes like Swachh Bharat Abhiyan and Pradhan Mantri Ujjwala Yojana (PMUY) whereas Infosys invested in Swachh Bharat projects only. Apart from conventional areas Infosys invested in relief of martyr's families and setting up orphanages whereas ITC expanded into Women Empowerment and agro Forestry and ONCG included conservation of National resources and socio-economic inequities. Activities like promotion of gender equality, armed forces, veterans, war widows and technology incubators are underexploited by the top six CSR spending firms.⁸

Table 3: Comparative Analysis

Name of the Company	Year	Thematic focus	Geographic Spread	Amount Spent
Reliance Industries Ltd.	2014-15	Rural transformation, Health care, Education, Environment, protection of National Heritage, Disaster response, Art and culture		532.96 crore
	2015-16	Rural development projects, training to promote sports, art and culture, Environmental Sustainability, Health Care, Poverty, Eradicating Hunger and Malnutrition, Education and Other Central	Andhra Pradesh, PAN India, Maharashtra, Delhi	651.57 crore

⁸ Activities considered as CSR as per Schedule VII of the Companies Act, 2013.

		Government Funds		
	2016-17	Health Care, Rural Development, Environment Sustainability, Livelihood Enhancement Projects, Art and Culture, Education	Andhra Pradesh, PAN India, Gujarat, Maharashtra	659.20 crore
	2017-18	Education, Health, Environment Sustainability, Rural Development, Art and Culture, Sports,	Maharashtra, Gujarat, Uttarakhand, PAN India	745.04 crore
	2018-19	Rural Transformation, Health, Education, Sports, Disaster response, At, culture and Heritage	-	904 crore
Oil and Natural Gas Corporation Ltd.	2014-15	Art and Culture, Environment Sustainability, Health Care, Education, Slum Area Development	PAN India	495.23 crore
	2015-16	Rural Development Projects, Training for Sports, Art and Culture, Environmental Sustainability, Sanitation, Health Care, Vocational Skills, Education, other Central Government Funds	PAN India, Uttarakhand, Punjab, Gujarat, Kerala, Karnataka, Odisha, Delhi, Maharashtra	4210 million

	2016-17	Education, Environmental Sustainability, Health Care, Art and Culture, Conservation of Natural Resources, Rural Development Projects, Sanitation, Training to Promote Sports, Women Empowerment, Socio-economic inequalities	PAN India, Meghalaya, Assam, Andhra Pradesh, Gujarat, Arunachal Pradesh	5259 million
	2017-18	Education, Health care, Sanitation, Sports, Protection of National Heritage, Women Empowerment, Environment Sustainability	Local and other regions	5034.4 million
	2018-19	Education, Health care, Sanitation, Sports, Women Empowerment, Ecological Balance, Environment Sustainability, Rural development	Local and other states	6146.44 million
NTPC	2014-15	Education	Rajasthan, Uttar Pradesh, Haryana, Kerala, Chhattisgarh, Odisha, Telangana, Maharashtra, Delhi, PAN India, Gujarat, Madhya	205.18 crore

			Pradesh, Bihar, Andhra Pradesh	
	2015-16	Rural Development Projects, Training to promote Sports, Art and Culture Environmental Sustainability, Health Care, Poverty, Eradicating Hunger and Malnutrition, safe drinking Water	Andhra Pradesh	491.80 crore
	2016-17	Rural Development Projects, training to promote sports, Art and Culture, Environmental Sustainability, Health Care, Poverty, Eradicating Hunger, Malnutrition, Education	PAN India	277.81 crore
	2017- 18	Sanitation, Environment, Healthcare, Rural Development, Sports, Art and Culture, Swacch Vidyalya Abhiyaan	PAN India	241.54 crore
	2018-19	Rural Development Projects, Training to promote Sports, Art and Culture Environmental Sustainability,	PAN India	285.46 crore

		Health Care, Poverty, Art and Culture, Environment Sustainability		
ITC	2014-15	Education, Environmental Sustainability, Training to Promote sports, Agro Forestry, Art and Culture, Women Empowerment, Health Care, Prime Ministers National Relief Fund	Andhra Pradesh, West Bengal, Bihar, Pan India	214.06 crore
	2015-16	Art and Culture, Environmental Sustainability, Training to promote sports, Health Care, Women Empowerment, Agro Forestry, Education, Prime Ministers National Relief Fund	Andhra Pradesh, Bihar, West Bengal, PAN India	247.50 crore
	2016-17	Education, Environmental Sustainability, Health, Training for Sports, Agro Forestry, Women Empowerment, Art and Culture	Andhra Pradesh, Bihar, West Bengal	275.96 crore
	2017-18	Education, Women Empowerment, Environment Sustainability,	Local and other areas	290.98 crore

		Health, Sanitation, Sports, Art and Culture		
	2018-19	Education, Women Empowerment, Environment Sustainability, Health, Sanitation, Sports, Art and Culture	Local and other areas	306.95 crore
Infosys	2014-15	Education, Livelihood Enhancement Projects, Poverty, Eradicating Hunger and Malnutrition, Health Care, Art and Culture, Rural Development Projects	Delhi, Karnataka, Tamil Nadu, Gujarat, Maharashtra, West Bengal, PAN India, Rajasthan	239.54 crore
	2015-16	Rural Development Projects, Art and Culture, Health Care, Poverty, Eradication of Hunger and Malnutrition, Education, Livelihood Enhancement Projects	Karnataka, Chhattisgarh, Maharashtra, PAN India, Andhra Pradesh, Odisha, Delhi, Uttar Pradesh, Gujarat, Tamil Nadu	202.30 crore
	2016-17	Health Care, Education, Poverty, Eradicating Hunger and Malnutrition, Armed Forces/ War Widows, Environmental	Karnataka, Punjab, Delhi, Odisha, Uttar Pradesh, Maharashtra, Arunachal Pradesh, Chandigarh, Madhya Pradesh, Assam, Andhra	289.44 crore

		Sustainability, Rural Development Projects, Art and Culture, orphanage	Pradesh, Kerala, PAN India	
	2017-18	Education, Health care, Environment Sustainability, Destitute care, Rural development, Art and Culture	PAN India	312.60 crore
	2018-19	Education, Rural Development, Destitute care and rehabilitation, Health care	Pan India	342.04 crore
HDFC	2014-15	Education, Environmental Sustainability, Vocational Skills, Health Care, Rural Development Projects	PAN India	118.55 crore
	2015-16	Rural Development Projects, Environmental Sustainability, Education, Health Care, Vocational Skills, Poverty, Eradicating Hunger and Malnutrition	PAN India	194.81 crore
	2016-17	Education, Environmental Sustainability, Health Care, Livelihood, Rural Development Projects, Poverty,	Maharashtra, PAN India	305.42 crore

		Eradicating Hunger and Malnutrition		
	2017-18	Education, Health care, Environment, Rural Development	PAN India	374 crore
	2018-19	Education, Health Care, Environment Sustainability, Rural development	PAN India	443.8 crore

Geographic Spread

One of the objectives of having CSR mandate was to ensure balanced regional growth. In context of Geographic area covered by CSR activities there is clear evidence that CSR effort is concentrated in states where firms are presently operating.⁹ For instance ITC discharges its CSR in three states Andhra Pradesh, Bihar and West Bengal except Prime Ministers Relief fund which has pan India presence for three years under study. In 2015-16, Reliance and NTPC limited their CSR activities Andhra Pradesh. Despite the Government clarification that firms can spend beyond their local area of operation¹⁰, NTPC and ITC restrict themselves to local limits. In 2016-17, Reliance major part of CSR in manufacturing locations was Gujarat alone and HDFC invested in Maharashtra. Interestingly ONCG expanded its area of reach to Meghalaya and Assam in 2016-17. Overall CSR spent was concentrated in few states ignoring north east and other backward states where CSR effort is a necessity. Gradually companies started learning as they started investing in other than local areas of operation from 2018.

IV. CONCLUSION

The exploratory study was attempted to understand the CSR practice and infer trends in CSR across diversified companies. The following suggestions and discussion emerge from the analysis of the top six companies.

- i. The Government should focus on provision for experts for planning and executing the CSR projects as initial delays were encountered in selection, planning and execution of CSR proposals.
- ii. The introduction of Section 135 by Companies Amendment Act 2013 is designed as a 'comply or explain' rule with no penalties for non-compliance. But after giving substantial time to the companies to understand and align CSR practices with their business operation, the legislation realised the need for penalties for non-compliance, thereby making CSR 'comply or punishment' rule penalising even the officers responsible for the same.¹¹ At the same time the Amendment Act recognises

⁹ According to the CSR Reports of the six sample companies.

¹⁰ Guidelines on CSR and Sustainability for Central Public Sector Enterprises, Department of Public Enterprises, 2014

¹¹ The Companies (Amendment) Act 2019, s. 135(7).

the needs to provide for carry forward of the CSR expenditure in cases where companies invest in long term or medium term CSR projects.¹²

iii. The Government needs to provide motivation for companies to invest in CSR activities beyond their geographic presence as the CSR benefit is evidenced in prosperous states making the objective of CSR mandate (inclusive growth) futile as the intent was to enable backward states to benefit.¹³

iv. Since companies are influenced by political philosophy in selection of CSR activities as evidenced from investment in Swachh Bharat Abhiyan, Swachh Vidyalaya Abhiyan, etc. the Government should motivate companies to ensure a balanced mix of CSR activities from Schedule VII rather than spending in some CSR activities. There is lack of investment in Incubation centre, relief for war widows and veterans and gender equality.

¹² *Id.*, s. 135 (6).

¹³ *Supra* note 2.



LAW RELATING TO DIVORCE BY MUTUAL CONSENT: CONTEMPORARY DEVELOPMENTS

Kusum Lata Bawlia*

Abstract

Contemporary law is silent on the justification of living separate of the parties to the marriage by agreement to live apart. Till the final decree for the dissolution is not passed by a court of competent jurisdiction, the marriage remains intact. Only divorce puts an end to the marriage. Section 18 of the Hindu Adoption and Maintenance Act, 1956 permits the wife to live separate from the husband in certain cases but that too is not consensual. Requited consent to dissolve the marriage essentially presupposes a contract between the parties to end the matrimonial bond without any allegation on each other under statutory or personal laws applicable to the parties under judicial or non-judicial law applicable to them. Marriage is idealized as exclusive union of a male and female, which is eternal in nature and requires solemnisation and recognition by the society. Dissolution needs no solemnization and recognition by the society. Hindu marriages could be polygamous before 1955 but, were still eternal as, till that time, there was no concept of divorce among Hindus. Introduction of *laissez faire* principle affected this eternal aspect of Hindu marriage turning it into a civil contract in which parties could enter into marriage with their free consent and can dissolve the marriage with mutual consent. With the introduction of monogamy that essentially requires the marriage to be an exclusive union of a male with a female only to the exclusion of others, dissolution by mutual consent has become more meaningful and required when parties are not able to live together as husband and wife and matrimonial bond has broken down beyond repair though any of the party is not able to prove the guilt ground for the dissolution of marriage. In such circumstances refusal to grant dissolution of marriage will not serve any social or individual interest. Such an unrealistic approach ignoring the feeling of the parties where the parties have scant regard for each other feelings and emotions will stimulate negative institutions in the society as a whole and negative attitude in the individual like depression, suicidal tendencies, bigamy and live-in -relationships etc. Though mutual consent divorce is essentially a regulatory process for the dissolution whereby the court observes and satisfies itself that the consent of both the parties is without any coercion, fraud, undue influence and force. The knowledge that marriage could be dissolved mutually without much delay is leading to many hasty divorces. The Apex Court had wide discretion under article 142 of the Constitution of India in favour of justice to dissolve the marriage shrugging off the required mandatory period of six months between the first motion and second motion, where the marriage is causing unnecessary hardship to the parties and they have mutually agreed to dissolve the marriage. Presently non legal groups also equally participate in marital discord matters and consequential actions like dissolution of marriage, custody of children and maintenance etc.

I. INTRODUCTION

Divorce is the process of terminating a marriage or marital tie, according to the law governing the people in matter of dissolution of marriage as per the personal law applicable to

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them. Divorce laws vary considerably around the world specifically, in India different personal laws governs the institution of marriage and its dissolution. The recorded history of early Roman Civilization testifies that marriage and divorce were easy matters. Just as parties could come and live together as husband and wife by mutual consent and without any formalities, they could as easily and without any formalities separate from each other by mutual consent.¹ Mutual divorce or divorce by mutual consent means when the legally wedded husband and wife mutually agree to dissolve their marriage as they are not able to live together anymore and they jointly present a mutual divorce petition before the honourable court without putting forth any allegation against each other. Presently, divorce is a very general phenomenon in Indian society too wherein in the classical times divorce was rare and marriage was considered as an eternal union. India has a lower rate of divorce that is less than 1%, out of 1000 marriages only 13 results in divorce. The lower rate of divorce in India, in comparison with the rest of the world, owes to society norms and pressure leaning in favour of preservation of marriage.² The modern concept of marriage as a contract is an outcome of the lofty ideals of liberty and equality produced by industrial revolution. Industrial revolution developed the thought that all social and human relations are outcome of will and choice of individuals not the status. Presently, Indian and western law considers that the marriage to be effective must be based squarely on personal volition of parties, wherein the parties have free consent to enter into marriage and dissolve the marriage. The global divorce rate has increased up to 257.8% since 1960. Every year, world organisation record global divorce rated. Under Hindu Law, marriage is considered as a sacrament and an eternal union but the element of its being eternal was destroyed by Act with the introduction of the grounds of divorce. Divorce by mutual consent is recognised as a ground of dissolution of marriage under different statutory provisions as the section 13B of Hindu Marriage Act, 1955, section 28 of Special Marriage Act, 1954, section 32B of Parsi Marriage and Divorce Act, 1988, section 10A of Indian Divorce Act and Muslim personal law. These provisions incorporated the doctrine of discharge from marital obligations by mutual consent of the parties, considering mutatis mutandis the importance of the principles of contract for the dissolution of marriage. These provisions for divorce by mutual consent under all these Acts are identical. Classical Muslim law recognise divorce by mutual consent in two forms, *khul* and *mubbarat*. Literally the word *khul* means putting an end his right by the husband over his wife in exchange of something by way of an agreement and *mubbarat* is consensual divorce based on the contract between the parties to live separate on certain terms or without any condition.

II. INDIVIDUALISM AND DIVORCE

Society in general and marriage relationships in particular are growing more individualistic. Marriage is seen as a vehicle of personal fulfilments than an intimate or interdependent relationship. Presently, marriage has grown as less institutionalised and more individualistic forming interdependent partnerships. Spouses are more likely to have their separate bank accounts, more desire to live separate from each other, social groups, and option

¹ Paras Diwan, *Modern Hindu Law* 63 (Allahabad Law Agency, Allahabad, 2006).

² "India has the lowest divorce rate in the world: Countries with lowest and highest divorce rates", *Times of India*, Nov 20, 2018, available at: <https://www.indiatoday.in/education-today/gk-current-affairs/story/india-has-the-lowest-divorce-rate-in-the-world-1392407-2018-11-20> (last visited on June 30, 2019).

not to have children, less caring attitudes and affection, having separate family names and not considering their marriage as a permanent union. The purpose of such behavioural patterns in the contemporary world is to attain independence, personal freedom and identity independent of spouses. Mutual fidelity is considered as the basis of marriage, where for any reason mutual allegiance cannot be maintained, the parties must have freedom to dissolve their marriage bond instead of being left to be carried away leading to irreparable and irreversible consequences for the whole family. Termination of marital bond with mutual consent is recognised in almost all the countries of the world like Belgium, Sweden, Japan, Portugal, United Nations and large number of the Commonwealth and East European Countries as an uncomplicated and facile process of disbanding marital relationship. Mutual divorce has been criticized just because it makes divorce very easy and sometimes very difficult. Most countries have incorporated the provisions for the dissolution of marriage through mutual consent hedged with safeguards. It provides the opportunity to the parties to leave the relationship if and when desired along with fulfilling their individual goals and need of being in a relationship. Individual views and values on marriage institution and its dissolution have changed over time and the society no longer sees marriage as an eternal union.

III. STATUTORY REQUIREMENTS FOR MUTUAL DIVORCE

The Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 provide that a petition for divorce by mutual consent cannot be presented to the district court before a year of solemnization of marriage even in agreement with each other on the ground that the parties have been living separately, the parties are not being able to live together and that the parties have mutually agreed that the marriage should be dissolved. To protect the divorce from being perfunctory and impulsive, the cooling period of 6-18 months is provided in the statute wherein the parties can reflect on their decision to dissolve the marriage. Dissolution through mutual consent was introduced for Hindus by the Marriage Law (Amendment) Act, 1976, for Parsis by Parsi Marriage and Divorce Act, 2001,³ and in Divorce Act it was added by the Indian Divorce (Amendment) Act, 2001⁴ whereas the provision exists since beginning in the Special Marriage Act, 1954.⁵

The basic requirements for the presentation of petition by mutual consent are:

- i. The husband and wife have been living apart for a period of one year or more.
- ii. Parties to dissolution are not able to live together.
- iii. The parties have mutually agreed to dissolve the marriage.

13B. Divorce by mutual consent under the Hindu Marriage Act

(1) According to the provisions of this Act, a joint petition for dissolution of marriage by a decree of divorce must be presented to the district court by both, husband and wife to a valid marriage, such marriage may have been solemnised before or after the passing of the Hindu Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living apart for a period of one year or more, that they are not willing to live together and

³ The Parsi Marriage and Divorce Act, 2001, s. 32B.

⁴ The Indian Divorce (Amendment) Act, 2001, s. 10A.

⁵ The Special Marriage Act, 1954, s. 28.

that they have mutually agreed that the marriage should be dissolved as their temperaments are not compatible with each other.

(2) Second motion after the first motion later than six months after the date of the presentation of the petition mentioned in sub-section (1) and not after eighteen months of the said date, if the implore is not withdrawn in the meantime, the court shall, after hearing the parties, and after making such inquiry as it thinks fit, on being satisfied that a marriage has been duly solemnised and that the averments in the petition are factual, pass a decree of annulment declaring the marriage to be dissolved with the effect from the date of the decree.⁶

While granting required consent divorce, the court is mandatorily expected to conduct a judicial enquiry on many aspects so that the divorce should not be turned out to be a hasty decision. The dissolution of marriage by mutual consent could be of a marriage which is otherwise a valid marriage conforming the personal law governing the parties. The status of marriage valid, void or voidable is of immense importance before deciding on the issue of the relief sought for. Section 14 of Hindu Marriage Act, 1955 provides that court is not competent to entertain any petition divorce by a decree of divorce unless one year has passed since the solemnisation of marriage. The basic purpose of the legislature seems to give time to the parties to adjust with each other. Marriage is an important institution in any individual's life, and therefore before getting the marriage dissolved by mutual consent, parties must be given some reasonable time to reflect on their move to dissolve their marriage. Law is in favour of preservation of marriage, therefore different statutes provides for some period of togetherness before separation in order to file the petition for disbanding of marital tie permanently with mutual consent. Section 14 is general provision applicable to all kinds of divorce whether by mutual consent or otherwise providing for a period of one year since the solemnization of marriage whereas section 13B of Hindu Marriage Act, 1955 is talking about a period of one year "living separately" immediately preceding the presentation of the petition. The expression living autonomously connotes not living like husband and wife though under one roof. It has no indication towards the place of living. The parties may be living under the same roof and yet they may not be living as spouses of each other. The parties should have no pining to perform their marital obligations⁷ towards each other.

Mutual consent for the purpose of dissolution of marriage should continue till the presentation of the second petition in continuity of the first petition after 6 months but before a period of 18 months. Section 13B furnishes for a period of minimum six months after the first motion being moved, if in the event the parties changed their minds during the specified time period. Hence, after the first motion and the presentation of the final petition for mutual break up, the parties obligatory wait for a period of six months before the second wave can be moved, and at that point of time, if the parties have made up their minds that they would be not capable to live together, the Court, after making such inquiry, as it may believe essential, grant a decree of divorce pronouncing the nuptials to be dissolved with consequence from the date of the decree. There is no hesitation in concluding that the legislature had in its insight had stipulated a cooling period of six months from the date of filing of a petition for mutual consent till such divorce is actually granted, with the intent that it would save the institution of

⁶ Ins. by Act 68 of 1976 (w.e.f. 27-5-1976).

⁷ *Sureshta Devi v. Om Prakash*, AIR 1992 SC1904.

marriage⁸. Both of the parties may withdraw his/her assent at any time earlier than the transient of the decree even after the running out of 18 months from the date of filing of opening petition⁹. The long period of six to eighteen months is given in divorce by mutual consent as to give occasion and chance prospect to the parties to reflect on their moves and seek suggestions from their friends and own flesh and blood. The Court ought to be satisfied about the bona fides and concurrence of both the parties. If there is no consent at the time of probe, the Court gets no authority to pass the divorce decree. If the Court is held to have passed the decree solely based on initial petition, it negates the whole idea of mutuality. There can be no one-sided withdrawal of assent. It was held, that if the consent of the wife was acquired by fraud and wife was not prepared to give consent, there may possibly be unilateral withdrawal of consent¹⁰. The parties must be living separately for a period of at least one year and must resolve towards ending the marriage. The parties must not be performing their conjugal obligations; physical separation is not the only criteria to assess abandonment. It is the total denial of performing obligations of married state. In *Smruti Pahariya v. Sanjay Pahariya*,¹¹ the Supreme Court held that the consent cannot be presumed by the nonattendance in the court of one spouse at the conclusion of 6 months nippy off period in mutual consent divorce petition. It also opined that Court cannot imagine consent of a party only because both the parties are signatories to the first motion under 13B of the Act.

IV. JUDICIAL ATTITUDE

In *Amardeep Singh v. Harveen Kaur*,¹² the question crop up for the deliberation of the court in this appeal is whether the minimum period of six months specified under sec 13B of Hindu Marriage Act, 1955 in a divorce proceeding divorce on the basis of mutual consent is mandatory or directory that can be unperturbed in some extraordinary state of affairs?. The Court held that where a party has already acted on the consent terms and conditions either wholly or in part to his/her detriment, the other party cannot be allowed to dissent from the consent given in the first motion. In *Nikhil Kumar v. Rupali Kumar*,¹³ the Supreme Court waived 6 months statutory period using its power given under article 142 of the Constitution of India and the marriage was dissolved to do complete justice. In *Manish Goel v. Rohini Goel*,¹⁴ a bench of two Judges of SC held that authority of this Court under article 142 of Constitution could not be used to waive the legal period of six months for filing the second motion under section 13B as doing so will be passing an order will be exploitation of constitutional provisions. In *Supreme Court Bar Assn. v. Union of India*¹⁵, the Constitution Bench of Supreme Court held under article 142, Apex Court cannot altogether ignore the substantive provisions of a statute and pass orders with reference to an issue which can be settled only through a mechanism prescribed in another statute. The Court observed that the power under article 142 can be exercised in cases where the court found the marriage to be

⁸*Devinder Singh Narula v. Meenakshi Nagia*, AIR 2012 (SC)2890.

⁹*Hitesh Bhatnagar v. Deepa Bhatnagar*, AIR 2011 SC 1637.

¹⁰AIR 1992 SC 1904.

¹¹2009 (8) SCR 631.

¹²Civil Appeal No. 11158 OF 2017 (Arising out of Special Leave Petition (Civil) No. 20184 of 2017).

¹³(2016) 13 SCC 383.

¹⁴(2010) 4 SCC 393.

¹⁵(1998) 4 SCC 409.

totally impracticable, emotionally scary, beyond retrieve and conked out irretrievably. This power can be work out only to put an end to useless litigations and to save the parties from further anguish.¹⁶

V. CONCLUSION

Under the customary Hindu Law, as it stands before the statutory law on the dissolution, marriage is an eternal union and can be dissolved by death only. Statutory provisions of different personal laws authorized the court to disband the marriage on different statutory grounds. The object of the provisions to dissolve the marriage which is otherwise once and for all broken down is to enable the parties to re-establish themselves as per accessible options. Forcible perpetuation of matrimonial status does not serve the purpose and six months cooling period is a safeguard against hurried decision to breaking the tie. The purpose of six months cooling period is not to prolong the agony of parties or to perpetuate a purposeless marriage. Though every effort needs to be made by the court to save the marriage, and if there is no probability of reunion, and there are curative chances, the court should not be toothless in granting the parties a better option. Whether a provision is mandatory or directory, language alone is not crucial; regard should be there to the context, subject matter and purpose of the provision.¹⁷

The supremacy under article 142 of the Constitution has been used by the Supreme Court in a number of cases even after the judgement of *Manish Goel*.¹⁸ The Court in *Amardeep Singh*¹⁹ was of the viewpoint that since *Manish Goel* lays the binding law and in absence of contrary decision by a larger bench; power under article 142 of the Constitution cannot be exploited contrary to statutory provisions especially when Apex Court is approached only for the purpose of waiver of the statutory period only. It was submitted by the *amicus curiae*'s Shri Abhishek Kaushik, Vrinda Bhandari and Mukunda Rao that the period enshrined in the section 13B is directory and cannot be waived by the Apex Court, except in extraordinary circumstances. Section 13B (1) relates to sway of the court and the petition is maintainable only if the parties are living singly for a period of one year before filing the motion and that are willing to live separate from each other and have agreed that the marriage should be dissolved. Section 13B (2) is technical guiding the process and the discretion to waive the period is considered looking into interest of justice.

The Court in this case laid down the guidelines to be followed while waiving the statutory period of six months as follows

- i. The statutory period of minimum six months specified in section 13B (2), after the statutory period of separation of parties for one year under section 13B (1) is already over before the first joint motion itself by the parties.
- ii. Courts should make all efforts to reunite the parties. All efforts for mediation/conciliation of parties including efforts in terms of order XXXIIA, rule 3 of CPC under section 23(2) of the Act and section 9 of the Family Courts Acts to reunite

¹⁶*Poonam v. Sumit Tanwar* (2010) 4 SCC 460.

¹⁷*Kailash v. Nanhku* (2005) 4 SCC 480.

¹⁸*Supra* note 14.

¹⁹*Supra* note 12.

the parties have failed and there is no probability of success in that direction by any supplementary efforts.

- iii. The parties have finally settled their issues including alimony, custody of the child or any other imminent issues between the parties related to the dissolution.
- iv. The Court is of the view that waiting period will only prolong their agony.
- v. The waiver application for waiving 6 months' time period can be filed within a week after the first motion praying for waiver with reasons thereof.

The decree for dissolution under section 13B is open to revision under section 115 of Code of Civil Procedure.



IMPLEMENTATION OF THE JUVENILE JUSTICE ACT, 2015: A STUDY OF OBSERVATION HOME IN FARIDABAD

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Abstract

The law relating to juveniles has undergone a lot of changes lately. Our legislation confirms to international standards, however, the implementation leaves a lot to be desired. Observation homes are meant to provide a holistic approach towards reform and rehabilitation of juveniles who come in conflict with the laws. The paper is an attempt to critically examine the organisational setup and institutional life within these homes.

I. INTRODUCTION

The substantive law applicable to crimes committed by juveniles in conflict with the law is the same as that of adult offenders but the treatment prescribed for juveniles is different, as the juvenile justice system focuses more on reform and rehabilitation of the juveniles rather than taking punitive actions. Progressive criminology advocates the use of non-institutional treatment for treatment of delinquency in juveniles. No juvenile should be sent to prison on account of default in payment of fine or default in furnishing of security. A large variety of disposition measures should be made available to the competent authority allowing for flexibility so as to avoid institutionalisation to the greatest extent possible.

The objective of juvenile justice is to take precautionary steps to prevent juveniles from coming into conflict with law¹ and if need arises then to treat every accused in a manner consistent with the promotion of child's sense of dignity and worth and the goal of complete rehabilitation of the juvenile by the time they leave the juvenile justice system. Thus, the objective of the Juvenile Justice System is both the protection as well as the preservation of the well-being of juveniles caught in unfortunate situations making them come in conflict with law. According to rule 1.3 of the Beijing Rules, all States should give proper attention to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with juveniles in conflict with the law. The United Nations Convention on the Rights of the Child obliges signatory states to provide separate legal representation for a child in any judicial dispute concerning their care and asks that the child's viewpoint be heard in such cases. In its General Comment 8 (2000), the Committee on the Rights of the Child stated that there was an "obligation of all States parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children.

II. APPREHENSION AND DETENTION OF JUVENILES-IN-CONFLICT WITH THE LAW

As soon as a juvenile is apprehended by the police, he has to be placed under the charge of the special juvenile police unit and his matter is to be immediately reported to a member of the Juvenile Justice Board. Under no circumstances is a juvenile to be kept in a police lock-up or jail. The police officers who frequently or exclusively deal with juveniles are to be specially instructed or trained so that they act in an appropriate and informed manner.² Immediately upon apprehension, the juvenile has a right to have his parent or guardian informed of his arrest and the Board before which he will be produced for examination and the juvenile has to be produced before the Juvenile Justice Board within 24 hours of his apprehension.³ Information of the arrest also has to be given to the Probation Officer so that he may take steps to obtain information regarding the

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¹ UN Guidelines for the Prevention of Juvenile Delinquency, Dec 14, 1990 popularly referred to as Riyadh Guidelines.

² Beijing Rules, r. 12.

³ Juvenile Justice (Care and Protection of Children) Act, 2000, s.13(1).

antecedents and family background of the juvenile in addition to collecting material facts and evidences which could be of assistance to the board while making inquiry into the case.⁴ This social investigation report is to be submitted by the Probation Officer as early as possible. Although the report has only a recommendatory value, nonetheless the Board has to consider it while arriving at any decision regarding the juvenile.

Detention pending trial should be used only as a measure of last resort and that too for the shortest possible period of time.⁵ During pendency of inquiry before the Juvenile Justice Board, every juvenile who is not placed under the charge of parent or guardian will then have to be lodged in an observation home which is an institution for temporary reception of juveniles in conflict with law during their trial period if bail is not granted to them. Such juvenile is to be initially kept in the reception unit of the observation home for preliminary inquiries and thereafter having due considerations regarding his physical and mental status along with degree of offence committed by him, he is further inducted in the observation home.⁶ Juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations as well as the International Covenant of Civil and Political Rights.⁷ As per the Beijing Rules while in custody, juveniles shall receive care, protection and all necessary individual assistance, *i.e.*, social, educational, vocational, psychological, medical and physical that they may require in view of the age, sex and personality.⁸ The danger of criminal contamination of the juveniles while in detention pending trial must not be underestimated. On account of the varying physical and psychological characteristics of the young detainees, some classification measures are to be devised such as on basis of age, sex, crime committed, addition to drugs, alcohol etc., so as to minimise chances of bullying, abuse, victimization as well as exposure to negative influences. Such categorization would also help in rendering need based assistance to such juveniles in a more appropriate manner. Children should not be handcuffed like ordinary prisoners and they are also not to be herded with the adult prisoners in police lockups or jails. On conviction by special boards, they are not to be sent to jails, on the contrary they are to be housed in institutions such as children's homes or special homes where they are to be given vocational training which might be of use to them later in life.⁹ In *Master Salim Ikramuddin Ansari v. Officer in Charge, Borivali*,¹⁰ a fifteen years old boy had to remain behind the bars for almost three years because of the sheer negligence, indifference and inhuman attitude adopted by the officials. Even after the Sessions Court declared him to be a juvenile, he was not sent to the observation home. The court directed that the boy be paid a compensation of one lakh rupees.

III. BAIL TO JUVENILE

Grant of bail to juvenile has been made mandatory to avoid disruption of his life, except in cases where it would be detrimental to the welfare of the juvenile himself. Upon apprehension of a juvenile, a judge or other competent body should without delay consider the issue of the release of the juvenile.¹¹ Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2015 provides for bail to be granted in all the cases regardless of the nature of the offence and that too as frequently as possible except where the child's release is likely to

- a) bring him into association with any known criminal; or
- b) expose him to moral, physical or psychological danger; or
- c) whether his release would defeat the ends of justice.

Except the above prescribed three grounds bail cannot be denied on the grounds of seriousness of offence¹² or *prima facie* proof of guilt.¹³ Juveniles who are denied bail on any of the above mentioned grounds are, then instead of being committed to prison, to be lodged in the

⁴ *Id.*, s. 13(2).

⁵ *Supra* note 2 at r. 13(1).

⁶ *Supra* note 3 at 47(4).

⁷ International Covenant of Civil and Political Rights, art. 9 & art.10.

⁸ *Supra* note 2 at r. 13(5).

⁹ V.G. Kanetkar, *Future Crimes* 34 (Jaico Publishing House, Bombay, 1988).

¹⁰ 2005 Cr. LJ 799(Bom).

¹¹ *Supra* note 2 at r. 10(2).

¹² *Vijendra Kumar Mali v. State of U.P.*, 2003 Cr. LJ 4619 (All.)

¹³ *Rahul Mishra v. State of Madhya Pradesh*, 2001 CrL. L.J. 214 (MP).

observation homes provided for under section 47 of the Juvenile Justice (Care and Protection of Children) Act, 2015 for such period during the pendency of the proceedings as may be specified in the order. Sometimes in case of orphans or children or migrant labour or those having no residential address, bail may be denied with a view to ensure the presence of such child at the next sitting of the board, but in all such cases reasons have to be recorded by the Board for refusal of bail. In order to ensure grant of bail to children having no family or organizational support, there is provision for the juvenile to be placed under the supervision of a Probation Officer or fit institution or person.¹⁴ It is submitted that in such cases the Boards, should be proactive and should *suo moto* take steps for grant of bail to such juveniles pending their inquiry, so that they do not have to languish in the Observation Homes unnecessarily. Detention pending trial should be used only as a measure of last resort and for the shortest possible period of time¹⁵ and whenever possible, detention pending trial shall be replaced by alternative measures such as close supervision, intensive care or placement with family or in an educational setting or home.¹⁶

Upon being lodged in a children's home or special home, the juvenile may also be granted leave of absence by the competent authority. Under this the juvenile may be permitted to go on leave under supervision to attend special occasions such as examinations, marriage of relatives, death of kith or kin or the accident or serious illness of parent or in case on any other emergency of like nature. The period of such leave shall be maximum seven days, excluding the time taken in journey.¹⁷

IV. OBJECTIVES OF THIS STUDY

The reformatory institutions, *i.e.*, observation homes and special homes and have been assigned the most important and complicated task to reform and rehabilitate the juvenile in conflict with the law. In the absence of proper functioning of these reformatory institutions, the juvenile justice system cannot become successful.

The improper and in effective organizational set up is more responsible than other factors for the defective working of administrative for juveniles. The insincere and inhuman attitude of administrative authorities, has impacted the impressionable minds of juveniles.

It also appears that there is lack of suitable conditions in the reformatory institutions for juveniles due to which juveniles suffer a lot. There is also a lack of awareness about the facilities provided by the State Government in reformatory institutions due to which changes are not happening. Reformatory institutions have failed in safeguarding fundamental right and establishing measure for social reintegration of young people once deprived of their liberty in prisons or in other institutions.

The various objectives of the present study are:

- i. To study the establishment and working of observation homes and special homes, the extent of their compliance with legal provisions;
- ii. To study the institutional life within Reformatory Institutions for juveniles;
- iii. To examine and evaluate the problems being faced by juveniles in these homes; and
- iv. Suggest remedial measures on the basis of findings.

With the aforesaid objectives the researcher has conducted this study in Faridabad.

V. METHODOLOGY

The methodology of present research work was carried out in reformatory institutions established at Faridabad. The primary data was collected from these institutions on the basis of the information obtained from the officials, management as well as inmates of these institutions. The primary data was collected with the help of both structured/unstructured interview schedules. Then this secondary data was collected and analysed in reference to the relevant provisions of the Beijing Rules, Indian Constitution, Juvenile Justice (Care and Protection of Children) Act, 2015 and Juvenile Justice (Care and Protection), Rules, 2016.

¹⁴ *Supra* note 3 at s. 12(1).

¹⁵ *Supra* note 2 at r. 13(1).

¹⁶ *Id.*, r. 13(2).

¹⁷ *Supra* note 3 at s. 98(1).

VI. FINDINGS OF THE STUDY

Institutional capacity

In Faridabad, an observation home was established in the year 2007, by the Department of Women and Children under the juvenile Justice Act. The Observation home has a capacity of housing 25 inmates, whereas at present there are a total on 87 juveniles residing there. This has led to severe overcrowding. They are given adequate beddings and weather appropriate clothing's and instructed to keep their surroundings clean at all times. However due to overcrowding and space constraints, some children are required to share beddings.

The inmates are segregated on the basis of the crimes committed by them.

Offences charged with	Total number of inmates
Culpable homicide, Murder, Attempt to murder	34
Rape, Unnatural offence, POCSO, Kidnapping	36
Theft and Robbery	15
Hurt, Grievous Hurt, Criminal Intimidation etc.	02

Staff

Before 1926, there used to be the post of assistant jailors. However, on the recommendations of Punjab Jails Enquiry Committee, 1925, these posts were replaced in 1926 by the deputy superintendent and assistant superintends respectively. Deputy superintendent which is applicable to the state of Haryana performs the functions of security, custody and discipline, care and welfare of juveniles. Head warder is required to be on duty for six hours daily and warder is assigned a particular duty by the order of either a superintendent or a deputy superintendent which may include charge of a ward. On the other hand, the head female warder (matron) as regards female juvenile performs the functions similar to those performed by male warders. They provide proper medical facilities for juveniles in homes. Medical staff is deputed by the director general, health services, Haryana, from its cadre of medical officers and para-medical staff.

Educational Facilities

The government provides education facilities in reformatory homes at Faridabad for the juveniles kept in homes. A special teacher is appointed for juveniles in homes. Students are encouraged to complete their schooling via open schools and they are granted temporary leave during examinations. Presently more than 50 percent of inmates are enrolled in school. They are provided study material, books, magazines and newspapers (one in Hindi and other in English) and guidance is provided to them from time to time.

The government also provides some professional training for the juveniles in homes. They learn spinning, niwar knitting and canning from the homes. Some juveniles opined that they are given less facility and are dissatisfied with these facilities.

Health, nutrition and Sanitation

They provide routine facilities like daily three times meals, *i.e.*, breakfast, lunch and dinner. In case of illness, a special diet is given to them. They provide good Medical staff and experience holder to care for juveniles. Daily checkup of juveniles is arranged in homes. The medical staff provides special medical facilities for juveniles in general hospital as well as in government dispensary.

There is a full time sweeper and person entrusted with responsibility of cleaning toilets. There are washing facilities available and every juvenile is provided with soaps to maintain

personal hygiene.

Surveillance

Inmates are kept under a close scrutiny to prevent any instances of physical or sexual abuse or mental torture. They are always under the watchful eye of officials. CCTV cameras have been installed at all places and there is 24 x 7 monitoring of their activities.

Miscellaneous

The government provides library, canteen, games, education and health facilities in reformatory homes established at Faridabad. Some juveniles were dissatisfied by these facilities. The government has also sanctioned some policy, programmes and schemes for them i.e. rehabilitation and employment post their release from reformatory homes. The government has also provided entertainment facilities for juveniles in the reformatory homes for example, T.V., cable and Dish etc.

The real problem of juveniles is that there is no healthy relationship with the official staff in the homes. No doubt, the officers use to solve the problems of juveniles, but some juveniles are of the view that there are problems, which are totally ignored by the official staff in home. According to the juveniles, meeting with their relatives and parents is insufficient, short and bounded.

The official staff also organizes cultural programmes for juveniles in reformatory homes. Juveniles have shown keen interest in the cultural programmes in homes. The official staff said that the juveniles are doing their work as per instructions of government and follow the rules and regulation accordingly.

VII. SUGGESTIONS

After an analysis of the existing laws and the findings of this study, the following recommendations are given

- i. Special educational programmes should be introduced in rural areas in order to protect the children from deviant behavior.
- ii. There is a need to spread moral education among the children at the primary level of schooling by making the teaching of moral education compulsory.
- iii. The government must provide facilities to the delinquents for their rehabilitation and they may be provided facilities of financial assistance for self-employment in the society so that so that they can be settled in a meaningful life in society.
- iv. The medical examination should be made compulsory for every juvenile at the time of entry to reformatory homes. Any one suffering from any serious disease should not be allowed to mix-up with other juveniles.
- v. Proper outdoor and indoor games facilities should be provided to the juveniles in homes. They should be in position to avail these facilities during leisure time. The games should be made compulsory by framing a time table, since, it can improve their physical outlook and attitude. This will also help to channelize their energies.
- vi. Vocational training is more relevant for the long term convicts as economic stress was found to be one of the major factors leading to criminal behaviors. The vocational training should be such that it makes the offender self-reliant that ensures economic facilitating and rehabilitation eventually.



TRANSGENDER RIGHTS BEFORE AND AFTER THE NALSA JUDGMENT

Monika Singhal*

Abstract

‘Transgender’ is an umbrella term used to cover people who do not identify with the gender assigned to them at birth, have different sexual orientation and also people with inter-sex variations. They are shunned by the society and it has been a long struggle for them to gain recognition as a human being with rights. This paper traces the legal struggle of transgender community in India and the steps taken by various states to grant them legal recognition.

I. INTRODUCTION

*Hijras*¹ have a recorded history of more than 4,000 years.² Every Indian native, especially from the North, is aware of the legendary narrative that people from *hijra* clan visit the house of a newly born child with a view to check its gender and shower their blessings if the baby doesn’t belong to their clan owing to its gender deformity. Studies reveal that as per the ancient myths, the *hijras* bestow the newly born with special powers to bring luck and fertility, however, at the same time, a child born with deformed genital is taken away and added into their own clan, which remains unopposed by the relatives of such deformed child. This practise, though apparently holds a sacrosanct space in the Indian culture, the *hijras* face grave hardships and harassment in enforcement of their rights because of the discrimination meted out to them owing to their gender. Biologically, the society recognizes only two sexes viz., male and female. The soundness of the practice of assigning rights on the basis of sex depends on two concepts:

- i. First, that sex is fixed at birth; and
- ii. Second, the assumption that everyone fits neatly into two boxes labelled as male and female.

The term ‘transgender’ has been derived from the Latin word ‘trans’ and the English word ‘gender’.³ The dictionary defines ‘trans’ as beyond or over. In literal sense it means crossing over of a gender. The word transgender is a blanket term that defines a person who physically and mentally doesn’t correlate themselves with the assigned gender that is naturally

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¹ This term is used in Transgender Persons (Protection of Rights) Act, 2019, s. 2(k). *Hijras* are biological males who reject their ‘masculine’ identity in due course of time to identify either as women, or “not-men”, or “in-between man and woman”, or “neither man nor woman”. *Hijras* can be considered as the western equivalent of transgender/transsexual (male-to-female) persons but *Hijras* have a long tradition/ culture and have strong social ties formalised through a ritual called “reet” (becoming a member of *Hijra* community). There are regional variations in the use of terms referred to *Hijras*. For example, Kinnars (Delhi) and Aravanis (Tamil Nadu). *Hijras* may earn through their traditional work: ‘Badhai’ (clapping their hands and asking for alms), blessing new-born babies, or dancing in ceremonies. Some proportion of *Hijras* engage in sex work for lack of other job opportunities, while some may be self-employed or work for non-governmental organisations.” A sociologist describes them as “man minus maleness” and “man plus woman”.

² Available at: <https://www.newstatesman.com/world-affairs/2008/05/hijras-indian-changing-rights> (last visited on October 4, 2019).

³ Available at: <https://www.dictionary.com/browse/trans-visited> (last visited on October 3, 2019).

allocated to them at the time of their birth. As defined by H.M. Levitt and M.R. Ippolito, a transgender is a common word used to define people whose inner sense of gender identity and behaviour is different from what is assigned to them at birth.⁴

According to The Transgender Persons (Protection of Rights) Act, 2019 “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*.”⁵

II. HIJRAS: THE THIRD GENDERED PEOPLE

‘*Hijra*’ refers to the third gender which means eunuch. The *Hijra* is an Urdu word and mostly used in Asian countries whereas the term transgender is a wider term and it is being used universally. Transgender is a very new term that came into use in the nineties and denotes all the communities whose sexual orientation deviate from the conventional sex binary of male and female.⁶

The *hijras* base their clans’ third gender identity on an episode in the Ramayana where Lord Rama is banished. In the story, Lord Rama requests a tearful group of men and women, lamenting his banishment, to leave his company and return to the city/ respective homes. Legend has it that every man and woman, except for the *hijra* clan stayed at the very spot as they did not fall under the directive sphere of Lord Rama. On returning after 14 years of exile, Lord Rama was amazed to see the entire *hijra* clan waiting for him. Seeing this as a sign of loyalty, Lord Rama rewarded the *hijra* clan with special divine power of blessings on auspicious occasions such as marriage and child birth, which culminated into a custom. This story is mostly popular in north India.⁷

The *hijras* include both ceremonially emasculated males and intersexed people whose genitals are “ambiguously male-like at birth.” All *hijras* have a female gender identity. There are no ambiguous females who identify as males in the group. Instead, all *hijras* dress and act as women even though they are not biological women.⁸ Eunuchs are not male as they have imperfect or absent penis and they do not have sexual desire for women as men usually have. They walk like women, they have female names, and wear female clothing, jewellery, and bindi.⁹

⁴ H.M. Levitt & M.R. Ippolito, “Being Transgender: The experience of transgender identity development”, 61(12) *Journal of Homosexuality* 1727-1758 (2014)

⁵ *Supra* note 1.

⁶ H. Boswell, “The Transgender Alternative”, available at: <https://www.ifge.org/?q=node/58> (last visited on October 4, 2019).

⁷ *National Legal Services Authority v. Union of India*, III (2014) SLT 748: II (2014) CLT 248 (SC), para 13.

⁸ Justice P. Sathasivam, *Rights of Transgender People – Sensitising Officers to Provide Access to Justice*, Refresher Course for Civil Judges (Junior Division)-I Batch at Tamil Nadu State Judicial Academy, December 12, 2011, available at: <http://www.hcmadras.tn.nic.in/jacademy/Article/PSJ-CJO-SPEECH-Royappetah.pdf> (last visited on October 5, 2019).

⁹ Serena Nanda, *Neither Man nor Woman: The Hijras of India* 13 (Wadsworth Publishing Company, NYC, 1999).

III. RIGHTS OF TRANSGENDER BEFORE NALSA JUDGMENT

Earlier, transgenders had minimal rights and were not recognised as separate gender under any Indian law. This denied them the right to own property, vote, and the right to claim formal individual identity through any official documents such as voting card, passport or driving licence, thereby rendering access to social welfare schemes frustrated. This promoted resorting to beggary and customary dancing rituals in marriages for earning livelihood among the *hijra* community.

Today, medical science is increasingly becoming skilled at altering a persons' birth sex through hormones and surgery and the prevalence of inter sexed individuals reveals the male-female binary as a social construct.¹⁰ Legal scholar Upendra Baxi, in the foreword to the PUCL Report,¹¹ says: "The dominant discourse on human rights in India has yet to come to terms with the production/reproduction of absolute human sightlessness of transgender communities. At stake is the human right to be different, the right to recognition of different pathways of sexuality, a right to immunity from the oppressive and repressive labelling of despised sexuality. Such a human right does not exist in India."¹² India is also amongst many countries which recognize two sexes and thus, the third sex is marginalized.¹³ In Indian scenario, a transgender cannot lead a life with dignity as the Indian society doesn't recognize transgenders as a part of the system, though such approach is contrary to the fundamental rights granted to a citizen.

As per the Indian Constitution, most of the protections under the Fundamental Rights' Chapter are available to all persons. However, the Constitution fails to elaborate safeguards for the rights of undetermined and uncategorized genders i.e. transgender. Without such distinction and categorization of an individual into a specific sex/ gender, deprives them of their civil state benefits which are guaranteed by the Indian constitution. For instance, there is no legal recognition in owning a property, solemnizing marriage (no special enactment to his effect), voting or contesting elections etc. The main problems that are being faced by the transgender community are of discrimination, unemployment, lack of educational facilities, homelessness, lack of medical facilities like HIV care and hygiene, depression, hormone pill abuse, tobacco and alcohol abuse, penectomy and problems related to marriage and adoption.¹⁴

In India every citizen enjoys some Fundamental Rights, which do not discriminate on the ground of caste, sex and religion etc. But, the Transgender community is not lucky enough and does not have any support nor from the society and from the government as well. They are still struggling to get a basic support such as availing education, dignified jobs, and participation in society. There are cases in which the transgenders have even denied their

¹⁰ Jennifer, Rellis, "Please Write 'E' in this Box - Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India", *available at*: <https://ssrn.com/abstract=982609> (last visited on October 6, 2019).

¹¹ People's Union of Civil Liberties-Karnataka, "Human Rights Violations against the Transgender Community: A Study of Kothi and Hijra Sex Workers in Bangalore" (September, 2003), *available at*: https://queeramnesty.ch/docs/HR_Vioaltion_Transgender_India_PUCL2003_text.pdf (last visited on October 5, 2019).

¹² Siddarth Narrain, "Being a Eunuch", *Frontline*, 14 October, 2003, *available at*: <http://www.countercurrents.org/gen-narrain141003.htm>. (last visited on April 12, 2019).

¹³ *Supra* note 2.

¹⁴ *Supra* Note 7.

political rights as well. For example, in the year 2002, Kamla Jaan¹⁵ became the first *hijra* to be elected as a Mayor of Katni but her election was challenged on the ground that she has contested the election on the seat reserved for women. The Madhya Pradesh High Court in 2003 upheld the order of an election tribunal which nullified the election of a hijra, Kamala Jaan, to the post of Mayor of Katni on the ground that it was a seat reserved for women and that Kamala, being a “male”, was not entitled to contest the seat. The High Court verdict came despite a direction from the Election Commission (E.C.) in September 1994 that hijras can be registered in the electoral roles either as male or female depending on their statement at the time of enrolment. This direction was given by the E.C. after Shabnam, a hijra candidate from the Sihagpur Assembly constituency in Madhya Pradesh, wrote to the Chief Election Commissioner enquiring about which category *hijras* were classified under.¹⁶

The other fields where this community feels neglected are inheritance of property or adoption of a child. They are often pushed to the periphery as a social outcaste and many may end up begging and dancing. They usually get sexually abused and eventually end up working as sex workers.¹⁷

IV. ACCESS TO JUSTICE

Around 4% of the world’s population is transgenders. In spite of various legislations in their favour, they continue to suffer mental, physical and social abuse in the society because the social stigma does not allow them to come to the main stream of the society¹⁸ The health and well-being of transgender people suffers great harm by attitudes of intolerance and hatred toward diverse gender expression.¹⁹

V. CONSTITUTIONAL PROVISIONS

India is a country where we have codified framework of Fundamental Rights embedded in the Constitution, irrespective of gender. There are four basic rights which are necessary for one’s survival and existence, *viz.*,

- i. Article 14 – Which states that the State shall not deny any person equality before the law or the equal protection of laws within the territories of the State.²⁰
- ii. Article 15 – The State shall not discriminate against any citizen on the grounds of race, caste, religion, sex, place of birth or any of them.²¹
- iii. Article 19 – All citizens shall have rights of –
 - Freedom of speech and expression;
 - Freedom of assemble peaceably and without arms;
 - Freedom to reside and settle in any part of the territory of India;

¹⁵ Available at: <https://www.dailyo.in/politics/kamla-jaan-to-kankar-munjare-eunuch-politicians-you-need-to-know-to-understand-what-s-at-stake-in-madhya-pradesh-assembly-elections-bjp-congress/story/1/27674.html> (last visited on August 8, 2019).

¹⁶ *Supra* note 10.

¹⁷ *Supra* note 11.

¹⁸ *Supra* note 7.

¹⁹ *Supra* note 11.

²⁰ The Constitution of India 1950, art. 14.

²¹ *Id.*, art. 15

Freedom to practice any profession or to carry on any occupation, trade or business.²²
 iv. Article 21– Right to his life or personal liberty.²³

VI. 12TH FIVE YEAR PLAN AND TRANSGENDER ²⁴

The Twelfth Five Year Plan (2012-2017) proposed empowerment of the third gender by providing them education, housing, access to healthcare services, employment, skill development and financial assistance. In addition to this, it also proposed that separate column must be incorporated in all government and non-government records for the third gender. Besides social upliftment, it had an ancillary benefit in determining the exact number of Transgender in India, which would have further benefitted their community in allocation of budget in the following Annual plans. The Ministry of Social Justice and Empowerment along with Ministry of Statistics and Programme Implementation will map their socio- economic status to create a better environment for them by improving their living standards.²⁵ A proper execution is yet to be seen in this direction as funds are being unutilized and lying dormant with the concerned state welfare departments. There is a need to fast track the execution process so as to address the social problems faced by the *hijra*/transgender community.

VII. LEGAL PROVISIONS AT STATE LEVEL

The state of Tamil Nadu and Kerala were the first states to introduce transgender welfare policies and as mentioned by the Researcher in Chapter IV that South India is always and more progressive towards the transgender community. As per the policies introduced , transgender has given a free access for SRS in govt. hospitals, but it is only for male to female, free housing schemes, providing citizenship documents, admission in govt. colleges and also provides the scholarship for higher studies, various other skilled programmers and providing monetary help for the same.²⁶ Tamil Nadu was the first state which forms a transgender welfare board, along with the representative of transgender community. Kerala also followed the paths of Tamil Nadu and stated providing free SRS surgeries in govt. run hospitals.²⁷

West Bengal also followed the path and in year 2015 set up a transgender welfare Board. But, the West Bengal govt. did not clarify many things about the board such as funding and who all were the part of the board and what will be the qualification and criteria to choose them.²⁸ This board was called as a failure.

²² *Id.*, art. 19.

²³ *Id.*, art. 21.

²⁴ Available at: <http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf> (last visited on August 8, 2019).

²⁵ Available at: https://mhrd.gov.in/sites/upload_files/mhrd/files/document-reports/XIIFYP_SocialSector.pdf (last visited on August 9, 2019).

²⁶ Available at: <https://www.firstpost.com/india/tamil-nadu-once-a-pioneering-state-for-welfare-of-transgenders-now-shuns-the-third-gender-3476538.html> (last visited on August 8, 2019).

²⁷ Available at: <https://scroll.in/article/804496/why-keralas-free-sex-change-surgeries-will-offer-a-new-lifeline-for-the-transgender-community> (last visited on August 8, 2019).

²⁸ Available at: <https://clpr.org.in/blog/the-transgender-welfare-development-board-west-bengal-a-wasted-potential-2/> (last visited on August 18, 2019).

In 2016, Odisha also enlarged some benefits to the transgender community, who were living their life below poverty line.²⁹ In 2019, 5 transgender persons have been appointed as security guards at Odisha Hospital.³⁰

Himachal Pradesh also set up medical boards at district and state level for the transgender persons. Government has further initiated certain schemes such as scholarship, skill development programme and financial support for the transgender's parents.³¹

In 2017, The Ministry of Drinking water and sanitation issued certain guidelines for the Swach Bharat Mission and to follow this principle the ministry advised all the states that transgenders should be allowed to use the public toilets of their identity choice.³²

Chandigarh also established the transgender welfare board with 14 members to ensure that the transgender community will not face any discrimination.³³ This step was taken when a local trust who was working for the welfare wrote to the Govt. to take steps for welfare of the transgender community.

Karnataka also issued policies for transgenders in 2017, with aim to spread awareness about the transgenders in Educational institutions. A Committees followed, which dealt with the problems and discrimination faced by the transgenders.³⁴

Andhra Pradesh also formed a policy to provide pension benefits to the Transgender community. As per the policy 1,500 Rupees was announced to be given to Transgender person above the age of 18 years as a social security pension. The policy further included ration cards.³⁵ Andhra also proposed the welfare board named as "Andhra Pradesh *Hijra* Transgender Welfare Board'. The Board was in line of the NALSA judgment.³⁶

In 2018, Jammu and Kashmir government recognized the needs of the Transgender community. As per the policy they would be provided free life and medical insurance and monthly pension schemes for the old age transgenders.³⁷

Delhi is lagging behind in the area of welfare of the transgender community. In May 2018, the government established a committee to review the transgender community problems including sexual abuse, discrimination at work and other social problems.³⁸ The Transgender Welfare board of Delhi government is still on papers and no positive steps have been taken so far.

²⁹ Available at: <https://in.reuters.com/article/india-odisha-lgbt-poverty/odisha-becomes-first-state-to-give-welfare-to-transgender-community-idINKCN0YO1S7> (last visited on August 8, 2019).

³⁰ Available at: <https://www.shethepeople.tv/news/five-transgenders-odisha-hospital> visited on November 2019.

³¹ Available at: <https://indianexpress.com/article/india/india-news-india/himachal-pradesh-to-bring-transgenders-under-social-security-net-3018937/> (last visited on November 8, 2019).

³² Available at: <https://www.indiatoday.in/fyi/story/transgender-public-toilets-ministry-of-drinking-water-and-sanitation-969945-2017-04-06> (last visited on August 8, 2019).

³³ Available at: <https://indianexpress.com/article/india/chandigarh-gets-its-first-transgender-welfare-board-with-14-members-4820148/> (last visited on September 8, 2019).

³⁴ Available at: <https://indianexpress.com/article/india/transgender-policy-cleared-by-karnataka-cabinet-4909196/> (last visited on August 8, 2019).

³⁵ Available at: <https://news.abplive.com/india-news/cm-naidu-announces-pension-scheme-for-state-s-transgenders-609165/amp> (last visited on August 8, 2019).

³⁶ *Supra* note 7.

³⁷ Available at: <https://scroll.in/article/865317/for-the-first-time-government-recognises-needs-of-kashmirs-transgender-community-is-it-enough> (last visited on April 2, 2019).

³⁸ Available at: <https://www.hindustantimes.com/delhi-news/delhi-commission-for-women-to-have-a-dedicated-transgender-cell/story-qOsSY7Rpey21J8KyHlMU3J.html> (last visited on August 8, 2019).

Rajasthan Transgender Welfare Board announced that they will be issuing ‘multi purpose identity cards’ to 75,000 transgender in the state to avail the govt. schemes.³⁹

In Uttarakhand, the High Court of Uttarakhand on September 28, 2018 directed the state govt. to provide reservation in education and jobs.⁴⁰ The Court further asked the government to form the policies for the welfare of the Transgender community.

On 2nd march 2019, Assam social welfare department published a draft policy which provides transgenders access to education, shelter, issuing identity documents and further raising awareness etc. Later on the definition which was provided in the Bill was criticised as the term includes the ‘intersex variations’ as transgenders.⁴¹

In February 2019 Gujarat announced setting up a Transgender Welfare Board, with main aim to provide various welfare schemes such as employment, education and other issues. The board was set up with an aim to ensure that the Transgender community can avail the benefit of the Govt. Schemes for the Transgender welfare.⁴²

In July 2019 Bihar Govt. also announced establishment of Transgender Welfare Board named as ‘Bihar Rajya Kinnar Kalyan Board’ and further to provide 1.5 lakh Rupees for the SRS operation.⁴³ As per the policy no one can refuse to give house on rent to the Transgender.

Madhya Pradesh Govt. in August 2019 also announced that they are going to set up Transgender welfare board and they will be providing monthly allowances to parents of intersex children, reservation in jobs and separate public toilets.⁴⁴

VII. LEGAL PROVISIONS AT NATIONAL LEVEL

The report of Peoples’ Union for Civil Liberties (PUCL) recommends that “Civil rights under law such as the right to get a passport, ration card, make a will, inherit property and adopting children must be available to all regardless of change in their gender.”⁴⁵ Such recommendations are yet to see a proper execution, though there have been implementation in bits and pieces, as certain legal aspects with respect to inheritance, adoption and employment in certain govt sector such as Indian armed forces are yet to be codified and regulated.

³⁹ Available at: <https://www.hindustantimes.com/jaipur/in-rajasthan-transgenders-to-get-identity-cards-soon-to-avail-of-scheme-benefits/story-p5PpZy10QUX5eHoHLBwleM.html> (last visited on August 8, 2019).

⁴⁰ Available at: <https://www.jagranjosh.com/current-affairs/uttarakhand-hc-directs-state-to-provide-reservation-to-transgenders-in-educational-institutions-1538381858-1> (last visited on August 8, 2019).

⁴¹ Available at: <https://nenow.in/north-east-news/assam/assam-government-criticized-giving-bad-definition-transgender.html> (last visited on August 8, 2019).

⁴² Available at: <https://thelogicalindian.com/news/gujarat-transgender-board/> (last visited on August 8, 2019).

⁴³ Available at: <https://thelogicalindian.com/story-feed/get-inspired/bihar-transgender-rights> (last visited on August 7, 2019).

⁴⁴ Available at: <https://www.hindustantimes.com/bhopal/madhya-pradesh-to-roll-out-welfare-policy-for-transgenders/story-dewBj0EdfPaokkokMy1vzN.html> (last visited on August 8, 2019).

⁴⁵ Supra note 9.

VIII. SUPREME COURT JUDGMENT

The National Legal Service Authority v. Union of India⁴⁶

The National Legal Services Authority⁴⁷ (NALSA) was formed under the Legal Services Authorities Act, 1987 and it aimed to provide free Legal Services to the weaker sections of the society and to organize Lok Adalats for amicable settlement of disputes. It has been actively involved in addressing the difficulties faced by transgender persons, one of them being fighting for securing provisions for legal adoption of children.

The case pertained to addressing the grievances faced by the transgender community and whether they should be recognized as a third sex and if yes, whether such recognition would be *ultra vires* the Indian Constitution. Existing laws only safeguarded rights of a male and a female and hence, such discrimination by the state laws required a speedy redressal.⁴⁸ Hence a writ petition was filed before the Supreme Court of India praying for the legal recognition of transgender persons as the third gender.

The Hon'ble Supreme Court has declared that:

- 1) *Hijras*, eunuchs, apart from binary gender, be treated as 'third gender' for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.
- 2) Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.
- 3) We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.
- 4) Centre and State Governments are directed to operate separate HIV Sero-surveillance Centres since *hijras*/transgenders face several sexual health issues.
- 5) Centre and State Governments should seriously address the problems being faced by *hijras*/transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.
- 6) Centre and State Governments should take proper measures to provide medical care to transgenders in the hospitals and also provide them separate public toilets and other facilities.
- 7) Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.
- 8) Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.
- 9) Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life."⁴⁹

⁴⁶ III (2014) SLT 748.

⁴⁷ Available at: <https://nalsa.gov.in/> (last visited on November 8, 2019).

⁴⁸ *Ibid.*

⁴⁹ *Supra* note 7 at 109-110.

IX. TRANSGENDER COMMUNITY AND HIGHER EDUCATIONAL INSTITUTIONS

On 29th October 2014, the University Grant Commission (UGC) issued a circular to all the Universities requesting them to include a separate column for transgender community in all application forms. The said circular emphasized upon taking affirmative steps by the Universities in providing the transgender community a safe and holistic environment where they can pursue their respective education, devoid of any harassment, threat, stigma, shame or embarrassment. The circulars further emphasized upon holding gender sensitization programmes and offering them a transgender friendly infrastructure. For the MBA Maharashtra Common Entrance Test - 2017, Out of 363413 applicants, 9000 applicants belonged to other gender means neither male nor female.⁵⁰ The column of ‘others’, other than male and female was incorporated in the form specifically.

Post the NALSA judgment, the Parliament of India introduced the, Rights of Transgender Persons Bill, 2014. On 24th April 2016, a private member’s Bill titled as “The Rights of Transgender Persons Bill, 2014” was passed by the Rajya Sabha and introduced in the Lok Sabha. The Bill deals with the different aspects like Social inclusion of transgender, their rights and entitlements, financial and legal aids, empowerment through education and skill development and prevention of abuse, violence and exploitation of transgender community.

X. THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

In spite of having a long history and introduction of a lot of Transgender Bills, none of them could make it to becoming an Act. The Minister of Social Justice and Empowerment, Thawar Chand Gehlot, introduced the 2019 Bill in light of 2018 Bill, which had lapsed. The Transgender Persons’ (Protection of Rights) Bill, 2019 was passed in Lok Sabha and Rajya Sabha on 5th of August 2019 and 25th November 2019 respectively.

The Bill received strong opposition by the members including a demand to send the Bill back to the Standing Committee for review and some of the member demanded to send back the bill again for the scrutiny before the standing committee. One of the members, a Member of Parliament from Dravida Munnetra Kazhagam, Tiruchi Siva, called for a vote to send the bill for scrutiny but the motion was defeated and after a lot of debate the bill was passed.

The 2019 Bill finally received the assent of the President on 5th December 2019 and became an Act. The First Section of the Act says that it extends to the whole of India, which includes Jammu and Kashmir as well.

⁵⁰Available at:

https://www.academia.edu/33006703/Problems_Of_Transgender_In_India_A_Study_From_Social_Exclusion_To_Social_Inclusion (last visited on August 8, 2019).

The transgender definition⁵¹ is the replica of the Transgender Persons Bill, 2018, which is also similar to the definition as proposed by the Standing Committee.⁵² No changes were made to the definition which stays the same as in 2018 Bill although interestingly the definition of intersex variation was removed. The said Act also does not include the National and State Commissions for the transgender. However, after a lot of criticism the screening committee section was deleted as it is against the various provisions of the constitution of India.

There are many provisions of the Act which are welcome and give hope to the transgender. The Bill clearly prohibits the discrimination against a transgender person, including denial of service or unfair treatment with respect to: (i) education;⁵³ (ii) employment;⁵⁴ (iii) healthcare;⁵⁵ (iv) right to movement;⁵⁶ (v) right to reside, rent, or otherwise occupy property;⁵⁷ (vi) opportunity to hold public or private office;⁵⁸ and (vii) access to a government or private establishment in whose care or custody a transgender person is.⁵⁹

XI. CONCLUSION

In Indian society and in any other civilised society there is a general perception that every individual possesses some fundamental rights for social upbringing of the person. With a holistic approach an individual can flourish in a society and a duty is cast upon the state to ensure such parity among various communities of the society. The transgender community is forced to live in seclusion without dignity. In India, people are getting representation on the basis of castes, religion and tribes but transgenders are never looked upon as they not even considered as humans. They have been treated as if they don't exist. That is why they live a secluded life among their own kinds with least interference from the society. Since the year 1994, the election commission of India has given them right to vote and contest as per their self-identified gender, but this has also been a pint of contentions in many cases. Finally, in the year 2014 (with the verdict of the NALSA Judgment), transgender persons were recognized as the third sex and the traditional binaries of male and female was finally demolished. This community was guaranteed by the Hon'ble Supreme Court of their fundamental rights and this has now taken the shape in the form of legislation being passed by the Indian Parliament.

⁵¹ *Supra* note 1. The Act defines transgender as '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*."

⁵² Government of India, "Standing Committee report on Transgender Persons (protection of Rights Bill), 2016", (Ministry of Social Justice and Empowerment, July 2017).

⁵³ *Supra* note 1 at s. 3(a).

⁵⁴ *Id.*, s. 3(b).

⁵⁵ *Id.*, s. 3(d).

⁵⁶ *Id.*, s. 3(f).

⁵⁷ *Id.*, s. 3(g).

⁵⁸ *Id.*, s. 3(h).

⁵⁹ *Id.*, s. 3(i).



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