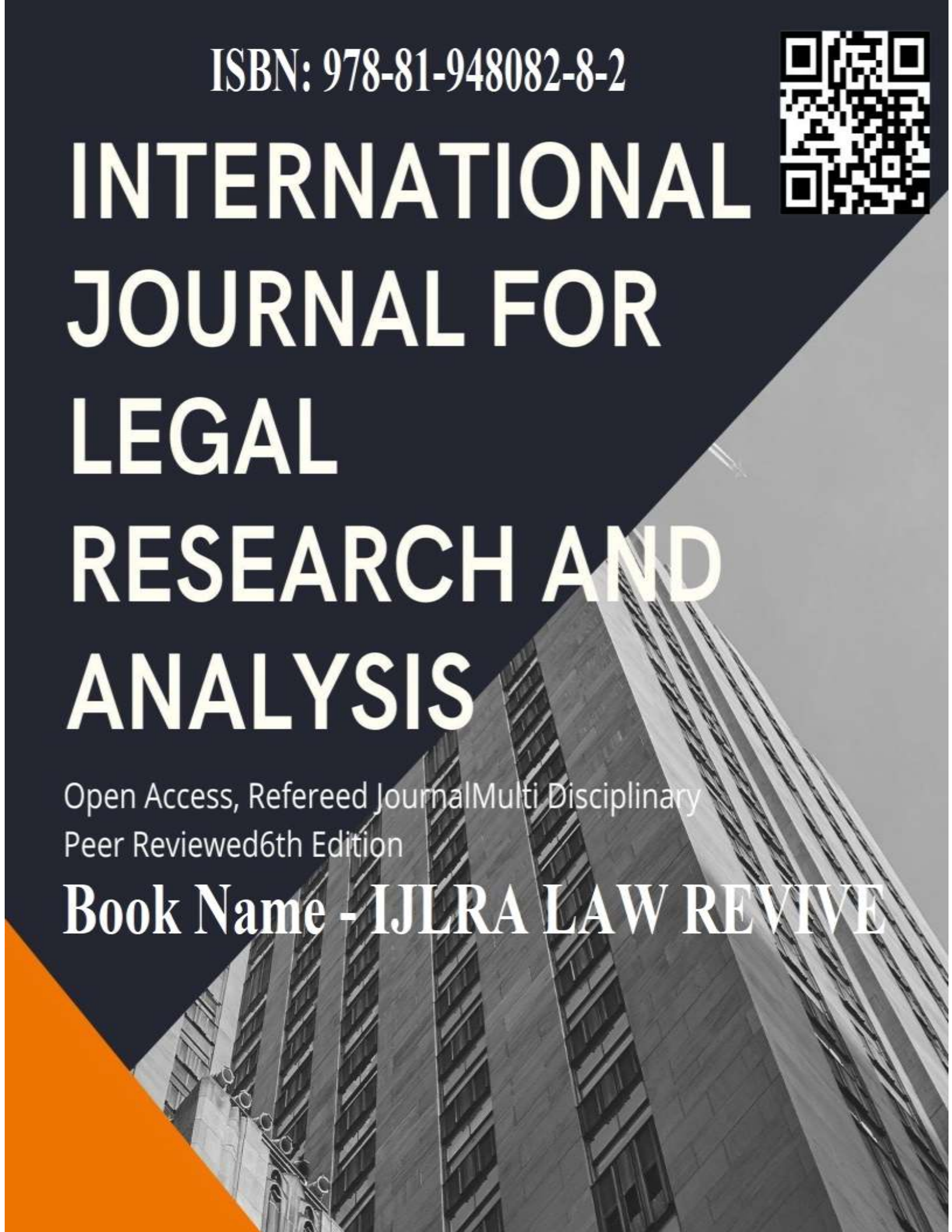
ISBN: 978-81-948082-8-2

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed JournalMulti Disciplinary
Peer Reviewed6th Edition

Book Name - IJLRA LAW REVIVE

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

DISCLAIMER

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

EDITORIAL TEAM

EDITORS

Megha Middha

Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board

 ISBN 978-81-948082-8-2

Dr. Namita Jain

Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC - NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India.India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020).Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi.Formerly Assistant professor of Law,Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration.10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.

Avinash Kumar

Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship.He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi.Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi.He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ISBN 978-81-948082-8-2

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANLAYSIS ISSN **ISBN 978-81-948082-8-2** is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN **ISBN 978-81-948082-8-2** welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

TABLE

ISBN 978-81-948082-8-2

S.L. NO.	NAME	TITLE	PAGE NO.
1.	Dhanaseeli G	The Shift To Capitalism In Outerspace: A Threat To Common Heritage Of Mankind Under International Space Law	1
2.	Shobitha Reddy Panyam	Surrogacy In India:A Dream For Motherhood Or A Pave To Commercial Exploitation	11
3.	Adithya Narayanan	Delegated Legislation And Its Influence In India, Usa And England	25
4.	Srishti & Sunil Kumar	Development Of Real Estate Laws In India: A Study	83
5.	Divya Sharma & Dr. Deepti Monga	Protection Of Investors In India: A Study	94
6.	Diksha Sharma & Dr. Sunil Kumar	Consumer Protection In India	103
7.	Navaldeep & Dr. Sunil Kumar	Legal Challenges Faced By E-Commerce	112
8.	Sonia & Chander Prakash	Schemes Related To Handicraft	121
9.	Manvi & Dr. Akhilesh Ranaut	A Critical Study On Corporate Criminal Liability With SpecialReference To Us And Indian Laws	130
10.	Chirag Chugh & Sunil Kumar	Working Of National Company Law Tribunal	142
11.	Sunil Kumar	Glory Salvatory_Shayo1.docx	151
12.	Robert Akoye	Impact And Role Of Fair Trade Movement In Social And Economic Development: An Overview	165
13.	Dr. Arifa Zahra	Predictable & Effective Mechanism For Corporate For Insolvency Proceedings In India Under Ibc, 2016	175
14.	Pallavi Lakhera & Mr. Sunny	Obscenity In The Internet Age And Intermediary Liability	193
15.	Dr. Suman Mawar	Competition Law And Social Transformation	208

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

THE SHIFT TO CAPITALISM IN OUTERSPACE: A THREAT TO COMMON HERITAGE OF MANKIND UNDER INTERNATIONAL SPACE LAW

AUTHOR NAME: G DHANASEELI

Abstract:

The private space area didn't exist at the time the agreement of outer space was written and it is not acceptable that any of the rules would apply to private groups. Furthermore, also, given the aspirations of many nations and corporations, it's basically impossible that private space going to endure any longer. Space is turning into a space for capitalism with both positive and more in negative way. We are entering into another period of the commercialization of space, outfitted towards producing benefits from dispatching satellites, space travel industry, outer space mining activities, and other related activities .Despite its humanistic, universalizing assumptions, New Space privatization doesn't help mankind all things considered but instead a particular arrangement of rich business people, who deliberately convey humanist figures of speech to induce energy for their exercises. Yet, right now is an ideal opportunity to consider the issues that could emerge from an industrially driven space race, and make the fundamental strides presently to stay away from conceivably lamentable outcomes in the future. Currently , space law rotates around the normal heritage of humankind regulation, a way of thinking whose current understanding struggles with the capitalistic beliefs that are driving the new blast in private space advancement and more serious dangers may expand in which a question arise that to what extend private outer space exploration should be legalized to held private players responsible for the activities on board.There is no proof for this up until now – yet as the field creates and extra private organizations move into space investigation – there will be a higher likelihood of mishap or emergency. Notwithstanding, the expenses of space investigation are cosmic and devastating to less fortunate nations, making them progressively rely upon business launchers. However, in the event that a private organization dispatches an item that therefore causes harm in space,

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

the striving economy should get the bill. The agreement may in this way should be refreshed to make private organizations more obligated. So the author see this as a puzzling effect of ' capitalistkind' which in turn affects the common heritage principle.

KEYWORDS: Private, Organisations, capitalism, Newspace, Space Investigation.

INTRODUCTION:

It has been 54 years since this Outer Space Treaty established the framework for the development of space law, and during those 50 years, it has never been violated. This is partially because only a very small number of countries have access to space, and these countries have only recently begun to utilise the huge expanse of space. But as the Human Race develops, it becomes imperative in nature for space to be exploited to greater heights. In the current situation, this also includes exploitation by private parties. Therefore, it is crucial that we establish guidelines for the proper exploitation of space by private parties up front in order to address this problem before it actually arises.[1].It will be more difficult to ensure that their actions benefit all of humanity. The exploitation of outer space takes many forms, ranging from the sale of plots on moon to the mining of appropriated asteroids, and so on.[2] Right now, the most realistic and well-funded use of space is for mining minerals and collecting water from asteroids in the asteroid belt or other celestial bodies. There are currently four companies working on this, all of which are registered in the United States. Explorations Technology Corp., or SpaceX, is another influential and significant US company whose goal is to enable life on other planets in the vast galaxy. SpaceX, which is owned by well-known entrepreneur Elon Musk, is the fastest growing provider of launch services, and its focus could easily shift to the exploitation of outer space in the near future.[3] The main goal of these private parties has to be considered while solving the issue of responsible exploitation of outer space.

---

[1] Robert Zimmerman, *Capitalism in Space,Private Enterprise and Competition Reshape the Global Aerospace Launch Industry* (Oct 30.2021,10.45AM), https://www.cnas.org/publications/reports/capitalism-in-space.

[2] Peter Lothian NelsonWalter E. Block**,** *Space Capitalism,How Humans will Colonize Planets, Moons, and Asteroids*(Oct30.2021,11.50AM), https://link.springer.com/book/10.1007/978-3-319-74651-7 .

[3] **Elizabeth Howell , Ailsa Harvey,** *Elon Musk: Revolutionary private space entrepreneur*, (Nov.1,2021,7PM), https://www.space.com/18849-elon-musk.html .

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Research Questions: To what extend private outer space exploration should be legalized to held private players responsible for the activities on board **?** If so, privatization is a key to space Exploration ?

Object Of The Paper:

Finally, the object of research into the identification of what extend the space can be exploited and the shift of privatization of outer space is really a help or hindrance to Mankind

Review of Literature:

- Lewis D. Solomon, The Privatization of Space Exploration- Business, Technology, Law and Policy, Routledge Publisher ,First Edition, 2011.
- Dr.Sachdeva , G.S. Outer Space-Law,Policy And Governance –KW Publishers Pvt Ltd; First Edition, 2013.
- Peter Ward,The Consequential Frontier- Challenging The Privatization Of Space, Black Stone publiser,2020.

Research Methodology:

The project is based on descriptive research method which is also considered to be a quantitative research method.

II OUTER SPACE TREATY – A HELP OR HINDRANCE TO CAPITALISM SHIFT ON SPACE:

According to Article VI of the Outer Space Treaty, states are responsible for national activities in outer space that benefit all mankind. These activities can be undertaken by both governmental and nongovernmental entities. Simply put, states are liable for the actions of companies registered with them. The author goes on to say that states must authorise and supervise non-governmental entities (NGEs), also known as private parties, who conduct activities in space. Some countries, such as the United States, have appropriate legislation in place for the authorization and supervision of private parties, but others have taken very small steps toward this goal or have no legislation at all. The manner in which this legislation is developed is also important. States should also ensure that NGEs or private parties have appropriate access to regulated outer space activities. However, this influence should not be overstated because it is also critical not to stifle investment.

This raises the question of how far exploitation of outer space should be legalised in order

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

to be responsible. According to Article II of the Outer Space Treaty, private parties cannot claim things in space, and areas in space can be appropriated by both states and NGEs.[4] Article V allows non-governmental entities to collect samples for scientific research. [5] As a result of the Moon Agreement and the ability to collect minerals under the supervision of an international mediator, there is no clear limitation or border line between what can and cannot be exploited. As a result, states can interpret space laws in a flexible rather than rigid manner; an example of this was a framework laid down in July 2017 (i.e., Luxembourg's introduction of a legal framework protecting companies seeking to exploit resources found in space).[6] According to this new legislation, Luxembourg acknowledges that private parties may possess resources in space and pledges to safeguard those parties who choose to use resources discovered in outer space. Once a nation may hope to give itself a global lead and progress in the field of space exploitation, it is anticipating the creation and progress of a very lucrative industry.

III UNIVERSALISATION OF CAPITALISM IN SPACE – AN OXYMORON:

Space travel inevitably reduces human differences to a common denominator or to a shared species. Even in numerous Hollywood science fiction movies, such as Arrival (2016), a first encounter with an intelligent alien species has a tendency to flatten all human differences, restoring mankind to its rightful universality. In order to meet with extraterrestrial messengers, ambassadors of the Earth as a whole, not specific nation representatives, came forward. However, even in the absence of such an encounter, the pursuit of habitable worlds or, more precisely, lucrative locations beyond Earth would compel the development of a shared understanding of the human predicament. This process started with the development of Pale Blue Dot photography in 1990s .[7] The words of astronomer Carl Sagan, famously remarked it as: It has been one of the dominant tropes in space discourse since the 1950s, and remains strong today, as the United Nations Office for Outer Space Affairs (UNOOSA)

[4] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (OST), (Nov.7,2021, 9.00PM), https://outerspacetreaty.org/.
[5]Agreement governing the Activities of States on the Moon and Other Celestial Bodies(Moon Treaty,1979),(Nov.9,2021,9.12PM),https://moonagreement.org/.
[6]Sam Woolfe, *Asteroid Mining and Capitalism in Space*,(Nov.12,2021,6.45PM), https://www.samwoolfe.com/2020/03/asteroid-mining-space-capitalism.html.
[7] *Id.*at 3.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

[8] says its job is to "support the vision of a more equitable future for all humanity through shared results in space." This representative trend uses humanism to generate enthusiasm for space-related activities. However, such representations are increasingly being taken over by capitalist enterprise, so that it is not humanity, but its modulation by space capitalists that will launch into the unknown darkness. It is not humanity that ventures out, but the capitalist genre.

NASA was expected to request $ 150 million in its 2019 budget in early 2018, to "enable the development and maturation of business entities and capabilities that will ensure that the commercial successors to the ISS are one of many signs that peace is becoming a space for capitalism." [9] According to one estimate, a single asteroid is worth more than $20 trillion in rare earth and platinum group metals (Lewis, 1996),[10] making it an extremely attractive prize for profit-driven businesses. space, making various appeals to "industry and the private sector," elevating the "space economy" to a central pillar of its Space2030 programme (including the use of resources that create and provide the value and benefits to the world population during the exploration, understanding, and use of space), even if the United Nations agency reverts to a humanist, quasi-social-democratic vision of the distribution equitable benefits and profits from the extraction, ex (UNOOSA, 2018).This strategic humanism can be found in a variety of statements made by New Space entrepreneurs. To illustrate, "From an entrepreneur's perspective, the moon has never really been explored," said Naveen Jain, president and co-founder of Moon Ex, a lunar marketing company.[11]

He also stated that the moon could hold resources for the benefit of the Earth and all humans. It should be noted that this New Space entrepreneur used the trope of all humanity, which was imitated in the 1979 Moon Accord, a United Nations treaty. Of course, Jain is incorrect in terms of a purely factual meaning: Google Moon provides high-resolution images of the

[8] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (OST), (Nov.7,2021, 9.00PM), https://outerspacetreaty.org/.

[9] Mike wall ,*Trump's 2019 NASA Budget Request Puts Moon Ahead of Space Station*,(Nov.11,2021,9.10PM), https://www.space.com/39671-trump-nasa-budget-2019-funds-moon-over-iss.html .

[10] Brett Heino, Book space,place and capitalism. pp :47, (2021).

[11] Pope Brock,*The Moon Is Full of Money: Capitalism in Space,*(Nov19,8.00PM), https://medium.com/nautilus-magazine/the-moon-is-full-of-money-8de0f9f997be .

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

lunar surface, and the moon has already been explored, in the sense that it has been mapped, albeit in a rudimentary manner with room for additional data collection. However, these mapping techniques were not used for capitalist purposes, such as mapping minerals or producing detailed diagrams that could one day turn the Moon into a "gas station" for commercial space companies, which is proposed by Wilbur Ross, Trump's Mall secretary, is the one who also proposed capitalist maps of the Moon. However, according to Klinger, a space research scholar, even though no one is currently actively examining the moon, at least six national space programmes, fifty private companies, and an engineering degree programme are determined to figure out how to do so. Klinger draws attention to mapping efforts that have revealed a high abundance of rare have already noted that, no, it is humanity, conceived as a species, that makes its way through the world.

IV PRIVATE COMPETITION IN DETERMINING DOMINANCE IN SPACE:

Bezos and Musk spent their time apart fighting for the top two spots on Forbes' rich list. For decades, they have also played the "mine is bigger than yours" card in their race for private space. During a pandemic that has destroyed the lives and livelihoods of millions, Bezos' personal wealth has nearly doubled. He is now resigning in order to devote more time to Blue Origin, a company that aims to provide large human colonies throughout the solar system. Musk's rival company SpaceX's stated goal is to "make humanity multi-planetary." To accomplish this, he reasoned, we need really big rockets - or, in SpaceX's original terminology, Big Falcon Rockets (BFR) - capable of transporting tens of people, hundreds of tonnes, and millions of miles through the solar system.[12]

The BFRs have now been replaced by a series of spacecraft. Musk also wants these spaceships to be reusable in order to demonstrate his environmental credentials. So much so that SpaceX planned to detonate four consecutive spacecraft prototypes in quick succession during the first four months of 2021, before attempting to land them again. Silicon Valley's motto is, of course, "move fast and break things." However, you must eventually return the goods. The SN15 spacecraft finally achieved that goal this year, and SpaceX was awarded a massive $ 2.9 billion contract from NASA three weeks later, propelling Blue Origin into the

[12] *Id.*at 9.

ISBN 978-81-948082-8-2

race for shadow space.[13]

To avoid being outclassed, Bezos imagined what he would hope would be the victorious comeback. He and his brother Mark would be two of the first people on Blue Origin's reusable New Shepard rocket when it made its first manned space flight on July 20. Nobody enjoys coming in second place. Even less the world's most powerful individuals. Richard Branson, the CEO of Virgin, suddenly burst in without even a permit to steal everyone's thunder. Branson made history on July 11 by becoming the first billionaire to travel into space, nine days before Bezos' big day. And he assured us that for $250,000 you too might spend minutes ecstatically staring at the world that you left behind. It appears that the Musk has already registered. Bezos is not required to do that. He has completed his flawless space mission.

This is not to be sniffed at considering the technical difficulties they are trying to overcome, but it is clear that they are simply not ready to send people into space with this success rate. Nevertheless, private space travel still has clear advantages. Multiple madness, and it shows how effective space exploration privatization can be. Mars Such an ambitious mission will require international collaboration between space agencies, and private space companies will likely be able to conduct supply missions to Mars. You may not send the people yourself, but they will still play a crucial role. Private space companies have their own weaknesses.

i) IS Privatization the Key to Space Exploration?

This is not to be sniffed at considering the technical difficulties they are trying to overcome, but it is clear that they are simply not ready to send people into space with this success rate. NASA can be irritatingly slow, but that's just part of the process for now. Nevertheless, private space travel still has clear advantages. Its Dragon capsule, which is designed to transport people beyond low Earth orbit, is 320 times cheaper than NASA's Orion capsule.[14]

[13] Mike Wall,*SpaceX launches Starship SN15 rocket and sticks the landing in high-altitude test flight,* (Nov.19,2021,8.30PM), https://www.space.com/spacex-starship-sn15-launch-landing-success .

[14] Capitalism Review,What a Billion Dollars Can Buy: Elon Musk's SpaceX Compared with NASA's Orion,(Nov.20,2021), https://www.capitalismreview.com/2020/12/what-a-billion-dollars-can-buy-elon-musks-spacex-compared-with-nasas-orion/ .

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Multiple madness, and it shows how effective space exploration privatization can be. SpaceX is also saving millions of dollars by repurposing its rockets. The missile reuse technique has yet to be perfected, but once it does, these types of savings will legitimize private exploration. Building stations on the moon, mining asteroids, and other aspects of science fiction become scientific facts. Mars Such an ambitious mission will require international collaboration between space agencies, and private space companies will likely be able to conduct supply missions to Mars.You may not send the people yourself, but they will still play a crucial role. Private space companies have their weaknesses. It's easy to fall in love with the Bezos and Musk hype, but keeping that excitement at bay is important. Once these companies grow, gain experience, and reduce their risks, the possibilities are endless.

V CONCLUSION AND SUGGESTION:

Last but not least, the recent news that SpaceX intends to launch an unmanned Dragon capsule to Mars by 2018 raises the possibility that the technical gaps between Orion and Dragon may not be as significant as NASA had hoped. Its primary use as a kite is still an ascend and descent capsule to securely transport people up and down from earth orbit while providing radiation shielding for extraterrestrial exploration. Both Orion and Dragon are insufficient for any interplanetary trip. They are just too small to hold a crew on a six to two-year voyage to Mars or beyond, as was already mentioned. Furthermore, SpaceX's own heavy-lift rocket, the Falcon Heavy, demonstrates that a heavy-lift rocket can be built for a lot less money and in a lot less time than NASA would have needed to develop SLS. The first test flight programme for the Falcon Heavy, which has roughly two-thirds the power of the first two SLS missiles, was established for the second quarter of 2017. SpaceX has said that its customers will only pay US $ 90 million - Billed per launch, indicating that the missile didn't cost much more to develop than the Falcon 9 and significantly less than the SLS.[15]

The factors are mentioned below, along with suggestions for what the government can do to benefit from them. One other thing: if you look closely at these suggestions, you'll see a connection. Every one of them aims to give American firms more freedom to respond to market needs while shifting the government's authority as a regulator. The primary concept that unifies these threads is freedom, a basic ideal upheld since the founding of the country. According to academics, the decision to go to the moon during the Cold War was a "defence

[15] Professor NAyef AL-Rodhan, *The Privatisation of Space: When Things Go Wrong*,(Nov.22,2021,9.50PM),

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

of freedom."The new space station was given the name "Freedom," and its purpose was to serve as a platform for the promotion of private businesses in orbit.[16] Freedom is really just a very basic concept. Giving individuals and businesses the freedom to operate in a competitive atmosphere encourages clever and smart conduct, and they will respond in kind.

The United States' history demonstrates the viability of freedom. It's time for them to do so once more in space. While privatised space exploration may one day be a preferable alternative, the transition can be challenging. Although NASA's space programme has been the most successful in the last 50 years and currently seems to be the most effective, it is imperative that NASA return to its previous programmes or risk losing its space exploration branch to private corporations. A government space programme is the greatest option for the foreseeable future, but at some point in the future moving to the private sector will be more beneficial. Privatizing space exploration could also become a significant risk, and capitalist type change in space will represent both visionary growth and a road block as it attracts some greedy competitors in space.

REFERENCE:

[1] Kurzweilai. China proposes space collaboration with India, 4 Nov.2012. http://www.kurzweilai.net/china-proposes-spacecollaboration .

[2] Data extracted from the Unilever website Feb.2013 http://www.unileverusa.com/mediacenter/pressrelease s/2013/axetoblast22fansintospace.aspx

[3] L.D.Solomon. The privatization of space exploration. Transaction Publishers. New Brunswick, 2012

[4] National Space Policy of the USA, 28 Jun. 2010 Web Jan. 2013 http://www.whitehouse.gov/sites/default/files/national_space_policy_6-28-10.pdf

[5] Data extracted from the NASA website Feb. 2013 http://www.nasa.gov/exploration/commercial/index.html.

[6] Data extracted from the SpaceX website March. 2013 http://www.spacex.com/usa.php

[7] S. Tkatchova, Space-Based Technologies and Commercialized Development: Economic Implications and Benefits. Hershey, NY, 2011.

https://www.gcsp.ch/global-insights/privatization-space-when-things-go-wrong .

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

[8] D. Cheng. China's Military Role in Space in Strategic Studies Quarterly, 6(1) 2012.

[9] ASD Eurospace, The European space industry in 2010, Eurospace fact and figures Directory 15 ed. (2011).

[10]T. Devezas, F. C. L. de Melo, M. L. Gregori, M. C. V. Salgado, J. R. Ribeiro, and C. B. C. Devezas, "The struggle for space: Past and future of the space race," Technological Forecasting and Social Change, vol. 79, no. 5, pp. 963–985, Jun. 2012.

[11] Stern, S. A. (2013). The low-cost ticket to space. Scientific American, 308(4), 68–73. Retrieved from http://www.ncbi.nlm.nih.gov/pubmed/23539792

"SURROGACY IN INDIA: A DREAM FOR MOTHERHOOD OR A PAVE TO COMMERCIAL EXPLOITATION"

AUTHORED BY –
SHOBITHA REDDY PANYAM

ISBN 978-81-948082-8-2

ABSTRACT

In India, motherhood is valued and a dream for many women because of the strong cultural pressure on the couple to bear and rear children. However, due to the high incidence of infertility cases, it is difficult to conceive. So, surrogacy is viewed as a means of completing the family and finding happiness.

As there were no barriers for strict laws and regulations in India in the 1990s, surrogacy was widespread there. Because of this reason, they were constrained, deprived of essentials, subjected to human trafficking, threatened, and many more. They focused more on the impoverished and illiterate surrogates. There have been instances where multiple eggs have been implanted to boost the likelihood of becoming pregnant for saving money and time.

The Surrogacy (Regulation) Act,2021 focus to combat the unethical and legal challenges, facilitate the needy infertile couple, protects the child born out of surrogacy, prohibits commercial surrogacy and allows altruistic surrogacy. Although the motive behind the present Act is to regulate surrogacy and prohibit commercial exploitation, some provisions of the Act are in conflict with the fundamental rights guaranteed under the Constitution of India such as right to equality , right to privacy and right to life etc.

This Article includes special emphasis on the legal provisions of 'The Surrogacy (Regulation) Act, 2021', status of Commercial surrogacy, lacunas and constitutionality of the Act.

INTRODUCTION

The term "surrogate" derives from the Latin word "Subrogare" (to substitute) which means "appointed to act in the place of "[17]. In the present context a woman is referred to as a "surrogate mother", if she becomes pregnant and gives birth to a child with the purpose of

[17] Collins, http://www.collinsdictionary.com

ISBN 978-81-948082-8-2

giving the child to another individual or couple, often known as the "intended" or "commissioning" parents. It refers to a replacement, particularly a person substituting in for another in a particular position.

When pregnancy is physically impossible, when the risks to the intended mother make it unsafe, or when a single guy or a male couple wants to have a family, people may look into surrogacy arrangements. One of the various assisted reproductive technologies is believed to be surrogacy.

Commercial Surrogacy became lawful in 2002 when the Indian Council of Medical Research (ICMR) published guidelines for the procedure[18], but no laws were passed to support it. Due to non-stringent regulations and no effective enforcement, the surrogacy industry flourished as a result. India has always been a popular destination for people seeking surrogacy children. Due to the low services' cost and easy accessibility, commissioning parents travelling from many other nations are also able to utilize the procedure.

The Surrogacy Act 2021, which was recently passed, regulates surrogacy in India. This law established stringent eligibility and ineligibility requirements for surrogate couple and surrogate mother, distinguished explicitly between altruistic and commercial surrogacy, and permitted only altruistic surrogacy to married couples exclusively on medical reasons.

HISTORICAL INSIGHTS ABOUT SURROGACY

Surrogacy is not a new phenomenon. For thousands of years, women have designated others to give birth on their behalf and even when referring to the ancient scriptures it can be found that, a woman bear a child for a couple to nurture, typically with the male partner serving as the biological father.

It may not come as surprise that surrogacy was practiced in antiquity. Some of the insights of mythology that were practiced, respected and socially accepted are mentioned below:

- During the Biblical Times, the first mention of surrogacy can be found in "The Book of Genesis". The first book of both the Hebrew and Christian Old Testaments is the

[18] Legal Service India, http://www.legalserviceindia.com

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Book of Genesis. This book mentions the story of Sarah and Abraham, despite being married, they were unable to bear children of their own. As a result, Sarah asked her servant Hagar to give birth to Abraham's child. In this instance of traditional surrogacy, the surrogate uses her own egg in the child she is carrying for the intending parents. Although Sarah and Abraham were not the child's biological parents per se, they both claimed ownership of the infant[19].

- Even in Hindu mythology, the Mahabharata describes "Surrogate Fatherhood," a practice that was formerly socially acceptable. Queen Satyavati asks her son Ved Vyasa to cohabit with her widowed daughters-in-law Ambika and Ambalika so they can have children in order to preserve her dynasty[20].

- Balarama, the eighth child of Vasudeva and Devaki, was conceived through surrogacy by Rohini, Vasudeva's first wife. In this instance, surrogacy was required because Devaki's brother Kamsa had sworn to kill any child conceived in her womb[21].

DEFINITION OF SURROGACY

Surrogacy is defined in section 2(zd) of Surrogacy (Regulation) Act, 2021. It means a practice whereby one woman bears and give birth to a child for an intending couple with the intention of handling over such child to the intending couple after the birth[22].

The two types of Surrogacies that are mentioned under the Surrogacy (Regulation) Act, 2021 are :

1. **Altruistic surrogacy –**

   Altruistic surrogacy is defined in section 2(b) of the Surrogacy (Regulation) Act, 2021. This is a surrogacy in which the surrogate mother, her dependents, or her representative receives no fees, compensation, expenses, or other financial benefits of any kind aside from the medical costs she incurs and the insurance coverage for the surrogate mother.

[19] David J Zucker, in/Voluntary Surrogacy in Genesis, 76/1 : 9-24, The Asbury Journal, 01,2021
[20] NCBI, http://www.ncbi.nlm.nih.gov.com
[21] BooksFact,http://www.booksfact.com
[22]The Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, 1949 (India)

ISBN 978-81-948082-8-2

2. Commercial surrogacy –

Commercial surrogacy is defined in section 2 (g) of Surrogacy (Regulation) Act, 2021. It refers to the commercialization of surrogacy services or procedures or its component services or component procedures, such as selling or buying human embryos or gametes or selling or buying or trading the services of surrogate motherhood by giving payment, reward, benefit, fees, remuneration, or financial incentive in cash or kind to the surrogate mother or her dependents or her representative, except the medical expenses and such other prescribed expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother[23].

Apart from the above mentioned, the other types of surrogacies that are recognized in India are:

I. Traditional Surrogacy:

Traditional surrogacy is also known as straight method surrogacy because in this type of surrogacy the surrogate is carrying her own biological child . The child is conceived with an intent to be raised by the intending parents. Some of the methods used for this type of surrogacy are :

i. Impregnation by IUI (intrauterine insemination)
ii. Artificial insemination
iii. Impregnation by ICI all of which is to be performed at a fertility clinic.[24]

II. Gestational Surrogacy:

This type of surrogacy is also known as host method surrogacy wherein the surrogate will not be the biological mother as it includes a process called 'embryo transfer' unlike traditional surrogacy. Hence the actual mother is the biological mother and the object behind this type of surrogacy is to gestate the child. On the other hand, the surrogate mother is referred to be gestational carrier[25].

[23] The Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, 1949 (India).
[24] Libertatem Magazine, http://www.libertatem.in
[25] Libertatem Magazine, http:// www.libertatem.in

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

COMMERCIAL SURROGACY IN INDIA

The Law Commission of India in its 208th report recommended for prohibiting commercial surrogacy and that there is an urgent need to enact a law to regulate the commercial surrogacy. The main reasons behind this recommendation were larger scale of exploitation of the surrogate mothers who may have been coerced to become surrogate due to lack of education and poverty ; with a motive of availability of getting cheap labor there was prevalent use of surrogacy by foreigners and lastly there was lack of proper & effective legal framework.

Earlier the only guide for surrogacy was the National Guidelines for Accreditation, Supervision and Regulation of ART clinics in India, 2005.

In ***Baby Manji Yamada V. Union of India***[26], a Japanese couple, Dr. Ikufumi Yamada and his wife, decided they wanted a child and signed a surrogacy agreement with an Indian lady in Anand, the Gujarati city that pioneered the surrogacy industry. The father insisted on having custody of the child despite the couple's marital . Under Indian Law, a single father cannot adopt a girl child. So he sent his mother instead and a petition was filed before the Supreme Court. The Government seemed to be helpless in this matter as there were no laws governing the effect of surrogacy. The writ petition challenged the legality of surrogacy and criticized it as fostering an illegal industry in India and stressed the need for enactment of a surrogacy law.

This was the first case wherein a decision linked to surrogacy was made by the Apex Court and it marked the importance of developing surrogacy regulation laws in India[27].

On the basis of Apex court's directions, the Legislature had drafted The Artificial Reproductive Technology (ART), Bill, 2008 . This is the first time in India towards regulating the surrogacy industry which was subsequently amended in 2010, 2013,2014, 2016 & 2019.

One of the biggest changes in the new law is a ban on "commercial surrogacy," only "altruistic surrogacy" is legal. This means a surrogate can only be paid for her medical

[26] AIR 2009 SC 84

[27] Legal Services India, http://www.legalservicesindia.com

 ISBN 978-81-948082-8-2

expenses, insurance cover for 36 months to cover post delivery complications.

Although there are two types of surrogacies, section 3(2) of The Surrogacy (Regulation) Act, 2021 clearly prohibits and mentions that no surrogacy clinics, pediatrician, gynecologist, registered medical practioner or any person shall conduct, offer, undertake or avail commercial surrogacy in any form.

Any intending couple or intending woman who seeks to aid surrogacy clinic or laboratory etc. for not following altruistic surrogacy and or conducting surrogacy for commercial purposes shall be punishable for a term extend to five years and a fine upto five lakh rupees and for the subsequent offence punishable upto ten years and fine upto ten lakh rupees[28].

NECESSITY OF SURROGACY:

Due to the surge in infertility, many women were unable to conceive for a variety of reasons, making surrogacy essential. In ***Suchita Srivastava v. Chandigarh Administration***[29], the Supreme Court held that the right to choose one's reproductive options falls under the protection of personal liberty provided under Article 21. The right of women to privacy, dignity, and physical integrity includes the right to carry a pregnancy to full term, whether or not to give birth.

REGULATION OF SURROGACY CLINICS:

Section 3 of the Surrogacy (Regulation) Act, 2021 clearly prohibits that no surrogacy clinic, pediatrician, gynecologist , embryologist, registered medical practitioner or any person shall act in any form as mentioned below:

I. Should not conduct or associate with or help in any in any manner, for conducting surrogacy and procedures unless registered.
II. Shall not conduct, offer, undertake, promote or associate with or avail commercial surrogacy in any form.
III. Shall not take services of any person, whether honorary basis or on payment who does not possess such qualification.

[28] The Surrogacy (Regulation) Act, 2021, Sec 40, No. 47, Acts of Parliament, 1949 (India).
[29] (2009) 9 SCC 1

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

IV. Shall not aid in conducting himself or through any other person surrogacy or surrogacy procedures at a place other than registered place.

V. Should not promote, publish or advertise or cause to be promoted or advertised which aims to induce a woman to act as surrogate mother, aim at promoting surrogacy, aim at seeking to act as surrogate mother, advertises commercial surrogacy in print or electronic media.

VI. No person including the intending parents shall conduct or cause abortion without written consent of surrogate mother and after the compliance of appropriate authority as per Medical Termination of Pregnancy Act, 1971.

VII. No person shall store human embryo or gamete for the purpose of surrogacy. Unless the storage is for medical purposes such as sperm bank, IVF and medical research.

VIII. No person shall in any form conduct or cause to be conducted sex selection for surrogacy[30].

CIRCUMSTANCES UNDER WHICH SURROGACY PROCEDURE CAN BE PERFORMED:

Surrogacy is not permitted under any other situations than those listed under Sec 4(ii) of the Act -

a. When an intending couple has a medical indication necessitating gestational surrogacy. The couple of Indian origin and intending woman shall obtain certificate of recommendation from the board. In the gestational surrogacy there will be implantation of embryo inside the womb of surrogate mother of the intending couple and the child is no way related to surrogate mother.
b. When it is only for the altruistic surrogacy.
c. When it is not for commercial surrogacy.
d. When it is not for sale of children , prostitution and exploitation .
e. Any other disease that is specified by the board[31].

THE DIRECTOR OR IN-CHARGE AND PERSON QUALIFIED CAN CONDUCT SURROGACY WHEN THE BELOW ARE SATISFIED:

[30] The Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, 1949 (India)
[31] The Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, 1949 (India)

ISBN 978-81-948082-8-2

1) a certificate of a medical indication in favor of either or both members of the intending couple or intending woman necessitating gestational surrogacy from a District Medical Board.
2) An order passed by the first class Magistrate on an application by the intending couple or the intending woman and surrogate mother concerning the parentage and custody of the child.
3) Additionally, an insurance coverage of the amount as prescribed by the surrogate mother for period of 36 months covering postpartum delivery complications[32].

ELIGIBILITY FOR SURROGATE MOTHERS:

i. A Woman who is not married and does not have a child of her own and is between the age of 25 to 35 years on the day of implantation can be a surrogate mother or help in donating her oocyte.
ii. No woman shall provide her own gametes.
iii. A woman can be a surrogate mother only once in her lifetime.
iv. The woman should have a certificate of medical and psychological fitness for surrogacy.

When all the above conditions are satisfied then the woman is eligible to get the certificate to be the surrogate mother[33]. Additionally, the intending woman or intending parents shall approach the appropriate authority with the willing woman who agrees to be a surrogate mother.

No organization, clinic or person etc. shall force the surrogate mother to abort except to the conditions prescribed by the board[34].

INTENDING PARENTS:

The below conditions must be satisfied for the eligibility of the intending couples by the appropriate authority:

i. The intending female must be between age of 26 to 55 years and intending parents must be between the age of 23 to 50 years.

[32] The Surrogacy (Regulation) Act, 2021, Sec 4(iii)(a), No. 47, Acts of Parliament, 1949 (India).
[33]The Surrogacy (Regulation) Act, 2021, Section 4(iii)(b), No. 47, Acts of Parliament, 1949 (India)
[34]The Surrogacy (Regulation) Act, 2021, Section 8, No. 47, Acts of Parliament, 1949 (India)

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

ii. The intending couple can opt for surrogacy when they don't have child neither biologically nor through adoption. Provided if the appropriate authority approves with medical certificate from district medical board that the child of the intending couple suffer with physical or mental illness , which cannot be permanently cured then they are legally allowed to opt for surrogacy.

iii. And any other conditions as specified by regulations[35].

PROCEDURAL REQUIREMENTS:

Section 6 of the Surrogacy (Regulation) Act, 2021 clearly mentions that the below should be followed for seeking or conducting surrogacy:

i. The surrogate mother shall be explained about the known side effects and the procedures.

ii. The surrogate mother should give written informed consent as prescribed from the language which she understands.

iii. The surrogate mother shall an option to withdraw her consent begore the implantation of human embryo in her womb.

RIGHTS OF THE SURROGATE CHILD:

I. A child born out of the procedure of surrogacy shall be deemed to be the biological child.

II. Child born out of the procedure of surrogacy shall be entitled to all rights and privilege's available to natural child.

III. The child should not be abandoned whether within or outside India for whatsoever reasons such as defects developing subsequently, sex of child, or more than one child born etc.[36].

REGULATORY AUTHORITY FOR SURROGACY IN INDIA:

A Registry is established called as National Assisted Reproductive Technology[37] and

[35] The Surrogacy (Regulation) Act, 2021, Section 4(iii)(c), No. 47, Acts of Parliament, 1949 (India)
[36]The Surrogacy (Regulation) Act, 2021, Section 7 & 8, No. 47, Acts of Parliament, 1949 (India)
[37] The Surrogacy (Regulation) Act, 2021, Section 15 & 17, No. 47, Acts of Parliament, 1949 (India)

ISBN 978-81-948082-8-2

Surrogacy Registry for the purpose of registering the surrogacy clinics, enforce standards, investigate complaints, recommend about the modifications, grant or reject application etc.

CONSTITUTIONAL VALIDITY OF THE ACT

Right to make reproductive choices falls under the personal liberty guaranteed under Article 21 and this right includes women's entitlement to carry a pregnancy to its full term, whether to give birth or not, these rights form part of women's right to privacy, dignity and bodily integrity[38].

The Surrogacy (Regulation) Act, 2021 further excludes other people based on their nationality, sexual orientation, marital status, and age, and limits and conditions surrogacy to married Indian couples alone. This criteria does not pass the test of the reasonable classification under Art 14 of the Constitution.

In ***Devika Biswas v. Union of India***[39], the Apex Court ruled that the "Right to Life" guaranteed by Article 21 of the Indian Constitution included the "Right to Reproduction" as a fundamental aspect. The right to reproduce involves the right to conceive, carry, give birth, and raise children. Therefore, restricting surrogacy to exclusively heterosexual couples in a certain age range results in a partial imbalance. Communities that are fully denied the freedom to have reproductive options include single persons, elderly couples, and couples that identify as LGBTQ+. This is potentially a breach of both Article 14 and Article 21 of the Indian Constitution

In the case of ***KS Puttaswamy & Anr v. Union of India***[40], the SC held that obtaining a certificate of infertility from the district medical board is in violation to "right to privacy" and has been recognized as a fundamental right to be protected under Art 21 of the constitution.

The surrogacy (Regulation) Act,2021 clearly defines who can be the intending couple and the intending women as:

[38] Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1
[39] (2016) 10 SCC 726
[40] ((2017)10 SCC 1)

 ISBN 978-81-948082-8-2

1) Intending couple: Section 2(r) of the Act defines intending couple as a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy and the married couple should be between the age of 23 to 50 for females and 26 to 55 for males. This section is violating the fundamental rights as guaranteed under the constitution as mentioned below:

a) Live in Relationship

The legal status of live-in relationships in India has been evolved and determined by the Supreme Court in various judgments. In the case of S.P.S. Balasubramanian v. Suruthaya [41] the court held that if a man and woman cohabitating under the same room for a number of years, there will be a presumption of marriage under section 114 of Indian Evidence Act and the children born under this relationship will be treated legitimate. Even after the change in time and acceptance among the society with the evolution of law still the couple in live-in relationships are not included under the definition of section 2(r) of the Act. As per Sec 2(r) of the Act, the intending couple who is intending to become parents by surrogacy is restricted to **only** the married couple and this restrictive meaning for the term 'intending couple' is violating the rights of couple in live-in relationship.

Article 14 of the Constitution of India guarantees fundamental right to equality. As the definition provided under Sec 2(r) of the Act is limited to the married couple per se, it does not stand the test of reasonable classification provided under the Art 14.

Hence the Fundamental right of equality provided under Art 14 is being violated to the couple in Live-in relationship.

Article 21 of the Indian Constitution guarantees right to life and personal liberty, this right includes the right to reproductive autonomy either naturally or through surrogacy.

When the Supreme court held that live-in relationships are not illegal in the eyes

[41] 1994 AIR 133 SCC

 ISBN 978-81-948082-8-2

of law and the children out of such relationship are treated as legitimate then why are they not allowed to opt for surrogacy?

b) LGBTQ

Even after repeated judgements from the Naz foundation v. Government of NCT Delhi[42] to Puttaswamy case that the right to equality, right to life, right to privacy are the fundamental rights guaranteed to every individual under Art 14, 21 of the constitution of India. Even till date the LQBTQ committee is being subjected to discrimination as homosexuals, a separate class. In the case of Nalsa v. Union of India[43], Supreme court clearly held that the rights provided under Article 14 are the rights that are to be enjoyed by any person, as per Article 15 and 16, there shouldn't be any gender-based discrimination, as per article 21, Privacy, gender identity and integrity are protected where the right to life includes right to live with dignity which is inclusive of right to choose gender identity. But still LGBTQ are not yet included in the ambit of section 2(r) of the act and this is in clear violation to Article 14, 15, 16 and 21 of the constitution. Hence, the question arises as to why aren't LGBTQ allowed to opt for surrogacy?

2) Intending woman: an intending woman is defined in section 2(s) of the Act as a widow or divorcee who is between 35 to 45 years of age and intends to avail surrogacy. This section is violating the fundamental rights guaranteed under the Constitution of India as mentioned below:

a) Unmarried Individuals

As per the eligibility criteria of the prospective adoptive parents by the central Adoption resource authority (CARA), regulated by the Ministry of Child and Resource Development, a single female can adopt a child of any gender and a single male is eligible to adopt a male child. Then why are they excluded from the 'intended persons' to opt for surrogacy? This fails the test of reasonable classification and is violative of Article 14, 15 and 21 of the

[42] 160 Delhi Law Times 277
[43] AIR 2014 SC 1863

ISBN 978-81-948082-8-2

constitution.

b) Divorced Husband

According to the section 2(s) of the Surrogacy (Regulation) Act, 2021, intending woman is defined as a widow or divorcee who is between 35 to 45 years of age. But this act completely excludes the divorced husband. When a divorcee and a widow woman can avail surrogacy then why should a divorced man be excluded? This is in clear violation to Article 14, 15 and 21 of the constitution.

c) Widower

A widow between the age of 35 to 45 years can opt for surrogacy as per section 2(s) of the Surrogacy (Regulation) Act,2021 but there was no mention of widower, why is a widower excluded from the purview of surrogacy in totality? This fails the test of reasonable classification and is violative of Article 14, 15 and 21 of the constitution.

RECOMMENDATIONS:

i. The Surrogacy statute restricts surrogacy to married couples and to that extent, excludes the members of the LGBTQ community, live-in couples, and single, divorced, or widowed parents. Since the right to reproductive autonomy and parenting are guaranteed by the right to life as stated in article 21 of the Constitution, everyone has this right and thus should be permitted to choose surrogacy. Accordingly, an amendment with respect to definition of intending parents/intending persons is much required.

ii. The Surrogacy statute also limits the autonomy of married couples and potential surrogates to a huge extent, by means of stringent conditions and requirements of eligibility certificates. The heavy onus laying prerequisites such as childlessness, five years of infertility for intending parents, the surrogate being a close relative, amongst others, are prone to criticisms. Although the stringent provisions play a crucial role in effective implementation of the Act it should not be in such manner that the objectives for which the Act was enacted goes in vain.

CONCLUSION

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Having child is everyone's dream, regardless of any gender. In India, a women's life is subjected to be incomplete when she is not able to have child. Surrogacy is a therapeutic option available to single women with medical issues who want to become pregnant, to couples with specific medical challenges so they can help them have their own genetic children, and to homosexual men who want to become parents. Furthermore, by making surrogacy the only source of income for some people, surrogacy opens the door for economic exploitation, which causes excruciating physical, emotional, and psychological suffering.

Therefore, it is necessary to arrive at a mid-way that facilitates commercial surrogacy but in a better and sufficient regulatory manner. Accordingly, the Surrogacy Regulation Act, 2021 was enacted by the legislature to address the issue and preserve the harmony between outlawing commercial exploitation and allowing surrogacy when it was necessary. However, those in need including persons belonging to LGBTQ community , single persons, unmarried couples, widowers, etc. are not included in the Act. The lacunas in the Act conflicts with the fundamental rights thus are in violation of Article 14, 15(1) and 21 of the constitution. Thus, the legislature should make necessary amendments to the Act which is in compliance with fundamental rights of citizens and reflect the changing social mores, to fulfill the objectives of the Act.

DELEGATED LEGISLATION AND ITS INFLUENCE IN INDIA, USA AND ENGLAND

AUTHORED BY: ADITHYA NARAYANAN,
3RD YEAR BBA-LLB STUDENT,
SDM LAW COLLEGE,
MANGALORE, KARNATAKA

INTRODUCTION

Indian constitution entitles the legislature to form laws for the country. one of the important functions of legislature is to regulate a legislative policy and to shape it as a rule of conduct. It is clear that such powers cannot be grant to other organizations. But keeping in mind

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

numerous activities of welfare state, it is literally impossible for the legislature to perform all the functions. In such circumstances, the idea of delegated legislations comes into picture. It is one of the most required elements of administration, through which the executive has to perform specific legislative functions. But the risk associated with process of delegation must not be ignored. Generally, an exhausted legislature may excessively exceed the limits of delegation. It may not lay down any policy, may declare any of its policy as indefinite and may set down any directions for the executive thus, awarding wide discretion to the executive to change or alter any policy framed by it without keeping for itself any control over subordinate legislation. Therefore, even though legislature can assign some of its functions, but it must not lose its control completely over such functions.

WHAT IS DELEGATED LEGISLATION?

Delegated legislation means the exercise of law-making power by the executive under the authority delegated to it by the legislature and also the rules, regulations, byelaws, etc., made by the executive in the exercise of the law-making power delegated to it by the legislature. This is a quasi-legislative function of the executive. Here, there is no need of a prior notice and hearing of the parties unless the statute delegating the power of legislation expressly requires them. Thus, when the executive authorities exercise the law-making power delegated to them by the legislature, it is called quasi legislative functions. Quasi legislative action has generally all the characteristics of the legislative function.

The term- 'delegated legislation' is used in two senses:

1) The exercise of the legislative power by a subordinate agency by means of the power delegated to it by the legislature.

2) The subsidiary rules made by the subordinate authority by the power conferred on it by the legislature.

According to De Smith, both the legislative act and quasi legislative act is the creation and promulgation of a general rule of contract without reference to particular cases.

ISBN 978-81-948082-8-2

The powers under subordinate legislation are limited and valid only as far as they are within the limits of parent legislation passed by the legislature. The delegated legislation means and includes all rules, regulations, bye-laws, orders, etc.

The legislature conferring the legislative power upon the executive is called the parent act, and the rules, regulations, etc., made by the executive under the legislative powers are known as subordinate laws or subsidiary laws or child legislation.[44]

REASON FOR THE GROWTH OF DELEGATED LEGISLATION

The administration of a country is a difficult problem. It requires rules and minor details. So, for efficient administration, the administrative authorities must be given opportunity to frame rules and bye-laws.

For example, the municipality can make bye-laws. The state and central cabinet of ministers can enact rules and laws.[45]

1) **LEGISLATURE OVERBURDENED:** The legislature is burdened with many legislative functions. So, it has no time to give details or frame rules. Therefore, the legislature formulates the general policy and the executive fills in the details. Thus, the strain of over work is relieved for the legislature.

2) **FLEXIBILITY:** Delegated legislation brings flexibility to legislation. A legislative amendment is a slow process whereas a change in the delegated legislation is easily

[44] iPleaders. 2022. *Delegated Legislation and its Control - iPleaders Blog*. [online] Available at: <https://blog.ipleaders.in/delegated-legislation/#:~:text=Delegated%20legislation%20is%20generally%20a,requirements%20of%20the%20primary%20authority.&text=It%20is%20also%20known%20as%20subordinate%20legislation%20in%20administrative%20law.> [Accessed 18 February 2022].
[45] , https://www.cusb.ac.in/images/cusb-files/2020/el/law/Delegated%20Legislation_6th%20Sem.pdf (last visited Feb 18, 2022)

 ISBN 978-81-948082-8-2

possible. The rules, regulations, by-laws, or orders, etc., if defective, may easily be amended.

3) **TECHNICAL KNOWLEDGE:** Many legislations require technical knowledge. This can be given only by experts in the administrative lines. For example., atomic energy, electricity, etc.

CASE- **AGRICULTURAL MARKET COMMITTEE VS. SHALIMAR CHEMICAL WORKS LTD:** The supreme court held that the main reason for the delegated legislation is the technically complex areas which cannot to be correctly stated in the statute.

4) **LESS ERROR IN PROCEDURE AND SUBSTANCE:** delegated legislations is made by the makers after intimate contact with the problems. So, there is less error in procedure and substance.

5) **DISCRETIONARY POWERS TO THE EXECUTIVE:** Delegated legislation allows discretionary powers to the executive and it regulates the discretion also by specific rules. With the discretionary powers, the executive authorities apply the delegated legislation depending on the circumstances and situations.

6) **CONDITIONAL LEGISLATION:** sometimes the legislature may enact a law whose prospective operation either in time or place or both depends on the fulfillment of a condition. This is called conditional legislation. Conditional legislation is helpful for the executive to apply the delegated legislation, depending on the nature and circumstances of each case.

7) **EMERGENCY TIMES:** During emergency times, the delegated legislation reduces the work of the legislature. Thus, in times of war and national emergencies, etc., the executive is vested with special powers to deal with such situations.

ISBN 978-81-948082-8-2

8) **APPLICATION WITH MODIFICATIONS:** sometimes the law has to the applied with some modifications as per the local needs. Here the legislature lays down broad outlines and guidelines. The details are left to be filled by the administrative authorities who implement the law.

9) **SECRECY:** sometimes, the public interest requires that the law should not be known till it comes to force e.g., in cases of import duty, exchange control, new levy of taxes etc. for this purpose, the delegation of powers to executive to make rules, regulations, by-laws, etc., is necessary.

10) **EXPERIMENT:** The executive is allowed through delegated legislation to experiment new rules and regulations and observe its compliance. Such experimental application is impossible in legislations.

11) **COMPLEXITY OF MODERN ADMINISTRATION:** Today every state has become a welfare state. So, there is complexity of modern administration and expansion of the multiple functions of the state. Hence new forms of legislations like delegated legislation, etc., are needed.

Due to above said reasons, the rapid growth of delegated legislation all over the globe is unavoidable and a reality.[46]

CLASSIFICATION OF DELEGATED LEGISLATION:

The delegated legislation may be classified into four types:

1) Title based delegation
2) Conditional or contingent legislation
3) Central, state and concurrent delegation
4) Sub-delegation

1) TITLE BASED DELEGATION:

[46] https://www.cusb.ac.in/images/cusb-files/2020/el/law/Delegated%20Legislation_6th%20Sem.pdf (last visited Feb 18, 2022)

 ISBN 978-81-948082-8-2

The delegated legislation exists in the form of rules, regulations, byelaws, directions, orders, schemes, etc.

a) **RULE:** it is a rule made in the exercise of powers awarded by any legislation and it also includes any regulation made under such rule of the enactment. It may be a general, particular, substantive or procedural rule.

b) **REGULATION:** Is an instrument by which orders, decisions and acts of the government are made known to the public.

c) **BYE LAW:** These are the rules made by the semi-government authorities established under a statute. E.g., rules made by local authority acts, companies act, co-operative societies act, etc.

d) **ORDER:** This order refers to legislative and quasi-judicial decisions. The order or specific order.

e) **DIRECTION:** It is an instruction given by the superior officials to the subordinates and the department to regulate their internal functioning. It may be compulsory direction or persuasive.

f) **SCHEME:** It is a frame work within which the administrative authority has to function.

2) CONDITIONAL OR CONTINGENT LEGISLATION:

Sometimes the legislature may enact a law whose prospective operation either in time or place or both depends on the fulfillment of a condition. The condition is laid down by the legislature and the government is given an authority of discretion the date and place of fulfillment.[47]

Conditional legislation takes place when the legislature empowers the executive:

1) To extend the operation of an existing law to an area or territory.

[47] Delegated Legislation and its Control - iPleaders Blog iPleaders, https://blog.ipleaders.in/delegated-legislation/#:~:text=There%20are%20three%20forms%20of,in%20council%20and%20by%2Dlaws. (Last visited Feb 18, 2022)

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

2) To determine the time of application of an act to a new area.
3) Determine the extent of limits within which it should be operated.
4) To extend the duration of temporary act subject to the maximum period fixed by the legislature.
5) Bring into force a special law.
6) To determine date and facts, on which the operation of law is made to depend.

CASE: RAJNARAIN SINGH Vs. CHAIRMAN, PATNA ADMINISTRATION COMMITTEE:

In this case, the supreme court has upheld the delegation of power but has held that ,the government could not make a change in the essential policy of the Act when it picks out a section of the Act and applies it to a designated area.

The court stressed by saying that when a section of an act is selected for application, it must not effect any change of policy or any essential change in the act.

TULSIPUR SUGAR CO., LTD., Vs. NOTIFIED AREA COMMITTEE (1980):

By information under sec.3 of the U.P. Town areas act 1914, the Tulsipur town limit was extended to Shitalpur village. The plaintiff who was the owner of a sugar factory in Shitalpur claimed that the procedure under the act was not followed and the subordinate legislation was bad.

The supreme court held that it was only a case of conditional legislation as it was a provision making the act applicable to a geographical area. It also held that it was not a subordinate legislation.

SUB-DELEGATION:

It means transfer or transmission of power from a superior authority to its subordinates.

Sub-delegation takes place when the rule making authority delegates further power to issue rules or directions, either to its or some other subordinate agency. Thus, a delegate further

ISBN 978-81-948082-8-2

delegates. It is thus an exception to the rule, "**DELEGATUS NON POTEST DELEGARE"** (A delegate cannot further delegate).

A) Reasons for sub-delegation:

1) The superior authority has to concentrate often on more important administrative functions.

2) The number of cases to be dealt are so much that one single authority may not be able to cope with all cases.

So, it authorizes a number of officers in the department to dispose of such matters, through subordinate legislation.[48]

DELEGATED LEGISLATION IN ENGLAND, USA AND INDIA

IN ENGLAND:

In England, the parliament is supreme since, the principle of 'sovereignty' prevails over the state. Thus, has immense powers to make any law. Where, no court can question the law made by parliament on any ground. Which means there is no limit for the parliament in regard to delegation of its power to the executive. The parliament do not require to provide any merit in the exercising of power. Thus, there is no outside authority to force the parliament to issue policy or protection in the statute delegating legislative power. In case of misuse of power, the remedy lies with the parliament itself and can control

[48] Delegatus Non-Potest Delegare - iPleaders iPleaders, https://blog.ipleaders.in/delegatus-non-potest-delegare/#:~:text=When%20a%20statute%20confers%20legislative,it%20is%20called%20sub%2Ddelegation.&text=If%20the%20enabling%20Act%20is,act%20is%20called%20the%20Children. (Last visited Feb 18, 2022)

ISBN 978-81-948082-8-2

delegation if it pleases.[49]

IN USA:

The delegated legislation is not accepted in theory, because of the doctrine of 'separation of powers' and '**delegatus non potest delegare',** i.e., a delegate cannot further delegate. But in practice, since the governmental functions had increased, it was impossible for the congress to enact all the statutes, and so delegation of powers is now practiced in U.S.A.

In **Panama Refining Co. Vs. Ryan:**

The national industrial recovery act authorized the American President to prohibit the transportation of excess of oil produced in a state in the interstate commerce.

The Court held that such a delegated legislation was invalid as no standard for the action of the president was formulated i.e., under what circumstances or conditions, such authority delegated to the president could be exercised. [50]

IN INDIA:

The origin and growth of delegated legislation in India may broadly be classified into two headings:

1. **Pre-constitutional period (before 1950)**
2. **Post-constitutional period (after 1950)**

1) PRE-CONSTITUTIONAL PERIOD (BEFORE 1950):

The East India Company acquired political control in India through the Charter Act of 1833 and delegated the legislative powers of his majesty to the governor general in council to make rules and regulations under the act.

By the government of India Act 1935, the intensive scheme of delegation was brought in through which the Governor General, the executive head, had full powers to make legislations in the reserved subjects and also to issue decree on the advice of the

[49] Dr. Rega Surya Rao, lectures on administrative law, pg. 74 (2nd edition, cited on 12 Feb, 2022
[50] https://www.cusb.ac.in/images/cusb-files/2020/el/law/Delegated%20Legislation_6th%20Sem.pdf (last visited Feb 18, 2022)

ISBN 978-81-948082-8-2

Council of Ministers.

The leading case in pre-constitutional period is:

Queen Vs. Burah:

In 1869, the Indian legislature passed an act authorizing the governor of Bengal by a notification and extended the application of the act to Jaintia and Naga and Khasi hills.

Burah, a resident of jaintia and Khasi hills, was arrested on charge of murder under the above act and was sentenced to death.

Burah challenged the application of the act to the Khasi and Jaintia hills by the order of Bengal governor on the ground that it was ultra vires, as the governor had no powers to extend the Act.

The privy council held that it was a conditional legislation empowering the governor to extend the application of an existing law to a new area or territory and therefore valid.

The conditional legislation laid down in the Burah case was subsequently applied by Indian courts in a number of cases.

By virtue of the above case, the president can promulgate ordinances and the executive can make rules and regulations under the parent act passed by the legislation. The constitutional validity of these provisions was upheld by many leading case laws.

2) POST CONSTITUTIONAL PERIOD (AFTER 1950):

a) In Re-Delhi laws act, AIR 1951 SC 332:

After the establishment of supreme court, this was the first leading case decided by the Supreme Court. Under the Delhi laws act 1912, the states were divided into

ISBN 978-81-948082-8-2

part A states, Part B states, and Part C states. The central government by Sec. 2 of the sub-Act called 'Part C states law Act 1950' extended any enactment in Part A to any areas of Part C state to any areas of Part C state with such modification/ restriction as is necessary.

The government was also authorized to repeal/amend any other state law to conform with the modification/ restriction made by it under sec. 2 of the said Part C states Act.

The legality of the above aspect of delegated legislation by the central government was questioned in the supreme court. The Supreme court by a bench consisting of judges looked into various aspects of the power of the central government to enact laws and in doing so, it laid down many conditions restricting the power of the Central Government to make laws.

Two major limitations imposed on the Central Government in the said case are as follows:

1. The executive has no power to repeal a law already in force. Such power of repeal lies only with the legislature.

2. The central government while modifying or restricting any law should keep in view the legislative policy/guideline of the parent act and therefore no modification/restriction is allowed as to change the legislative policy.

The court held that the delegation under sec. 2 of the central government is only conditional legislation and not delegated legislation and therefore valid.

b) **Hari Shankar Bagla Vs. state of M.P., AIR 1954 SC 465:**

The state of M.P enacted the cotton textiles order under the Essential supplies Act. The Act required a permit for the movement of cloth. Bagla was arrested for not having a valid per permit and for transporting cloth without permit. The order was challenged by Bagla.

 ISBN 978-81-948082-8-2

Since the Act had no direction, the court held that there was enough guidance for equitable distribution of cloth at a fair price and hence the order was valid.

c) Bhatnagar Vs. Union of India, AIR 1957 SC 478:

Bhatnagar had a license under the imports and exports act. The collector seized the goods. The petitioner challenged the order of the collector as ultra vires and excessive delegation. The court held that there was sufficient guidance in the main act for supply of essentials for life of the community and hence the act was held valid.

d) Hamdard Dawakhana Vs. Union of India, AIR 1960 SC 554:

The drugs and magic remedies act prohibited the advertisement of magic drugs to cure hidden diseases. Dawakhana challenged the order as excessive delegation. The supreme court held that there was no direction, or proper standard laid down and hence held the act void.

e) Brij Sundar Vs. First Addl. District judge, AIR 1989 SC 572:

Certain diseases have been mentioned in the drugs and Magic Remedies Act 1954 and the government was empowered to include and 'any other disease' in the diseases mentioned in the Act.

In this case, the court held that there is nothing objectionable in such a provision and hence valid. Further the court observed- once essential legislative powers are exercised by the legislature, then all the other incidental functions can be delegated to the executive.[51]

CONCLUSION:

Therefore, to conclude, delegated legislation means rules of law made under the authority of an act of parliament. Even though, law making is the function of legislature, it may, by a

[51] https://www.cusb.ac.in/images/cusb-files/2020/el/law/Delegated%20Legislation_6th%20Sem.pdf (last visited Feb 18, 2022)

 ISBN 978-81-948082-8-2

statute, delegate its powers to other bodies is persons.

Delegated legislation is important in the wake of the rise in the number of legislations and technicalities involved. But at the same time with rise in delegated legislations, the need to control it also arises because with the increase in the delegation of power also increases the chance of the abuse of power.

Apart from the legislative and procedural control, the judicial control is the way how the delegation of power can be controlled.

Consequently, the delegated legislation can be questioned on the grounds of substantive ultra vires and on the ground of the constitutionality of the parent act and the delegated legislation. The latter one can also be challenged on the basis of it being unreasonable and arbitrary.

BIBLIOGRAPHY:

1) https://www.cusb.ac.in/images/cusb-files/2020/el/law/Delegated%20Legislation_6th%20Sem.pdf (last visited Feb 18, 2022)
2) Delegated Legislation and its Control - iPleaders Blog iPleaders, https://blog.ipleaders.in/delegated-legislation/#:~:text=Delegated%20legislation%20is%20generally%20a,requirements%20of%20the%20primary%20authority.&text=It%20is%20also%20known%20as%20subordinate%20legislation%20in%20administrative%20law. (Last visited Feb 18, 2022)
3) Delegatus Non-Potest Delegare - iPleaders iPleaders, https://blog.ipleaders.in/delegatus-non-potest-delegare/#:~:text=When%20a%20statute%20confers%20legislative,it%20is%20called%20sub%2Ddelegation.&text=If%20the%20enabling%20Act%20is,act%20is%20called%20the%20Children. (Last visited Feb 18, 2022)
4) Dr. Rega Surya Rao, lectures on administrative law, pg. 74 (2nd edition, cited on 12 Feb, 2022)

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

TAX, GST AND GOVERNMENT

Name of Authors: -
1. Khushbu Sangwan
2. Abhyaa Gupta
Centre for Legal studies Gitarattan International Business School
2019-2024, BBALLB
1. Khushbusangwan2000@gmail.com (9873148295)
2. abhyaa2710gupta@gmail.com (9599784353)

ABSTRACT

Taxes are the primary source of income or revenue for all governments worldwide since they are needed for welfare programmes that support and contribute to the state's balanced development. One of the most significant economic reforms to the Indian economy since Independence is the goods and services tax, sometimes known as the good and simple tax. The main intention of introducing GST was to reduce black money and boost transparency among government officials.

With a decrease in transaction costs, trade and industry would progressively become more

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

competitive. The Goods and Service Tax (GST) rollout and the elimination of interstate checkpoints are seen by the World Bank as the two most major reforms that could improve India's manufacturing sector's competitiveness.

INTRODUCTION

"Isn't it appropriate that the month of the tax begins with April Fool's Day and ends with cries of 'May Day!'?" Rob Knauerhase:

The word 'tax' is derived from a Latin word, 'taxare' which means to estimate. In the first dynasty which lasted from 3000 BC to 2800 BC, ancient Egypt initially instituted taxation. According to historical records, the Pharaoh would visit the kingdom every two years to levy taxes on the populace. For the government to keep functioning and for the maintenance of the nation's law and order, it needs funds. The government requires money for welfare programmes to support and contribute to the state's balanced development. Subsequently, taxes are the main source of income or revenue for all governments worldwide.

India is the largest democracy in the world and also it is a republican and socialist nation with a federal structure being the central and state governments are part of the framework. The government share foremost accountability for handling the nation's expanding development demands, which are majorly taken care by the taxes as taxes are the main source of revenue, to promote economic growth and accomplish socio-economic objectives. It is pertinent to note that a supporting law must be passed by the State Legislature or the Parliament to support any taxes that are imposed for better effectivity.

Goods and Services Tax is known as the ***GST***; it was passed in Parliament on 29th March 2017 and came into effect on 1st July 2017. This is an indirect tax replacing many indirect taxes in India (such as excise duty, VAT, services tax, etc)[52]. The idea of implementing GST was first recommended by the Union Finance Minister of that time, P. Chidambaram in his budget speech in the year 2006-07. Thereby, it was planned to initiate the idea of GST from 01 April 2010 but was later enacted 7 years later by the present government.

[52] CLEAR TAX, *Goods & Services Tax GST (India) What is GST? Indirect Tax Law Explained*, (Jan 11, 2022), available at: https://cleartax.in/s/gst-law-goods-and-services-tax (Last visited on Oct 17, 2022)

ISBN 978-81-948082-8-2

Many economists ascertain that the implementation of the Goods and Services Tax (GST) is a major development in India's indirect tax reforms. GST has and will significantly reduce the negative impacts of cascading or double taxation by combining a variety of Central and State taxes into a single tax and opening the door to a single national market.

Primarily the enactment of GST would benefit the consumer since there would be a decrease in the overall tax burden on goods, which is now estimated to be between 25% and 30%. Also, it would help the consumer to have much better access to information about the true cost of indirect taxes on goods and services. Additionally, due to the complete neutralisation of input taxes along the whole value chain of production and distribution, the introduction of GST will also increase the competitiveness of Indian products in both home and foreign markets. Hence, adding to the economic growth of the country with aware consumers in the economy.

As quoted by then Finance Minister Arun Jaitely, "The old India was economically fragmented, the new India will create one tax, one market and for one nation[53]". Before GST, the tax used to be collected separately by the Centre and the State which caused the actual taxpayer levy from paying the taxes and the burden of paying the tax was shifted from one person to another person, to add on the complication the tax laws were varied from state to state.

According to the Income Tax Act of 1961, beneficiaries who earn more than the maximum exemption amount shall be subject to income tax at the rate or rates set forth by Finance law. A person, a HUF, an association, a group of people, a business, an enterprise, a municipal authority, etc. can all be assessed and the entire income of an individual depends on their residence status in India (Individuals might be residents, non-residents, or non-ordinary residents for tax purposes).

"A tax on products and services with value creation in every phase with a comprehensive

[53] INDIAN EXPRESS, *GST in reality is 'Good and Simple Tax': Top quotes from GST rollout launch,* (July 1, 2017), available at https://indianexpress.com/article/india/goods-and-services-tax-rollout-narendra-modi-arun-jaitley-pranab-mukherjee-parliament-4729802/, (last visited on Oct. 15, 2022)

ISBN 978-81-948082-8-2

and continuous chain of benefits from service providers point to the retailer level where only the end customers should face the tax," defines goods and services tax (GST), it is a destination-based consumption tax levied on several production distribution stages of goods and services. In addition to state and local taxes, entertainment taxes, excise taxes, surcharges, and octroi are all combined in one tax. It is applicable to the transaction value, which takes packing, commission, and other sale-related expenses into account. Whether it be goods or services both are treated equally under the GST, and throughout the supply chain, they are taxed only once before being made available to customers, making it less complicated and keeping track of double taxation.

HISTORY

Despite having a long history, the tax had a very limited impact in the ancient world. There were consumption taxes which were imposed in ancient Greece and Rome. In terms of generating revenue, tariffs—taxes on imported goods—were substantially more significant than internal excises. When it came to property, taxes on the property would be temporarily imposed during times of war as a way to raise additional revenue, these taxes were initially only applicable to real estate, but they were eventually expanded to cover other assets. Transactions involving real estate were also taxed. The tax laws of the Roman Empire made distinctions between citizens and residents of conquered lands in Greece, where free citizens had different tax duties from slaves.

Many of these old taxes, particularly the direct levies, were replaced by a system of "aids" and various required duties during the Middle Ages (most of which amounted to gifts). Transit tariffs, which are levied on products passing through a country, and market fees were the principal indirect taxes. In the cities, the idea of a universal tax responsibility emerged; taxes on certain foods and beverages were meant to be paid in equal measure by consumers, producers, and businesspeople. The introduction of head taxes for the poor and net worth taxes or, sporadically, crude income taxes for the wealthy occurred during the later Middle Ages in various German and Italian cities. Land and housing taxes eventually went up.

Much more than taxes have impacted the Revolutions, wars have been significant in

ISBN 978-81-948082-8-2

influencing taxation. Many taxes, like the income tax (first enacted in Great Britain in 1799) and the turnover or purchase tax (first enacted in Germany in 1918; Great Britain in 1940), was initially intended to be "temporary" wartime measures. Similar to this, France, the US, and Britain all developed the withholding technique of income tax collection during the Second World War. Income taxes in various nations were changed during World War II from being upper-class levies to mass taxes.[54] Henceforth, the context of tax was similar to what it is today that is generating revenue for the working of the empire then and the government today.

Even before taxes made up a significant portion of the national revenue, they have historically been a contentious political issue. The American colonies' insurrection against Great Britain is a well-known example. In that uprising, the colonists refused to pay taxes levied by a Parliament in which they had no say, hence the slogan "No taxation without representation" began to oppress the parliament. Another example is the French Revolution of 1789, which had a significant impact due to the unequal distribution of the tax burden.

HISTORY OF TAX IN INDIA

India had a formal tax established since the Mauryan period. The wealthier folks paid 1/6th of their income in taxes. According to history, the tax was scripture in Manu Smriti, one of India's oldest books, even before the Mauryas. Later Mughal invaders brought their own revenue system with them. The infamous Jizya was levied against the nation's non-Muslim residents, which was later abolished by the third Mughal emperor Akbar, in 1579[55].

In 1860, the British first imposed the income tax in India in the form we know today. It was put in place to make up for the losses the government suffered as a result of the 1857

insurrection. The annual charge imposed on both earned income (*Income is the amount that a person or company receives in return for rendering goods or services*) in the form of wages, salaries, or commissions and unearned income, such as dividends, interest, or rent, is

[54] BRITANNICA, Maria S. Cox and Charles E. Mclure, *History of Taxation*, https://www.britannica.com/topic/taxation/Principles-of-taxation (last visited on Oct 22, 10:53)
[55] WIKIPEDIA, *Jizya*, available at https://en.wikipedia.org/wiki/Jizya, (last visited on Oct 12, 2022)

ISBN 978-81-948082-8-2

known as income tax.

Progressive income tax in simple words is the tax imposed upon the taxpayer on the basis of his income that is if his income is less then, a less percentage is levied upon him than the one with a higher income. This type of tax is intended to finance a government's activities as well as more equitably divide the wealth among the populace and act as a safety net during economic cycle changes. Personal income tax and corporate income tax are the two main categories of income tax.[56]

Since the Income Tax Act's enactment in India in 1886, it has undergone numerous amendments and improvements. A new Income Tax Act was enacted in 1918 following the First World War, once more to combat the lingering effects of the economic destruction brought on by the war. Up until 1922, when it was replaced by another Act, this income tax law was in effect.

Change is the key to success, to be one the Income Tax Act was reformed once more after 40 years after India had obtained independence from the British. The current Income Tax Act was enacted on April 1, 1962, following its adoption in 1961 including Sikkim, Jammu, and Kashmir, as well as all of India. Under the regulations of the Central Board of Revenue Act, of 1963, the Central Board of Revenue divided the two types of taxes i.e., direct and indirect tax and established a separate board for direct taxes, known as the Central Board of Direct Taxes.

GOVERNMENT AND GST

Goods and service tax or Good and simple tax is considered to be one of the greatest reforms in the Indian economy after the Independence. It was brought with aim of removing black money and eradicating corruption from the government functionaries promoting transparency. The Concept of GST is however not new to India, but the mechanism of the GST Council is significantly unique, as India is a quasi-federal economy GST council came

[56] LEVARE, *History of Taxation in India*, https://www.levare.co.in/articles/history-taxation-india (last visited on oct 23, 10:14)

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

with provisions which matched the demands of the Centre and State resulting in the amalgamating seventeen laws to bring up one that is GST.

GST, as it is today, was brought into force during the reign of the Bhartiya Janta Party, which once opposed it when Congress tried to implement it. As it is believed it was the dream of the congress party, ironically it was then opposed by Bhartiya Janta Party. However, whoever proposed it, now that it is in force and it has been more than five years, it seemed to have faced various challenges politically as well as economically in the practical aspect.

Every coin has two sides; GST has its too, one where it seems to be promising in the long run and another where it is technologically uplifted which creates problems for those who are not prone to technology although it will be accessible to all in the coming era as with use the usage gets easier.

COVID AND GST

Covid 19 pandemic affected not only India but the whole world leaving none, it did not just destabilize the health sector and economy of not just developing countries but also developed countries. As GST was introduced in 2017 and as it completed its 2-year anniversary a few months later the whole country went into lockdown except for the health sector which required governmental funds, funds which are maintained via tax collection. Subsequently in its early GST was tested by the pandemic situation. The government collects GST from the goods and services offered but as the country was in lockdown it was difficult to collect tax from these means.

The places with higher tourism and travel offering services hit a steep fall in the collection of the GST, as this is the service sector wherein everything came to a halt and there were no services left to offer for the GST to be collected. The manufacturing sector suffered as there was a suspension on the activities of production, which disabled the GST collection on the majority of the goods. However, the manufacturing sector contributes less to than the services sector to the GDP and both sectors were affected by this global epidemic which

ISBN 978-81-948082-8-2

knocked out the GDP of the country[57].

The government initiated new cultures such as Digital India Culture and other aspects like work from home and online education system etc., such initiatives kept the economy to not fall. The collection of the GST was extended and the loan payments were deferred as the banks relaxed the customers from payment of the loan amount. As they say, the test is on a rocky road and if you drive past that then you will pass the test, on that same note it appears that with some relaxation and initiative the government was able to keep the economy intact.

BENEFITS OF GST

With expanding the tax base and enhancing taxpayer compliance, the GST is anticipated to boost government revenue, and many other benefits will be and are offered via GST some of them are as follows: -

- By eliminating rate arbitrage between neighbouring States and between intra- and inter-State sales, uniform GST rates will lessen the incentive for evasion.

- Compliance will be made simpler and easier by the harmonisation of laws, regulations, and tax rates. Through the GST portal, there would be uniform definitions, forms and formats, and an interface, leading to efficiencies and synergies everywhere. Additionally, this will end interstate conflicts regarding entry tax and e-commerce taxation as well as multiple taxations of the same transactions. All of this will also assist in lowering compliance costs and removing the need for numerous records keeping for various taxes, both of which will result in a decrease in the resources and labour used in preserving records.

- The ability of trade and industry to compete would gradually increase with a reduction in transaction costs. The World Bank considers the Goods and Service Tax

[57] Dr. Arundhati Roy Biswa Bhusan, *Impact Of Covid-19 On Goods And Services Tax (Gst) With Respect To Micro Small And Medium Enterprises (Msme) Sector,* Palarch's Journal Of Archaeology Of Egypt/Egyptology 17(9). ISSN 1567-214x, (Sep 17, 2020)

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

(GST) rollout and the removal of interstate checkpoints to be the most significant reforms that could increase the manufacturing sector of India's competitiveness.

- The GST is anticipated to reduce the average tax burden on business and commerce, which will lead to lower pricing and higher consumption, ultimately leading to improved production and better industry growth. It is anticipated that domestic demand would rise and that local enterprises will have more chances, leading to an increase in employment nationwide.

DISADVANTAGES OF GST

As we all know, the GST is changing how tax is paid, businessmen are now required to hire tax professionals in order to be GST-compliant, and due to this added expense of hiring experts, this will gradually raise costs for small enterprises. Additionally, firms will now need to teach their staff members about GST compliance, which will increase their overhead costs.

Only companies with annual sales of more than Rs. 1.5 crore were required to pay excise duty under the old tax system. Whereas now with the new tax system i.e., GST, businesses with annual sales of more than Rs. 40 lakhs are also required to pay tax.

IMPACT OF GST

GST being the regime was introduced to bring change in the present economic structure which led to major and minor impacts in the economy, some are visible today and others will be in the long run. The authors have attempted to analyse the past and present situation elaboration is mentioned below:

1. Common man: So far since the last 5 years of implementation of GST, it has been a win-and-lose situation for the common man, as there have been certain complexity removal as well as there is heavy imposal of tax on certain goods an services. Although a wide perception as per the survey organized by the Local Circle of Consumer Affairs, the Local Circle nearly 54 per cent of the people believed that the GST implementation has enhanced the expenses of the household of the month nearly

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

by 30 per cent[58]. However, initially the inflation which is observed in the short term will be eradicated in the long term.

2. Businesses: GST has helped the manufacturer is simplifying the tax structure but at the same time due to it being a new regime hiring professionals for them to understand the concepts of the same increased their short-term cost however it will have a good impact in long run.

3. Government revenue: For the government, GST is going to be a good income generator in long term, despite all the challenges faced today and in the past just because of the change implemented, and change is always difficult in the beginning.

4. Real Estate: Real estate is considered to be the best investment as it never disappoints in long run and with the introduction of GST the stamp duty is excluded hence the extra cost which was incurred later with the property will be reduced.

CONCLUSION

GST is a simplified tax reform, it has had a long and refined journey. Initially, it will be difficult for all the sectors to cooperate accordingly but eventually, it will be observed as a boon in all the sectors of the economy. It is just not India, it has already been implemented in many other developing and developed countries, long before India. A simplified and single tax form has escalated the development of the country with increased.

[58] SAGINFOTECH, Sourabh, *GST impact on common man*(Dec 29, 2021) https://blog.saginfotech.com/gst-impact-on-common-man (last visited on Oct. 26, 2022)

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

ABORTION LAW IN INDIA

AUTHORED BY –
SEJAL ANIL JETHVA

INTRODUCTION

"There is no freedom, no equality, no full human dignity, and personhood possible for women until they assert and demand control over their bodies and reproductive process…The right to have an abortion is a matter of individual conscience and conscious choice for the women concerned."[59]

Induced abortions have generated a lot of discussion and controversy throughout history. A person's value system is closely related to their personal position on the difficult ethical, moral, and legal issues. The morality of induced abortion and the ethical bounds of the

[59] BettyFriedan, Abortion: A Woman's Civil Right, 39 (reprinted in Linda Greenhouse and Reva B. Siegel, 1st edn 1999).

ISBN 978-81-948082-8-2

executive branch of government can both be considered when describing a person's attitude on abortion.

The right of a woman to have an abortion is protected by her individual rights, including her right to life, liberty, and the pursuit of happiness. The sexual and reproductive health of a woman influences her reproductive decisions. Internationally, it is acknowledged that improving women's human rights and fostering development are mutually exclusive goals.

ABORTION AND THE CONSTITUTION OF INDIA

While establishing the democratic setup, our Constitution framers were vigilant and inculcated the sprit that people must be protected against misuse of power by the government and its officials. They, therefore, provided for the fundamental rights in part-III of the Constitution. The article 21 of Indian constitution provide right to life which includes within its ambit the right to privacy. Right to life and personal liberty is the most sacrosanct, precious, inalienable and fundamental of all the fundamental rights of citizens. This guarantee imposes a restraint on the government and it is part of the cultural and social consciousness of the community in India. In this context, every woman owe an individual right, right to her life, to her liberty, and to the pursuit of her happiness, that sanctions her right to have an abortion. The women have reproductive features and have right to decide about her sexual health and shape her reproductive choices. To ensure availability of human rights to women and to advance the development, the international community acknowledged reproductive rights of the woman. In order to follow the international mandate, governments from all over the world have recognized and accredited reproductive rights to women to an unprecedented heights. To fulfill its commitment government enacted formal laws and policies that are prime indicators in promoting reproductive rights. Thus it can be reiterated that all over the World each and every woman has an unconditional right to have control over her own body.[60]

MEDICAL TERMINATION OF PREGNANCY ACT, 1971

[60] https://www.legalserviceindia.com/article/l384-Legalize-Abortion-In-India.html

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

After the Roe v. Wade[61] case, European and American countries started to legalise abortion. During the last thirty years, since 1970s many countries have liberalized their abortion laws. Roe case has been subsequently modified by the US Supreme Court in Planned Parenthood v. Case [62] where the legality of the abortion law is now linked to the viability of the foetus rather than the rigid third trimester test laid down in Roe case.

In India, the Central Family Planning Board on August 25, 1964 recommended the Ministry of Health to constitute a committee to study the need of legislation on abortion. The recommendation was adopted in the later half of 1964 constituting a committee which consisted of members from various Indian public and private agencies. The committee – called Shantilal Shah Committee. After analysing a vast expanse of statistical data available at that time, this committee issued its report on December 30, 1966.[63] On the basis of this report, the government passed the Medical Termination of Pregnancy Act, 1971 (MTP Act of 1971) and liberalised abortion laws in India.

The committee acknowledged that there did not exist and would not exist in the predictable future either the doctors or the medical facilities to support an extensive abortion programme. It also specifically denied that its intention was to force down for the legislation of abortion only for the population control in India. The committee further pointed out: [64]

It is felt, that legalising abortions with a view of obtaining demographic results is unpractical and may even defeat the constructive and positive practice of family planning through contraception. It is noteworthy that the MTP Act was implemented in the month of April, 1972 and again revised in the year of 1975 to eliminate time consuming procedures for the approval of the place and to make services more readily available. This Act was amended in the year 2002 and again in 2005. The Preamble of the Act states, "An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto".[65]

[61] 410 U.S. 113 (1973).
[62] 505 U.S. 833 (1992).
[63] Government of India, Report of the Committee to Study the Question of Legalisation of Abortion 36 (Ministry of Health and Family, 1966)

[64] Ibid.

[65] Medical Termination of Pregnancy Act, 1972 (Act of 1971), Preamble.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

The Act, consisting of just 8 sections, deals with the various aspects like the time, place and circumstances in which a pregnancy may be terminated by a registered medical practitioner. It legalizes abortion in case where there is a failure of contraceptives or where the pregnancy will adversely affect the physical or mental termination of pregnancy, consent of the pregnant woman is a must unless she is a minor or lunatic when her guardian's consent is required.[66]

The Act permits abortion only in certain circumstances. It Act allows medical termination of pregnancy up to Twenty weeks' gestation. Though the Act talks about the written consent of the pregnant mother before the technique is administered to her, the law fails to recognise the social reality that a woman cannot make a free choice. Thus, it is evident that the Act fails to achieve a equilibrium between the right of the unborn to be born and the right of the woman, who bears, gives birth and rears the child, to decide whether she wants the child or wants to abort the foetus.

In Nikhil D. Dattar v. Union of India,[67] section 3 and 5 of MTP Act was challenged on the ground of non-inclusion of eventualities vires of the Act. In this case the foetus was diagnosed for complete heart block thus the Petitioner, in her twenty sixth week of pregnancy, had sought termination of pregnancy. The petitioner contended that section 5(1) of the MTP Act should be read down to include the eventualities in section 3 and consequently, a direction should be issued to the respondents to allow the petitioner to terminate the pregnancy. The court held that the courts are not empowered to legislate upon a statute. Sections 3 and 5 provide for right to terminate pregnancy only under the specified circumstances. And the remedy under section 5 can only be available when the non-termination of pregnancy would be dangerous to the life of pregnant woman. While dismissing the petition the court further held that since twenty six weeks of pregnancy has already passed the court could not pass any direction for exercise of right under section 3. This case further reiterated that the physical and mental trauma which may be experienced by women in such circumstances. It also highlighted the ethical issue faced by the doctors in

[66] Medical Termination of Pregnancy Act, 1972 (Act of 1971), s. 3.
[67] S.L.P. (Civ.) No. XXXX of 2008 (Supreme Court of India), available at: http://www.hrln.org/hrln/images/stories/pdf/xandy-petition-8-3-14.pdf

ISBN 978-81-948082-8-2

similar situations.[68]

Section 3 of the said Act, says that pregnancy can be terminated:

(1) As a health measure when there is danger to the life or risk to physical or mental health of the women

(2) On humanitarian grounds - such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc.

(3) Eugenic grounds - where there is a substantial risk that the child, if born, would suffer from deformities and diseases.

It is submitted that a decision as to abortion may be entirely left with woman provided she is sane and attained majority. Only in cases where an abortion may affect her life, her freedom may be curtailed. All other restrictions on the right to abortion are unwelcome. True, a woman's decision as to abortion may depend upon her physical and mental health or the potential threat to the health of the child. Apart from these reasons, there are also various important factors. She or the family may not be financially sound to welcome an addition. It may be a time when she wants to change her profession, which requires free time and hard work. Her relationship with the husband may virtually be on the verge of collapse and she may prefer not to have a child from him, for it may possibly affect a future marriage. All these factors are quite relevant and the Indian statute on abortion does not pay any respect to them. The law thus is unreasonable and could well be found to be violative of the principles of equality provided under Article 14 of the Constitution. Is it desirable to pay compensation to woman for all her physical and mental inconveniences and liabilities, which arises in that context? Finally, it may be noted that the M.T.P. Act does not protect the unborn child. Any indirect protection it gains under the Act is only a by-product resulting from the protection of the woman.[69]

Under Section 4 of the Act detailed description of the place of termination of the pregnancy

[68] https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Datar_v_India.pdf

[69] https://www.legalserviceindia.com/articles/adp_tion.htm

ISBN 978-81-948082-8-2

is stated like a hospital. It should be hygienic place to perform abortion, where an operation table is provided with proper instruments needed to perform it and drugs and other necessary items for it in the place to be kept. A woman has complete right over her body and she has the right to abortion too and can decide not to do it. Most of the countries where abortion is legalised death rate of women is below 1 for 100,000 procedures. Abortion is quite a safe method if it is done by skilled doctor and who has proper facility.[70]

CASE LAWS

D. Rajeswari vs State of Tamil Nadu And Others[71]

The case, is of an unmarried girl of 18 years who is praying for issue of a direction to terminate the pregnancy of the child in her womb, on the ground that bearing the unwanted pregnancy of the child of three months made her to become mentally ill and the continuance of pregnancy has caused great anguish in her mind, which would result in a grave injury to her mental health, since the pregnancy was caused by rape. The Court granted the permission to terminate the pregnancy.

Dr. Nisha Malviya and Anr. Vs. State of M.P[72]

The accused had committed rape on minor girl aged about 12 years and made her pregnant. The allegations are that two other co-accused took this girl, and they terminated her pregnancy. So, the charge on them is firstly causing miscarriage without consent of girl. The Court held all the three accused guilty of termination of pregnancy which was not consented by the mother or the girl.

Murari Mohan Koley vs The State 2003[73]

In this case, a woman wanted to have abortion on the ground that she has a 6 months old daughter. She approached the petitioner for an abortion. And the petitioner agreed to it for a consideration. But somehow the condition of the woman worsened in the hospital and she

[70] https://lawyerslaw.org/tutorials/an-overview-of-medical-termination-of-pregnancy-act1971/

[71] 1996 CriLJ 3795

[72] 2000 CriLJ 671

[73] (2004) 3 CALLT 609 HC

ISBN 978-81-948082-8-2

was shifted to another hospital. But it resulted in her death. The abortion was not done.

Shri Bhagwan Katariya And Others vs State of M.P[74]

Abortion without mother's consent 2000.The woman was married to Navneet. Applicants are younger brothers of said Navneet while Bhagwan Katariya was the father of said Navneet. After the complainant conceived pregnancy, the husband and the other family members took an exception to it, took her for abortion and without her consent got the abortion done. The Court opined that if we refer Section 3 of the Medical Termination of Pregnancy Act, 1971, a doctor is entitled to terminate the pregnancy under particular circumstances and if the pregnancy was terminated in accordance with the provisions of law, it must be presumed that without the consent of the woman it could not be done. Present is a case where a permanent scar has been carved on the heart and soul of the woman by depriving her of her child. And the Doctor will be liable.

SINGLE, UNMARRIED WOMEN HAVE THE RIGHT TO SAFE AND LEGAL ABORTION

In a significant ruling on reproductive rights, the Supreme Court on 29th September 2022 extended the right to safe and legal abortion up to 24 weeks of pregnancy to unmarried and single women, saying it is the "right of every woman to make reproductive choices without undue interference from the State". Now, all women in the country, regardless of marital status, can undergo an abortion up to 24 weeks into pregnancy.

The bench of Justices D Y Chandrachud, A S Bopanna and J B Pardiwala, ruling on a plea by an unmarried pregnant woman who had been in a consensual relationship but was denied the right to abortion because she was past the 20-week limit, made it clear that provisions of the Medical Termination of Pregnancy Act cannot be interpreted to deny that right to single women beyond 20 weeks of pregnancy.

If the Act and Rules, the bench said, were "to be interpreted such that its benefits extended only to married women, it would perpetuate the stereotype and socially held notion that only

[74] 2001 (4) MPHT 20 CG

ISBN 978-81-948082-8-2

married women indulge in sexual intercourse, and that consequently, the benefits in law ought to extend only to them".

"This artificial distinction between married and single women is not constitutionally sustainable. The benefits in law extend equally to both single and married women," it said. Article 21 of the Constitution "recognises and protects the right of a woman to undergo termination of pregnancy if her mental or physical health is at stake. Importantly, it is the woman alone who has the right over her body and is the ultimate decision-maker on the question of whether she wants to undergo an abortion… Depriving women of autonomy not only over their bodies but also over their lives would be an affront to their dignity," it said.[75]

SOCIO- ETHICAL ISSUES

Abortion touches social, religious, economic and political aspects. Its impact on the society seen can be looked at both in a positive and a negative manner. In the earlier years of forming abortion policy, the Western civilisations disapproved the practice. By the nineteenth century many nations passed laws banning abortion. It wasn't until late in the twentieth century when the women rights were given importance and after many awareness movements that some nations, including the US, began to legalise abortion.

In India, which is a country with immense social baggage supplemented by societal evils such as illiteracy and poverty, the impact of the MTP Act should be judged in the context of changing social circumstances, values and attitudes. The social implications of MTP Act, in its very raw form can be segregated into abortion in unmarried girls versus abortion in married woman. These two have completely different connotations. In MTP Act married woman is not considered as a social stigma, whereas unmarried girls are not easily accepted. The fact that it is unaccepted creates hindrances in safe abortions, sometimes defeating the very purpose of abortion *i.e.*, health of the woman undergoing abortion. In villages where there is in access to medical facilities, girls are taken to other distant places for MTP Act in the name of preserving the girl's future and keeping image in the society intact. The legalising

[75] https://indianexpress.com/article/india/all-women-entitled-to-safe-and-legal-abortion-supreme-court-8179879/

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

of MTP Act has obviously had a positive stimulus upon the omen in need of MTP and has shown reduced incidence of suicide and betterment of health and safety. The acceptance of the family planning methods has also witnessed wider acceptance.[76]

The real problem lies in the implementation of the laws and existing framework. It is the responsibility of the government to ensure that MTP Act is done by qualified surgeons in registered clinics or hospitals. The concerned authorities need to deal with another major challenge and that is of the genuineness of reasons behind requesting termination of pregnancy.

There have been cases reported where in MTP Act is performed flimsy ground such as examinations, family weddings, tours etc. such abortions are conducted by the medical practioners for financial gains and go unchecked on most occasions due to fabricated reports. Abortions have both long term and short term consequences. It is also unfortunate that abortion often is used as an alternative to regular methods of family planning.[77]Such issues can only be addressed by government initiatives and awareness programs. It is the social responsibility of doctors to counsel all patients coming for termination of pregnancy about the use of some contraception. It should be emphasised that contraception use is much safer than termination of pregnancy. To mitigate the ill effects on society, the balancing of the negative and positive aspects of this social legislation needs to be taken up.

The ethical debate about the legal stance of prevention of unwanted pregnancies has been continuing for many years throughout the world, and this established the idea of enacting a legislation that would balance the ethical and legal perspective. In India, in spite of legislative

and judicial control, ethical controversies surrounding medical termination of pregnancy still continues. Though many people believe that medical termination of pregnancy is immoral but

today it is a right that cannot be taken away from the women.

[76] Government of India, Report of Ministry of Health and Family Welfare on Rural Health Care System in India

(MHFW, 2005).

[77] Ministry of Statistics and Programme Implementation, NSSO 60th Round, Report No. 507 on Morbidity, Health Care and the Condition of the Aged, (National Sample Survey Organisation, 2004).

ISBN 978-81-948082-8-2

In relation to social stigma a Supreme Court bench comprising Thakker and D.K. Jain JJ held in *Suman Kapur* v. *Sudhir Kapur*[78] that an abortion by a woman without her husband's consent would amount to mental cruelty and a ground for divorce. To quote the bench:[79] Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of the other for a long time may lead to mental cruelty. A sustained course of abusive and humiliating treatment calculated to torture, discommode or render life miserable for the spouse.

In the light of such judgements, it can be said that Constitution does not guarantee right to abortion to the women in India and the MTP Act, 1971 itself limited sphere of this right and provides for the 'termination of pregnancy' in certain cases only.

In a expansion that may have far-reaching consequences, the Supreme Court of India have decided that severe foetal abnormality can be a valid ground for the medical termination of pregnancy, even if the foetus is more than twenty weeks old. The Supreme Court granted a twenty four week pregnant woman and rape survivor the permission to go for an abortion in *Ms.X* v. *Union of India.*[80] Here it is pertinent to specify that the International Federation of Gynecology and Obstetrics (FIGO) recognises an ethical obligation to allow women to terminate a severely malformed fetus.[81]FIGO emphasises that in such cases, "[t]he decision to terminate a pregnancy should rest primarily with the parents."[82] It is evident that many countries permit the legal abortion procedure throughout pregnancy in cases of fetal impairment to protect a pregnant woman's health.

PSYCHOSOCIAL ASPECTS

The famous birth control activist Margeret Sanger once said that "No woman can call

[78] AIR 2009 SC 589
[79] Ibid.

[80] http://supremecourtofindia.nic.in/FileServer/2016-07-25_1469453114.pdf
[81] http://www.figo.org/docs/ Ethics%20Guidelines%20%20English%20version%202006%20-2009.pdf

[82] *Id.* at 75.

ISBN 978-81-948082-8-2

herself free until she can choose consciously whether she will or will not be a mother". Women have however now come a long way since those days where in abortion was illegal and medical termination of pregnancy was socially unacceptable. The crucial consequence that followed this attitude towards abortion was the psychological implications upon the pregnant woman and her family. These persons were faced with distress of an uncertain future. In today's time however, it is legally available in most countries of the world and due to this the physiological trauma and social isolation have reduced. Psychologically it gives them a sense of control upon one's own future and the power to make choices. However, in the favorable social circumstances following legalised abortion, the patient's relief of getting rid of the unwanted pregnancy out shadows and feeling of guilt that either used to accompany an illegal and socially unsanctioned procedure. In a minority of patients, one sees psychological disturbances in the form of major psychoses or depression.[83]

It was not yet recognised as a justification for abortion that the women's health would be endangered if the pregnancy is carried to the full term. That step has not been taken but perceptibly it constitutes a greater inroad in the sanctity of life of the fetus than a provision intended to guard against danger to the women's life. But each person has a right to bodily sovereignty and human rights and various international instruments protect such rights. Thus it becomes important to secure the right to abortion to every woman.[84]

Those who are pro-life are against abortion and believe that since life begins at conception, abortion is parallel to murder as it is the act of taking human life. Abortion is in direct disobedience of the idea of the sanctity of human life and that no civilized society permits any human to harm or take the life of another human. Their answer to an unwanted child is adoption and they believe that with millions of child less parents wanting to adopt a child. In the instance of rape and incest, *etc*., they believe that abortion punishes the unborn child who committed no crime; instead.

Their basic premise is that for women who demand complete control of their body, control

[83] Siddhivinayak Hirve, "Abortion Policy In India: Lacunae and Future Challenge" Abortion Assessment Project 2004, India Centre for Enquiry into Health and Allied Themes, Bombay (2004).

[84] Ibid.

ISBN 978-81-948082-8-2

should include preventing the risk of unwanted pregnancy through the responsible use of contraception or, if that is not possible, through self-restraint. In short, it can be said that abortion should not be used as another form of contraception.[85] On the other hand, those who are prochoice support abortion and believe that since the fetus cannot be regarded as a different entity in the first trimester as a fetus cannot exist independent of the mother. This is so because it is attached to the mother by the placenta and umbilical cord and its health is dependent on her health, and cannot be regarded as a separate entity as it cannot exist outside her womb.[86]

Another contention that they out forwards is that the concept of human life is totally different from the concept of personhood. At the time of conception human life occurs, but fertilized eggs that used for in vitro fertilisation, in many times, are not implanted and are routinely thrown away and it is not considered as murder, then how would abortion be considered as murder? They also believe that the concept of adoption is not an alternative remedy to abortion. Even in the case of rape or incest, *etc.*, often a woman is unaware that she is pregnant or is too afraid to talk about, thus the contraceptive pills are ineffective in these situations. This group of persons believes that although abortion should not be used as a form of contraception but even with responsible contraceptive use pregnancy can take place.[87]Another aspect that they rest their case on is that teenagers who become mothers have harsh prospects for the future such as leaving the school, health issues, inadequate prenatal care combined with social stigma. Thus they believe it to be against the very fundamental concept of civil rights and right to make choices.

CONCLUSION

Before drawing any conclusions, it is important to understand the basic purpose behind abortion law. It can be concluded that the main goal is to provide quality abortion care that

[85] Abortion Arguments from Pro-Life and Pro-Choice Sides & Main Points of Debate, *available at:* http://womensissues.about.com/od/reproductiverights/a/AbortionArgumen.htm
[86] Abortion Arguments: 10 Arguments For Abortion, 10 Arguments Against Abortion, available at: http://womensissues.about.com/od/reproductiverights/a/AbortionArgumen.htm

[87] Ibid.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

meets the needs of all women by improving aspects such as easy access and affordability of safe abortion services. I can do it. This can be done by mobilizing human, financial and material resources to provide care and safety in abortion procedures and by increasing the number of trained people and well-equipped abortion centers. It also integrated abortion services into primary and community health centers, increased investment in public facilities, expanded the abortion provider base by training paramedics in early pregnancy abortion, and combined it with the latest technology. Increase efficiency and reach by simplifying enrollment procedures and policies. In India, the legalization of abortion through her MTP law enacted in 1971 has not yielded the expected results. Despite modest guidelines, the majority of women still rely on unsafe abortions. This contributes significantly to the burden of maternal morbidity and mortality. The MTP Act now clarifies Section 3. In this section, dismissal for rape or contraceptive failure is permitted because the distress they cause constitutes"serious injury to physical or mental health." The MTP method is discouraged because the diagnosis of fetal dysfunction is likely to result in distress that constitutes a serious mental health violation, and because specific fetal abnormalities are not identified within a fixed 20 weeks of gestation. It should be recognized that no exceptions must exist during pregnancy. Pregnancy can be determined. The great Tamil saint Thiruvalluvar said, "To touch children is a bodily pleasure, and the ear's pleasure is to hear their words." It is a mother's duty to give her best to her children. However, they may also engage in activities that harm their unborn child. This may be due to ignorance, negligence, or sometimes willful misconduct. Abortion is associated with various social, ethical and economic issues. From this we can conclude that the mother's right to abortion is limited. Ensuring the mother's independence and liberty and the life of the unborn child rests on the shoulders of Law No. The medical community and society need to offer love and support to women with unplanned pregnancies and help them find compassionate alternatives to abortion.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

LIQUIDATED DAMAGES AND PENALTY IN INDIAN LAW AND ENGLISH LAW

Submitted By: Khushi Doshi
NMIMS Kirit P Mehta School of Law, Mumbai

ABSTRACT

"Ubi Jus Ibi Remedium" is a Latin legal adage that translates as "where there is a right, there is a remedy," implying that if a person's right is infringed, the victim will be entitled to an equitable solution under the law.

The purpose of this article is to examine the two most essential words in Sections 73 and 74 of the Indian Contract Act, of 1872, namely "Damages" and "Penalty." In this article, an attempt has been made to examine all of the viewpoints and ways in which these phrases might be interpreted so that the genuine meaning and sense of these portions can be easily deduced. These two words are not defined in the same way in terms of what they signify or include.

When a contract is broken, liquidated damages and/or a penalty are due. While the phrases penalty and liquidated damages may appear to be interchangeable, there is a substantial distinction between the two. In this post, we'll look at the regulations that regulate the amount of compensation that must be paid in the case of a contract violation.

KEYWORDS: Breach, Liquidated damages, penalty, Indian Contract Act.

INTRODUCTION

The Latin legal aphorism "Ubi Jus Ibi Remedium" means "where there is a wrong, there is a remedy." The maxim's underlying idea is that when a person's right is infringed, the victim

 ISBN 978-81-948082-8-2

will be entitled to an equitable remedy under the law.

"A contract is an agreement enforceable by law," according to Section 2(h) of the Indian Contract Act of 1872. It refers to any agreement created with free consent, lawful consideration, and a legitimate object, and signed and executed by a legally competent person.

In basic words, breach of contract implies breaching the terms of a contract by failing to fulfill a promise made under an agreement by either side. When a person or parties to a contract fail to perform their responsibilities, whether partially or totally, it is considered a civil wrong.

Even if the party(ies) acts in a way that indicates their intention to not execute their duties willingly shortly, this might result in a breach of contract.

The court or arbitrator should determine the type of breach of contract and its compensating value to grant relief to the aggrieved party after a thorough examination of the facts and scraps of evidence about the specific contract and the parties involved.

The Remedies allowed for the reimbursement of loss or damages caused by a violation of contract are dealt with in Chapter VI of the Indian Contract Act, 1872.

Any party to the contract that wilfully fails to fulfil its obligations or violates the conditions of a contract is obligated to pay the aggrieved, either via a penalty or through damages.

- **The concept of Damages in the Indian Contract Act:**

If the parties violate a contract, they will be obligated to pay the aggrieved party for the losses caused, which will be the sum known as liquidated damages/penalty. Damages, according to the black's law dictionary, are any monetary claim made by, or ordered to be paid to, a person as recompense for any loss or harm they have suffered[88]. In contrast, civil law regimes generally enforce fixed sums, whether they are intended to approximate

[88] *Bryan A. Garner and Henry Campbell Black, Black Law dictionary (Thomson Reuters 11th edition, 2019)*

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

damages or deter breach.[89] The case of Dunlop Pneumatic Tyre Co. Ltd v. New Garage & Motor Co. Ltd[90] (Dunlop's case) is regarded as authoritatively elucidating the common law stance on damages.

In that instance, the key concept was established that if contracting parties agree to a stipulated sum as damages in the event of a violation, the courts would only maintain such an amount provided it is a true pre-estimate. When there is a breach of contract, i.e. when one party fails to satisfy the conditions of the contract to which he is committed, that person is obligated to compensate the other party who has incurred a loss under the Indian Contract

Act. The basic purpose of compensation is to put the damaged or aggrieved party in the same financial position as if the contract had not been violated.

- **Interpretation of Damages by the judiciary/ Case laws:**

Justice Greenwood of the

Utah Court of Appeals opined the following terms in Sohm v. Dixie Eye[91]: "damages" normally refers to money demanded by, or directed to be paid to, a person as recompense for loss or damages. "The term injury is sometimes used in the sense of damage, including the harm or loss for which compensation is sought, and has been defined as damage resulting from an unlawful act; however, there is, properly speaking, a material distinction between the two terms in that injury means something done against the party's right, causing damage, whereas damage is the harm, detriment, or loss sustained as a result of the injury."

- **Remedies for the damages/injury caused:**

A contract's parties are legally required to fulfil their respective commitments, hence any violation by any side is frowned upon by the law. As a result, once one party breaches a contract, the law provides the other party with three remedies. He could try to get:

1. Damages for the monetary loss.

[89] *Edward Alan Farnsworth, Contracts (4th edn Aspen Treatise Series 2004)*
[90] *Dunlop Pneumatic Tyre Co. Ltd v. New Garage & Motor Co. Ltd UKHL 1, AC 79*
[91] *166 P.3d 614, 2007 UT App. 235 (Utah Ct. App. 2007)*

 ISBN 978-81-948082-8-2

2. A decree for specific performance.
3. An injunction.

In this paper, the researcher will focus on the remedies for the breach of contract that is liquidated damages, and penalties, and the differences between Indian Law and English Law.

• Proof of Damage:

For a claim of damages and the imposition of liability, there must be a causal relationship between the breach and the loss or injury incurred. If the defendant's breach of contract is the only "genuine and active" cause of the harm or damage for which damages are sought, this causal relationship is said to have been established; in the case of numerous causes, the "dominant and effective" cause is to be considered.

The proof of damage lies in the hands of the party claiming the damages of the breach of contract. For a claim of liquidated damages, the production of total proof is required. This stems from the concept that the fair recompense agreed upon as liquidated damages in the event of a contract breach is in respect of some loss or harm; consequently, the presence of such loss or injury is required for a claim of liquidated damages.

➢ LIQUIDATED DAMAGES

Section 74 of the Indian Contract Act talks about where a penalty is established for a breach of contract and compensation is provided in the liquidated or unliquidated form. To avail of the compensation, it has to be proved by the party claiming the compensation or revoking the contract. It can't be merely decided by the parties.

As per the black law dictionary liquidated damages means, "*an amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches the contract*[92]

Parties agree to a sum or an amount before entering into a contract that will be paid or compensated by the party which violates the guidelines or breaches the contract to the party at loss or who suffered the injury. This is known as Liquidated Damages.

[92] *Bryan A. Garner and Henry Campbell Black, Black Law dictionary (Thomson Reuters 11th edition, 2019)*

ISBN 978-81-948082-8-2

IMPORTANCE:

1. *A way of pre-determining the loss at the time of contracting aids in the recovery of damages. Simultaneously, the computation error is decreased.*
2. *It reduces the expense and inconvenience while highlighting genuine loss and harm.*
3. *It reduces the risk of under-compensation and, in cases when the consequences of the breach of contract are understood, it reduces the complexity of evaluating the situation to some extent.*
4. As the uncertainty facing the contracting parties increases, so does their latitude in stipulating post-breach damages.[93]

CASE LAWS:

1. **Sir Chunilal V. Mehta and Sons[94]:** In this case, the agreement was terminated by the board of directors The appellant then filed an action in the Bombay High Court on the original side, demanding damages of Rs. 50 lakhs for the improper termination of the agreement. It eventually changed the plaint with the Court's approval and sought Rs.

28,26,804/- instead as mentioned in clause 14 of the contract as the liquidated damages. The corporation conceded before the Court that the termination of the appellant's employment was improper, leaving the only question for the learned Judge to resolve was the number of damages the appellant was entitled to. The court determined that construing the provisions of the agreement to determine the amount of compensation owed is a serious matter of law.

2. **Arbitration Petition No. 4 of 1986 vs Dilip Dharamsey Khatau on 12 April 2013:** It was opined by the bench of 5 judges who interpreted section 74 of the Indian Contract Act in this that the party committing a breach of contract shall pay the compensation and the upper limit of the compensation has the amount stated in the

[93] *Charles J. Goetz and Robert E. Scott, "Liquidated Damages, Penalties and the Just Compensation Principle" Columbia Law School Scholarship Archive, 1977*
[94] *Sir Chunilal v. Mehta and sons, 1962 AIR 1314, 1962 SCR Supl. (3) 549*

ISBN 978-81-948082-8-2

contract as liquidated damages. Section 74 has linked a provision for payment of liquidated damages in the event of a contract violation with a stipulation for payment of a penalty.

3. **Balkishan Das v. Fateh Chand (AIR 1964) 1 SCR[95]-** The Hon'ble Supreme Court concluded in this case that the amount of compensation paid to the aggrieved party must be based on the real loss and cannot exceed the amount mentioned as damages or penalty prescribed.

➢ PENALTY

In the case of the penalty provided in section 74 of the Indian Contract Act 1872, however, this is not the case. Damages or a stipulated penalty are used to establish the amount. Furthermore, the amount indicated in the appropriate compensation for the breach and cannot be greater than the amount specified in the contract. As a result, section 74 only discusses liquidated losses and no other types of damages. Damages in liquidation: (not defined in the Indian Contract act, 1872) It is liquidated damages if the amount determined is a genuine estimate of the foreseeable losses that would come from the breach.

1. **T.K. Sundaram v Co-operative sugars ltd:**[96] opined that the compensation agreed upon by the parties is a genuine pre-estimate of the compensation. e it is not by way of penalty the court will enforce the penalty as such.

2. **Cellulose Acetate silk v. Widness Foundry:**[97] It was opined by the court that the parties were knowledge of the actual loss will be more than the loss calculated while drafting the actual contract, but the payable damages will be limited to the amount which was agreed by both the parties.

• Difference between liquidated damages and penalties

In accordance with Section 74 of the Indian Contract Act of 1872, "If a contract has been

[95] *Balkishan Das v. Fateh Chand (AIR 1964) 1 SCR*
[96] *T.K. Sundaram v Co-operative sugars ltd A.I.R 1988 Mad. 167.*
[97] *Cellulose Acetate silk v. Widness Foundry (1933) A.C. 20*

ISBN 978-81-948082-8-2

breached, whether the sum is specified as the amount to be paid in the contract in the event of such breach, or whether the contract includes some other clause as a punishment, the complaining party shall be entitled to claim fair compensation from the party who has breached the contract, whether or not the actual damage or loss is found to have been caused thereby."

The claimant does not need to provide proof to demonstrate his real loss, as is the case under English law if the parties have agreed that the amount represents a true preliminary assumption of the damage or harm that will be experienced. However, the petitioner must establish a civil injury, and it is legitimate for the defendant to assert that the amount sought by the plaintiff may be less than the amount to which he or she is entitled because it is difficult to show that the plaintiff suffered a forfeiture.

If the parties break a contract, they are accountable for repaying the aggrieved party for the losses they have incurred, which are calculated as liquidated damages/penalties.

These damages or penalties are the same as they are under Indian law, but they are not the same as they are under English law.

The simple test for evaluating whether a "liquidated damages" clause is an unenforceable penalty clause is whether the agreed sum of liquidated damages was a legitimate covenanted pre-estimate of the loss that may be caused by a breach of the relevant main duty. This concept was established a century ago in the case of Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co[98], which held that if the sum payable was "extravagant, excessive, or unreasonable," the clause would be invalid. As a result, LDs provisions have been challenged because they are penalties.

Lopes, J. in Law v. Redditch [99]Local Board clarified the difference between a penalty and liquidated damages. The difference between penalties and liquidated damages is determined by the parties desire to be obtained from the whole contract. The sum mentioned is the penalty if the purpose is to secure contract performance by the imposition of a fine or penalty; nevertheless, it is liquidated damages if the intention is to assess damages for contract violation.

[98] *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor, Co 1915 AC 79.*
[99] *Lopes, J. in Law v. Redditchn(1892) 1 C.B. 127, at 132*

ISBN 978-81-948082-8-2

➢ English Law

The sum indicated in the contract might be either a penalty or liquidated damages, according to English law.

Liquidated damages are when the parties to a contract jointly agree and pre-fix an amount as compensation, and the amount pre-fixed is fair. This is a sum set aside before or at the time of the contract to cover any future breaches. The Court cannot compel the party to compensate the aggrieved party an amount greater than this predetermined sum for losses suffered.

Penalty: If the sum specified by the party(ies) is not fair and is not adequately estimated but is set forth in the contract to instil dread in the minds of the contracting parties to follow through on their commitments and not violate any terms/obligations as stated in the contract. It is frequently a larger sum than the average loss that any party may suffer as a result of the breach. In such a circumstance, the parties are only given the amount equal to the real loss, not the entire penalty.

Under English Common Law, parties may specify a payment to be paid in the event of a breach. If the money is categorized as a penalty by the court, it is irrecoverable; but, if it is classified as liquidated damages, it is recoverable.

➢ Indian Law

According to Indian law, there is no distinction between a penalty and liquidated damages. According to Section 74 of the Indian Contract Act, 1872, if a party breaks or breaches a contract, the amount to be paid in such breach is by way of penalty/damages or any other form stipulated, and the party claiming for such breach is entitled, whether the actual damage or loss is proven, to receive from the party committing such breach a reasonable compensation not exceeding the amount so mentioned, which is usually decided by the Court.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Exception — In the event of contracts with the government for the general public, a breach is compensated by the Authority returning the whole contract amount.

According to the Indian Contracts Act, of 1872, the theory of fair compensation governs the liquidated damages and penalties due by a party that breaches a contract. The amount of appropriate compensation must be determined by the court.

The Law of Contracts in India does not recognize any qualitative differences in the nature of damages, as section 74 abolishes the relatively complicated refinement that existed under Common Law. The elimination of this distinction avoids a morass of complicated categories, requiring the court to give just "fair compensation" that does not exceed the contract's damages.

CONCLUSION

When it comes to liquidated damages and penalties, courts have the propensity to decide that liquidated damages must be adequate recompense, whereas penalties must be shown. If no loss is expected to arise as a result of the violation, the court might decline to award compensation.

If the damages are in the character of a penalty, the court has the authority to award fair compensation up to the amount specified in the contract upon proof of damages. In the event of a contract violation, the courts have unrestricted power to award damages, but the damages must be fair.

While Indian law regards both to be synonymous, English law distinguishes between the two. To prevent the parties from defaulting, the penalty is overstated. Liquidated damages are a more accurate representation of the loss.

In terms of liquidated damages and penalties, the court appears to have reached the judgment that liquidated damages should be considered appropriate recompense, whilst penalties should not.

When compared to penalties, liquidated damages are simple to apply. Penalties can also be levied for specific occurrences such as late completion of work or supply delays. In addition, there is no distinction between liquidated damages and penalties in the Indian Contract Act.

References:

1. https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1404&context=faculty_scholarship
2. https://www.worldwidejournals.com/paripex/recent_issues_pdf/2014/November/November_2014_1416651736__33.pdf

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

3. https://www.toppr.com/guides/business-laws/indian-contract-act-1872-part-ii/liquidated-damages-and-penalty/#:~:text=The%20Indian%20law%20makes%20no,Court%20will%20not%20allow%20more.
4. Avtar Singh's Contract and specific relief, Thirteen Edition
5. Dr. R.K. Bangia, Indian Contract Act
6. *Justice M Jagannadha Rao,' Liquidated Damages and Penalties: Ex Ante or Ex Post Methodology"*

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

ANALYSIS OF HATE SPEECH

Submitted By: Khushi Doshi
NMIMS KIRIT P MEHTA SCHOOL OF LAW, MUMBAI

ABSTRACT

Hatred is a deteriorator of one's own personal beauty. It destroys a person's sense of value as an individual. Hate ideology is frequently transformed into "sociocultural rational thinking," which demeans societal convictions and manifests itself as hateful speech. This phenomenon occurs because hate ideology is frequently transformed. Free speech can unfortunately lead to hate speech as an unintended consequence. Getting rid of hate speech completely is something that can never be achieved in a country that claims to be democratic. It is indisputable that there is a pressing need to limit hateful speech; as a consequence, the primary focus of this research project is on the legal framework that currently exists in India to govern hate speech. This study makes reference to the various legal measures that have been taken in India to combat the foundations of hate speech as well as its subsequent dissemination. This research is being done with the intention of examining the idea of hate speech as well as the difficulties that it presents to the legal system. In addition to this, it discusses the judicial and legislative efforts that have been made at the multilateral level to limit hateful speeches and respect the individual expression of freedom of speech. The suppression of hate speech has proven to be a difficult and time-consuming endeavor. The law that prohibits inciting hatred through speech is being challenged on the grounds that it violates a person's right to freedom of expression and opinion. In light of the undeniable harm that is caused by hate speech, it is essential to go far beyond the framework that is currently in place and search for standard practices that can be implemented in conjunction with the framework described above in order to address the problems that are caused by hate speech.

KEYWORDS: Hate speech, social common sense, democracy, free speech, law, judgments.

INTRODUCTION

Speech that is insulting, derogatory, discriminatory, provocative, or even incites and supports

ISBN 978-81-948082-8-2

the use of force or ultimately results in violent reprisal is considered hate speech in today's society. As a direct consequence of this, the existing equilibrium and order of society as a whole are both thrown off. In addition, hate speech has developed into a truly horrific sort of hate crime, causing victims of abuse to suffer actual harm to their bodies as well as their minds. It has an effect on its targets that cannot be seen, restricting their freedom to speak freely and prohibiting them from taking part in democratic processes and public dialogue.

The term "hate speech" refers to any type of communication (including contact that takes place online) that incites or seeks to incite hatred or contempt for a person or group of people in any manner. This may be done intentionally or unintentionally. Hate speech seeks to promote prejudice and produce undesired societal divides. It is a kind of communication that is very derogatory and has the potential to result in aggressiveness, hostility, and social inequality. Discourse based on bigotry may result in a broad variety of unfavourable outcomes, one of which is the activation of terrorist actions.

There are four primary categories of individuals who are guilty of engaging in hate speech and are to blame for the proliferation of such speech. The following classes are appropriate for dividing them up into:

1. People who actively employ hostile speech in order to get pleasure and excitement from the unpleasant circumstances that their hateful speech has brought into existence are known as "thrill seekers."

2. Protective: to preserve and uphold their own standards and principles.

3. Retaliators are those who retaliate in response to an occurrence that occurred directly to them.

4. Task: seeking to attain a vested goal via the use of hostile speech as a motivation.

It is difficult to trace the roots of hostile speech in India back to their original sources. On the other hand, this problem has very certainly been made worse by the meteoric rise in internet use. There is no question that the unrestricted use of social media platforms has contributed to an increase in the number of hate messages. It is also possible for communications based on hatred to be gendered in a way that incites a group to commit crimes against women, for

ISBN 978-81-948082-8-2

instance. It might be based on a group, for instance, instigating violence or a social ban on a certain group, but it could also be based on an individual. It also plays an important role in mob violence, as shown by the fact that in 2018, many mob assaults were organized and carried out against the citizens of Bihar and Jharkhand in the state of Andhra Pradesh, allegedly as a response to the spread of bogus hate messages. This is evidence that it plays an important role in mob violence. It would be elaborated upon more during the course of this study report.

AIM

To understand the concept of hate speech

To analyze the factors that contribute to the propagation of hate speech

To understand hate speech in terms of criminal law perspective

RESEARCH QUESTIONS

What constitutes of hate speech in India?

What are the legal provisions to limit hate speech in India?

How can the government control the propagation of hate speech in India?

LITERATURE REVIEW

Ayush Raj in the research paper titled **"HATE SPEECH LAWS IN INDIA"** centers on the legal frameworks that have been implemented in India to address the source and dissemination of hate speech. In order to provide a full grasp of this subject, the researcher has also addressed the origins, effects, instances, and remedies of this societal behemoth evil. Anandita Yadav in the research paper titled **"COUNTERING HATE SPEECH IN INDIA: LOOKING FOR ANSWERS BEYOND THE LAW"** discusses how Hateful speech regulation has proved to be a challenging undertaking. The anti-hate speech statute is being challenged because it interferes with a person's freedoms of speech and expression, it further discusses how the current framework can be improved.

In the article titled "Hate speech in India: an analysis in light of Section 153A and 295A of IPC" the author explains the two most important laws pertaining to hate speech crimes, it further explains the role of religion and politics in the furtherance of hate speech in India.

ISBN 978-81-948082-8-2

In the article titled “Hate Speech and Freedom of Expression: Balancing Social Good and Individual Liberty” the author aims to analyze the concept of hateful speech and the challenges it poses to the legal system. It also discusses the judicial and legislative efforts done at the multilateral level to limit hateful speech and respect personal liberties of expression and speech.

MEHVISH ASHRAF in research titled “Online Hate Speech in India: Issues and Regulatory Challenges” this paper emphasizes the necessity for a strong regulatory framework to address current forms of hatred content emerging on the internet.

ANALYSIS

In recent years, hate speech has had a significant impact on the right to freedom of expression. Inflammatory remarks disseminated by media outlets have resulted in major violent protests, putting the accused's life in jeopardy. Only a few renowned media individuals abuse their press authority. Their skewed reporting, which favors one political party or philosophy over another, has resulted in the loss of public discussion and impartial critique. Today's media focuses on a single group and people, branding them as "antinational" or "Naxalites." On primetime tv, shows dubbed "TraitorsvsPatriots" air. In an attempt to acquire an audience, the media builds a cynical storyline, twists the truth, and provides dramatic news.

As the propagation of disinformation across social media platforms is frequent these days, the issue of inciting hatred has also increased on social networks. WhatsApp and other social media applications are the most popular means of disseminating hate speech. Despite WhatsApp's efforts to educate its users about the dangers of providing false news or messages that constitute hate speech, incidences of public lynching and assaults on people based on inaccurate assumptions continue to occur. Trolls on social networks have become a major source of concern for social media platforms. Trolling is when someone makes an inflammatory or disrespectful statement on social media in order to malign someone.

Politicians are now known for offering hateful speech in order to obtain selfish political victory as well as to promote their personal religious convictions. Politicians have been caught on camera making alarming remarks " The broader populace reacts with religious

ISBN 978-81-948082-8-2

hatred and community violence as a result of this. The lack of rigorous legislation to prohibit hate speech and hold those responsible for its transmission responsible has resulted in an increase in hateful speech lawsuits.

LEGAL PERSPECTIVE

There are a number of autonomous, self-regulatory, and governmental measures that are aimed at stopping the dissemination and practice of hate speech. The Indian Penal Code of 1860, which was created a long time before India attained its independence, has a provision that addresses hate speech as well. Additionally, a variety of laws, legislation, and rules have been adopted with the purpose of restricting and penalizing the use of hateful speech. These laws were enacted with the intention of minimizing the use of hateful speech.

In Section 153A of the Indian Penal Code, the provisions for the punishment of persons who commit the following offenses are outlined:

• Through words, gestures, drawings, or other similar things, discord is sown among people who belong to different castes, creeds, beliefs, regions, dialects, or any other groupings of the same sort.

• Cause a disturbance in the calm and serenity that exists in the public realm.

• Form armed troops inside a religious or social organization with the intention of inciting violence against another religious or social organization.

People who commit such offenses might get a jail term of up to three years. If any of the inappropriate activities described above are carried out in front of a religious community, the punishment might be raised to years behind bars. This section as a whole solemnly swears to defend the character of our country. Anyone who threatens the peace in India, which has a population comprised of people from many different backgrounds and is renowned internationally as a nation that places high importance on "togetherness," is susceptible to criminal punishment.

Ramesh v. UOI (1988)

A movie called 'Tamas' was broadcast on television in the year (1988). The film focuses on a work by a well-known academy-winner author that has been widely read in institutions for

 ISBN 978-81-948082-8-2

a long time. The petitioners claimed that showing the video was in violation of Section 153-A.

The Court found the respondents not responsible, stating that the impact of a movie, TV show or other media must be viewed through the eyes of a rational man, who, according to English precedent, is someone riding the Clapham omnibus.

Section 153B of the IPC deals with matters relating to imputations that endanger state security.

Section 505 of the IPC criminalizes any activity that convinces members of the armed forces and authorities to fail to serve their authorized duties, whether spoken or written in any manner.[100]

The arousing of hate or violent provocation against some communities is required for Sections 153A and 505 and 505(2) to apply.

Section 295: In circumstances when a person violates, damages, or desecrates any religious icon or image or even anything regarded as holy by a community of individuals, Section 295 of the IPC puts down the measures for punishments. A person who does either one of the foregoing crimes will be arrested for up to 2 years, punished, or penalized including both imprisonment and fine. This Act does not protect unintentional acts. One such instance is Jan Mohd. v. Narain Das (1883), in which a person who had no intent to propagate hate chipped stones from a crumbling mosque so was not held guilty.[101] However, where the crime is deliberate, such as in Saidullah Khan v. State of Bhopal (1995), and the perpetrator is mindful that the item is holy, he is held accountable.

Section 295A: People who wilfully offend or try to offend a religion or religious feelings of a group of individuals by speech, actions, or items incur a term of imprisonment up to 3 years,

[100] Raj, A. (n.d.). Hate speech laws in India (paper). Retrieved November 09, 2021, from https://www.probono-india.in/research-paper-detail.php?id=722

[101] -, S., By, -, Mahawar, S., & Here, P. (2021, September 27). Hate speech in India : An analysis in light of Section 153A and 295A of IPC. Retrieved November 09, 2021, from https://blog.ipleaders.in/hate-speech-india-analysis-light-section-153a-295a-ipc/

ISBN 978-81-948082-8-2

a penalty, or both under Section 295A of the IPC. Section 295-A is a non-bailable and non-compoundable offense, and the police can readily apply Section 41 of the Code of Criminal Procedure, 1973, to prosecute it (CrPC). Both sections 153A and 295A deal with faith, with the difference being that the first deals with inciting hatred between two different groups, whereas the latter concerns individuals who disrespect a community or faith[102].

Ramji Lal Modi v. State of U.P (1957)

The Indian Supreme court affirmed a man's sentence for deliberately insulting Muslims in a feature article. Ramji Lal Modi wrote a piece in Guarakshak, a cow-protection publication, that was considered to be deliberately offensive to Muslims and hence in breach of Indian Penal Code Section 295a. The Court decided that the limitation to protect the community order from shock and provocative speech was legally valid.

The petitioner stated that any law that restricts the right to free speech under Article 19(2) of the Constitution "in the interest of the public order" [103]would only be permissible if the statement was probable to provoke public disturbance and had a direct link to the disturbance. In this regard, disrespecting a society's faith does not usually result in public unrest, though this may in some situations. As a result, the petitioner argued that where legislation encompasses both protected by the constitution and prohibited speech, the Court would rule that law unconstitutional.

This contention was dismissed by the Court. It began by pointing out that the constraints listed in Article 19(2) are mitigated by the phrase "in the interests of," which has a much broader spectrum than "for the preservation of." "A law may have not been established in the interest of the public order even if it was not intended to actively protect public order." The Decision went on to say that provision 295A only punishes religion insults committed "with the conscious and deliberate goal of enraging the religious emotions of that group." As a result, insults delivered "inadvertently" or without intention do not fall under section 295A. The Court defended its position by stating that intentionally meant remarks have a "planned

[102] -, S., By, -, Mahawar, S., & Here, P. (2021, September 27). Hate speech in India : An analysis in light of Section 153A and 295A of IPC. Retrieved November 09, 2021, from https://blog.ipleaders.in/hate-speech-india-analysis-light-section-153a-295a-ipc/

[103] Ramji Lal Modi v. state of uttar pradesh. (2021, July 07). Retrieved November 09, 2021, from https://globalfreedomofexpression.columbia.edu/cases/modi-v-uttar-pradesh/

ISBN 978-81-948082-8-2

intention" to undermine state security.

The petitioner further stated that section 295A belongs in Chapter XV of the IPC, which deals with religious violations, rather than Chapter VIII, which deals with state security offences. As a result, religious crimes have no influence on the maintenance of law and order. The Judge dismissed this claim, citing Articles 25 and 26 of the Constitution, which protect freedom of religion. The exercise of these freedoms is constrained by civil safety. As a result, the Court rejected the notion that a statute enacting a crime in the light of faith can be used to prevent public unrest.

As a result, the Court rejected the Petitioner's plea and determined section 295A of the IPC to be valid.

ONLINE HATE SPEECH: CRIMINALISING HATE SPEECHES

Section 66A of the Information Technology Act, 2000, which was affirmed by the Landmark Judgment of Shreya Singhal vs Union of India in 2015, makes it unlawful to propagate hostile speech online. After this clause was removed from the Act, the Parliamentary Standing Committee put up a proposal to alter the Act so that it more effectively and appropriately incorporates hate speech that may be found on the internet.

The state may restrict any online tool from any website or publication if it damages civil order, sovereignty, integrity, or fosters hostile speech, according to Section 69A of the same IT Act.

Impact of hate speech on freedom of expression

In recent years, hate speech has significantly impeded individuals' rights to freedom of expression and speech.

As was mentioned earlier in the piece, hate speeches that are disseminated by various media channels have led to unrest and violence in the general public, which has even put the accused person's life in jeopardy. There are only a few prominent figures in the media who abuse their power. Their unbalanced reporting that favours one particular political party or ideology over

ISBN 978-81-948082-8-2

another has led to a reduction in the amount of public debate and criticism that is objective. The media of today targets a particular group and individuals within that group, and it labels them as "antinational" or "Naxalites." There are programmes broadcast on national television with titles like "Traitors vs. Patriots." In order to increase viewing, the media builds a narrative that is cynical, it distorts the facts, and it provides news that is spectacular.

As the proliferation of false information throughout the many internet platforms has become more frequent in this day and age, the issue of hate speech has also increased with it. The use of social networking applications such as WhatsApp has become the most prevalent method for the dissemination of hate speech. Despite the efforts of the WhatsApp firm to educate its users about the dangers of spreading false information or any message that may be considered hate speech, incidents of mob lynching and assaults on people as a result of false suspicion are still occurring. Trolls on social media have emerged as yet another major concern for websites that facilitate social networking. Trolling is the practise of defaming a person via the use of social media by making comments that are intentionally provocative or hurtful.
Hate speeches are often given by politicians in today's world for the purpose of garnering personal political benefits and also elevating their own religious ideas. Politicians have been caught on several occasions making alarming remarks, such as "Muslims should shout Bharat Mata ki Jai if they wish to survive in India." This leads to intolerance of other religions and violence among communities among the general population.

There has been an increase in the number of incidents of hate speech as a direct result of the absence of stringent regulations to limit hate speech and to hold the person responsible for its distribution.

SUGGESTIONS/CONCLUSION

It is difficult to differentiate between free speech and hate speech in a country like India because of the large number of people who come from a diverse range of backgrounds and traditions. As a result, dealing with contentious issues such as hate speech has become one of the most challenging problems facing the country. When attempting to limit speech, there are a number of considerations that need to be given attention. These include the number of contrasting viewpoints, the potential for offending certain groups, and the effect on the principles of dignity, freedom, and justice. Although there are laws that prohibit such acts,

ISBN 978-81-948082-8-2

there is still a significant amount of work that has to be done.

It is not an easy undertaking to apply laws in a manner that is both effective and reasonable in the context of the situation. Concurrently, the issue that needs to be addressed is whether or not the existing legislation is sufficient to manage the difficulties of controlling hate speech. Considering the delicate balance that needs to be achieved when dealing with instances of hateful speech and administering justice to those who were involved, this is a question that needs to be answered. The damage that is caused by hate speech is not only harmful, but also exceedingly dangerous. It is a double-edged sword. There is no way to repair the damage that is done to the public as a whole as a result of hateful speech, and there is also no opportunity for victim rehabilitation or any other kind of form of vengeance. As a consequence of this, it is very necessary for individuals to search for a solution to an effective response to hate speech that goes beyond the confines of the criminal justice system.

The Indian laws that ban hate speech must to be examined and revised according to the requirements of the situation. A number of components of the legislation against offensive speech are far too open to interpretation. These aspects include those that deal with encouraging animosity between classes and groups, inciting a riot, and willfully insulting a religion. A rule of this kind would cover an extremely wide range of situations.

On the surface, this seems to imply that legal action may be taken if a person's sentiments are injured in any way. Even if a more objective point of view is adopted, in the end it will be up to the court to decide whether or not the work in question is offensive to the prototypical reasonable man.

The Viswanathan Committee recommended including Sections 153 C (b) and 505 A in the Indian Penal Code (IPC) as a punishment for inciting others to commit a crime on the basis of their faith, colour, class or group, gender, sexual preference, birthplace, domicile, dialect, impairment, or ethnicity. This was one of the recommendations made by the committee.

Although there is a valid concern that these social networks may resort to excessive censorship, it is possible that this worry might be alleviated by recruiting material censors who have received enough training and are better conversant with India's socio-political system. Activists from all across the world have made the suggestion that websites, rather

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

than enforcing a single rule globally, should instead investigate the possibility of crafting region-specific censoring criteria.

In conclusion, the significance of independent, high-quality reporting cannot be understated. This kind of reporting emphasises telling the truth, cultivating a critical mentality, providing assistance to disadvantaged populations, and verifying material found online. The only way to ensure individuals who have been wronged by such actions get justice is if we wait until that point.

The true objective here is to pinpoint the underlying reason for hateful speech and put an end to it. This will not only be accomplished via the implementation of stringent legislation, but also through the dissemination of information about nonviolent and inclusive methods. It is necessary for the effective healing of social miscommunications in order to keep the likelihood of hateful and hurtful communication in the community to a minimal. This will allow for the possibility of hatred to be reduced. When it comes to rules and regulations regarding hate speech, it is essential to ascertain the motive for these laws, as well as to ensure that their smooth execution is ensured. It is very necessary to find a middle ground between the right to free expression and the practise of stirring hate in order to keep the latter under control. It is necessary to have both effective education and robust discussion within a democratic framework in order to address the primary factors that contribute to hate speech. It not only tries to stop hatred, but also to raise awareness about the negative consequences of hateful speech.

BIBLIOGRAPHY

Hate Speech Laws in India (Paper) | ProBono India, https://www.probono-india.in/research-paper-detail.php?id=722 (last visited Nov 9, 2021)

Understand what constitutes Hate Speech CJP, https://cjp.org.in/understand-what-constitutes-hate-speech/ (last visited Nov 9, 2021)

Hate speech in India : an analysis in light of Section 153A and 295A of IPC iPleaders, https://blog.ipleaders.in/hate-speech-india-analysis-light-section-153a-295a-ipc/ (last visited Nov 9, 2021)

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Ramji Lal Modi v. State of Uttar Pradesh Global Freedom of Expression, https://globalfreedomofexpression.columbia.edu/cases/modi-v-uttar-pradesh/ (last visited Nov 9, 2021)

Do Indian Courts Face A Dilemma in Interpreting Hate Speech?, Economic and Political Weekly 7–8 (2015)

Hate Speech in India, https://legalserviceindia.com/legal/article-1056-hate-speech-in-india.html (last visited Nov 9, 2021)

"Hate Speech in India Relies on Stoking Fear to Escape Criminal Action": Study The Wire, https://thewire.in/communalism/hate-speech-in-india-relies-on-stoking-fear-to-escape-criminal-action-study (last visited Nov 9, 2021)

COUNTERING HATE SPEECH IN INDIA: LOOKING FOR ANSWERS BEYOND THE LAW, https://www.ili.ac.in/pdf/csi.pdf (last visited Nov 8, 2021)

DEVELOPMENT OF REAL ESTATE LAWS IN INDIA: A STUDY

Authored By - Srishti & Sunil Kumar

1ResearchScholar, University Institute of Legal Studies, Chandigarh University, NH-95, Chandigarh-Ludhiana Highway, Gharuan, Mohali (Punjab) 140413, srishtigarg2016@gmail.com

2Associate Professor, University Institute of Legal Studies, Chandigarh University, NH-95, Chandigarh-Ludhiana

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Highway, Gharuan, Mohali (Punjab) 140413,uils.sunil@cumail.in

ABSTRACT:

Real estate is not a new sector in India. It is an industry which has developed over the passageof time. Earlier, property was a mere basic necessity for people included under the three very basic necessities for survival i.e., 'roti', 'kapda, makaan'. The concept of private ownership of land emerged after the development of the agriculture. Before agriculture, people wandered from one place to another in search of food, clothing and shelter. They survived by eating flesh, fishes and fruits. While with the development of concept of ownership land, disputes began to arose. Although, property disputes can be traced back from the times of Mahabharata and Ramayana to ancient rulers of the world. However, there was no separate law to deal with the issues being faced by the consumers in the real estate sector. Some of these disputes were covered under The Transfer of Property Act, 1882, Indian Contract Act, 1872, Consumer Protection Act, 2019, etc. After a long wait of 8 years, The Real Estate (Regulation and Development) Act, 2016 was formed and came into existence which dealt with all the issuesof the real estate.

Real estate is considered as the fastest growing and most booming sectors of economy. People now purchase property not merely for residential purposes but for investing purposes also. The Real Estate Act aims at ensuring efficiency, transparency and protection to the consumers. But the need of the hour suggests that changes are required to be made in the present law to deal with the existing problems in the real estate sector efficiently.

KEYWORDS: Real Estate, Land, Property, Residential, Commercial, Unregulated Sector.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

INTRODUCTION:

Human life is not possible without the existence of property. Human beings have a natural desire to possess. Property has multiple implications like social, economic, political, religious and legal implications. Possession of property with the people affect their social status and depict their economic strength. In the same way arises, the concept of private ownership of property by people and legal rights of that individual associated with it. People ensuring it to own property and to retain it developed the law of Inheritance.

Property is anything tangible or intangible that is owned by an individual or entity. An ownerof property has the right of absolute use of his property. He can sell or rent, mortgage, transfer, exchange, or destroy his property, as well as to remove any person from illegal possession and exchange their property with others based on the nature of the property. This right encompassesany intangible right that is regarded as a source or component of income or wealth in additionto money and other tangible items of worth. He has the entire right to enjoy and get rid of some items however he pleases. Property is an appropriate of an object by the individual and the acceptance of this appropriation on the part of the rest of the society.[1]

Moreover, the owner of the property possess three basic rights, the right to ownership, right of possession of that property and right to alienate that property according to one's own will.[2] Also, there is no existence of property with laws and vice versa.

MEANING OF REAL ESTATE

The term 'Real Estate' has not been defined specifically anywhere. However, according to the New Standard Encyclopaedia, "Real estate or Real property is land and the improvements (such as buildings and trees) attached to the land. Real estate includes not only the surface of the land, but also everything under its surface, such as oil, gas, coal, or other minerals".

Also, Real estate is a type of tangible property that is comprised of land and includes all of the things that are affixed to it, such as apartment buildings, shopping centres, and single-family homes as well as natural objects growing on the land.[3]

[1] R.S.Bhalla, *The Institution of Property* 4 (Eastern Book Company, Delhi, 1st edn., 1984).

[2] *Inder Sen* v. *Naubat Sen* (1885) ILR 7 All 553. [3] Lynn T. Slossberg, *The Essentials of Real Estate Law* 18 (Delmar Cengage Learning, New York, USA, 2nd edn.,2008).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

According to the Cambridge Dictionary, "Real Estate has been defined as the property that is in the form of piece of land and buildings that someone owns.[4]

Wex definitions state that Real estate is a plot of land that includes any man-made or natural property that is inextricably linked to it, either above or below, such as a home, a structure, a tree, or minerals. Property rights belong to the owner of real estate. [5]

India has an enormous demand for space. The future appears to be promising for the associated real estate industry. Rapid development can be harmful and tragic when unchecked. Strong regulation is ultimately needed for healthy and long-lasting real estate markets. One of India's fastest growing industries, real estate is still underwhelmingly governed. Real estate is also considered as an strong indicator of strength, stability and independence.

EVOLUTION OF REAL ESTATE SECTOR:

Real Estate is considered as a crucial resource for an individual, firm, or even the region; thus, the significance of the real estate in the present era is undisputable. The real estate industry does not only comprise of the land and residential properties. It includes a list of variety of properties based on the nature of the activities it is used for viz. commercial, entertainment, educational, religious, recreational, etc., and it also covers an extensive variety of business activities ranging from development, sale, and purchase of land and building. Development of Real estate sector has helped in strengthening the socio-economic structure of India. [6]

The growth of other economic sectors like retail, hospitality, entertainment, education, and information technology, as well as increasing commercial prospects and an expanding labour force, all contribute to the development of the real estate sector. These factors increase demand for commercial and residential real estate, especially rental housing. As a result, the Indian real

[4] *Available at*: https://dictionary.cambridge.org/dictionary/english/real-estate (last visited on 27-11-2022).

[5] *Available at:*https://www.law.cornell.edu/wex/real_estate#:~:text=Real%20estate%20is%20a%20piece,estate%20has%20real%20property%20rights (last visited 12-12-2022).

[6] Ayush Banerjee, "Housing in India with RERA (Real Estate Act)", INPRA, 2017, *available at*: http://inpra.in/2017/05/01/housing-in-india-with-rera-real-estate-act/ , (last visited on December 8, 2022).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Residential Real Estate- it is a kind of property which is purchased, improved or developed for residential purpose. People live there and consider it their home. For example- single family house, residential complexes where families have separate ownership and residence, etc.

estate industry is one of the most booming businesses of the present, and it is predicted that it would eventually draw FDI from all of the major global investors, so boosting the Indian economy.[7]

The real estate sector is broadly categorized into two types, Residential and Commercial real estate.

Commercial Real Estate- it is a type of property which is purchased with the primary purpose of conducting business or commercial transactions. Properties which are used as corporate offices, home offices, warehouses, multi-national companies, etc

Any person's expectations from owning a piece of property, supported by their financial capacity to do so, are a crucial component in determining the value of the asset. Without the proper demand for certain commodities and services, the supply of those goods and services is useless and ineffectual. According to economic theories, it is possible to increase demand fora property by lowering the price, and it is also possible to decrease demand for a property by increasing the price. Such a price increase influences potential investors or buyers to purchase the property at a greater price or choose an alternative offered in the market.[8]

The components of a property's structure and construction, such as the material used in construction, the property's layout plan, the building's design, as well as the property's longevity, have an impact on its value. The value of any property is influenced by the qualityof the materials used together with the building requirements, including the size of the property,the area available for development, its dimensions, its foundation and platform, as well as any waterproofing and disaster management features. The value of such a property increases with the quality of the materials and other building blocks employed in its creation. Additionally,the

[7] Alan Billingsley, "RREEF Global Real Estate Investment Outlook and Market Perspective 2011", *available at:* http://realestate.deutscheam.com/content/_media/RREEF_Global_Investment_Outlook_Market _Perspective_2011.pdf, (last visited on 10-11- 2022).

[8] A. Bansal, "A Review on Indian Real Estate: Trends, Challenges and Prospectus" 1 KKIMRC *InternationalJournal of Research in Human Resources Management* 39-55 (2011).

availability and possibility of the buyer's option for customization affects the price of real estate.[9]

SITUATION PRIOR TO 2016:

ISBN 978-81-948082-8-2

The real estate sector was highly unregulated before the 2016 regulation. There was no central legislation to act as an regulatory body to deal with the various problems existing in the real estate sector. Various existing legislations dealing with the grievances of the consumers in the real estate sector are-

The Indian Contract Act, 1872: It deals with law relating to contracts, capacity to enter into a contract, execution, breach and remedies available to the aggrieved thereof.

Transfer of Property Act,1882: This act provides general principles of property such as sale, exchange, mortgage, lease, etc.

Indian Easement Act,1882: This act deals with the law related to easementary rights of immovable properties.

Registration Act,1908 and Indian Stamp Act, 1899: The condition stipulated in Transfer of Property Act 1882 mandates for registering of the written document pertaining to all deeds of transfer of property between the parties.

Special Relief Act, 1963: The Specific Relief Act explains the right and liability of a person involved in the real estate transaction especially in connection with filling a legal action against the party of the registered transfer deed.

Land Acquisition Act,2013: This act deals with acquisition of private land or property by the central or state government for the development of public utilities and infrastructural improvement.

Consumer Protection Act,2019: this act provides redressal to the consumers availing the housing construction or residential property as it falls under the definition of 'service' under the said act.
Draft Model Tenancy Act, 2019: The Model Tenancy Act of 2019 provides a model legislative

[9] Vandna Singh and Komal, "Prospects and Problems of Real Estate in India" 24 *International ResearchJournal of Finance and Economics* 242-254 (2009).

framework to address issues relating to rented housing in order to resolve the challenges presented by the current State legislation relating to tenancy and rental properties.This act covers properties used for residential, commercial as well as for educational purposes.

Land Revenue Codes: The laws governing land revenue, tenancy types, agricultural land holding, and other related issues have been developed by many States around the nation. The mentioned code includes the division and classes of immovable property in a State, transfer limitations,

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

responsibilities and authority of tax officers, and guidelines and sanctions for code violations.

THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT,2016

Although the real estate industry is one of the major drivers of the economy, it is astonishing how unregulated it remained for a long time because there was no specific regulator. The lackof such regulatory or monitoring mechanisms led to an increase in the number of real estate fraud and shady scheme victims. Despite the fact that the industry was mostly unregulated, customers in the real estate sector were protected under the Consumer Protection Act of 1986 (now the Consumer Protection Act of 2019), and they also had the choice to seek redress in civil courts.

The ambiguity in settling the dispute in the most efficient and practical way was brought about by the inclusion of potential buyer in the definition of real estate buyer.[10] Similar to this, a person's housing needs have long been one of their main goals in India, but they come with a number of legal complications that make buying or selling real estate an extremely time- consuming process.[11] Demand for property space is booming in India. The future of the real estate industries appear to be really bright. However, when growth in some industry takes place rapidly in an uncontrolled manner, it is dangerous for the society and may result in tragedy.

Although the real estate industry is one of the major drivers of the economy, it is amazing that until recently there was little regulation because there was no specific controller. increasing number of victims of shady schemes and real estate fraud as a result of monitoring mechanism Although the legislative requirement for consumer protection offers a different way to request for treatment with a comparatively lower financial burden, it offers the curative major rather than the

[11] Sachin Mittal, *The ABC of Real Estate in India* 17-53 (White Falcon Publishing, 1st edn.,2018).

[10] T. Koti Reddy, "Progress of Real Estate Sector in India"3 *Indian Journal of Applied Research* 25-27 (2013).

ISBN 978-81-948082-8-2

preventive major to protect the rights of homebuyers. The lack of institutionalisation and refined competence in the real estate market has an impact on the Indian real estate industry.[12]

Before the Act was passed, most real estate disputes were handled by the Consumer Protection Act of 1986, while complaints of unfair business practises were handled by the Competition Commission of India (CCI) in accordance with the Competition Act of 2002. The National Conference of Housing Ministers of States and Union Territories in January 2009 was when the proposal to pass legislation for the regulation and control of the real estate sector initially emerged.[13]

The Real Estate (Regulation and Development) Bill, 2013, as approved by the Union Cabinet in its meeting on 4th June, 2013. The bill was introduced in the Rajya Sabha by Dr. (Ms) Girija Vyas, Minister of Housing and Urban Poverty Alleviation on 14th August, 2013 which is the he most comprehensive overhaul of the legislative intent to regulate the real estate sector.[14] The Bill was introduced on the grounds that it was necessary to provide "a regulatory oversight structure to enforce, disclosure, fair practise and accountability rules in the real estate sector, and to provide adjudication machinery for quick dispute redressal." The bill was later gone through various rounds of deliberations by Standing as well as Select Committee before it is passed by Rajya Sabha and Lok Sabha as Real Estate (Regulation and Development) Act 2016 which came into force on May 01, 2017.[15]

It was felt that the Consumer Protection Act, 1986 was only curative and inadequate to address all the concern which arises in the real estate sector. The shortcoming leads to a lack of professionalism and standardisation in the real estate market, which has a negative impact on India's future in the real estate industry. The Real Estate (Regulation and Development) Act 2016 was thus introduced in order to ensure that the country's real estate market is efficient and consumer-friendly. This was done in recognition of the need for a specific regulatory framework.

---

[12] Arindam Bandyopadhyay and Asish Saha, "Distinctive Demand and Risk Characteristics of Residential Housing Loan Market in India" 38 *Journal of Economic Studie*s 703-724 (2011).

[13] Press Information Bureau, Ministry of Housing and Urban Poverty Alleviation, 30-04-2016, *available at*: http://pib.nic.in/newsite/PrintRelease.aspx?relid=142595 (last visited on 23-11-2022)

[14] *Available at*: http://pib.nic.in/newsite/PrintRelease.aspx?relid=98224 (last visited on 29-12-2022).

[15] M.V. Durga Prasad, *Law Relating to Real Estate Regulation in India*, 2 (Asia Law House, 2nd edn., 2017).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Additionally, the Indian real estate market has always been unsteady due to a largely unregulated industry, which served as a catalyst for the loss of confidence between buyers and sellers. Additionally, although being one of the major contributors to the economy, this sector never had a single, central regulation guiding its operations and was instead heavily influenced by the control of the individual States.

With the implementation of the Real Estate (Regulation and Development) Act, 2016, this industry felt a paradigm shift in its governance the year before. The Act's 69 sections were notified before it went into effect on May 1, 2016. This Act addresses the construction of both residential and commercial buildings, as well as the goals of any trade, profession, or other activity, as well as other matters pertaining to the real estate sector.[16]

This act has been proved to be a significant step in controlling the troubled real estate marketin India by guaranteeing effectiveness, transparency, and the protection of consumer interests. Some issues, though, had not been resolved.[17]

Despite the fact that the Indian real estate industry has recently seen steady and sustainable growth, it is not exempt from the market abuses brought on by the unethical and immoral behaviour of builders and developers across the country. Similar to how the real estate in India has consistently come under fire for excessive delays in the completion of real estate projects, subpar construction quality, and investor susceptibility that leads in the violation of their rights.

Since the RERA Act of 2016 has established accountability for all parties engaged in real estate transactions and increased transparency in real estate transactions, investing in real estate is now much safer. The main goal of proposing this Act is to guarantee the protection of the buyers from builders' and developers' fraudulent behaviour in real estate transactions. It is a positive step toward improving the nation's socioeconomic and legal situation, but there are some unresolved issues with the implementation of real estate laws, such as the fact that real estate projects in India take a long time to complete due to the complexities involved in thelegal and administrative mechanisms, which causes operational delay.

[16] Malvikka Arya and Rishabh Manocha, "Promoting Investment: Governance of Properties with Rera andBenami Law" 5 *KIIT Student L Rev* 70 (2018).

[17] *Available at:* http://164.100.47.4/billstexts/lsbilltexts/asintroduced/290LS%20AS%20INTRO.pdf, (last visited at 12-12-2022).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

The properties that are covered under the ambit of RERA are both residential as well as the commercial properties and the plotted distribution of developed land wherein the area of the property measure more than five hundred square meters or more than eight units whichever is more.[18]

CONCLUSION AND SUGGESSTIONS

The residential real estate market's lack of organisation makes the real estate sector subject toa number of hazards even as it has recently experienced growth. Residential real estate transactions have always been difficult for clients to carry out, particularly for those from the middle class.

The correct execution of a regulatory framework is necessary for its efficacy. The regulatory structure, it seems, has a number of problems and difficulties that prevent it from being implemented properly. To understand the essential modifications for an efficient legal system in the context of future requirements, these difficulties and challenges must be taken into account and examined.

The introduction of RERA results in the establishment of fundamental standards and criteria for real estate development in India, and its successful implementation would be a game- changer for a variety of stakeholders. However, the successful implementation of RERA is not possible without the support and consideration of the relevant State government. Real estate project developers have emphasised that the retroactive application of RERA deviates from their justifiable expectations as well as their earned interest.

The process and formalities for conducting real estate business are governed by real estate legislation. It oversees and controls how the nation's real estate market is operating. It affects many parties involved in real estate transactions, including home purchasers, renters, developers, landlords, real estate agents, etc., directly or indirectly.

[18] Real Estate (Regulation and Development Act) 2016 (Act 16 of 2016), s. 3(2)(a).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

PROTECTION OF INVESTORS IN INDIA: A STUDY

Authored By - Divya Sharma
& Dr. Deepti Monga

Abstract

Every company needs capital to run its business. Capital involves huge risk. The larger the amount of capital, higher the level of risk involved. Due to the immense financial burden, it is virtually difficult for a firm to face any form of risk alone. To tackle this problem company needs the public through indulging them to make investment by offering them variety of schemes. The persons making investment in the company are investors and a law namely security laws being passed for their protection. For the securities market to operate smoothly, maintain openness, and protect investor interests, several Acts, rules, and regulations have been passed. Doctrinal research methodology is followed in this research. In this secondary data is to be used. This research present about the investor protections program and initiatives taken by SEBI to generate awareness among investor regarding investment and the rights of investors. Also the redressed mechanism of SEBI i.e., SCORES. SCORES is the online web based system in which investors can lodge complaint and also track the status of their complaint.

Keywords : Investment, Investors, Investor Protection, Security Law.

1. INTRODUCTION

An 'investor' is the person who invests or contributes money with the expectation of return out of that. Simply, investor is the person who makes investment for getting a return. Investors are the real owner of company. Investor can be individual or an entity. The main concern of investor is to get maximum return with minimum risk. Investors are individuals or groups who use the securities market to invest money in businesses in order to receive a return in the form of profits.[104] Capital market, commonly referred to as the security market, is further broken down into the primary and secondary markets. When investors invest in the company, they becomes

[104] Institute of company secretary of India, securities law and capital market 743, ICSI study material, October, 2017.

 ISBN 978-81-948082-8-2

shareholder of that company. They get benefit by way of dividend and capital appreciation. Shareholders also have some rights in the company as well as some responsibility.

The primary element of this market is to safeguard the interest of stakeholders for the growth of market. Protection of investment concentrate on making sure that the investor has complete knowledge of company in which he is going to invested. To protect the investor's right and built up confidence among them various legislations has been passed and various guidelines, rules and regulations are issued from time to time. Investors are the main source for the economic growth of a country. Investors needs protection from various malpractices, unfair trade practices of corporate and intermediaries. For the development of economy it is necessary to make security market operation effective, fair, transparent and safe.[105]

The investor protection means the process of protection of interest of investors in securities market. For investor protection various measures or initiative taken by SEBI in India.

2. Securities market:

The financial asset that grants ownership to the holder is referred to as a security. The term "security" is defined in Section 2(h) of the Security Control Regulation Act of 1956 to include shares, warrants, stocks, bonds, debentures, and other marketable instruments.

The market for securities is where securities are bought and sold based on their supply and demand. It is the location where trading is done with the goal of helping various businesses raise funds because it requires a significant investment. It is also known as capital market and capital market has two components that is primary market and secondary market. Primary market is deal with new securities and secondary market deals with existing securities which have been already issued. In primary market securities are issued to public with the guidelines of company's act, listing and SEBI. Secondary market is wider than primary market so investor protection in this market is necessary. Every participant of secondary market get themselves register with SEBI.[106]

[105] Prithvi Haldea, "guide to investors" 1-5, ministry of corporate affairs, Investor protection and education fund,2010.
[106] Moushumi sarmah, *protection of investors in India* 2 International journal on law and legal jurisprudence studies (2015).

 ISBN 978-81-948082-8-2

3. Investor protection measure by SEBI

The SEBI Act, 1992 gave the statutory regulatory agency, SEBI, which was founded on April 12, 1988 as an executive body, statutory authority on January 30, 1992. SEBI came into existence with the objective of protection of investors and to promote the development and regulation of security market. Head office of SEBI situated in Mumbai and branch office at Delhi, Kolkata, Chennai. Now SEBI recently open its branch office among different cities that is Ahmedabad, Jaipur, Bangalore, Guwahati, Bhubaneshwar, Patna, Kochi and Chandigarh.[107]

The SEBI has the power under section 11(2) of SEBI act to take measures for the protection of investors. These measures are:[108]

- Regulate the business of stock market.
- Register the intermediaries and regulate the work of intermediaries.
- Register and regulate the work of depositaries, depositary participants and other institutions.
- Prohibit fraudulent and unfair trade practices in securities market.
- Prohibit insider trading in securities.
- Promote investors education and training of intermediaries.
- Regulate substantial acquisition and takeover of companies.
- Others as prescribed.

4. INVESTOR PROTECTION: LEGAL FRAMEWORK

I. SEBI (Stock Broker & Sub Broker) Regulations, 1992

As investors are not connected directly in stock market, they are connected through intermediaries. So it is necessary for the protection of investors to keep monitoring the working of intermediaries. To work as intermediary, it is compulsory to get themselves register with SEBI and also follow the regulations that are issued by SEBI. Under Chapter VI, SEBI may impose a financial penalty in the event of a default.[109]

[107] SEBI Act, 1992, s.11.
[108] SEBI (Investor protection and Education fund) Regulation, 2009.
[109] SEBI (stock broker and sub broker) Regulation act, 1992, s.10.

 ISBN 978-81-948082-8-2

II. SEBI (Prohibition of Insider Trading) Regulations, 1992

The word 'insider' means the person who have connected with the company have accessed to unpublished price sensitive information in respect of security or the company. The term "insider trading" refers to certain actions that are prohibited by regulation 3, such as having direct or indirect access to any confidential price-sensitive information and communicating with or providing advice to any third party without payment. If any person convict of insider trading then a heavy penalty shall be impose on that person by SEBI.[110]

III. SEBI (Investor protection and Education Fund) Regulation, 2009

The major goal of this legislation is to safeguard investors' interests by educating them and raising their level of awareness through the organisation of seminars, research, publications, and other events. A fund called the "Investor Protection and Education Fund" was formed in 2007 since providing education costs a lot of money.[111]

5. Legislations dealing with security market

There are mainly four legislations which are related to security or capital market. These legislations mainly involve with share market and deal with all the transactions of capital market. There legislations are as follows:

- SEBI Act 1992; This law primarily deals with investor protection, encouraging the growth of the securities market, and regulating how the capital market operates.[112]
- Companies Act, 2013; set a code of conduct related to issue, allotment and transfer or disclosure in public issue.[113]
- Securities Contract Regulation Act, 1956; this act frame the rules and regulations regarding working of stock exchange.[114]
- Depositaries Act, 1996; this act maintain holding of shares in electronic form and transfer of ownership in demate account.[115]

[110] SEBI (prohibition of Insider trading) Regulation, 1993.
[111] SEBI (Investor protection and education fund) Regulation, 2009.
[112] SEBI act 1992, s.11.
[113] Companies act, 2013, s.26, 56.
[114] Securities contract regulations act, 1956, s.4.
[115] Depositories act, 1996, s.29.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

6. SEBI INITIATIVES RELATED TO INVESTMENT AWARENESS

1. SaaRTHI APPLICATION

saaRTHI app is the recent initiative taken by SEBI for investor awareness in security market. Its aim is to create awareness among investors about share market, recent market development, trading and settlement and investors grievances redressal mechanism etc. This app is available in English and Hindi both.[116]

2. Advertisement

SEBI makes various advertisements related to securities market for investors. SEBI also prepared some do's and don'ts for investors of security market for their protection.

3. Education

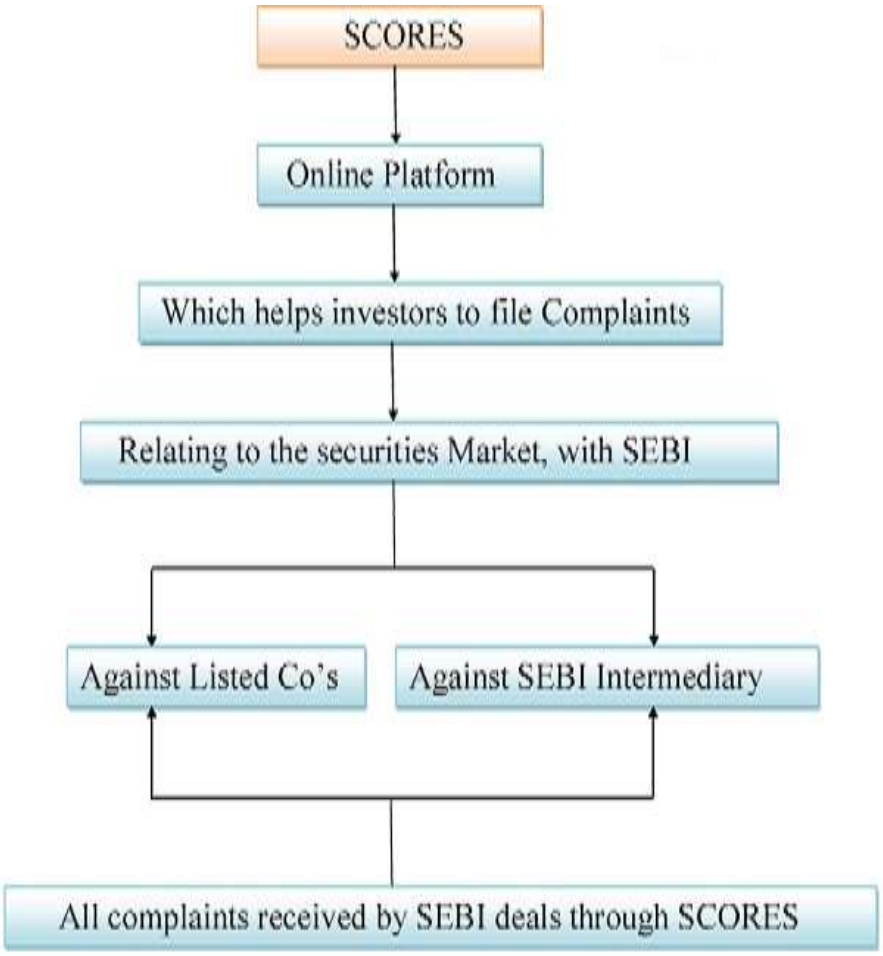
SEBI also organise seminars and educational programme for provide knowledge of investment and awareness in securities market. SEBI also aware people about their rights as investor. SEBI provide education through reading material, by the medium od radio, or through website i.e., http://investor.sebi.gov.in

7. INVESTOR GRIEVANCE REDRESSAL SYSTEM

SEBI provides an online platform to investors to resolve their grievance. That platform is named as SCORES. Investors can use SCORES as a platform to submit online complaints about the securities market and to follow the status of those complaints. It is a platform which is available 24x7 and can be accessed from anywhere else. It saves the time of investors and also easy to use. Here is the figure to get a overview about SCORES.

[116] *Available at* https://byjus.com/current-affairs/saarthi-app/ last visited on December 26, 2022.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

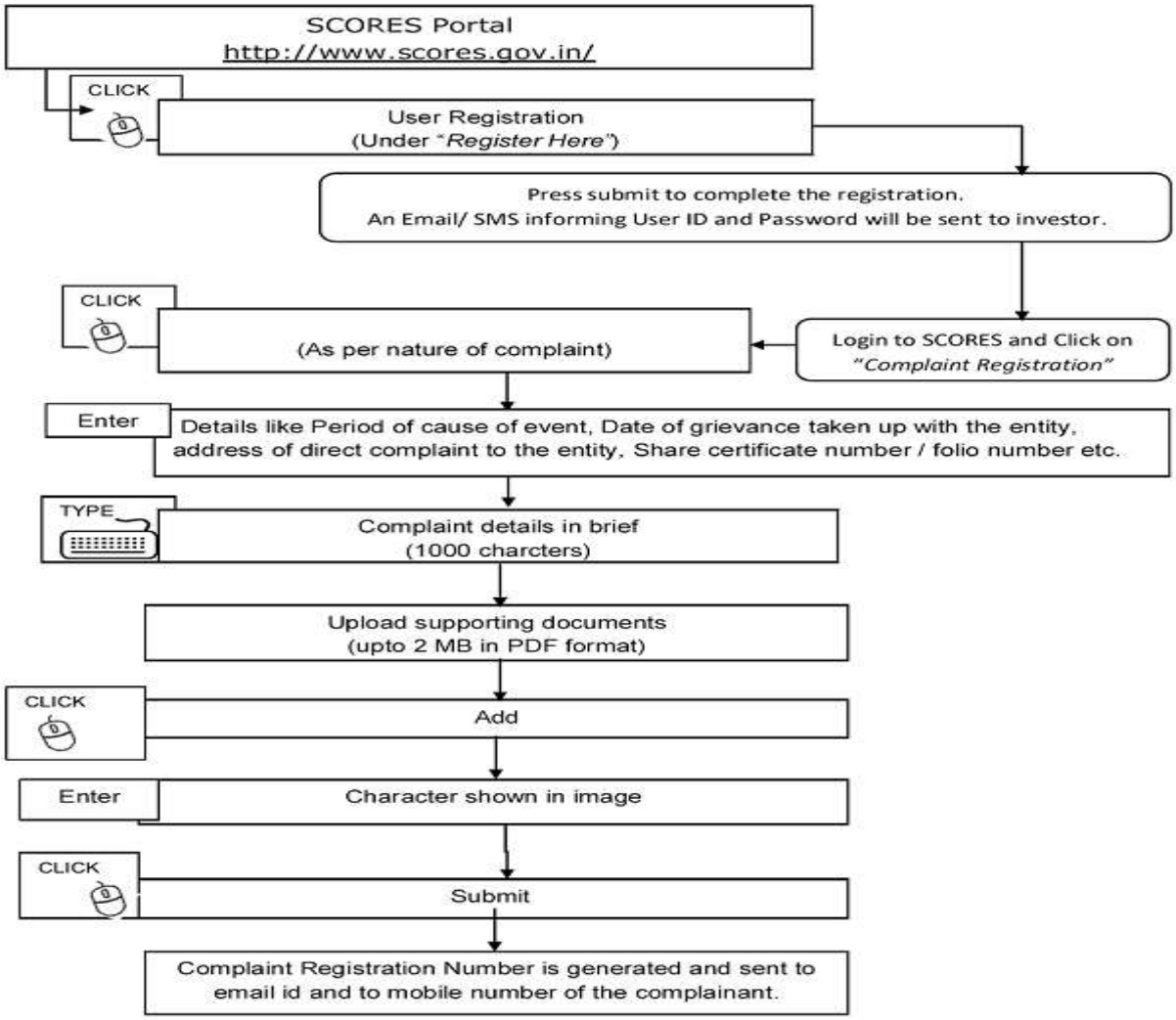


SCORES complaint redressed mechanism[117]

[117] *Available at* www.taxguru.in last visited on December 25, 2022

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

8. PROCESS TO LODGE A COMPLAINT ON SCORES



SEBI investor grievances redressed system[118]

9. COMPLAINTS NOT ADDRESSED BY SCORES

The following matters that cannot be addressed by SCORES:[119]

i. Complaint not related to investment in the securities market.
ii. Complaints that are insufficient or unclear.
iii. Allegations made without evidence.

[118] *Available at* https://taxguru.in/sebi/investor-grievance-redress-mechanism-policy-measures.html last visited on December 25, 2022
[119] *Available at* https://www.indialawoffices.com/legal-articles/complaints-pertaining-to-shares-and-securities-of-companies-practice-and-procedure last visited on January 2, 2023.

 ISBN 978-81-948082-8-2

iv. Looking for clarification or advice.
v. Dissatisfied with the share price of the companies' shares on the market.
vi. Disputes arising out of unlisted companies/intermediaries.
vii. Matters involving fake/forged documents.
viii. Complaints about any unregistered/un-regulated activity.
ix. Unlisted/ Delisted companies.
x. Sick companies.
xi. Suspended companies/ companies under liquidation.
xii. Company falling under the preview of other regulatory bodies.
xiii. Company under moratorium order is passed under liquidation/ insolvency proceeding.

10. CONCLUSION

It is concluded that SEBI faces many problems in the development of security market. SEBI act as a dog of share market who always monitor the activities of share market and the persons connected with share market. Investor education campaigns is the great step for the protection of investor and awareness and it results in positive to some extent, still lot more efforts need to be done. According to current scenario, it is to be noted that grievances redressal system established by SEBI done a lot for solving the problem of investors which build up the confidence of investors in share market. But still there is a need to serve more because there are a lot of investors who not get their grievances register. SEBI do some more initiatives to get investors aware about their rights and also tackle their grievances in share market. Moreover, SEBI also invites suggestions from investors to improve its existing service regarding grievances.

11. BIBLIOGRAPHY

Books-

1. Agarwal Sumit &Robin Joseph Baby, SEBI Act (Taxmann Publication 2011)
2. Capital market and security law (The Institute of company secretary of india)
3. SEBI (prohibition of insider trading) regulation, 1993.
4. SEBI (investor protection and education fund) Regulation, 2009.
5. SEBI Act, 1992.
6. SEBI Manual (15th edn, Taxmann Publications 2010)

 ISBN 978-81-948082-8-2

7. Sekhar K., Guide to SEBI capital issues debentures and listing (3rd edn, Wadhwa &Company 2003)

website

'Securities and Exchange Board of India' http://en.wikipedia.org/wiki/securities_and_exchange_board_of_india

http://investor.sebi.gov.in/Reference%20Material/rights%20and%20responsibilities.pdf accessed on 25 December 2022

Image available at https://taxguru.in/sebi/investor-grievance-redress-mechanism-policy-measures.html accessed on December 25, 2022

accessed 25 December 2022

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

CONSUMER PROTECTION IN INDIA

Authored By - Diksha Sharma

& Dr. Sunil Kumar

University Institute of Legal Studies, Chandigarh University, NH-95, Chandigarh-Ludhiana Highway, Gharuan, Mohali (Punjab)14041diksha.sharma3126@gmail.com

Associate Professor, University Institute of Legal Studies, Chandigarh University, NH-95, Chandigarh-Ludhiana Highway, Gharuan,Mohali (Punjab) 140413, Uils.Sunil@cumail.in

ABSTRACT

We live in the age of the consumer. Government and private sector actors should work together to ensure the safety and well-being of consumers as part of their socioeconomic responsibilities. Before India's independence, protecting consumers was a key aspect of the consumer's protection. However, in 1986, a formal consumer protection legislation was created with the express purpose of protecting consumers. In 1986, a landmark year in consumer history, the Consumer Protection Act was signed into law. The first law of its sort in India, it seeks to alleviate the pain of customers who have been mistreated by unscrupulous businesses or who have received inferior products or services. Providing quasi-judicial apparatus for the redress of consumer complaints is central to the Consumer Protection Act, the goal of which is to resolve matters as quickly and easily as possible. More protections for consumers are included in section 2(9) of the Consumer Protection Act of 2019 as a result of the recent legislative reorganisation. Other consumer protection laws in India include the Indian Contract Act of 1872, the Sales of Goods Act of 1930, the Indian Penal Code of 1860, the Drugs and Cosmetics Act of 1940, the Civil Procedure Code of 1908, the Prevention of Food Adulteration Act of 1954, the Essential Commodities Act of 1955, the Companies Act of 2013, the Agriculture Procedure of 1937, etc. In a broader sense, these rules safeguard the interests of customers by preventing them from dealing with dishonest merchants. This study traces the protection of consumer protection in India, from its inception to the current consumer protection legislations.

*"**Keywords:** Consumer, awareness, consumer protection, consumer rights, consumer protection act."*

INTRODUCTION

ISBN 978-81-948082-8-2

There has always been a strong emphasis on the consumer in Indian society. There are references to how a client ought to be handled all the way back in ancient texts, and even as recently as the early 20th century, when Mahatma Gandhi said that a customer is valuable because he provides a favour to a business owner. As previously said, it was U.S. President John F. Kennedy who first brought up consumer interest when he introduced the consumer Bill of Rights, outlining four basic protections for consumers: the "right to safety," "right to choose," "right to be heard," and "right to information."[120]

As a result, the idea of consumer interest and protection found its way to the United Nations in 1985, and eventually entered the framework of legislation of nations throughout the globe, including India. In 1986, India established the Consumer Protection Act, the primary purpose of which was to create a consumer council and to provide for the resolution of consumer complaints and other issues related thereto.

CONCEPT OF "CONSUMER" AND "CONSUMER PROTECTION"

The definition of a consumer, as stated in the collegiate version of Webster New World Dictionary, is "A person who uses goods or services to satisfy his needs rather than to re-sale them or produce other goods with them." A customer is defined by the Molony Committee on Consumer Protection as "one who purchases goods for private use or consumption."[121]

According to the Consumer Protection Act of 1986, "a person who purchases products or employs or uses services for 'consideration' is referred to as a consumer."[122] The Supreme Court stated that the word 'consumer' is a finished enunciation that connects from a person who buys anything as like consumable or else regardless commencing a business house, shop, association to use for private or open organisations." in the case of *Lucknow Development Authority* v. *M.K. Gupta*.[123]

Consumer protection is a combination of the phrases "consumer" and "protection." The last suggests a degree of defence for the first. In order to prevent businesses from taking advantage

[120] Consumer Bill of Rights, *available at* https://www.mass.gov/service-details/consumer-bill-of-rights (Last visited on January 7, 2023).
[121] The Molony Committee Report in C.J. Miller; Brian Harvey; Deborah Parry, *Consumer Trading. and Trading Law,* 4 (1st Edi., Oxford University Press, Oxford, 1992).
[122] Consumer Protection Act (Act No. 68 of 1986), S. 2(1)(d).
[123] (1994) 1 SCC 243

ISBN 978-81-948082-8-2

of their customers, consumer protection laws and regulations have been put in place. The term "consumer protection" is used to describe the measures put in place to safeguard customers against dishonest or unethical business activities on the part of retailers, producers, service providers, etc., as well as to provide redress for those whose rights as consumers have been infringed.[124]

LEGISLATIVE BACKGROUND OF CONSUMER PROTECTION IN INDIA

The Directive Principles of State Policy[125] in the Indian Constitution's Preamble include "social justice." There is no question that customers have rights and remedies under numerous consumer laws, but they are difficult, costly, and time-consuming. Due to the need for quick and affordable consumer remedies, several nations have passed particular consumer protection legislation.[126]

Even while there are legal remedies available, the general law has a significant flaw since they are expensive and require complicated legal procedures to pursue. Consumers in India are unable to use the legal system to seek justice because of their poverty, ignorance, illiteracy, and callous demeanour. In order to properly safeguard consumer interests, a specific legislation was thus urgently needed. Six consumer rights are now formally recognised in India according to the Consumer Protection Act of 1986. The promotion and protection of consumer rights are the responsibility of the Central Council.[127]

Throughout the whole history of customer security in India, consumer protection has been a success. As soon as the Consumer Protection Act of 1986 was established by the Parliament to safeguard consumer interests, consumer protection and the consumer movement began to take genuine form. In order to progress industrialism and consumer growth in the country, several consumer groups stepped up their efforts. Different arrangements legally or implicitly allow consumer justice, as is stated in the Preamble of the Indian Constitution, which also values "social justice." In fact, there were provisions for consumer protection in many statutes long before the Consumer Protection Act.

More than 25 laws, including the Weights and Measures Act, the Cosmetics Act, the Drugs Act,

[124] B. Robert Reich, 'Towards a New Consumer Protection', 128 *University of Pennsylvania Law Review,*1, (1979).
[125] The Constitution of India, 1950, Arts 38, 39,42,43,46 and 47.
[126] Consumer Protection Act (Act No. 68 of 1986).
[127] *Id,* S. 6.

ISBN 978-81-948082-8-2

the Prevention of Food Adulteration Act, and others, were in effect prior to the Consumer Protection Act of 1986. Customers were hassled and virtually without a viable redress since there was no particular clause on consumer protection. Indian buyers are unable to seek legal relief from the courts because of their poverty, numbness, lack of knowledge, and detached attitude.

Given the precarious state of consumers, it was necessary and important to enact legislation with never-before-seen protections for their interests. The United Nations Economic and Social Council received a statement from the Secretary-General of the United Nations on May 27, 1983, which stated that countries operating globally should implement a strict client confirmation process in accordance with the guidelines in that statement. The law-making bodies were required to provide the necessary infrastructure, such as administrative and budgetary offices, to make consumer confirmation processes a reality.

A comprehensive social government assistance programme, the Consumer Protection Act of 1986 was created to improve consumer security. The fundamental goal of this exhibit is to protect the consumer from mistreatment by unfair commercial practises and to provide consumers with a fast, straightforward, and modest remedy. It is a significant development in the country's documented history of consumer movement. Judicial opinions have helped to shape the Consumer Protection Act of 1986.

According to the Preamble of the Act, the legislation is built on the idea "to better safeguard the interests of customers. The word ‘protection’ is used to set the course on rule-makers' thoughts. In resolving the idea that the presenter cannot manage the notwithstanding suffering importance of a game plan, there are several nations as well as game plans that delightfully difficulty in achieving these. The Act addressed the need of safeguarding consumers from rights violation in the past.”

The regulation was created to address the necessity to safeguard common customers following damages that were formerly fixed according to a standard procedure but became unique due to various factors. The Consumer Protection Act was passed in 1986 to provide better protection for consumers and to provide appropriate machinery for quick, affordable remedy. However, the embracing in their impossible, yet real extreme factors show up, evidently, towards becoming silver covering, that may result in due to the time win concerning checking the decay as discussed above. It happened shortly after the Supreme Court intervened in the public interest lawsuit brought by the Delhi-based common cause group. This organisation became active. Consumer agencies were established nationwide in the beginning of 1993, or seven years after the passage

ISBN 978-81-948082-8-2

of this crucial statute, following the Supreme Court of India's current directives.

CONSUMER PROTECTION LAWS IN INDIA

The Consumer Protection Act, 2019[128]

"When it goes into effect on the day set by the Union of India, the new The Consumer Protection Act, 2019, will abolish the previous The Consumer Protection Act, passed in 1986.

In addition to creating a regulatory body for the prompt and efficient administration and resolution of consumer complaints, it seeks to advance consumer interests. To offer a more effective grievance redressal process for safeguarding and upholding consumer rights, the Consumer Protection Act, 2019 was passed. E-commerce platforms are now particularly covered under the Consumer Protection Act of 2019, which was created in response to the rapidly evolving digital economy."

The legislation must handle new problems encountered by consumers in light of the digital and e-commerce eras, as well as changing conditions. The Consumer Protection Bill, 2019, which intends to enable prompt and efficient administration and resolution of consumer issues, was approved by the Indian Parliament on August 6, 2019. The Central Government may specify a date on which the Consumer Protection Act, 2019 (New Act), the New Act, will take effect. The more than three (three) decade-old Consumer Protect is intended to be replaced by the New Act.

OTHER LAWS PROTECTING CONSUMERS

The Indian Contract Act, 1872

According to this legislation, all agreements qualify as contracts if they were freely entered into, the parties were of legal age to contract, they included legal consideration, and they had legal purposes. Only when the consent is free from force, undue influence, fraud, deception, and legal error will it be considered to be free. In certain situations, the party whose permission was gained has the ability to void the contract.[129] In the past, consumer interests resulted from a contract between two parties, such as a car purchase, TV purchase, clothing dry cleaning, delivery of goods to a carrier who does not arrive at the destination in a timely manner, or the purchase of a gas stove that is inherently defective and ultimately results in the destruction of the buyer's

[128] (Act No. 35 of 2019).
[129] Dr. Avtar Singh, *Introduction to the Law of Torts & Consumer Protection*, 2(2nd edition, Eastern Book Company 2005)

ISBN 978-81-948082-8-2

property.

Guarantees and contractual obligation were also covered under the Indian Contract Act. The weaker party may choose to have the contract voidable under Section 19 of the Indian Contract Act, 1872 if the normal form of contracts for goods like cookers or gas stoves, etc., included conditions of contracts that were irrational and may be used to unfairly benefit the weaker party.[130]

The Indian Penal Code, 1860

"In 1835, the then-Indian government created the First Law Commission. The Indian Penal Code was first drafted by Lord Macualayand was established in 1860.[131] There are numerous provisions for the protection of consumer interests in the code, including the prohibition of the fraudulent use of false weighing instruments (Section 264), the fraudulent use of false weights or measures (Section 265), the possession of false weights or measures (Section 266), and the making or sale of false weights or measures (Section 267). These rules are intended to uphold integrity in business dealings and to safeguard consumer rights. Additional rules include: (1) Section 272 prohibits adulteration of food or drink intended for sale; (2) Section 273 prohibits sale of poisonous food or drink; (3) Section 274 prohibits sale of adulterated drugs; (4) Section 275 prohibits sale of adulterated drugs; and (5) Section 276 prohibits sale of a drug as a different drug or preparation (Section 276). The early modern Indian era's concern for consumer protection is seen from these rules.[132]"

The Sales of Goods Act, 1930

This Act tries to safeguard purchasers. The English Sales of Goods Act, 1893, is the model code for this act. Before the Indian Contracts Act of 1930 was passed, the legislation governing the sale of commodities was governed by the Sales of Goods Act of 1930. This Act altered the caveat emptor principle and made all dealers accountable for the sale of commercial goods. This Act gives the customer the right to reimbursement for late or damaged deliveries, as well as for any other losses or harms suffered. The Act's Sections 14 through 17 deal with warranties and guarantees. The statute also examines the distinction between items sold in quantity and in

[130] Y.K Bahl, *Consumer protection Law & Procedure,*39 (The Lawman & layman,2006).
[131] B.M. Gandhi, *Indian Legal and Constitutional History*, 297 (Eastern Book Company, Lucknow, 2009)
[132] K.D. Gaur, *Textbook on the Indian Penal Code*, 393-394 (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2009)

ISBN 978-81-948082-8-2

samples, as well as the seller's right to sell goods.

Agriculture Products Act, 1937

This Act was created with the intention of providing customers with high-quality agricultural products, including horticulture and livestock products. According to this Act, the Central Government has the authority to establish regulations for the marking and representation of specific grade designations, the authorization of interested parties to grade, the stipulation of marking requirements for packaging, and the prescription of sanctions like confiscation in accordance with its provisions. "AGMARK" is the emblem that is still in use. To safeguard consumer interests and prevent misbranding, the Act was revised in 1986. The "AGMARK" is only given if the product has undergone a thorough inspection and is deemed suitable for human consumption.[133]

The Drug and Cosmetic Act, 1940[134]

This Act was passed with the intention of preventing misbranding and regulating the sale, distribution, import, and export of pharmaceuticals and cosmetics in accordance with the necessary standards. The Act's Section 18 deals with the banning of medications and cosmetics that is substandard in quality, adulterated, fake, or misbranded.

The Prevention of Food and Adulteration Act, 1954[135]

To stop the adulteration of commodities, this Act was passed. Under this Act, officials are established to inspect the food and dining venues for quality. The foods that are naturally contaminated are defined in Section 2 of the Food Adulteration Act, 1954. The circumstances that cause an item to be adulterated are listed in this section; a few of them are mentioned here, such as when an item is not of the promised quality as promised to the purchaser[136], when an item is of inferior quality[137], when an item is harmful to health[138], when an item is kept in unsanitary conditions[139], when an item is unfit for human consumption, when an item comes from a sick animal, etc.

[133]The Agricultural Produce (Grading and Marking) Act (Act No. 1of 1937), s. 3.
[134]The Drug and Cosmetic Act, 1940, *available at*http://medindia.net/indian_health_act(Last Visited on November 15th, 2022).
[135]Act no. 37 of 1954 as amended by act 22 of 1995
[136]*Id.,* S. 2(d).
[137]*Id.,* S. 2(e).
[138]*Id.,* S. 2(f).
[139]*Id.,* S. 2(i).

ISBN 978-81-948082-8-2

The Essential Commodities act, 1981

The Act dealt with those who were engaged in stockpiling, illegal trading, and profiteering with regard to necessities in order to drive up the prices of necessities. Under this statute, essential commodities include things like edible oils, pulses, petroleum products, medicines, and fertilisers. Due to the cyclical nature of agricultural production in India, it is very difficult to distinguish between legitimate stock building and speculative hoarding. However, the Act also plays a significant role in preventing the ordinary man from becoming a victim of merchants and shopkeepers.

CONCLUSION

It is essential to note that the preceding list is in no way exhaustive, and that many additional statutes echo the ideas of consumer protection and consumer interest and are also in effect and accomplish the goal of consumer protection in India. It is for these reasons that it is important to note that the list is not exhaustive.

It is feasible to get the conclusion that the protection of the interests of consumers, as well as the consumers' interests themselves, is of the highest important in an economy such as that of India. This is something that can be shown in a demonstrable manner by the many laws that are currently in effect and that are supporting the idea of consumer interest. As a consequence of this, we are able to reach the conclusion that protecting the interests of consumers is extremely important. This is true not only for ensuring that those who wrong consumers are held accountable, but also for countries such as India, whose economies are still in the process of developing and could receive a boost from more consistent, high-quality expansion. Customers play a significant part in this situation because they are the ones who are exposed to the nature of a product or service for the first time and because, as frequent users, they are in an excellent position to develop an opinion about the nature of the product. They are in a position to predict the long-term success or failure of a large number of these goods and services, and can thus determine whether or not they will continue to contribute to the development of the GDP and the expansion of the economy.

To ensure that the needs of consumers are met, it is essential for the trade and industry to accept and abide by a voluntary code of conduct as well as the citizen's charter. Additionally, it is essential for all authorities, including the federal and state governments, educational institutions, non-governmental organisations, and print and electronic media, to actively engage in the process

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

and work together. Both unyielding faith in the consumer movement and social neutrality with respect to consumer demands are critically necessary at this time.

LEGAL CHALLENGES FACED BY E-COMMERCE

Authored By - Navaldeep & Dr. Sunil Kumar

University of Legal Studies, Chandigarh University, NH-95, Chandigarh-Ludhiana Highway, Gharuan, Mohali(Punjab)140413, navaldeepsihag123@gmail.com

ISBN 978-81-948082-8-2

Associate Professor University, Institute of Legal Studies, Chandigarh University, NH-95, Chandigarh-Ludhiana Highway, Gharuan, Mohali (Punjab) 140413, Uils.sunil@cuchd.in

---

ABSTRACT

The Internet is the most current platform for doing commercial transactions because of its immense flexibility and speed. Globally, companies and consumers may choose from a wide range of products and services. The whole globe has been transformed into a market that can be accessed with the click of a mouse on a laptop or mobile. The Information Technology Act, 2000 was passed by the Indian Parliament in 2000 to offer security and legal validity to transactions carried out electronically, albeit it differs greatly from the Model Law's spirit in many ways. After the IT Act was passed, it was discovered that certain important elements were missing, the legislation's contents lacked cohesion, and numerous legal difficulties were not well explained. "The 2008 amendment to the IT Act has four goals in mind. It's interesting to note that the draughtsmen acknowledged that the original IT Act's requirements for digital signatures for the authentication of electronic records are linked to a specific technology, necessitating the provision of an alternative technology. However, the original requirement for digital signatures was left in place, further adding to the confusion. Additionally, the Indian courts have not yet had a chance to evaluate how the IT Act's provisions may affect the fundamental concepts of contract creation outlined in the Indian Contract Act of 1872. The issues raised by information technology regarding contract formation, the impact of the IT Act on the principles relating to contract formation provided in the Contract Act, and the impact of omitting the e-commerce-related principles provided in the Model Law but not reflected in the IT Act all require analytical evaluation."

Keywords: E-Commerce; Legal issues of E-Commerce; E-Commerce Security Digital Signature

INTRODUCTION

Doing business using the internet is referred to as "e-commerce" in short. "The Organization for Economic Cooperation and Development (OECD) defines e-commerce as a new way of conducting business that takes place over networks employing non-proprietary protocols that are defined through an open standard establishing procedure, such as the Internet. E-commerce is a relatively new method of conducting commercial transactions." E-commerce, in its most general sense, refers to any and all types of commercial transactions that take place via an electronic network or medium, most often the Internet. Electronic commerce encompasses three primary

 ISBN 978-81-948082-8-2

types of transactions: those between businesses (also known as B2B), those between businesses and governments (often known as B2G), and those between businesses and individual consumers (also known as B2C). Estimates place the worth of "e-commerce" in countries such as the United States at very close to $500 billion in the year 1999. However, a number of laws have been enacted or are now being discussed to supplement or, where necessary, change the existing legislation in order to make it more readily applicable to e-commerce in light of the new context. The e-commerce business in India has huge potential thanks to the country's 288 million strong middle class. The growth of electronic commerce in India, on the other hand, has been hampered by a number of challenges on the legal, regulatory, and technological fronts. At the moment, only a select few law firms in India are informed on both the technological and legal aspects of the regulations governing e-commerce. The rapidly developing fields of cyber law, e-commerce, and other related topics need the Indian legal profession to increase its knowledge and capabilities. Despite the fact that our country does not have a law that is specifically geared toward e-commerce, the Information Technology Act of 2000[140] (IT Act 2000) is the only cyber legislation in India that controls the business and transactions involved in e-commerce.

LEGAL ISSUES

E-contracts

The Indian Contract Act of 1872[141] (also known as "ICA"), which lays out the fundamental principles that are applicable to electronic contracts and states that in order for a contract to be considered valid, it must have been entered into by at least two adults with their free consent and for a lawful consideration, According to Section 10A[142] of the Information Technology Act of 2000, the use of electronic contracts is permitted ("IT Act"). Because of this, it is essential to study both the ICA and the IT Act together in order to fully appreciate e-contracts and to endow them with legal validity. In addition, Section 3[143] of the Evidence Act specifies that the evidence may be presented in an electronic format. In the case of *Trimex International FZE Ltd. Dubai* v. *Vedanta Aluminum Ltd*[144], the Supreme Court determined that “email discussion between parties on their respective responsibilities might constitute a legally binding contract”.

“Because of the growing popularity of online platforms among people and their preference for

[140] Information Technology Act, 2000 (Act 21 of 2000).
[141] Indian Contract Act, 1872 (Act 9 of 1872)
[142] *Supra* note 1, S. 10A.
[143] Indian Evidence Act, 1872, (Act 1of 1872)
[144] 2010 (1) SCALE 574

ISBN 978-81-948082-8-2

making online purchases of goods and services, it is more possible that people will enter into legal agreements while they are using these platforms. It is vital for an online business portal to take this possibility into consideration and declare on its website or form that the person it is conducting business with or entering into a contract with is a major in order to avoid any legal complications."

The **stamping of contracts** is still another issue. It is possible that an improperly stamped document will not be accepted as evidence if the necessary stamp fee and penalty have not been paid. However, it is not feasible to pay stamp duty on electronic contracts; this is a requirement that only applies to physical documents. On the other hand, considering that the stamp duty may be paid online and that electronic stamp papers are readily accessible, it is not out of the question that stamp duty will one day be needed for electronic contracts as well.

The authority to accept offers in an online context and the acceptance of offers themselves are two more significant problems. Customers who enter into a contract for click wrap or shrink wrap are not offered the opportunity to debate the terms and circumstances of the contract; rather, they are expected to indicate their approval of the contract before completing a purchase. "When a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears, on the face of it or on the basis of evidence adduced, to be unconscionable, the person who is in a position to dominate the will of the other has the burden of proof" that the contract was not induced by undue influence, as stated in Section 16(3)[145] of the ICA. In the event that a disagreement arises over the terms of an electronic contract, it will be on to the company that was responsible for conducting the online business to demonstrate that there was no undue influence. In addition, Section 23[146] of the ICA states that "the consideration or object of any agreement is unlawful when it is forbidden by law, or is of such a nature that if permitted, it would defeat the provisions of any law; or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy."

Protection of Personal Data

One of the key concerns is whether or not the information that is provided during the online transaction will be secure. "Under the provisions of section 43A[147] of the Information Technology

[145] *Supra* note 2, S. 16(3).
[146] *Id.*, S. 23.
[147] *Supra* note 1, S. 43A.

ISBN 978-81-948082-8-2

Act, the 'Reasonable practises and procedures and sensitive personal data or information Rules, 2011' have been proposed as a framework for the protection of personal data in India. Passwords, financial information, physical, physiological, and mental health issues, sexual orientation, medical records, and the results of HIV/AIDS test may all be considered sensitive data." The term "personal data" refers to "any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person." This definition includes both direct and indirect references to a person's identity. The organisation that is collecting the data has to have a privacy policy in place, should always get permission before collecting sensitive information from a source, and should adhere to acceptable security standards and processes. The suppliers of online products and services are obligated to examine any instances of unauthorised access to personal information as well as any instances of misuse of such information.

Another challenge that comes with making purchases online is navigating the interface with the payment gateways. The EFT, or electronic funds transfer, is a retail funds transfer system that was invented in 1995. It allows customers to transfer money between accounts and between regions without the need to physically move any instruments. The internet banking policy was adopted by the Board, and as a result, the banks were given the green light to provide online banking services without first seeking authorization from the RBI. In March of 2004, the Reserve Bank of India (RBI) made the Real-Time Gross Settlement (RTGS) system operational as a step toward reducing risk in high-value payment systems. "This made it possible for transactions to be settled in real time and on a gross basis. The Reserve Bank of India (RBI) is the organisation in charge of the RTGS System. In 2005, the implementation of the National Electronic Funds Transfer (NEFT), which is a more secure countrywide retail electronic payment system, made it possible for bank customers to more easily transfer money between any of the nation's networked bank branches. The Payment and Settlement Systems Act, 2007[148] granted the RBI the authority to control and supervise the nation's payment and settlement systems, as well as the authority to grant permission for the establishment or continuation of these systems, request information and data from payment system providers, and provide instructions to payment system providers. 'electronic commerce' which refers to the use of techniques other than paper-based methods of communication and information storage, was given legal recognition by the Information Technology Act for transactions that were made via electronic data interchange and other forms

[148] Payment and Settlement Systems Act, 2007 (Act 51 of 2007).

 ISBN 978-81-948082-8-2

of electronic communication.[149] The Information Technology (Amendment) Act of 2008[150], the Reserve Bank of India's directions on mobile banking and pre-paid value cards, and the guidelines for internet banking and mobile banking are only a few of the things that have been done so far to assure the safety of electronic transactions. The provision of section 43A[151] of the IT Act, which mandates that bodies corporate use 'reasonable security practises' for the purpose of protecting 'sensitive personal information' essentially lays the framework for increased cyber security and data protection in India.[152] The Information Technology Act (IT Act) defines 'sensitive personal information,' and brings the concept of data protection into Indian law, and establishes a body corporate's duty for keeping and protecting such sensitive personal information. [153] In addition, it provides both legal and criminal liability for failing to safeguard personal data and information.[154] In addition, the Reserve Bank of India (RBI) has mandated that all online transactions must utilise a method that use information that is encrypted on the cards but concealed from view in order to give an additional layer of verification. In addition to this, financial institutions are required to have security systems that can monitor behaviour on the internet." E-commerce websites are subject to a variety of RBI requirements because to their reliance on online payment methods; nevertheless, the payment gateways are the primary focus of this impact. Before utilising such payment channels, it is essential, however, to have a clear understanding of the contractual obligations relating to the use and security of one's data.

Intellectual Property Rights

The risk of a violation of a patent, trademark, or other kind of intellectual property rights occurring online is relatively significant. Other businesses are responsible for the development of e-commerce websites and, in many cases, also provide the material found on such websites. If the parties' agreements do not specifically convey the intellectual property rights, there may be serious ownership difficulties with regard to the IPR. Legal authorisation is required for any use of intellectual property rights belonging to a third party. These challenges must to be expressly addressed in the disclaimer and IPR policy of interactive websites, and product and service providers ought to routinely check how their websites are being used by their customers. Domain

[149] PSA, Legal isssues to e-commerce, *available at* https://www.mondaq.com/india/it-and-internet/299686/legal-issues-in-e-commerce-think-before-you-click (Last visited on January 5th 2023).
[150] Information Technology (Amendment) Act of 2008 (Act 10 of 2009)
[151] *Supra* note 1, S. 43A
[152] RBI, Security and Risk Mitigation Measures for Electronic Payment Transactions available at https://rbi.org.in/Scripts/NotificationUser.aspx?Id=7874&Mode=0 (Last visited on January 5th 2023).
[153] *Supra* note 1, S. 43A
[154] *Supra* note 1, S. 43A and 72A.

 ISBN 978-81-948082-8-2

names are subject to trademark protection, and cases of trademark infringement may arise when domain names are confusingly similar to one another. In the case of *Satyam Infoway Ltd.* v. *Sifynet Solutions Pvt. Ltd.*[155], the Supreme Court said that "a domain name may pertain to the provision of services within the meaning of section 2(z)[156] of the Trade Marks Act."

Efficient Delivery System and an Effective Supply Chain and Service Management

Concerns about the safety of the consumer are an ongoing priority in the realm of online business. The Consumer Protection Act of 1986[157], often known as the "CPA" is the law that governs the interactions that exist between buyers and sellers of goods and services. The CPA does not include any specific restrictions that belong to the conduct of business via the internet. A provider of products or services is considered accountable if there is a "deficiency in service" "defect in goods" or "unfair trade practise" Any service that is supplied at no cost is specifically exempt from falling within the jurisdiction of the CPA. Because of this, users will be considered clients in accordance with the CPA if and only if the actual transaction takes place online. It is possible that the providers of the goods or services will be required to make the necessary improvements or replacements, to repay any money that has already been paid, to provide compensation, to refrain from engaging in unfair or restrictive business practises, and to affirm that they will not engage in such practises in the future.

"Before allowing anyone to access or make use of their computer resources, intermediaries are required to make public their rules and policies, as well as their privacy policies and user agreements, in accordance with the Information Technology (Intermediaries Guidelines) Rules, 2011[158], which were passed in 2011. Users of computer resources should be warned by these rules and standards not to host, display, upload, edit, publish, transmit, update, or share certain types of material that are prohibited. Within thirty-six hours of becoming aware of illegal content, the intermediary is required to take down any prohibited items that it is aware it has published or stored." In the case of *Consim Info Pvt. Ltd.* v. *Google India Pvt. Ltd.*[159], the Delhi Court acknowledged that "no injunctive relief could be granted to Consim because it did not meet the

[155] 2004 (3) AWC 2366 SC
[156] Trade mark act 1999, (Act 47 of 1999), S. 2(z).
[157] Consumer Protection Act, 1986 (Act 68 of 1986).
[158] Information Technology (Intermediaries Guidelines) Rules, 2011 available at https://www.wipo.int/edocs/lexdocs/laws/en/in/in099en.pdf (Last visited on January 5th 2023).
[159] 2013 (54) PTC 578 (Mad)

 ISBN 978-81-948082-8-2

three requirements of (i) prima facie case (ii) balance of convenience (iii), irreparable hardship." The case was about whether or not Google violated Consim's intellectual property rights in India. The fact that the disputed trademarks were of a generic character, on the other hand, was a crucial factor in the court's determination to rule as it did in this particular instance. The court went on to note that "although it is impossible to continuously monitor every advertisement that is posted online, the intermediary, Google, cannot be held liable for infringement that is the result of the actions of a third party." The court did note, however, that "this observation was subject to section 3(4)[160] of the aforementioned Intermediaries Guidelines and that Google was required to act upon it within 36 hours of receiving it; otherwise, it could be held liable for the infringement."

Advertising

Advertising is a crucial and legitimate method for a business owner to generate interest in the products he sells. For an exceptionally long period, advertisements were governed by the government, the courts, or the police, depending on the specifics of each situation. Furthermore, since there was not a single comprehensive piece of legislation, it was impossible to identify what criteria the company need to adhere to and who had the authority to manage or supervise the advertising strategy. This was a significant obstacle. The Advertising Standards Council of India (also known as "ASCI") was established in 1985 as a non-statutory tribunal with the purpose of ensuring that advertising practises adhere to ethical standards. Complaints were taken into consideration by ASCI, and issues were rectified in line with its Code of Advertising Practice[161] ("ASCI Code"). However, there have been times when courts have rejected decisions issued by ASCI because they considered the voluntary organisation was misusing its power by issuing orders against people who were not members. Over time, the advertising industry began to accord a great deal of respect to the ASCI Code. As soon as the advertisers started to recognise the warnings that ASCI had issued against the misleading commercials, the advertisements were either prohibited from being broadcast or were drastically altered so that they would comply with the ASCI Code. In addition to not being objectionable to morals or public decency, advertising should not promote things that are hazardous or detrimental to society or to individuals, particularly young people. This is especially important when it comes to the protection of children. They should also avoid publishing anything offensive or hurtful, as well as avoid making inappropriate representations of women, adhere to fair competition practises while keeping the interests of consumers in mind, and prevent indecent portrayals of women.

[160] *Supra* note 19. S. 3(4).
[161] ASCI code, *available at* https://ascionline.in/index.php/ascicodes.html (Last visited on January 5th 2023).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Competition

The expansion of e-commerce has already resulted in fierce market rivalry, which has prompted the development of new services, distribution networks, and ways that are more efficient for doing business. It is possible that some competition issues may arise if certain e-hubs seem to have sustainable market power as a result of network effects and/or are engaged in strategic efforts to keep or preserve their market power. There is a potential for issues to arise for companies involved in e-commerce, including price fixing, covert cooperation, anti-competitive discrimination, and limiting access to third parties. Participants in the e-commerce industry should stay away from practises such as price gouging and collusion. It's possible that the fact that multiple parties can use the same online platform to transact business for a variety of goods and services will lead to the proliferation of multiple middlemen and collusive behaviour. There should be more of an emphasis on market openness.

CONCLUSION

The steps involved in placing an order and making a payment ought to be laid out explicitly on e-commerce websites, and those websites ought to regularly check and update the information that is provided. The terms and conditions should be specific and tailored to the nature of the products and services that are being provided, and they should be brought to the attention of the customers in a way that allows them sufficient time to read them before accepting them. Participants in the e-commerce industry have a responsibility to take the necessary safety measures to prevent illegal transactions. Despite the fact that the industry of online commerce is still in its infancy, its growth has been remarkable. It is essential for e-commerce players to strive toward capacity development by educating staff members about the hazards mentioned above and training them to avoid them. It is vital to work on and, more significantly, to execute the risk management strategy and plan for the organisation in order to reduce the overall risk that the company faces. "It is vital to continually monitor and analyse customer behaviour in order to provide an accurate risk assessment as well as subsequent efforts for developing a strategic and dynamic approach to the digital economy (such as by tracking their online footprints, which may also be used as proof in the future). When it comes down to it, e-commerce is ultimately more about business strategy and management than it is about technology." In addition to providing its users with cutting-edge technology and confidential information structures, the online platform should also give a sufficient number of precautions and safeguards. This will ensure that the

ISBN 978-81-948082-8-2

problems are avoided completely, or at the least, the companies are provided with a strategy to deal with them when they do arise.

Schemes Related To Handicraft

Authored By – Sonia & Chander Prakash

University of Legal Studies, Chandigarh University, NH-95, Chandigarh-Ludhiana Highway, Gharuan, Mohali (Punjab) 140413, soniakadiyan01@gmail.com

Associate Professor University Institute of Legal Studies, Chandigarh University, NH-95, Chandigarh-Ludhiana Highway, Ghaduan, Mohali (Punjab) 140413, Chander.E11760@Cumail.In

Abstract

Handicraft sector is second largest unorganised and employment generation sector after agriculture in India. This research paper try to examine the awareness level of handicraft schemes among the artisan. Most of the schemes are running under the supervision of the ministry of textile but still the artisans facing financial, lack of technical knowledge, awareness regarding

ISBN 978-81-948082-8-2

government schemes, lack of market knowledge etc. The researcher reviewed different journals, reports. Internet etc. to get the information regarding crafts but one or two paper based on the awareness of schemes among artisans. The major finding of the research paper is that most of artisans have no information about the different schemes of handicrafts. So, Government might be take some fruitful steps to overcome these problems and they can use personal and non-personal methods to increase the awareness of schemes in urban and rural area.

Keywords : Artisanal, moldable, significant, potential, supervision

Introduction

Handicrafts constitute an important segment of the unorganised sector of our economy. As we know that most of the Indian population are living in rural area and in the same way most of the handicraft artisans are living and doing their work in rural area. Most of the workers, working as a part time but for the time being the importance of the handicraft sector increasing. Handicrafts have a big potenial to leads employment opportunities for the skilled and unskilled workers, In order to overcome these constraints, BAHVY scheme has been running under the suervision of minstry of textile to provide them all types of amenities which is helpful to increase the production of handicraft products.

According to the "The Office of the development commissioner of Handicraft' the handicrafts are products produced with a manual labour with minimal or no input from machines, a substantial level of skill or expertise, a significant element of tradition and its history of survival. In the same way, M.L. Meena et.al (2012), defined handicraft is as simply as objects made by the skills of the hand and which carry a part of the creator as well as centuries of evolutionary tradition.]1 [162]

Concept of Handicraft

A handicraft , sometimes more precisely expressed as artisanal handicraft or handmade, is any of a wide variety of types of work where useful and decorative objects are made completely by one's hand or by using only simple, non-automated related tools likescissors, carving implements, or hooks. It is a traditional main sector of craft making and applies to a wide range of creative and design activities that are related to making things with one's hands and skill, including work with textiles, moldable and rigid materials, paper, plant fibers,clay etc. One of the oldest

[162] Dilip Kumar, Awareness of Governmnt initiated schemes A study of handicraft sectorin Mirzapur, available at researchgate, (december,2018

 ISBN 978-81-948082-8-2

handicraft is Dhokra; this is a sort of metal casting that has been used in India for over 4,000 years and is still used. In Iranian Baluchistan, women still make red ware hand-made pottery with dotted ornaments, much similar to the 5000-year-old pottery tradition of Kalpurgan, an archaeological site near the village. Usually, the term is applied to traditional techniques of creating items (whether for personal use or as products) that are both practical and aesthetic. Handicraft industries are those that produce things with hands to meet the needs of the people in their locality without using machines.]2

Objectives and Research Methodology of the study

1) To understand the meaning and importance of handicraft.
2) To identify the various components of handicraft
3) To understand the initiatives started by government for the promotion of handicraft
4) To analyse the cases filed and disposed
5) To give some suggestions for empowering handicraft

REASONS FOR PROBLEMS FACED BY RURAL ARTISANS

Most of the problems that are being faced by the rural artisans emerge from the conditions in which the artisans are placed. Theimportance of handicraft items of these artisans is decreasing in their locality. The quality of this handicraft items are decreasingday by day because of great competition with the industrial sophisticated and cheap products. Major factors which are responsiblefor their failure are listed below.

1. Weak Financial Power and inability to get bank loans

The financial position of the artisans is very weak hence they had to depend on the money lenders for the financialrequirements, who charge exorbitant rate of interest on this loan,in many cases if the artisans are unable to pay interest orprinciple amount these money lenders take the handcraft items at very low price which is much below the market price.Due to weak financial power, these artisans are unable to buy raw material in bulk and hence to production cost goeshigh with low profitability. However government have announced loans and finance at concessional rates forprocurement of equipment's and tool-kits, yet they are unable to get because of huge

ISBN 978-81-948082-8-2

formalities maintained by thenationalised banks. Lack of finance and cash flow is almost always the crux of the artisans, these artisans are still waitingfor simplified and proper financial award which can help them to survive their business and livelihood.

2) Illiteracy of artisans

Mostly rural artisans are uneducated and illiterate thus lack of education makes it difficult to manage inventory, accessgovernment schemes and bargain with traders and middlemen. As per the report published in economic and politicalweekly 2003, by the World Bank titled handmade in India: Preliminary analysis of crafts producers and craft production90% of the female artisans are completely uneducated and 50% of heads of households of crafts producing families had no education.

3. Non availability of quality raw material

Rural artisans often lack access to quality raw material, for raw material they have to depend upon the middle men anddealers on very high price and even of poor quality. Another reason is due to weak purchasing power they can't procurebulk raw material as a result they have low bargaining power and are forced to buy sub-standard material at a higherprice. So these rural artisans are gradually shifting as a labour to agricultural sector.

4. Lack of skill improvement and technology up gradation

Artisans lack the financial capability to upgrade technology in production and to undergo necessary trainings on regularbasic. Most of the artisans engaged in handloom and handicraft business are using old and obsolete tools, machinery andequipments which drastically effect upon the quality and quantity of their product

5. Shift of rural customers towards the industrial product

With the growth of industrialisation the demand of handloom and handicraft products are decreasing substantially andthe rural buyers are attracted towards machine made, good looking, and attractive package products. With the advent ofglobalisation and availability of cheaper and more varied products craft faces tough competition in contemporary market.They are typically perceived as traditional, old-fashioned and antithetical to modern taste. In most modern societiesdesign evolved in the interaction between the artisans and consumer but the rural artisans are unaware of thesociocultural context of the consumer and could not design the products as per their needs and fashion.

6. Nonexistence of infrastructural facilities

ISBN 978-81-948082-8-2

Artisans are lacking various infrastructural facilities like communication, work sheds, storage space, packing facilitiesand transportation in rural areas, they have to depend on middlemen for selling the products as consumers of craftproducts are increasing becoming urbanized. These artisans have few opportunities to reach new customers throughrelevant retail platforms such as departmental stores and shopping malls. Further due to lack of education and training,artisans are often unable to supply their products online.

7. Very low income and no regular work to Artisans

Wages of the craft artisans are insufficient, even the highest wages are relatively lower than those others in theagriculture or other non-firm activities. The combination of low wages and insufficient work tends to exacerbate povertyamong craft artisans. Production for home consumption is completely different from production for a commercialmarket. In this competitive and dynamic market the artisans needs sensitive adaption, proper quality control, accuratecosting if they intends to win and keep a place in the market. In other words right combination of human, financial,physical and social capital is essential

Schemes for the prtection and promotion of Handicraft

1) Ambedkar Hastshilp Vikas Yojna

Under Dastkar Shashktikaran Yojna subsection of this scheme, the programme enables community empowerment to mobilise artisans into self-help groups. Post this, the implementing agency will prepare a diagnostic study report (DSR) for proposing further interventions in the cluster. The implementing agency will be responsible for overall project management and implementation of various interventions to facilitate bulk production and sourcing of goods. Towards this end, apart from other things, the implementing agency will appoint a cluster manager.

Under the design and technology upgradation subsection, a 25-day workshop is conducted to develop new prototypes to suit the tastes and preferences of contemporary markets, using the traditional skill of artisans, and introduce new techniques and technologies for enhanced production. Besides this, support is provided in the form of an integrated design and technology

ISBN 978-81-948082-8-2

development project, assistance to exporters and entrepreneurs for design prototypes, and commercial market intelligence. Ambedkar Hastshilp Vikas Yojna also provides support in human resource development, infrastructure and technology support, healthcare, and more.

2) Mega cluster scheme

The programme follows a mega cluster-based approach in scaling up infrastructural and production chains at handicraft centres that have remained unorganised and have not kept up with modernisation and other developments. The objectives include generating employment and improving living standards for existing artisans. The mega clusters will be taken up for development through the Handicrafts Mega Cluster Mission (HMCM) or through central/state corporations as and when announced in the Union Budget, or as per requirements, and as per the diagnostic report.

A maximum of three percent of the project cost shall be earmarked for establishing baseline data or reports against which performance can be compared at the end of the project. The total fund requirement will be as per the report. The maximum duration of the project is four years.

3) Marketing support and services scheme

This part of the programme provides interventions for domestic marketing events to artisans, such as providing financial assistance for organising or participating in marketing events in India. Assistance is also provided for hiring built-up space for events organised by other institutions. Besides this, craft awareness and demonstration programmes are also conducted.

The marketing and support services component helps conduct domestic buyer-seller meets which provide linkages to local artisans to showcase their products to major buyers of India, thus ensuring integrated and inclusive development of Indian handicrafts. Buyer-seller meets, workshops seminars, etc are also occasionally organised abroad. Another component is publicity and brand promotion, which highlights Indian handicrafts in print and electronic media, and on the web.

4) Research and development scheme

The schemes formulated are based on evaluation and research conducted from time to time by a governmental in-house research and development team. The initiative was introduced to generate feedback on economic, social, aesthetic, and promotional aspects of various crafts and artisans in the sector. Surveys and studies are conducted on specific crafts on which enough information is not easily available, on problems related to the availability of raw materials, technology, and more. Research is also conducted into measures to provide financial assistance for the preparation

ISBN 978-81-948082-8-2

of legal, paralegal, standards, audits, and other documentation leading to labelling and certification for artisans' products, and more.

The Copyright Act, 1958

The Copyright Act provides that a copyright subsists in an original literary, dramatic, musical or artistic work, cinematographic films and sound recordings. However, no copyright subsists in a cinematographic film if a substantial part of the film is an infringement of the copyright in any other work or in a sound recording if in making the sound recording of a literary, dramatic or musical work, copyright in such work is infringed. A computer programme is treated as a "literary work" and is protected as such. Following rights are given under copyright act:

1) Reproduce the work in any form, such as print,sound,video, etc.

2) Use the work for a public performance, such as p;ay or musical work

3) Make copies/recordings of the work, such as via compact discs, cassettes,

4) Broadcast it in various forms[163]

Recommendation and Suggestion

In order to make handicrafts reach the top spot the following suggestions may be implemented**.**

1. Market Development Assistance (MDA) Grant and Market Access Initiative (MAI) Assistance for participation in Fairs & Exhibitions/Reverse/Buyer-Seller Meets in India & abroad.

2. Assistance provided by the Government for marketing study, branding/International publicity, participation in Fairs & Exhibitions, Buyer-Seller Meet in India & abroad etc. through Marketing and other Schemes.

3. Design registration of handicraft:

Design registration of handicrafts should be done. That means whatever designs any artisan has introduced on any item should be registered. Then no one can copy it.

163

ISBN 978-81-948082-8-2

4. Price uniformity in handicraft:

The prices of handicraft products are very much erratic and not uniform. There is significant difference in prices of the same article if purchase from two shops or from two places. In this situation the customer feels very much exploited and harassed. This might have very bad repercussion on the demand of the products. Pricing of the product should depend on categorization of art in each craft, skill exhibited and quality of raw materials.

5. Awareness creation:

The majority of artisans are not aware about various new schemes like loan at concessional rates, free tools, dyes and chemical, work shed-cum-housing facilities. The artisans should be made aware about the various welfare schemes and its implementation process.

5. Value Addition in Handicraft:

The various specialized organization, like Development Commissioner (Handicrafts), may help the local units to produce various value added items with would not only help to penetrate the local market, but also help in exporting of such items to foreign countries.

6. Publicity in Handicraft:

To attract more and more buyers both within and outside the country, promotional and marketing organizations must give due emphasis on wide publicity of various local products. For this frequent buyers and sellers meets may be organized by promotional organizations**.**

Conclusion

Handicraft is the standard mark of creativity and the essential differentiator for a country in the sweeping wines of globalization. Most importantly, craft has to become a fountainhead for both industrial design and communication design, for deriving the differential advantage of Indian design in the global market place. The handicrafts sector plays a significant and important role in the country's economy. It provides employment to a vast segment of craft persons in rural and semi urban areas and generates substantial foreign exchange for the country. Handicraft is such a product that when a buyer likes it, he is prepared to pay a price, which may be far in excess of the standard price of the product. The prime consideration is his liking of the product. Channel agents, such as middlemen, retailer or distributor try to capitalize on such possibilities and earn significant profit almost wholly at the cost of the craftsmen. Handicraft product may be

ISBN 978-81-948082-8-2

categorized on the basis of price, export on domestic market, ease of maintenance, ease of storage, utility value or decorative value and modernity or traditional orientation. Besides, it is necessary for likeminded institutions to come together to provide the strategic direction and action plans to evolve systems. Procedure and norms related to design, market, technology, innovation and quality of life so that product designs, technology and marketing become integral part of the craft up gradation and repositioning process. The sector has, however, suffered due to its being unorganized, with the additional constraints of lack of education, low capital, and poor exposure to new technologies, absence of market intelligence, and a poor institutional framework. It faces imminent threat from the growing clout of Chinese economy coupled with their cheap yet disciplined labour as also from superior quality products manufactured by developed countries. However Indian handicraft has great growth potential in the changing scenario with its basic strength being the abundant and cheap availability of manpower and being a traditional profession of millions still requires very low investment compared with other countries barring china.

References

https://yourstory.com/smbstory/indian-handicrafts-artisans-schemes-boost-exports

https://bnblegal.com/article/copyright-law-implication-protection-traditional-handicrafts-india/

https://www.arcjournals.org/pdfs/ijmsr/v9-i5/4.pdf

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

A Critical Study on Corporate Criminal Liability with Special Reference to US and Indian Laws

Authored By – Manvi & Dr. Akhilesh Ranaut

University Institute of Legal Studies, Chandigarh University, NH-95, Chandigarh-Ludhiana Highway, Gharuan, Mohali (Punjab) 140413, manvigeed98@gmail.com

University Institute of Legal Studies, Chandigarh University, NH-95, Chandigarh-Ludhiana Highway, Gharuan, Mohali (Punjab) 140413, Akhilesh.e6584@cumail.in

ABSTRACT

Due to the rise in industrialization and globalisation, big scale companies are emerging worldwide and have established a dominating position during the last two centuries. Multinational Corporations now have a significant impact in almost every aspect of human existence. An company is viewed as a separate legal entity from its owners. It may be described as a team of individuals working together for a single goal, typically commercial. According to Indian criminal law, corporate criminal liability establishes the extent to which a company, as a separate organization, is liable for

 ISBN 978-81-948082-8-2

the deeds of its employees. It is apparentthat natural individuals commit crime because they are physically and intellectually capable of doing so, but a corporation cannot, even if it is considered a person under the law.

England, United States, And Canada which are also known as common law countries were among the first to attempt to establish corporate criminal responsibility. Section 305 of the Criminal Procedure Code provides the procedure for dealing with the accused company, however the tough subject of imposing punishment when the legislation mandates a minimum time of imprisonment as penalty arises. The present research paper attempts a comparative analysis regarding the criminal liability of corporate entities in USA and India.

KEY WORDS: Corporations, Corporate, Criminal, Liability

INTRODUCTION:

"Corporate bodies are more corrupt and profligate than individuals, because they have morepower to do mischief, and are less amenable to disgrace or punishment. They neither feel shame, remorse, gratitude nor goodwill"

The definition of "corporate governance" can be both specific and general. When confined,it refers to the interactions between corporate executives, directors, and shareholders. It can also include how a company interacts with its stakeholders and the wider community. Even more broadly defined, "corporate governance" can refer to the collection of laws, rules, listing rules, and voluntary private sector practises that allow the firm to draw investors, operate profitably, fulfil legal duties, and generally live up to social expectations**.**

India is not an unknown territory as far as corporate crimes are considered. Given the prevalence of corporate fraud that is on the rise and endangering the welfare of the nation'seconomy, it is actually a serious current issue owing to the multifaceted character of these types of crime. While the corporate sector cannot guarantee economic stability, it does play a significant role in every nation's development. Corporate crime poses a severe threat to society's well-being because of how many people it affects and how much it permeates most facets of social and community life. Corporate entities are therefore in a position to significantly impair both the physical and economic environment.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

"Actus Reus non facit reum nisi mens sit rea" is the most significant ingredient required by Indian criminal law in order to punish the crime. The term "person" is defined in section 11 of the Indian Penal Code to cover both natural and artificial persons, such as corporate. In addition to the Penal Laws, strict liability has also been imposed on the corporate houses, though it is still debatable, with the passage of the new Companies Act, 2013, and it has been given the proper weight. There are various other legislations in India other than Companies Act which governs the Corporate criminal Liability like, Transplantation of Human Organs Act 1994, Food and Safety Standards Act, 2006, Narcotic Drugs Psychotropic Substance Act, 1985, Code of Criminal Procedure,1975 etc can be prosecuted against but it is quite ineffectual as the company cannot be punished with imprisonment or death. The only punishment that can be levied on the company is by way of fine, which at times is quiteminimalistic. The question then raised is whether a company can ever be prosecuted for criminal offences and be punished with more than just a monetary fine. Now it's high time to put a control over these crimes. There has been a debate as to whether a Corporation canbe held criminally liable.

Corporate liability in the present context must be strengthened. The phenomenon of corporate criminality emerged primarily in the 20thcentury[1]. In India, regulations governing corporate accountability are being toughened, especially in the wake of the Bhopal Gas disaster. It is, however, still in its infancy. the conventional view of crime, which excludes corporations Business corporations have risen to prominence in society. It is even more crucial to determine the criminal responsibility of corporations given their extensive influence throughout the spectrum of social existence and their commercial outlook on ourvalue systems.

RESEARCH METHODOLOGY

The present research has been conducted using a doctrinal research technique. Doctrinal isthe ancestor of the term doctrinal. the Latin word "Doctrina," which denotes instruction, learning, or knowledge Legal theories and propositions are the topic of doctrine research. Itinvolves conducting an analytical review of relevant cases, current statutes, and reputable literature on a particular topic. Secondary sources will be the main topic of the study.

Scholarly books, research summaries, journals, dissertations, textbooks, and relevant websites are examples of secondary sources for the subject. For the purpose of this research, several secondary sources have been investigated in order to analyse corporate criminal liability. The current study includes a comparative analysis of the same-topic trendsin India and the USA. Reviewing case laws and case studies would be the very important part of present research.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

LITERATURE REVIEW

- Avtar Singh, Company law, (14th Ed)

The author of this book addressed how, as a body corporate, a corporation can both sue and be suedin its own name. A company may file a criminal complaint, but it must be handled by an individual.
The complaint must be capable of being rejected due to the absence of the representative in the same manner as an individual complaint is capable of being dismissed if the complainant is absent.The author of this book correctly pin points that, while the directors and officials of the company'sbusiness are natural people as a group, the corporate entity is unique from its members since it is entitled to sue individuals and others can sue the company.

-Corporate Criminal Liability as revisited by the Standard Chartered Bank decision by M Sivaraman
There can be no two opinions that companies, like natural persons, should be punishedseverally for grave and serious offences and should not be allowed to escape punishments simply because they cannot be imprisoned, but when it remains within the realm, command, and competence of the law, this would not logically follow that the courts are there to move in and supply the same. Thus, in the humble opinion of this author, and with all due respect to their Lordships, it appears that the courts in the Standard Chartered Bank's case overreached the problem by reading into the laws a discretion that is not legislatively granted to the courts. The author argues in this piece that companies should be penalised in conformity with current regulations, and he criticises the court's discretion, which is not authorised and permitted by the legislation.

- **Vol.1 issue 2 Angira Singhvi, "Corporate crime and sentencing in India:**

Required amendments in law", International Journal of criminal justice sciences, 2006 Criminal liability of corporate entities is predicated on the idea that corporations are capable of committing crimes. However, Indian legislation are out of step with these changes, and the judiciary will only levy a fine. As a result, modifications should be implemented as quickly as feasible by the legislature. According to the author, because the judiciary lacks discretion, it should not levy fines in place of punishment, and so legislative change is necessary in this regard.

- **Vol.27 1&2, 2003, Ratna R Bharamgoudar, "Corporate criminal liability: an overview", Cochin University Law Review**.

In this article, the author examines that although companies can be considered "persons" in some legal contexts, but they cannot be easily considered criminals. The law has been hesitant to recognise criminal responsibility for business entities. The author of this article correctly said that Indian laws are hesitant to identify corporate entities as criminals, yet the Indian judiciary has acknowledged corporations as criminals.

CONCEPT OF CORPORATE CRIMINAL LIABILITY

ISBN 978-81-948082-8-2

Over the years, the issue of whether a doctrine of corporation criminal liability is necessary has come up. There isn't a universal answer to this query. The liability of businesses must beinvestigated and decided in each instance before a decision is made.

The following two reasons are given by opponents of this idea as to why the doctrine ofcorporation criminal liability is totally unnecessary:

First, they argue that individuals, not businesses, are the ones who conduct crimes. Second,the shareholders and customers are the ones that bear the brunt of the retaliatory effect. Itindicates that shareholders and customers must pay the price of corporate criminal fines and sanctions for the actions of corporations. In criminal law, corporate liability determines the extent to which a corporate as a legal person can be liable for the acts and omissions of the natural person it employs. It is regarded as an aspect of criminal vicarious liability.

Development of the Concept of Corporate Criminal Liability

The criminal liability of any act is based on the Latin 'maxim Actus non facit reum mens sit rea,' which means that to make a person or any entity liable, it must be shown that there is an act oromission which is forbidden by law, and with 'mens rea,' which is legally understood as having aguilty mind.[2]

In comparison, criminal conduct is not necessary for a civil lawsuit[3].Claims that the accused operated carelessly and caused the plaintiff injury are made in several of these disputes. As opposed to criminal trials, which are viewed as offenses against society, civil lawsuits entail disagreements between people, thus the reason for this distinction. In addition, rather than being imprisoned, the punishment for the offender in a civil lawsuit is just financial loss or the enforcement of specific rights.[4]

Historically, businesses were not held accountable for any crimes. It was believed that because a corporation had an artificial personality governed by laws, it was prohibited from acting unlawfully,making these actions ultra vires by definition. Additionally, the company could not be imprisoned;

therefore, mens rea was not present[5].Therefore, academics, bureaucrats, law enforcement agencies, adjudicating bodies, lawmakers, and the general public have never studied or been concerned with corporate crime. It was a minor point in the judicial processes and only had little significance, even on a national scale.

What are the hurdles which are faced by Indian Corporates in terms of Corporate Criminal Liability?

The traditional arguments focused on the necessity of subjecting businesses to criminal punishment

 ISBN 978-81-948082-8-2

when civil penalties could already be imposed. In the context of criminal law[6], social morality served as the foundation for this discussion. It is argued that social morality and the criminal justice system are connected. Criminal law serves as a tool to uphold societal morality and guarantee that crime is suppressed in order to protect people from harm. The State is therefore permitted to utilise the authorities at its disposal with the aim of preventing harm to members of society. Traditionally, businesses have solely been viewed as profit-making entities. Corporate crimes, on the other hand, found little toleranceamong the general public by the middle of the 20th century, which marked a change in howsociety perceived corporations. The society turned to the State to use its powers to restrain corporate crime as it became obvious that the activities of businesses have a significant potential to undermine social values and interests. Corporate companies were now anticipated to have a social conscience. Adapting moral norms made it possible for businesses to be under the purview of criminal law.

Also the Corporates are treated as separate from its members, so it was very difficult todetermine its liability.

JUDICIAL APPROACH TO CORPORATE CRIMINAL LIABILITY IN INDIA

Since there are specific examples that demonstrate the difficulties the judiciary encountered in determining corporate criminal liability and the conclusions it reached, and since the following cases are being critically examined, the court plays a crucial role in determining corporate criminal liability.

1. In the Landmark case of **Velliappa Textiles**[7], Court decided that the company could not be punished for offences that required the imposing of a compulsory term of jailas well as a penalty by way of fine. It was also decided that when the sentence is jail and a fine, the fine merely cannot be imposed by the court. The court went on to saythat the parliamentary mandate would be to keep courts from deviating from the mandatory minimum punishment recommended by the Statutory provision, and when analysing a penal statute, if many interpretations are possible, the court mustlean towards the interpretation that excludes a person from punishment instead of the one that imposes the punishment.

2. It was determined in the case **"State of Maharashtra V. Jugmander Lal"**[8] that the phrase "must be penalised for imprisonment and also for fine" indicates that the court is required to impose a punishment that includes both imprisonment and fine. As a result, the case against the

 ISBN 978-81-948082-8-2

corporation has been dropped by the court. As a result, the court ruled that unless a statute expressly states otherwise, the firm cannot be held liable for the actions of his officers or employees. The following is refused. The nicest part of this case is that the court at least took the law reports and other factors into account.

3. In the case **"Kusum Products Limited V. S.K. Sinha"**[9] The court stated unequivocally that a corporation, as a legal entity, could not be imprisoned because it is not possible for the judge to impose a fine or grant any punishment if the court finds thecorporation guilty, and if the judge does so, it would be changing the very system of the Act and attempting to usurp legislature.

4. However, the perspective of the judiciary shifted in 2005 with the Supreme Court's decision in the case **"A.K. Khosla V. T.S. Venkatesan"** [10], Under the Indian Penal Code, two corporations were charged with fraud. The Magistrate issued the process against the corporations. The defendants' counsel argued before the Calcutta High Court, among other things, that the businesses, as juristic persons, could not be prosecuted for IPC offences requiring mens rea. The judge agreed. The court emphasised that corporate organisations must meet two elements in order to be indicted: mens rea and the ability to inflict the requisite penalty of incarceration. Each of these prerequisites rendered prosecution of the defendant corporation's moot: a corporate entity cannot be alleged to have the required mens rea, nor can itbe imprisoned since it lacks a physical body.

5. In the case **Assistant Commissioner V. Velliappa Textiles Ltd**[11] , private firm, Velliappa Textiles, was charged for violating crucial sections of the Income Tax Act. Inthe above mentioned case, Sections 276-C and 277 of Income Tax Act, provided for imprisonment and a fine for the breach they have done. The Apex Court ruled that the defendant corporation could not be punished for violations under the abovementioned specific provisions as each of these sections required the imposition of a mandatory term of imprisonment as well as a fine. Due to the provisions in question, the court was only entitled to impose a fine. Using a rigorous and precise logic, the Apex Court determined that a company lacked a corporeal and physical person to jail and hence could not be punished by imprisonment. Furthermore, the Apex Courtheld that the legislative aim was to prevent courts from straying from the Act's minimum obligatory sentence.

6. In the Case **Standard Chartered Bank and ors. V. Directorate of Enforcement and ors**[12] It overturned earlier opinions on Corporate Criminal Liability and gave the theory a fresh new look. Standard Chartered Bank was being tried in this matter forviolating several sections of the Foreign Exchange Regulation Act of 1973. ("FERA"). The Supreme Court stated that no

ISBN 978-81-948082-8-2

organisation is immune from prosecution for criminal offences just because the prosecution demands compulsory sentence. TheSupreme Court held that where both incarceration and penalty are needed, firms must be penalised.

Practical Problems faced by Corporations in India

A significant issue that needed to be resolved involved the kind of penalties and fines that can be imposed on a corporation if it violates the law. Given that imprisonment was obviously not an option for a company because it is an artificial legal entity, the question of whether the courts might impose fines in lieu of the punishment required by law had to be taken into consideration. This problem arose in India and had some additional effects. Fines and imprisonment are both permitted as penalties in various provisions of the Indian Penal Code, or sometimes both. The moot point was that for such offences that require both imprisonment as well as fine, what should be the punishment meted out to a corporation, since corporation being a 'artificial person' cannot be imprisoned. This issue has been addressed in the ground-breaking cases. Companies cannot escape prosecution just because the offense for which they must be prosecuted involves a mandatory sentence of imprisonment. The apex court ruled in the case of Iridium India Telecom Ltd. v. Motorola Incorporated and Ors[13] that the position of the corporation is same as any individual attracting conviction under common law and statutory offences including even those where mens rea is necessary.8 It was made very clear by the apex court that there is no immunity for corporations fromcriminal prosecution based on the contention that criminal mens rea was missing when the act was committed. Embracing the principles of attribution and imputation has negated the very idea of a corporation not capable of being held liable for the commission of a crime.

The very concept of corporate criminal liability is developing in India since past some years. Amidst increasing the many dimensions of corporate crimes and defaults, authorities are feeling the necessity to have clearer and stricter laws and norms, which could deter them from committing suchcrimes. Courts have also started adopting stricter approach towards corporate criminal liability and are extending it further beyond its limited traditional scope. The spread of the concept of corporate criminal liability extends beyond IPC, 1860 and is spread across different statutes and legalprovisions.[14]

Punishment for fraud under Companies Act, 2013

This section states- " Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to beguilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved

 ISBN 978-81-948082-8-2

in the fraud, but which may extend to three times the amount involved in the fraud".

Punishment for Corporate Fraud Section 447 of Companies Act defines fraud as an act of omission or commission leading to consequences against the interest the company misusingor abusing his/ her authority by virtue of his position. According to this Act, fraud is an offence punishable by imprisonment not less than six months and can go up to maximum often years. The provision for fine cannot be less than the amount of fraud and may extend upto three times the fraud amount. The Act has been effective in controlling corporate crimes and frauds. The Report of the Companies Law Committee received suggestions that the ambit of Section 447 was too broad and would result in minor infractions being punished with severe penalties, which are non-compoundable.[15] However, it was also suggested during the discussions that once the offence of fraud is established, it would not be tenable to provide for a threshold for it to be punishable under Section 447. The Committee observed that "the provision has a potential of being misused and may also have a negative impact on attracting professionals in the post of directors etc. and, therefore, recommends that only frauds, which involve at least an amount of rupees ten lakh or one percent of the turnover of the company, whichever is lower, may be punishable under Section 447 (and non-compoundable). Frauds below the limits, which do not involve public interest, may be given a differential treatment and compoundable since the cost of prosecution may exceed the quantum involved."

CORPORATE CRIMINAL LIABILITY IN USA

The concept of "respond eat superior" is what underpins corporate criminal responsibility inthe USA. This states that a company is responsible for any actions made by its employees while operating within the extent of their employment and, at least in part, for the company's benefit. Federal law does not mandate that an employee possess a certain level of corporate responsibility, such as the ability to speak on behalf of the company, membership in a control group, or guiding mind, even though certain jurisdictions have different standards. In spite of not having a soul to damn, as the saying goes, a company may be held legally liable for the actions of any of its employees in the USA. The same is truefor partnerships, closely held corporations with a small number of controlling owners, and limited liability corporations.

Corporate criminal liability is so broad that even when an employee disobeys corporate rules, the firm could still be charged with a crime. If an employee violates the law while performing their duties, no amount of counter-instructions, no matter how detailed, will be able to prevent the company from suffering harm. Even a business with a strong compliancepolicy may be held liable

 ISBN 978-81-948082-8-2

for the illegal actions of its employees under US law. Given the foregoing, US government prosecutors believe it would be easy to charge the company with a crime. Because of this, US businesses are much more inclined to negotiate a deal with prosecutors to avoid going to trial.

The Supreme Court of America explicitly held in **"New York Central and Hudson River Rail Road Co. V. United Nations"** [16] that companies are crimes with intention.

In the case **"H. L Bolton and Co. ltd v. T.J Graham and sons"[17]**, Lord Denning observed that a company can be compared to a human body in many respects. They have a mind and a nerve centre that govern what they are doing. They also have hands that grip the equipment's and operate in compliance with the centre's commands. Several employees in the firm are only workers and agents who are nothing but hands to execute the task and cannot be claimed to reflect the intellect or will. Everyone else are directors and managers who reflect the company's controlling mind and will and govern what they do. The state of mind of these executives is the state of mind of the company, and it is regarded as such by law.

Lord Haldane's held in the case "Lennard's Carraying Firm Ltd v. Asiatic Petroleum Co. Ltd"[18] that, under criminal Jurisprudence, if the law demands a criminal mind and criminal intent of directors or management, the corporation itself is guilty.

In the context of corporate criminality, prosecution in the United States labours under notion that the corporation is a person but an artificial one. Here the entity is guilty if any person commits an offence to benefit the corporation while acting within the scope of his corporate duties. The authors, in an effort to examine the fall-out of actions based on such an assumption, arrive at the conclusion that the premise may not always hold true in the present scenario.[19] The stigma and moral judgement that befall the corporate organisation, which are typically intended to act as a deterrent for the offender, are frequently transmitted to thousands of innocent employees and stockholders, especially in the case of large public firms. With large-scale multinational corporations being under the supervision of professional managers, the owners seldom play any meaningful role in the management of corporate affairs – holding them liable for the acts of employees may thus often lead to results rationality[20]. It is this very concern that leads prosecutors to strike at the wrongdoing of individual employees instead of putting corporations on trial, despite the existence of legislations like the Sarbanes-Oxley Act of 2002 that exposes corporations to increased criminal liability after the high profile cases like Enron and World com.

The legal regime in United States assigns vicarious liability to a corporation for the acts of its

 ISBN 978-81-948082-8-2

employees if the individual: (a) Acted within the scope and nature of his employment; (b) Acted, at least in part, to benefit the corporation; and (c) The act and intent can be imputedto the corporation. The first criterion is fulfilled if and only if the employee has actual or apparent authority to engage in the act in question, with the burden of proof to demonstrate the same lying with the prosecution.

Employees who commit with one another or with outside parties to commit a crime may be prosecuted by the corporation they work for. However, despite judicial misgivings regardingthe doctrine's applicability in criminal proceedings, it cannot be found guilty of conspiring with its own employees under the Intra-Corporate Conspiracy Doctrine. Rarely, after a merger or amalgamation, corporations have been held criminally liable for the earlier misbehaviour of a target corporation; however, these instances were handled under the successor responsibility provisions of U.S. state corporation law, which is outside the scope of the current topic. Offences like deliberate disregard of criminal activity or concealing andfailing to report a felony may also attract corporate criminal liability. The wilful blindness doctrine is often applied in such cases, which requires proof of either actual knowledge or conscious avoidance[21].

In the US, the principle underlying corporate criminal liability is respondeat superior. In essence, an organisation is responsible for all its employees' actions done in the course and scope of their employment and, at least in part, for the benefit of the corporate.[22] Although some American states have different rules, in federal jurisprudence it is not necessary that the employee have a certain level of corporate responsibility, such as being able to speak forthe corporate, being part of a control group or being a directing mind.[23] It has long been US
law that a corporate can be criminally liable based on any of its employees' actions, despitenot having a soul to damn nor body to kick, as the saying goes. And the same applies to partnerships, closely-held companies with a small group of controlling shareholders and criminal liability companies.

This article outlines the development of corporate criminal liability and sentencing, and it makes the case that the Department of Justice and the U.S. Sentencing Commission have taken administrative measures in response to criticism that has been levelled at both the existence of corporate liability and the scope of the respondeat superior standard of liability. Due to this evolution in enforcement, relatively few businesses are found guilty, and the punishments meted out to those who are are altered to take corporate culpability into account. However, a wide spectrum of corporate action is significantly impacted by the broad possibility for criminal responsibility. Corporations are strongly motivated to conduct internal investigations, work with law enforcement and prosecutors, and actively pursue resolution of allegations of malfeasance. To avoid criminal

ISBN 978-81-948082-8-2

liability, corporations also enter into deferred prosecution agreements that often require changes in corporate business practices and governance as well as monitoring to ensure compliance. The purpose of these administrative responses attempt is to reduce or eliminate the negative effects of imposingcriminal liability while exploiting the law's power to deter criminal behaviour, improve corporate citizenship, and bring about beneficial structural reforms.

The U.S. Supreme Court first recognized the respondeat superior standard as appropriate for imposing corporate criminal liability for intentional crimes in New York Central Railroad had been convicted of bribery because an assistant traffic manager gave "rebates" on railroad rates to certain railroad users.[24] The Elkins Act, which entailed criminal penalties, was broken because some users' effective shipping prices as a result of the rebates were lower than required rates. The Supreme Court used the respondeat superior principle to uphold the conviction of New York Central, concluding that the railroad was accountable because one of its agents had committed a crime while performing his official duties. Almost no consideration was given by the Court as to whether respondeat superior was the proper criterion for determining criminal intent when it applied this broad standard to New York Central. The Court noted that the principle of respondeat superior was well established in civil tort law, then simply stated that "every reason in public policy" justified "going only a step farther" and applying respondeat superior to criminal law. Other American courts have followed the lead of New York Central, stating: "There is no longer any distinction in essence between the civil and criminal liability of corporation, based upon the element of intent or wrongful purpose"[25].

Conclusion

The concept of corporate criminal liability is still in its emerging stage in India as well as intentionally. Although attempts are made in terms of legislations like Companies Act, 2013 to control the corporate crime, the very definition and concept of corporate criminal liabilityis still at nascent stage. Corruption is an evolving danger that Indian government is trying hard to fight. Such crimes are of the nature where not only individuals but the companies also need to share the liabilities whether civil and [1] .It is still a matter of debate as to how effectively can laws and regulations control corporate behaviour.

One of the most serious problems facing society today is corporate criminality. Corporate crime loopholes that result in a court response are meant to have a positive effect on the neighbourhood and society. Criminal acts that are committed on behalf of the Company or by employees who work there are referred to as corporate crimes. A change is needed because corporate offences that can be prosecuted under the law are more productive. Industrial disasters and environmental degradation

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

brought on by certain corporate crimes are among the most imminent hazards to human life and environmental preservation. Thecriminal justice system is essential for current company activities, especially when considering the criminological and penological components. to evaluate or address corporate criminal behaviour and conducts, distinctive and particular policies must be devised.

Under federal and state law, organisations and individuals who engage in illegal activity in the United States of America may be held criminally liable. This concept of corporate criminal liability, which derives from the civil law system's notion of respond eat superior, iscreated by common law. With an emphasis on delayed trial and non-prosecution agreements as shown in pertinent instances, the role of the US Department of Justice in prosecuting firms is investigated.

The strict application of the reply eat superior principle tobusiness behaviour in a criminal context is currently entrenched in the United States of America. Clearly, a lot is required to be done in the area but the efforts done so far should not be undermined. Provisions must be made to avoid conflicts in interpretation of corporate criminal liability and its implication for companies. Similarly USA has laws which are better as compared to Indian Laws but still there approaches towards the dealing of thecases are better then we deal.

ISBN 978-81-948082-8-2

[1] United States v. George F. Fish, Inc., 154 F.2d 798 (2d Cir.), cert. denied, 328 U.S. 869 (1946), p. 801

ISBN 978-81-948082-8-2

REFERENCE

[1] Corporate Criminal liability in India Assistant Professor, Saveetha School Of Law, Saveetha institute of medical & technical sciences.

[2] "Corporate Criminal Liability - White Collar Crime - Legal Service India." https://www.legalserviceindia.com/legal/article-521-corporate-criminal-liability-white-collar-crime.html. 3 "Civil Cases | United States Courts." https://www.uscourts.gov/about-federal-courts/types-cases/civil-cases.4 "The Differences Between a Criminal Case and a Civil Case - FindLaw." 16 Apr. 2020, https://www.findlaw.com/criminal/criminal-law-basics/the-differences-between-a-criminal-case-and-a- civilcase.html.

5 "The Law on Ultra Vires Acts and Contracts of Private Corporations."https://core.ac.uk/download/pdf/148693594.pdf.

6 Criminal liability for corporations: Does the old order need to change Shouvik Kr. Guha & Abhyudaya Agarwal, Students NUHS.

7 (AIR 2003 SC 721)

8 (AIR 2005 SC 380) [9] 126 ITR 809 Cal, 1980 10 Cr LJ. 1448, 1992.

11 Comp L.J. 21, 2004

12 AIR 2005 SC 380

13 Iridium India Telecom Ltd. v. Motorola Inc., (2011) 1 SCC 74

14 Kartick Chandra v. Harsha Mukhi Dasi AIR 1943 Cal 345 (FB) and Darbari Lal v. Dnaram Wati, AIR 1957 All541, relied on in State of Maharashtra v. Syndicate Transport, AIR 1965 Bom 195.

15 (1996) 6 SCC 665 (Supreme Court of India).

16 53 LEd; 613, 215 USA 481, 1908

17 3 ALL ER 604, 1956, 632

18 3 1915 AC706, 113 LJ 195

19 J. Gra, Company Directors and Ignorance of the Law, 17 Co. LAW. 296, 299 (1996).20 Multinational Corporations and International Law by majit dewan

21 See United States v. One Parcel of Land, 965 F.2d 311, 316 (7th Cir. 1992) and Baena v. KPMG LLP, 45322 United States v. Potter, 463 F.3d 9, 26 (1st Cir. 2006). See also Hyewon and Wagner, supra note 35

23 9 Standard Oil Co. v. United States, 307 F.2d 120, 129 (5th Cir. 1962)24 New York Central & Hudson River Railroad v. United States (1909)

25 " (Egan v. United States, 137 F.2d 369, 379 (8th Cir.), cert. denied, 320 U.S. 788 (1943))

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

WORKING OF NATIONAL COMPANY LAW TRIBUNAL

Authored By - Chirag Chugh & Sunil Kumar

"[1]University Institute of Legal Studies, ("UILS") "Chandigarh University, NH-95, Chandigarh-Ludhiana Highway, Gharuan, Mohali (Punjab) 14041"3, chiragchugh239@gmail.com"

"[2]University Institute of Legal Studies, ("UILS") "Chandigarh University, NH-95, Chandigarh-Ludhiana Highway, Gharuan, Mohali (Punjab) 140413",uils.sunil@cumail.in"

ABSTRACT

Since its founding more than two decades ago, the Company Law Board has struggled with a massive backlog of cases as a result of a lack of members—more than half of the board posts were vacant—and an insufficient number of benches. Numerous committees identified these issues and recommended the creation of a new tribunal since empowering the current one would not be a wise course of action. On the basis of the recommendations made by these committees, the Central Government established the National Company Law Tribunal (NCLT).

Finding a specific court to handle business cases has become necessary for the public authorities in the present. On June 1st, 2016, the National Company Law Appellate Tribunal (NCLAT) and National Company Law Tribunal (NCLT) were formed by the Central Government in accordance to this idea.

NCLT has been operating inside the positive boundaries ever since it began. This essay examines the functions of the National Company Law Tribunal under various laws because, although this law currently provides enormous assistance to the corporate sector, only judges who are proficient in this area will render decisions and provide equity. A similar act will be regarded as a positive development in the history of corporate law in India due to its significant effects.

The National Company Law Tribunal, which stands in for all organisations covered by the Companies Act of 2013, has the upper hand over the Company Law Board. Understanding the Nation Company Law Tribunal's responsibilities under the Companies Act is crucial. fundamental, practical, qualitative, quantitative, and other research relevance. While agreements relating to the review of an organization's

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

records, the freezing of benefits, class action lawsuits, and the conversion of an open organisation into a privately owned business will now be administered by the NCLT,

Key word: National Company Law Tribunal, National Company Law Appellate Tribunal, Company Law Board

INTRODUCTION

The Hon'ble Supreme Court of India presented the argument for the creation of a specialised tribunal in the case of *S.P. Sampath Kumar* v. *Union of India*[164]. In that lawsuit, the nation's population has been gradually increasing since independence, according to the court, which stated the alternative organizational mechanism argument, and as a result, the number of legal disputes that must be heard by the courts has also been rising, placing a burden on the courts to handle the cases. In addition, the Shah Committee's report on the establishment of specialised tribunals stated that there is an immediate need to amend the legislation governing the creation of independent tribunals due to the backlog of cases at the courts.

The Eradi Committee proposed the provision for the enactment of the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) at the time the Second Amendment to the Companies Act, 1956, took place in 2002. However, the clause remained unclear until January 6, 2016.

The NCLT and NCLAT were enacted by the Ministry of Corporate Affairs on June 1, 2016, in accordance with its authority under Sections 408 and 410 of theCompanies Act, 2013, in order to provide a single forum for the resolution of all matters relating to Indian companies. Sections 407 to 434 of the Companies Act, 2013, specifically Chapter 27th, were applicable. However, the Tribunal related Sections were not put into effect until 2016 at the earliest. The Company Law Board (CLB), which was established in 1956 under the Companies Act, 1956, was dissolved as a result of the Tribunal's creation and constitution, and all of the Board's pending and active cases were transferred to the Tribunal.

[164] *S.P. Sampath Kumar* v. *Union of India* , 1 S.C.C. 12(1987)

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

The National Company Law Appellate Tribunal and National Company Law Tribunal were established by the Central Government on June 1, 2016. In Delhi during the month of June, and in other metro areas with many seats during the lengthy month of July, NCLT had started operations. The first class activity suit has been recorded in Mumbai, and as a result, NCLT operations have begun. Through the methods used in this document, the Researcher make an effort to test the idea, character, and scope of the National Company Law Tribunal's forces.

Under the CLB, there were only five benches in existence. However, this number increased to 11 throughout India, with the central bench in New Delhi, one additional bench there, and benches in Ahmedabad, Chennai, Guwahati, Chandigarh, Hyderabad, Bengaluru, Kolkata, Allahabad, and Mumbai in addition to one bench in all of these cities. The NCLT merged the corporate authority of the following boards as soon as it was established:

1. Board for Industrial and Financial Reconstruction

2. Company Law Board

3. Powers and authority granted to India's High Courts in connection to company winding up and restructuring

MEANING OF NCLT & NCLAT

The Companies Act of 2013 established the NCLT as a quasi-judicial body to handle civil corporate disputes that may arise as a result of the Act.[165] The NCLT has authority and conduct akin to a court. In India, the NCLT operates similarly to a regular court and is required to fairly assess the relevant facts, provide findings that are consistent with the natural justice principles and issue orders as necessary to carry out those decisions.[166] The orders so created may improve or change the authorities, duties, responsibilities, or rights of the parties involved as well as aid cure a situation, right a corporate wrong,

[165] Anonymous, *NCLT & NCLAT under Companies Act, 2013,* http://taxguru.in/company-law/nclt-nclat-companies-act-2013.html. (last updated Jun. 02, 2016).

[166] V.D. Rao, *Challenges before the National Company Law Tribunal?* http://indiancorporatelaws.blogspot.in/2010/05/supreme-court-on-nclt-nclat.html. (last updated Sep. 5, 2016).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

or impose fines or expenses. The Tribunal is not required to abide by the rigorous norms on application of procedural law and evaluation of any evidence.[167]

The appeals resulting from NCLT decisions are handled by the NCLAT, an appellate tribunal and authority. It was established as a check and balance system and to address any mistakes the Tribunal made. After an order or decision from the NCLT, appeals are heard in a temporary appellate forum similar to the High Court. The Supreme Court is also a venue for appeals of NCLAT judgements. The NCLAT has the power to uphold decisions and orders made by the NCLT after reviewing them.

IMPORTANT LAWS CAME INTO FORCE

The following sections, which will take effect after the National Company Law Tribunal is established, have been notified by MCA:

1. Section 7(7) of the Companies Act, with the exception of clauses (c) and (d), which deals with warrants issued when a company is founded using incorrect information or by omitting any materially important facts, the tribunal may challenge the incorporation declaration. Because of the current implementation of this article, shareholder interests are now protected.[168]

2. Sections 14(1) and 14(2), which discuss the changing of the company's nature. Following the establishment of NCLT, a corporation would now need NCLT permission if it wanted to change the article that causes a public company to become a private firm by passing a special resolution. Additionally, the printed copy of the amended articles must be filed within 15 days together with the approval letter outlining the modification.

3. In accordance with Section 55(3), NCLT clearance is now required in order to issue new redeemable preference shares in exchange for undelivered preference shares where the company's financial status is poor and they are unable to redeem such preference shares.[169]

4. National Company Law Tribunal has the authority to accept amalgamation and distribution of share capital under Section 61(1)(b), which will affect the voting proportion of various shareholders.[170]

[167] PrachiManekarWazalwar., *NCLT – Powers & Functions under Cos. Act, 2013*., http://lawstreetindia.com/experts/column?sid=164 (last updated Sep. 04, 2016).
[168] 14, Companies Act, 2013.
[169] *Supra* note 12.
[170] Anonymous, *Constitution of National Company Law Tribunal (NCLT)., Available at:* http://blog.ipleaders.in/constitution-national-company-law-tribunal-nclt/ last accessed on 24 December 2022.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

5. Section 62(4), (5), and (6) discuss additional share capital issues when a firm must appeal to the National Company Law Tribunal, when converting government-issued debentures or loans into shares of the company is necessary, or whenever the corporation rejects the terms offered.

6. In accordance with Sub Section (9), (10), and (11) of Section 71 the Code, Debenture holders may petition the Tribunal if a corporation fails to pay off its Debentures or give interest on them. or if the holder of the debenture believes that the company's balance sheet is insufficient. The corporation is given the right to redeem the debentures, and the holder should immediately receive payment of the principal and interest due.

7. Sections 99, 98, and 97 of The Companies Act deals with the Tribunal's authority to summon an annual general assembly of the members; if the assembly is not conducted or the business disregards NCLT's directives, each and every official responsible for the failure will be held accountable for the penalties outlined by the law.

8. Monitoring of general meeting minute books is covered in Section 119(4), thus every significant statement made in a general meeting must be recorded and kept as a document. Therefore, whenever company members ask for these papers for inspection, they should be made available to them. If the company refuses to do so, minute books may be subject to an immediate inspection by NCLT, or they may be required to send a replica to the appropriate party.

9. Sections 130 and 131, The NCLT may conduct an inspection if it receives information from a specific company member or statutory authority that the prior accounts contain fraud or other irregularities. requirements are required for them are not fully followed, raising questions about the validity of financial statements.[171] The NCLT has granted the authority to request a review of the preceding year's books of accounts up to that point.

10. If the company's auditor has engaged in any fraud, the NCLT may dismiss him on its own initiative, at the request of the federal government, or by any other means. This could even result in the auditor appointment eligibility for any other company being suspended for a while.

[171] *Supra* note 7

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

11. Section 169(4) gives NCLT the authority to limit a director's ability to represent the firm as specified in that section if that director has abused that power.[172]

12. In addition, a few more authorities that were created after the NCLT was put into effect are listed under Sections 213, 206(2), 218, 221, 224(5), and 245 & etc. Out of the 470 provisions of the Companies Act that were in effect prior to the introduction of the NCLT by the amendment act, 284 were in effect as of 2013however, the vast majority of the Act's 186 remaining provisions will now get in force..[173]

POWERS WITH THE NCLT

Among the important authority now granted to NCLT are:

1. **Class Action**: Since its beginnings, corporation law has been concerned with protecting the interests and privilege of multiple shareholders, especially non-promoter stakeholders. Numerous irregularities have been discovered, with the stockholders serving as the main offenders.[174] Investors discovered that they had lost money on investments they had made in a number of publicly traded companies, which later turned proved to have defrauded shareholders and stakeholders.

In the event of any fraud, the shareholders have a good variety of remedies available under the *Companies Act* 2013. Shareholders now have a legal option for punishing the offender and holding other parties responsible via a civil lawsuit, more specifically a class action lawsuit. The shareholders and depositors will now be entitled to compensation from the offenders and ancillaries for the damages they sustained as a result of the company's fraudulent practises.

Many plaintiffs may assert a claim on account of a wider group of people through the use of a class action lawsuit, often known as a class. What a class action lawsuit entails is analogous to a representative litigation in which only some of the parties represent the rights and responsibilities of people's interests. The shareholders who are geographically distributed and are harmed by the wrongdoings of the corporation can benefit from a class action lawsuit. When a small group of people pursue legal action on behalf of a big group, it can be a useful instrument. To protect investors against the wrongdoing of

[172] Government of India, *Proposed amendment and its reasons. Available at:* http://www.mca.gov.in/Ministry/pdf/Company_AmendentBill_2016.pdf, last accessed on 24 December 2022.
[173] S.N. Gupta, *National Company Law Tribunal – The Company Court of Tomorrow., Available at* www.icsi.edu/docs/…/NATIONALCOMPANYLAWTRIBUNAL-SMGUPTA.doc., last accessed on 24 December 2022

[174] *Supra* note 26.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

the organization's management or other organizations and advisers connected to the body corporate, Section 245 is introduced into the Companies Act, 2013. Companies in the public and private sectors are both the targets of the class action lawsuit.[175] It may be brought against any corporation covered by the Companies Act of 2013 or an earlier version, the Companies Act of 1956. The banking industry is the only one that is exempt from class action lawsuits.

2. **Registration of Companies**: Under the Companies Act of 2013, it is now possible to call into question the legality of any company if certain formalities were not followed during the registration and incorporation processes. The NCLT has the authority to take a variety of actions, including revoking the registration and dissolving the business. Even the charge or obligation of members may be made unlimited by the Tribunal. According to Section 7(7) of the Act of 2013, The new procedure for cancelling a company's registration has been made available in select situations where the registration certificate was acquired dishonestly or unlawfully.

3. **Refusal to Transfer Shares**: Under Sections 58 and 59 of the 2013 Firms Act, which were once the purview of the CLB, the NCLT has the authority to consider complaints of companies being refused permission to transfer shares and securities as well as the adaptation of the register of members. The only securities covered by the 1956 Act's remedies for denial of transfer or transmit are the company's shares and debentures. However, under the 2013 Act, the scope of these remedies has been expanded to include all securities issued by a corporation. Contracts involving the transfer of securities are expressly acknowledged by the sections of the agreement that deal with remedies in the event of default or fraud by the corporation.

4. **Tribunal-ordered investigations**: NCLT is granted a number of investigative rights under Chapter XIV of the 2013 Companies Act. Some of the Tribunal's most significant authority includes:

5. **The ability to order an investigation**: Under the Companies Act of 2013, an investigation into the company's affairs may be ordered with the application of 100 members, whereas 200 members were previously necessary. Furthermore, the tribunal has the authority to order an investigation if any

[175] Anonymous, *National Company Law Tribunal Constituted – New Perspectives for Dispute Resolution*., *Available at*: http://blog.scconline.com/post/2016/06/04/national-company-law-tribunal-constituted-new-perspectives-for-dispute-resolution/, last accessed on 24 December 2022.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

individual who is not connected to the corporation is successful in persuading NCLT that there are circumstances warranting such an action.

6. **Deposits**: Chapter 5 of the 2013 Companies Act, which addresses deposits, was stated in various time frames in 2014, and CLB was given the ability to take up matters under this chapter. With the creation of NCLT, these chapter 5 powers have now been shifted from Company Law Board to National Company Law Tribunal. On the surface, the regulation on deposits under the Act of 1956 and 2013 clearly differ from one another. Before the NCLT was established, the Companies Act of 2013's deposit-related provisions had previously been made known. In order to seek redress for the conduct, distressed depositors now have access to class action lawsuits as a remedy.

7. **Authority to freeze company's assets:** NCLT has the authority to launch an investigation at other people's requests in specific circumstances, in addition to being able to condense the company's assets for use later while it is under examination or investigation.

8. **Transformation of a public company into a private business**: The transformation of a public limited company into a private limited company is governed by Sections 13 to 18 of the Companies Act, 2013. The NCLT must first approve the conversion. According to Section 459 of the Companies Act of 2013, the Tribunal has the authority to set restrictions or requirements and may do so before granting approval.

9. **Change in Financial Year:** On April 1, 2014, Section 2 (41) was notified. Every firm or other entity covered by the Act is required to have a financial year that is standard and that ends on March 31 of each year. The NCLT application by the corporations to select a new financial year is the only instance in which this clause is not applicable. The CLB had the authority to control and modify the dates of a company's financial year because NCLT was not in effect at the time Sec. 2(41) was notified. Because of the creation of NCLT, all applications that were previously in CLB and have not yet been resolved have now been shifted to the Tribunal.

10. **AGM Appointed by Tribunal**: The Company periodically evaluates Shareholders' Opinions in its General Meetings. Every corporation is required by the Companies Act of 2013 to have a "annual general meeting," or "AGM," once a year. "Extraordinary general meeting" is the designation for any additional general meetings. The NCLT is authorised under Sections 97 and 98 of the Companies Act of 2013 to administer the companies or, acting alone, to convene general meetings of the defaulter company if company could not organise or convene an AGM or an EOGM in accordance with the

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

method specified by the Act of 2013. Regarding the AGM and EOGM, none of the Companies Acts has any different provisions.

11. **Corporate Debt Restructuring (CDR)**: Per the NCLT's draught regulations, if more than 75% of secured creditors believe that a corporate debt restructuring is necessary, they may contact the NCLT. The Companies' Act of 1956 did not previously offer this type of provision to the creditors. In addition, the applicant must make other disclosures through an affidavit, such as an auditor's report that complies with the solvency test following the CDR, measures for creditors' protection, a statement of creditors' duties, and a valuation report analysed by a registered valuer that represents the company's shares and all of its assets.

CONCLUSION AND SUGGESTIONS

The functions of the National Companies Law Tribunal under several legislations were assessed in the current paper. after the enactment of this law, the corporate sector received significant assistance; as a result, some judges who are only experts in this area will decide lawsuit and deliver justice as soon as feasible. Everyone has praised the creation of NCLT/NCLAT as a long deserved reform. There will be a prompt remedy, the tribunal will have the authority to set its own rules, and cases will be resolved quickly. Now that the tribunal has the authority to proceed class action lawsuits, India will see the emergence of a new and distinct form of shareholder democracy, similar to that practised in many western nations. This would support Indian businesses in establishing better corporate governance procedures and increase shareholder value. The current challenge for MCA is to manage the transition from CLB to NCLT, which they must do with care. Additionally, this could not have happened if CLB had been disbanded at the same time NCLT was founded, since this would have sped up the process. Nevertheless, as experts, we consider this a highly positive development in the history of Indian corporate law that will have a significant impact.

Finally, it can be said that the government made a sensible decision by replacing the CLB with the NCLT, but it would only be a success if the government made sure that the tribunal had the right infrastructure and a sufficient number of members, failing which, history would repeat itself. A supervisory organisation that would guarantee the tribunals' independence as well as give them administrative support is also necessary to guarantee the tribunals' ability to function independently.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

The tribunals should never be affiliated with their parent ministry since they are utterly dependent on it, which makes the litigants question the tribunals' independence. The government is required to immediately take the necessary steps as mentioned above to ensure that NCLT/NCLAT achieves the very goal for which they were founded, i.e. faster administration of justice.

Glory Salvatory_Shayo1.docx

Authored By - Sunil Kumar

Submission date: 10-Jan-2023 11:44AM (UTC+0530)

Submission ID: 1990605894

File name: Glory_Salvatory_Shayo1.docx (33.45K)

ISBN 978-81-948082-8-2

Word count: 3982

Character count: 21262

A CRTICAL ANALYSIS OF CONSUMER PROTECTION ACT, 2019

Glory Salvatory Shayo[1], Sunil Kumar[2]

[1]*ResearchScholar, University Institute of Legal Studies, Chandigarh University, NH-95, Chandigarh-Ludhiana Highway, Gharuan, Mohali (Punjab) 140413 shayoglory35@gmail.com*

[2]*Associate Professor, University Institute of Legal Studies, Chandigarh University, NH-95, Chandigarh-Ludhiana Highway, Gharuan, Mohali (Punjab) 140413 uils.sunil@cumail.in*

ABSTRACT

The new Consumer Protection Law 2019 aims to introduce strict measures to effectively protect consumers. And that alternative become the need of the modern Indian consumer. It was said that nearly millions of Indian citizens will buy products online, because of this majority of mobile internet users will buy online. Hence the consumer protection act 2019 will be very useful to the Indian consumer. The new consumer protection law has provided many new provisions for consumers. It is intended to assist consumers and seeks to overcome problems by granting basic rights to consumers in a very important sector called electronic commerce. There are six simple rights or privileges of consumers in India, the right to security, the right to choose, the right to be information, the right to consumer education, the right to be heard and the right to ask question. Consumer Protection 2019 ensure these rights by applying new strategies and methods. Moreover, when consumers' rights to the quality of goods and services are guaranteed and respected, there is no reason. This situation will undoubtedly create an atmosphere in which customers, consumers, and consumers are satisfied with what they need most, and consumers of goods/services must also understand the compensation mechanisms available at the complaint station. Only when consumers exercise their rights can they control the steering wheel. This article analyzes the different aspects of consumer rights and discusses the main provisions of the Consumer Protection Act.

Keywords: Consumer Protection Act 2019. Consumer rights, consumer complaints etc.

1.INTRODUCTION

"A customer is the most important visitor on our premises". Mahatma Gandhi. However, in India, prior to 1986, the Consumer Protection Act was administered by various laws such as the Drug Control Act of 1950, the Trademarks Act of 1958, etc. There was a need felt for a more exhaustive enactment to cure the misuse of consumer as these Acts were unfit to give fitting cures. "The Consumer Protection Act (CPA), 1986 being the principal governing body for ensuring the privileges of the customers had gotten bygone and doesn't cover quick

changes in the Consumer commercial centres, particularly those managing internet shopping, mail order shopping, item review, risky agreements, and misdirecting notices. Subsequently, it was decided to replace it with the Consumer Protection Act, 2019." [1] "New consumer protection law has numerous new arrangements for clients. It is intended to help customers and it attempts to conquer issues in giving fundamental rights to shoppers of a significant area called internet business."[2] New consumer protection assists with securing these rights by applying new strategies and techniques.

2.REVIEW OF LITERATURE

Mohammed kamalun (2015)	In this book the author examines the rights of consumers and the defensive measures espoused in India and different nations, It particularly deals with the statutory steps for Redressal of consumer grievances handed under the consumer Protection Act.[3]
Dr. Avtar Singh (2015)	its Emphasis on different forums created under the Consumer Protection Act.[4]
Dr. Jan Rifat (2016)	This book contains detail information regarding the consumer protection legislative framework and Legal Protection [5]
Dr. Barowalia (2016)	The importance of the Consumer Protection Act 2019 is that its solemn goal is to promote social welfare by allowing consumers to directly participate in the market economy [6]
Justice D P Wadhwa & N L Rajah (2017)	The book attempts to provide an interface between Consumer Protection Law and Competition Law by eliminating duplicity of rules/activities. [7]
Justice SN Aggarwal (2017)	This book provides a unique compendium of information of all the sections, amendments and the Supreme Court legislation on topics that are binding on all consumers.[8]

3.RESEARCH METHODOLOGY OF THE STUDY

The methodology, which is going to be adopted for the present study work will be non-empirical and analytical research. The present research work is based on the actual rights of consumers. For this, the researcher will review various legal commentaries, website, government publications, legal journal, Articles, research paper, newspaper and unpublished theses on the subject for the purpose of collecting

Volume 2, Issue 7 | January 2022 ISBN 978-81-948082-8-2

literature and data for study. Substantive help will be taken from internet sources also. Thus, the study is based on secondary data.

4.INDIAN CONSUMER PROTECTION LAW

The increasing interdependence of the world economic system and therefore global nature of many business practices have led to an overall focus on protecting and promoting consumer rights. High-quality goods and better services. The development of modern technology has undoubtedly had a major impact on the quality, availability and safety of goods and services, but consumers are still victims of unfair and exploitative behaviors. Counterfeit food, fake drugs, suspicious installment plans, high prices, low quality, poor service, misleading advertising, dangerous products, black market marketing, and many other forms. Investing in consumers in the form of cybercrime and plastic money will hit consumers even more. "Consumer first" and "customer first" are just myths under the current circumstances, especially in developing countries. However, people correctly recognize that consumer protection is a socio-economic plan that must be implemented by the state and enterprises, because meeting the needs of consumers is in the interests of both parties. However, "in this case, the government has the primary responsibility to protect the interests and rights of consumers through appropriate policies, legal structures, and administrative frameworks." [9]

5.KEY HIGHLIGHTS OF CONSUMER PROTECTION ACT, 2019

The significant changes defined are:

5.1 Digitalization

The new law has taught different new arrangements concerning digitalization. This long-awaited change becomes important given the mind-boggling appearance of electronic transactions. consumers rights likewise must be advanced in a similar manner. The progressions in this respect were:

5.1.1 Definition of Consumer

is defined as an individual "purchases any good" and "hires or avails of any service" for thought however does exclude an individual who gets products for resale or goods or service for any business reason. The Act seeks to extend the scope of this definition. Subsequently, a consumer will currently mean any individual who "purchases any products" and "avail any services" which will incorporate both online and offline

transaction through electronic means, mail order shopping, direct selling or multi-level marketing.[10]

5.1.2 E-Filling

The new Act 2019 additionally considers the grievances to be recorded electronically, online or through phone call. It is expected that enabling electronic complaint registration will improve the complaint outcome and hence people who are previously unable to file complaint can now file complaint.

5.1.3 Hearing and Exam of Events Parties Through Video-Conferencing

Also, as per the legal hearing process, is concerned, video conferencing is also accepted as a method for hearing.

5.1.4Seller's Definition Extended to Consist E-Commerce Platforms.

- **Benefit Under the New Act**

5.2.1 E-Commerce

E-commerce is a life changing thing. Its new concept especially during this pandemic when most of our shopping is through an E-commerce website, adding E- commerce platform in the preview of this act which would prove to be very beneficial for the consumer because we believe that where there are E-commerce websites like amazon or flipkart which always came with the instructions, which always talk about warranty at the time of delivery or they had their previous redressal commissions and everything was there for such famous website or for famous E-commerce platform but now any E-commerce platform that is selling products online would come under the preview of this act and every E-commerce which would talk about return, refund, exchange, warranty, guarantee, delivery , shipping or payment method etc. so if you feel any E-commerce website is not following this prescribed format then you are well within your right as a consumer to file a complaint against them. However, all online business will be administered under all laws.

5.2.2 Place of Filing

This is very beneficial; a complaint can be filed from a place where you are residing or you are working.

5.2.3 Central Consumer Protection Authority

which is there to safeguard the right, and issue guidelines.[2]

5.2.4 Online Purchase

Online purchasing is a new concepted added in the definition of consumer, so when they say e-commerce, a consumer would be a person who is making an online purchase also, so this particular instance has been added in the act which states that a consumer will include an online purchaser as well.

5.2.5 Express Warrant

Express warrant means every website or E-commerce platform or any seller or manufacturer in general, has to talk about express quantity which means whenever you are selling a product, a warrant must be issued along with that.

5.2.6 Incidental Losses

for example, when a consumer, applied to certain university which issued a misleading advertisement and based on that misleading and they applied to that university, they got degree done and later found out that the value of that degree is not what the advertisement talked about, now in that case a consumer complaint can been file and a person can be paid for incidental loss. For e.g., years got wasted or the education did not prove beneficial for them in any way, so such different categories are incidental losses and the new act will cover those losses as well.

- **STEPS TAKEN TOWARDS ENHANCING TRANSPARENCY**

5.3.1 Establishment of Central Consumer Protection Authority

"The central consumer protection authority CCPA" [11] is a body made to oversee, get and implement the privileges of the customer. The CCPA takes care of the issue of unfair trade practice. It has been offered a position to ask and start activity against the individuals who ignore the 2019 Act. It is additionally enabled investigative powers. "The CCPA will be engaged to force punishments, review products, cause withdrawal of administrations, give refunds and investigate issue." [12] The Act shall provide for setting up an examination wing which will be headed by the director general who will be selected by the local government for leading examinations, according to the request for the CCPA. Further, "the Act additionally presents electronic mode for recording complaints for unfair trade practices or false or misdirecting ads to the district collector, the chief of the local office or CCPA." "They may uphold an approval against misdirecting commercials, including against the individuals who

embrace those advertisements." This basically implies that even a VIP who is just employed to act in a business might be expected to take responsibility. .

They CCPA may have the powers to:

- To conduct investigations into violations of consumer rights and may institute complaints or prosecute on the basis of violation.
- The CCPA may order re call of unsafe good and services
- The CCPA may have to stop or seize the misleading advertisements and may hold both the manufacturer and the services provider as well as the celebrity endorse accountability for such misleading advertisements.

Example

Someone claim that, this set of oil could cure hair baldness or some other thing which is not actually possible, then such misleading advertisement can be held accountable and the CCPA will impose financial penalty of up to Rs 10 lakhs on the first violation and this amount may increase in subsequent violation of such misleading advertisement.

5.3.2 Strudure Forum

Particulars	District Forum [1]	State Commission	National commission
Composition	1 president and at least 2 members	1 president and at least 4 members.	1 president and at least 4 members
Location	In district of state	In each state	At NCR
Qualification	As given by the central government	As given by the central government	As given by the central government
Filing complaint	By the central authority: may filed electronically.	By the central authority: may filed electronically.	By the central authority: may filed electronically.
Place of suing	Where the complainant resides or works.	Where the complainant resides or works.	_____

5.3.3 Consumer Courts

The said act permits the consumer to find the complaints from where they reside or work to acquire. This has given the consumer extraordinary great relief as prior the complaint was recorded just where the seller or specialist co-op was found or where the reason for activity emerged. This move is viewed as pertinent subsequent to taking a gander at the rising online business, where specialist co-op could be found anyplace.

5.3.4 Territorial Jurisdiction

This Act awards purchasers more admittance to equity. Prior, customers suffered difficulties if the business didn't have an office in their state since ward was confined to the space where the vendor resided or led business. In contrast to the 1986 Act, this demonstration licenses purchasers to document an objection dependent on where they reside or work.

5.3.5 Pecuniary Jurisdiction Change

The 2019 Act got changes this perspective for the Commissions. Prior the cut-off for District Commission was ₹. 20 Lakhs however presently it is Rs. 1 Crore. The breaking point for the State Commission used to be ₹. 1 Crore yet is presently stretched out till ₹. 10 Crore. In like manner, the breaking point for the National Commission has expanded far in excess of ₹. 10 Crore.

5.3.6 Empowering Recording from Place of Home or Work of Shopper:

According to the arrangements of the past Act 1986, a customer can file a complaint in the nearby jurisdiction of the forum where the buyer occurred or where the dealer's enrolled office is found. "The new Act 2019 now empowers the consumer to record the grievance in the local jurisdiction at the place of their home or work environment also." [14]

5.3.7 Product Liability

Product liability means three classes of people who would be liable for the product they are selling, one would be the product manufacturer, second would be the product service provider and the third would the product seller, until now the liability of this people were very restricted but now the 2019 Act has added all together section 82 to 87 which would be taking about the product liability.

Examples:

- In case of a product manufacturer, for e.g., there is a defect or there a problem in the design or you have seen a product online and when you get the product the specification of the product mentioned online and what you have received is completed different or there is no warranty involved or there has been anything which is false and misleading then that very product manufacturer would be liable under this act.
- In case of a product service provider for e.g., there has been negligence on the part of a service provider or certain instructions were not given at all or again there is no warrant, in all these four circumstances, the product service provider would be liable under this act.
- in case of a product seller, now we all know a seller is through which you are directly buying that product, you may not be buying it from the manufacturer but from the seller, so when the product comes to the seller, e.g. the design is wrong, the packaging was not correct or the product has been modified from the manufacturer has produced or the seller has not been cautious in assembling the product or inspecting the product then in those cases, the product seller would also responsible.

Other than these three categories, there are certain situations where there would be no liability, for example the product has been harmed by you during your usage, in that case we know we have to be cautious to use the product but if you harm the product at your own level or if you misuse the product then in such situation, there would be no product liability.

Second, a warrant has been given but then still the product has been used in a different way, so in this way again there would be no product liability.

Thirdly, now certain products have mentioned that the products have to be used in the supervision of an adult or an expert so if you are using the product not looking after those guidelines then there would be no product liability.

Fourthly, in cases where there would be no product liability, for example the complainant was under the influence of a drug or alcohol which has not been prescribed so why use the product if certain mis-happening or something happens then in such situation the product liability would be there. So, these are the certain sections which have been completed or newly added to the present act.

5.3.8 Unfair Trade Practices

One of the greatest improvements is that the new demonstration has widened the meaning of unreasonable trade practice. New act says that a consumer's private information ought not be unveiled to some other individual or association without disclosure from the consumer. [15]

For example, sometime they discover this improvement is very good in light of the fact that when you visit any vehicle display area or bank and so forth they gather your own information, for e.g., your telephone number, email, how much cash you acquire and so on furthermore, they offer this information to different organizations or individuals for cash which is a truly downright awful out of line unfair trade practice since when they offer this individual information to others then different organizations begins calling you, messaging you about their items which is huge mental harassment for consumers.

5.3.9Aalternative Dispute Resolution

The 2019 act provides for a mediation cell as an alternative dispute resolution mechanism and the act also proposes mediation cells to be attached to consumer commission as well as national commission, state commission and district commission. The advantage of this mediation cell is that. For example, there is any scope of settlement outside the consumer court between the manufacturer, seller and the complainant or between any two parties., they can get the matter peacefully resolved by this alternative dispute resolution system, so mediation cell has been a very important addition to 2019 act because before going to the courts, if the court feels like, there's any possibility of getting the dispute amicably resolved then they can refer the matter to the mediation cell.

5.3.10Penalty Against False or Misleading Advertisements:

Penalties are enforced under the following categories:

- Non-compliance of the directions of the central authority, if the central consumer protection authority has issued a certain guideline or passed an order and the order has not been complied by any of the parties then there would be certain penalties for the same.
- Second in case if you are selling any spurious goods or for example if you are selling something which is adulterated, there would be certain penalties with regards to the same.
- If a search has been conducted by the director general in a very fixation way so in that situation also a penalty will be imposed on that director general who conducted a

search which was not within its scope. For example, there are chances that they may conduct a search over which they have no right so they can be penalized under this very section for conducting such a search.

For e.g, there's non- compliances of the directions of the central authority then there's an imprisonment of 6 months and a fine of 20 lakh rupees and in case a false or misleading advertisement has been given then there will an imprisonment of 2 years and a fine of 10lakh and if subsequently the person is again giving a false advertisement, then in that situation the imprisonment will be 5 years and a fine of 50lakh rupees.

In case of Adulterated products, for example, the products that have been sold are adult rated, there are three to four categories which come under: -

A. If because of the sale of that adulterated product no injury has been caused to the complainant so in that way imprisonment will be 6 months with the fine of one lakh rupees

B. In case the consumer who suffered injury because of that adulterated product then in such case the imprisonment would be of 1 year and a fine up to three lakh rupees

C. In case the consumer suffered injury along with grievous hurt then in that situation, the imprisonment is 7 years with a fine up to five lakh rupees

D. In case the consumer died, they well be imprisoned for more than 7 years and a fine of 10 lakh rupees.

All and all the new act has brought so many new things, when it comes to mediation, offences and penalties, jurisdiction and that has completely changed the 1986 act.

6.RECOMMENDATION AND SUGGESTION

The Legislature of India has made an enormous stride by refreshing a 30 years of age consumer protection law. This is a generally excellent thing that the Government has done. Be that as it may, there are such countless provisions like the new law that says online selling stages will be additionally expected to take responsibility for selling of defective items or administrations. Presently assuming they think about this thing, all online web-based businesses like flipkart, amazon, myntra, snapdeal and so on should arrange a component which will assist with decreasing sales of fake items or flawed on their foundation. Which is truly threatening to our economy assuming some of them don't think that it's simple, they may quit working together in our nation so the idea is that the administration of India ought

to likewise help them in planning a formally dressed instrument which will make shared benefit circumstance for the two parties.

7.CONCLUSION

It's very well be presumed that the new Act 2019 gives a more prominent level of safety to the rights and interests of the consumer than the 1986 Act. Basically, it overcomes the unbalanced power structure between customer and retailer. In any case, for the 2019 Law to be truly effective in guaranteeing consumer protection, the implementation of the legislation is the fundamental determinant that remains to be seen given the delay in the 2019 Law.

However, The Act is a much-needed development for the consumer. It furnishes them with obviously characterized rights and dispute resolution measures which may empower them to determine their complaints on a most optimized plan of attack premise. Online commercial centers and online sale destinations, which have all through been incorporated under the domain of an "aggregator"[3], have likewise been incorporated under the domain of this Act which will put greater duty on them as for the labour and products being sold and given by them.

REFERENCES

[1] Dr. Chatar Singh Negi and Dr. Sanjay Kumar. 2020. "Consumer Protection In India: Empowering Consumer", International Journal Of Development Research, 10, (02), 33873-33877.

[2] Consumer-Rights, *available at*: http://Vikaspedia.In/Social-Welfare/Social-Awareness/Consumer-Education/Consumer-Rights (last visited on Dec.21, 2022)

[3] Mohammed Kamalun Nabi 2015, Consumer Rights and Protection in India.

[4] Dr. Avtar Singh, *Consumer Protection Law and Practice* (Eastern Book Company 5th Edn 2015.

[5] Dr. Jan Rifat, *Consumerism and Legal Protection of Consumers* (Deep & Deep Publications 2019)

[6] Dr J N Barowalia , *Commentary On The Consumer Protection Act* (Lexisnexis , 6th Edn 2017)

[7] Justice D P Wadhwa & N L Rajah 3rd Edn, *The Law of Consumer Protection* 78, (Lexisnexis, Allahabad, Uttar Pradesh ,2017)

[8] Justice S N Aggarwal, *Supreme Court on Consumer Protection Act* (Lexisnexis 2nd End 2017)

[9] Consumer Protection Law in India, *available at:* http://www.Legalservicesindia.Com/Article/1739/Consumer-Protection-Law-In-India.Html (last visited on Dec.21, 2022)

[10] Kapoor, Sheetal. "Consumer Protection Act, 2019: A Milestone in Empowering Consumers." Yojana (2019): 53

[11] Aggarwal, VK. (2015) Consumer Protection: Law and Practice. Bhatat Law House, Delhi.

[12] Nomani, M. Z. M., Faizanur Rahman, And Alaa KK Alhalboosi. "Consumer Protection Act, 2019 And Its Implications for The Medical Profession and Health Care Services in India." *Journal Of Indian Academy of Forensic Medicine* 41.4 (2019): 282-285.

[13] The Consumer Protection Act, 2019 (The Gazette of India)

[14] The gazette of India, *available at:* https://egazette.nic.in/WriteReadData/2019/210422.pdf (last visited on Dec.21, 2022)

[15] Sable, Vivek. (2020). Analysis Of Consumer Protection Act, 2019.

[16] Consumer Protection (Distance Selling) Regulations 2000

[17] Mishra, Suresh. Is The Indian Consumer Protected? One India One People.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Glory_Salvatory_Shayo1.docx

ORIGINALITY REPORT

7%	7%	2%	4%
SIMILARITY INDEX	INTERNET SOURCES	PUBLICATIONS	STUDENT PAPERS

PRIMARY SOURCES

1	www.researchgate.net Internet Source	2%
2	www.coursehero.com Internet Source	2%
3	lordsoflaw.com Internet Source	1%
4	www.ebcwebstore.com Internet Source	1%
5	Submitted to Damodaram SanjivayyaNational Law University Student Paper	<1%
6	"CyberBRICS", Springer Science and BusinessMedia LLC, 2021 Publication	<1%

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Impact And Role Of Fair Trade Movement In Social And Economic Development: An Overview

Authored By - Robert Akoye

ABSTRACT:

With the event of the Cold War, new terms such as developed countries (industrialized nations) and developing countries (non- or less industrialized nations) appeared to respectively refer to the countries in the North and the South. The trading relations between these two regions of the world weren't ideal. Developed countries that buy products from developing countries have unfair terms of trade. It was to change this statu quo that the Fair Trade movement emerged. Fair Trade is "a movement whose goal is to help producers in developing countries to get a fair price for their products so as to reduce poverty, provide for the ethical treatment of workers and farmers, and promote environmentally sustainable practices."[176]

Many researchers, authors, and organizations that have been referred to as sources wrote books, articles, reports and essays on pretty much every aspect of the Fair Trade movement, and based on their work, this paper focuses on its impact and role in social and economic development, as well as the excesses which can be made of it. Fair Trade is intended for good, but it can be ineffective in the wrong hands.

KEYWORDS: Fair Trade, International Trade, developed and developing countries, farmers

[176] "Fair Trade." Merriam-Webster.com Dictionary, Merriam-Webster, *available at:* https://www.merriam-webster.com/ (last visited on 29 December, 2022)

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

1. Introduction:

All over the world and for many centuries, people, and then empires and kingdoms have developed economic and commercial relations based on mutual benefit and solidarity. Fair Trade applies these ideas to the contemporary challenges of international trade in a globalized world.[177]

There is so much inequality within international trade today based on the fact that the world, at present, has been divided into two categories (I) developed and (II) underdeveloped countries: (I) The industrial countries having high per capita income due to their economic progress and considered as developed countries. Developed economies are characterized by high levels of aggregate output and therefore by higher consumption standards and more savings and investment. (II) An undeveloped country is characterized by poverty, with obsolete methods of production and social organization. An undeveloped economy is further characterized by high population and low growth rate, abundant but under-utilized natural resources, a low rate of capital formulation, a low standard of living accompanied by continuous and sustained efforts to raise it through proper utilization of available natural, manpower, financial and entrepreneurial resources.[178]

Rich countries and multinational companies dominate the world markets, placing the environmental and economic burden on producing countries in the Global South.[179] Developing countries grow and produce many different things that are sold to developed countries. These eventually end up on our supermarket shelves. A prime example of this is coffee and chocolate. This might be seen as a good thing for developing countries' economies, but unfortunately, it is not. Rich countries that buy from developing countries have unfair terms of trade. Something that needs to be changed and should never be this way. Big corporations take advantage of this supply chain and leave farmers and workers, many of whom are children, at an incredible disadvantage.[180] Many farmers throughout the developing world are forced to accept low prices for their crops as

[177] The World Fair Trade Organization and Fairtrade International, *"The International Fair Trade Charter"* 4, *available at:* https://www.fair-trade.website/the-charter-1 (last visited on 29 December 2022)
[178] Ishita Chatterjee, *International Trade Law* 8 (Central Law Publications, 2013)
[179] What is Fairtrade and why is it important?, *available at:* https://spunout.ie/voices/advice/what-is-fairtrade-why-important#:~:text=Fairtrade%20provides%20disadvantaged%20farmers%20and%20workers%20with%20better,a%20stable%20price%20even%20when%20the%20market%20drops. (last visited on 29 December, 2022)
[180] *Supra* note 4

 ISBN 978-81-948082-8-2

they have no other choice. This leaves them with very little profit. According to Fairtrade UK, on average, cocoa farmers earn just 6% of the final value of a bar of chocolate. When crops, such as coffee beans and cocoa, are exported to developed countries, they are processed, packaged, and sold. More than 80 percent of the profits belong to the countries that sell the final product.[181]

Fairtrade changes this *statu quo* and helps developing countries grow their economies in environmentally friendly ways.[182]

2. Definition, meaning and background:

First, "Fair" means just, equitable, right, adequate, reasonable, etc.[183] and "Trade" is defined as buying and selling of goods and services in a market, or an instance of bartering items in exchange for one another.[184] Thus, a movement whose goal is to help producers in developing countries to get a fair price for their products so as to reduce poverty, provide for the ethical treatment of workers and farmers, and promote environmentally sustainable practices is called Fair Trade. [185]

Secondly, the main global networks of the Fair Trade movement agreed the following definition of "Fair Trade" in 2001: "Fair Trade is a trading partnership, based on dialogue, transparency and respect, that seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalized producers and workers – especially in the South.

Fair Trade Organizations, backed by consumers, are engaged actively in supporting producers, awareness raising and in campaigning for changes in the rules and practice of conventional international trade."[186]

Fair Trade is the solution that makes a significant difference in the lives of those who grow and produce the goods we enjoy. Fair Trade Organizations help set standards to alleviate poverty and

[181] *Supra* note 4
[182] *Supra* note 4
[183] "Fair meaning", *available at:* https://www.bing.com/search?EID=MBSC&form=BGGCMF&pc=W129&DPC=BG02&q=fair+meaning (last visited 29 December, 2022)
[184] "Trade." Merriam-Webster.com Dictionary, Merriam-Webster, *available at*: https://www.merriam-webster.com/ (last visited on 29 December, 2022)
[185] "Fair Trade." Merriam-Webster.com Dictionary, Merriam-Webster, *available at:* https://www.merriam-webster.com/ (last visited on 29 December, 2022)
[186] The World Fair Trade Organization and Fairtrade International, *"The International Fair Trade Charter"* chapter 2 11, *available at:* https://www.fair-trade.website/the-charter-1 (Last visited on 29 December 2022)

ISBN 978-81-948082-8-2

exploitation of farmers and workers by providing better wages and reforming working conditions.[187]

Fair Trade is an arrangement designed to help producers in developing countries achieve sustainable and equitable trade relationships. The fair trade movement combines the payment of higher prices to exporters with improved social and environmental standards. The movement focuses in particular on commodities, or products that are typically exported from developing countries to developed countries but is also used in domestic markets, most notably for handicrafts, coffee, cocoa, wine, sugar, fruit, flowers and gold.[188]

Fair Trade basically means there is another way to practice international trade i.e. to bring justice, equity, and sustainability in international commerce.

The term "Fair Trade Organizations" refers to all organizations and networks that use trade to combat poverty and inequality as part of their mission. This includes the production, exchange, and marketing of goods as part of Fair Trade initiatives, as well as the promotion, education, and advocacy of the Fair Trade concept.

The 2009 Charter of Fair Trade Principles, which has been widely used as a primary reference document for policy and advocacy work, is revised and updated in this document. An international panel of experts has provided advice to the World Fair Trade Organization and Fairtrade International, the two global networks that are co-leading the process.

The Charter update provides an opportunity to restate the fundamental Fair Trade values that unite the diverse range of organizations and networks that comprise the Global Fair Trade movement. This is significant because the success of Fair Trade is encouraging more widespread use of the term, increasing the need for a common reference point.

[187] What is Fair Trade?, *available at:* https://www.gallantintl.com/what-is-fair-trade-in-detail (Last visited 29 December, 2022)

[188] Fair Trade, *available at:* https://en.wikipedia.org/wiki/Fair_trade, (Last visited on 29 December, 2022)

 ISBN 978-81-948082-8-2

The new Charter also seeks to highlight Fair Trade's long history of addressing issues such as inequality, gender equality, climate change, and other topics addressed by the United Nations Sustainable Development Goals.[189]

3. History:

There are many stories about the history of Fair Trade, but it's a pretty recent concept. It all started in the United States. The first formal "Fair Trade" shop which attempted to commercialize Fair Trade goods in Northern markets opened in 1958 in the USA by religious groups and various politically oriented non-governmental organizations (NGOs). Ten Thousand Villages, an NGO within the Mennonite Central Committee (MCC), and SERRV International were the first, in 1946 and 1949 respectively, to develop fair trade supply chains in developing countries. The products, almost exclusively handicrafts ranging from jute goods to cross-stitch work, were mostly sold in churches or fairs. The goods themselves had often no other function than to indicate that a donation had been made.[190]

During the 1960s and 1970s, Non-Governmental Organizations (NGOs) and socially motivated individuals in many countries in Asia, Africa and Latin America perceived the need for fair marketing organizations, which would provide advice, assistance and support to disadvantaged producers. Many such Southern Fair Trade Organizations were established, and links were made with the new organizations in the North. These relationships were based on partnership, dialogue, transparency and respect. The goal was greater equity in international trade.[191]

In the first decades, Fair Trade products were sold mainly by Fair Trade Enterprises that had Fair Trade as the central ethos guiding their activities. In the 70s and 80s, Fair Trade products were sold to consumers mainly in world shops or Fair Trade shops. In 1973, Fair Trade Original in the Netherlands, imported the first fairly traded coffee from cooperatives of small farmers in Guatemala. Now, more than 30 years later, Fair coffee has become a concept. Meanwhile, hundreds of thousands of coffee farmers have benefited from Fair Trade in coffee. In Europe, Fair

[189] The World Fair Trade Organization and Fairtrade International, *"The International Fair Trade Charter"* chapter 1 10, *available at:* https://www.fair-trade.website/the-charter-1 (last visited on 29 December 2022)
[190] History of Fair Trade, Wikipedia, *available at:* https://en.wikipedia.org/wiki/Fair_trade#History (Last visited on 29 December, 2022)
[191] History of Fair Trade, *available at:* https://wfto.com/about-us/history-wfto/history-fair-trade (Last visited on 29 December, 2022)

ISBN 978-81-948082-8-2

Trade coffee became a popular choice for many consumers. Presently, between 25 to 50 % of turnover of Northern Fair Trade Organizations comes from this product. After the success of coffee, many fair trading organizations expanded their food range and started selling commodity products like tea, cocoa, sugar, wine, fruit juices, nuts, rice and spices. Consumers welcomed these products like coffee. Food products enable Fair Trade Organizations to open new markets, such as institutional markets, supermarkets and bio shops. In addition to these food products, other non-food products such as flowers and cotton have been added to the Fair Trade assortment.[192]

Both trading organizations in the South and the North felt the need to establish a global network for Fair Trade Organizations, to act as voice for Fair Trade and a forum for the global Fair Trade movement. Thus, in 1989, WFTO was formed in the Netherlands. The members of WFTO vary greatly. They represent the Fair Trade supply chain, from production to sale, and also include support organizations such as Shared Interest, which provides financial services and support to produces.[193]

In the course of the years, the Fair Trade movement has become more professional in its awareness-raising and advocacy work. It produces well-researched documents, attractive campaign materials and public events. It has also benefited from the establishment of European structures that help to harmonize and centralize its campaigning and advocacy work. An important tool was the establishment of the FINE Advocacy Office in Brussels, which focuses on influencing the (European) policy-makers. It is supported, managed and funded by the whole movement, represented in FLO, IFAT (now WFTO), NEWS and EFTA – hence its acronym FINE.[194]

During its history of over 60 years, Fair Trade has developed into a widespread movement. Thanks to the efforts of Fair Trade Organizations worldwide, Fair Trade has gained recognition among politicians and mainstream businesses. More successes are to be expected.[195]

[192] *Supra* note 16
[193] *Supra* note 16
[194] *Supra* note 16
[195] *Supra* note 16

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

4. Impact and role of Fair in social and economic development:

The current research focuses on the Fair Trade movement and its impact and role in the social as well as economic development.

4.1. Social impact and role:

• *Empowering women:* On of the immediate impact of Fair trade movement in social development is empowerment of women. Although women are often the main providers of labour, they are often restricted from accessing land and credit that would enable them to benefit fully from economic activity and opportunities for social and economic development. Women have the right to receive equal pay and treatment, and have access to the same opportunities, compared to men.

Fair Trade Organizations not only respect this principle of non-discrimination, but they work actively to promote gender equity within their own operations by including women in decision making and to influence positive change more widely.

For millions of women, Fair Trade projects have provided the first opportunity to make decisions about household income, and evidence shows this improves outcomes in areas such as health, education and social development.[196]

• *Protecting the rights of children and investing in the next generation:* The exploitation of children can only be addressed by targeting its causes as well as monitoring compliance with national and international standards.

Fair Trade supports organizations that help families earn sufficient income without recourse to child labour and that builds understanding within communities of the importance of children's well-being, educational needs and right to play.

Fair Trade also addresses the threats facing many rural communities from the lack of incentives for the next generation to become farmers and artisans. Fair Trade Organizations offer young people the option of a brighter future close to their families and as part of their communities by

[196] The World Fair Trade Organization and Fairtrade International, *"The International Fair Trade Charter" chapter* 3 20, *available at:* https://www.fair-trade.website/the-charter-1 (last visited on 29 December 2022).

 ISBN 978-81-948082-8-2

enabling them to learn the skills required for their future working life. Leaders of Fair Trade Organizations, especially women, are powerful entrepreneurial role models for young people.[197]

• *Involving citizens into building a fair world:* Fair Trade supply chains help connect producers and consumers. The growing presence of Fair Trade products in mainstream markets illustrates the power consumers wield in their consumption choices. By informing people about the impact of their buying choices it contributes to responsible consumption that can be sustained within the ecological limits of the planet.

But it should not just be the responsibility of consumers to seek out Fair Trade; they have a right to expect it as the norm for all products. Therefore, Fair Trade also engages with its stakeholders as citizens, recognizing that producers and consumers are social actors as well as economic ones.

Fair Trade's focus on inclusion and empowerment helps connect local grassroots campaigns with a global movement for alternative economic models that include a just and equitable global trading system for everyone.

The success of Fair Trade in its work with producers in Africa, Asia and Latin America & the Caribbean selling to markets in Europe, North America and the Pacific is increasingly referenced by initiatives seeking to improve trade in all parts of the world.[198]

4.2 Economic role and impact:

• *Achieving inclusive Economic growth:* Trade is more than just an economic activity about exchanging goods and services; it is a social interaction between people. Fair Trade aims to strengthen social capital by partnering with inclusive and democratic organizations that are active in supporting education, health and social facilities within their communities as a way of spreading the gains of trade as widely as possible.

Associations or co-operatives of small and family-owned businesses have always been at the heart of Fair Trade because of their role in helping marginalized and disadvantaged producers and workers improve their access to markets. Fair Trade Organizations support the efforts of

[197] *Supra* note 21.
[198] The World Fair Trade Organization and Fairtrade International, *"The International Fair Trade Charter"* chapter 3 23, *available at:* https://www.fair-trade.website/the-charter-1 (last visited on 29 December 2022). .

 ISBN 978-81-948082-8-2

associations and cooperatives to build their capacity to manage successful business, develop production capabilities and strengthen access to markets.[199]

• *Providing decent work and helping improve wages and incomes:* Everyone should be able to live with dignity on the proceeds of their labor. Fair Trade encourages the observance of local regulations or international conventions governing freedom of association and collective bargaining, the abolition of discrimination, the avoidance of forced labor, and the provision of a safe and healthy working environment.

Aside from that, Fair Trade Organizations strive to achieve a living wage for workers in their supply chains, as well as for small-scale farmers and artisans to make a living from their businesses.[200]

• *Nurturing biodiversity and the environment:* Environmental protection, as well as the long-term viability of natural resources and biodiversity, are fundamental pillars of Fair Trade.

All actors in the production, distribution, and consumption chains are responsible for good environmental practice, which includes the protection of soil and water resources as well as the reduction of energy consumption, greenhouse gas emissions, and waste.

To ensure that the true costs of good environmental practice are reflected in prices and terms of trade, the entire value chain should be managed.

Small-scale farmers and artisans are particularly vulnerable to the effects of climate change, and it is critical that they receive assistance in developing and investing in adaptation and mitigation strategies.[201]

5. Discussion:

The current international trade is unfair. The Fair Trade movement comes as a solution to an existing unfair system of trade which is at the disadvantage of producers and farmers originating in developing or emerging countries. Although developing countries are the most concerned with

[199] The World Fair Trade Organization and Fairtrade International, *"The International Fair Trade Charter"* chapter 3 19, *available at:* https://www.fair-trade.website/the-charter-1 (last visited on 29 December 2022).
[200] *Supra* note 24.
[201] The World Fair Trade Organization and Fairtrade International, *"The International Fair Trade Charter"* chapter 3 21, *available at:* https://www.fair-trade.website/the-charter-1 (last visited on 29 December 2022).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

the current unfairness of international trade, the main actors of the Fair Trade movement are people from developed countries. Thus, the problem here is whether those advocates are really sincere in their implication into the movement. Fair Trade is all about equity, fairness, justice, and sustainability, but is it all that good and always beneficial for developing countries? Are its advocates being just and fair in their decisions making? Moreover, some companies and organizations associated with Fair Trade are not really invested into the movement. They are just using it as a label to sell their products. So Fair Trade is just a marketing tool for them. They don't care about the farmers and producers who work really hard to provide the products they are selling. This excessive use of Fair Trade is against what it intended for [(i) To support the work of Fair Trade Organizations in raising awareness among consumers and citizens of the importance and impact of Fair Trade, so that more people will be inspired to join and support it, (ii) to facilitate collaboration among Fair Trade Organizations by connecting their specific missions and strategies with the common philosophy of the movement, and to promote collaboration with the solidarity economy, organic agriculture movements and others that fight for similar goals to the Fair Trade movement, (iii) to enable others who work with Fair Trade Organizations to recognize the values and approaches that unite the global movement.[202], (iv) to help producers in developing countries to get a fair price for their products so as to reduce poverty, provide for the ethical treatment of workers and farmers, and promote environmentally sustainable practices.]

6. Conclusion:

This paper aims at explaining the Fair Trade movement, bringing a meaning to it, analyzing its background, importance in today's international trade and its role and impact in social and economic development.

Fair Trade would be more effective if developing countries are more involved in it and take it more seriously. In addition to this, Fair Trade advocates should be fully committed to the movement and its organizations should make sure that companies selling Fair Trade labelled products aren't just using it as a marketing tool. Fair Trade is a life changing movement. People involved in it should really care.

202 The World Fair Trade Organization and Fairtrade International, "The International Fair Trade Charter" chapter 1 4, available at: https://www.fair-trade.website/the-charter-1 (last visited on 29 December 2022).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

PREDICTABLE & EFFECTIVE MECHANISM FOR CORPORATE FOR INSOLVENCY PROCEEDINGS IN INDIA UNDER IBC, 2016

AUTHORED BY - DR. ARIFA ZAHRA

arifa.zahra@presidencyuniversity.in

zahraarifa786@gmail.com

Presidency University, Bengaluru (Karnataka)

7043663068

Abstract

In the current research paper, researcher would like to highlight the recent amendment to the corporate insolvency proceedings in India after passing of the Insolvency and Bankruptcy Code in the year 2016. The focus of the research is the insolvency system which can keep a check on the corporate activities and to provide adequate punishment in the event of violation. Hence, present research goes into detail to explore the winding up of company's affair on the grounds of insolvency. The discussion on the subject matter is significant as it owes its importance from the contemporary practice of corporate world. The scams and frauds like Kingfishers, Washington mutual Bankruptcy, WorldCom Bankruptcy and ENRON warrant the need to come up with immediate and speedier solution to defeat the corporate offenders and to bring an Insolvency system where the rights of the creditors are not curtailed and at the same time, the efforts and labour of the members in building up the edifice of the company do not go in vain and hence to strike an authentic balance in between the interest of the creditors and the members of the company.

Research Methodology: Researcher in the present paper will be using the doctrinal method of research by taking the assistance of Primary tools: Acts, Codes, Regulations and secondary tools comprising of Books, Journals, Blogs and websites.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Research Questions: Researcher shall attempt to answer the following questions:

a) How does IBC, 2016, tackle the Corporate Insolvency Regime in India?
b) What is the winding up proceedings under IBC, 2016?
c) What is the judicial approach to IBC, 2016?

Findings of the Research: IBC has brought a major amendment in the Insolvency and Bankruptcy Regime in India. Earlier, there existed Companies Law, 1956 read with the Companies Law, 2013, which laid down exhaustive procedures for the winding up of the companies on several grounds. Passing of 2016 Code simplified the insolvency procedures in India by providing the Insolvency Resolution Plans, Insolvency Resolution experts and the speedier and time bound liquidation proceedings.

Predictable & Effective Mechanism for Corporate Insolvency Proceedings in India under IBC, 2016

Over the years, International Monetary Fund Organization has become increasingly involved in the promotion of orderly and effective insolvency system among its members. Experience speaks that the reform in the current field can play a significant role in strengthening a country's economic and financial systems. For example, an effective insolvency system provides an important pillar of support for the domestic banking system by enabling banks to curtail the deterioration of the quality of their claims on the corporate sector, whether through a court approved restructuring or where necessary, through an efficient liquidation insolvency reform can be partially relevant for the economies in transition, where it can play a critical role in addressing the problem of the insolvent state-owned enterprises. In the context of the financial crises, an orderly and effective insolvency system can provide an important means of ensuring adequate private sector contribution to the resolution of such crises. Also, although the insolvency procedures are implemented through the courts, the very existence of a predictable mechanism establishes an incentive for negotiations between the debtors and their creditors, which may lead to out-of-court agreements being reached in the shadow of the law.[203]

[203] International Monetary Fund, Orderly and Effective Insolvency Procedures 13 (International Monetary Fund, 1999).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Insolvency as the researcher has interprets means a situation where a company is unable to pay its debts or when the debts of the company are higher than its assets and liabilities of the company are more than its capital. In other words, it can be known as the 'corporate insolvency'. There it implies the situation when an individual, firm, or organization cannot encounter its financial obligations for paying liabilities as they are due. Corporate insolvency and bankruptcy are among the grounds of the winding up of the company where the debtor company is unable to pay its debt or has stopped paying the amount. It is the result of the debtor and creditor relationship which is created by way of the debt owned by the creditor from debtor.[204]

Since the laws relating to the unpaid debts and the winding up are given in Companies law act 1956 & 2013, there was no separate legislation in this respect but gradually with time, government felt the need to provide an appropriate procedure for the insolvency proceedings and hence, 2016 Insolvency Act Bankruptcy Code was passed on 28th May, 2016. Earlier, as there was no exhaustive legislation on the subject in India therefore, four different authorities had overlapping jurisdiction in insolvency proceedings: High Court, Company Law Boards, Board for Industrial and Financial Reconstruction (BIFR) and Debt Recovery Tribunals (DRTs)[205]

Corporate Insolvency in India & Enactment of Insolvency and Bankruptcy Code of India, 2016

Intention of the Insolvency legislation is the realization of all the assets of the debtor's company and the determination of the rights of the creditors. Liquidation of the company and reinvesting the assets thereof, keep regulating the Nation's Economy. The law of insolvency and corporate insolvency authorities are to intend the welfare of the creditor's, debtor's (Insolvents) and country's as well and hence insolvency laws are to attempt[206]:

- "To provide the valid reconstruction of the valuable business and to facilitate appropriate fiscal policies to start up and reorganizing the business and to assess the probable risks involved;

[204] Michael Murray & Jason Harris, Keay S Insolvency: Personal & Corporate Law and Practice 34 (Thomson Reuters Australia, Limited, 2018).
[205] Debts Due to Banks and Financial Institutions Act, 51 S.3 (1993).
[206] David Milman & Chris Durrant, Corporate Insolvency: Law and Practice 78 (Sweet & Maxwell, 1987).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

- To implement strong steps in order to achieve maximum value of the assets to determine the creditor's rights in large number and thus to unburden the insolvents;
- To realize the advantage of near-term debts collection through liquidation against preserving the value of debtor's business through reorganization;
- To resolve the interests of the creditors in an orderly fashion so as to determine the rights fairly as per the market interest and the percentage of debts from whole.
- To protect the assets of the company against the premature distribution by an individual creditor's action;
- To facilitate a transparent liquidation procedure so as to make all the information available to the creditor and the debtor about the assets, assets market value, reconstruction procedure or sale procedure;
- In the event of the liquidation of the foreign company, to provide coordination between the jurisdiction and assist in the administration of the foreign insolvency proceedings and to provide specific cross-border insolvency;
- Main task which insolvency legislation should attend to is to provide equilibrium of the interest of different groups of creditors and to fulfill the same via rehabilitation and the liquidation of the insolvent corporations. However only the legislation would not help unless the practice by the authorities is in conformity which otherwise warrants the interest of insolvency corporations, insolvency agencies as well as the stake holders of the company."[207]

Therefore, corporate insolvency in India was never governed by a single legislation until the passing of recent 2016, Code. In order to resolve the insolvency matters, suitable legislation has to be looked upon. Apart from the type and kind of the company and the debt situation, the matter subjects to the procedural as well as jurisdictional before dispute settlement forums. Indian civil law[208] provides that major company insolvency cases are to be handled by the ordinary civil courts. General law confers power on the civil court to entertain and conduct insolvency proceedings unless, the jurisdiction of particular authority is already mentioned in the companies act or in the contract between the debtor and creditor.[209]

[207] Shivam Goel, *Insolvency and Bankruptcy Code, 2016: Problem and Challenges* 3 *IJIR* 1725 *(*2017).
[208] Civil Procedure Code Act 5 S. 9 (1908).
[209] Jyoti Singh & Vishnu Shriram, Insolvency and Bankruptcy Code, 2016: Concepts and Procedure 11 (Bloomsbury, 2017).

 ISBN 978-81-948082-8-2

Insolvency and bankruptcy code, 2016 was passed by Lok Sabha on may 05, 2016 by the Rajya Sabha on May 11, 2016 and assent of the president of India was obtained on May 28, 2016 and it is known as Insolvency and Bankruptcy Code, 2016 (IBC, 2016.[210]

Preamble of the code, 2016 sets the following purpose:

"A Code to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner, for maximization of the value of assets of such persons, to promote entrepreneurship, availability of credit and balancing the interest of stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India and for other matters connected therewith."[211]

The preamble above mentioned states the very purpose of the code to bring a reform to the Insolvency and reorganization of the insolvent companies for the determination of the rights of the creditors and the debtors. To provide a fast track procedure for the realization of the maximum value of the assets, to strengthen the entrepreneurship in India and an assurance to the stakeholders of the security of their debts and hence the availability of the credit by balancing the interest. [212]

The code shall have the applicability in relation to the Insolvency, Liquidation, voluntary liquidation, Bankruptcy as the case may be on the followings:

1. The companies incorporated under the provisions of the companies act, 2013 or any other previous companies act;
2. Limited liability Partnership incorporated under the provisions of the LLP (Limited liability Partnership) Act, 2008;
3. Other body corporate as specified by the central government;
4. Partnership firm;
5. Individual.[213]

[210] Insolvency and Bankruptcy Code of 2016, No. 1, Acts of Parliament, 2016 (India).
[211] *Supra.*
[212] David Milman & Chris Durrant, Corporate Insolvency: Law and Practice 12 (Sweet & Maxwell, 1987).
[213] C.A Kamal Garg, Insolvency & bankruptcy Code Ready Reckoner 4 (Bharat Law House Pvt Ltd., New Delhi, 1st edition., 2018).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Key Highlights of Insolvency and Bankruptcy Code, 2016

Apart from being a comprehensive and consolidated legislation on the treatment of Insolvent corporate entities, the fundamental feature of the Code is that it allows creditors to assess the viability of a debtor as a business decision and agree upon a plan for its revival or a speedy liquidation. Thus, the code makes the liquidation or the insolvency proceedings more transparent so that no rights of any creditor shall be denied. Now, let's discuss the key highlights of the Insolvency and the Bankruptcy Code, 2016 regarding Liquidation of the companies which fall under the following headings:

- **Definition of Financial creditor & operational creditor**: The maintainability of applications for initiating corporate insolvency resolution process chiefly depends on the applicant first satisfying the Tribunal that it falls either within the definition of 'Financial Creditor' or 'Operational Creditor' under the IBC. Order dated 20th February 2017 passed by the Hon'ble National Company Law Tribunal, Principal Bench, New Delhi in **Col. Vinod Awasthy v. AMR Infrastructure Limited**[214] is an important case on the point whereby the Hon'ble Tribunal interpreted the definition of 'Operational Creditor' under the IBC to ascertain the applicability of the same to a flat purchaser.

  Prior to discussing the aforesaid Order, it is imperative to first understand the definitions of 'Financial Creditor' and 'Operational Creditor' under the IBC. Therefore, a financial creditor is defined under IBC to mean: "a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred".[215]

  In order to ascertain whether a person is a financial creditor, the debt owed to such a person must fall within the ambit a 'Financial Debt'[216] as under IBC. A financial debt is defined under IBC to mean:

[214] Col. Vinod Awasthy v. AMR Infrastructure Ltd. (2017) 10 C.P PB (India).
[215] Insolvency and Bankruptcy, 2016, No. 1 (S. 5(7)).
[216] Insolvency and Bankruptcy, 2016, No. 1 (S. 5(8)).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

"a debt along with interest, if any, which is disbursed against the consideration for time value of money and includes-[217]

- Money borrowed against payment of interest;
- Any amount raised by acceptance under any acceptance credit facility or its de-materialized equivalent;
- Any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- The amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- Receivable sold or discounted other than any receivable sold on non-recourse basis;
- Any amount raised under any other transaction, including, any forward sale or purchase agreement, having the commercial effect of borrowing;
- Any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
- The amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause".

An operational creditor is defined under IBC to mean: "any person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred".[218] In order to ascertain whether a person would fall within the definition of an operational creditor, the debt owed to such a person must fall within the definition of an operational debt as defined: "a claim in respect of the provisions of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority".[219]

[217] Aurohee Gursale & Sana Khan, Financial Creditor And Operational Creditor Under The Insolvency And Bankruptcy Code, 2016 (July, 4th 2017), . http://www.mondaq.com/india.
[218]Insolvency and Bankruptcy, 2016, No. 1 (S. 5 (20)).
[219] Insolvency and Bankruptcy, 2016, No. 1 (S. 5 (21)).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

- **Corporate Debtor's right to file for insolvency**: The Code proposes two independent stages for the insolvency proceeding wither to determine the rights of the creditor by following a resolution plan or by liquidating the company.
  - Insolvency Resolution Process, during which financial creditors assess whether the debtor's business is viable to continue and the options for its rescue and revival; and
  - Liquidation, if the insolvency resolution process fails or financial creditors decide to wind down and distribute the assets of the debtor.[220]

- **The Insolvency Resolution Process**: A financial creditor (himself or jointly with other financial creditors), an operational creditor or the corporate debtor (through Corporate applicant i.e. corporate debtor itself; or an authorised member, partner of corporate debtor; or a person who has control and supervision over the financial affairs of the corporate debtor) may initiate corporate insolvency resolution process in case a default is committed by corporate debtor. An application can be made before the National Company Law Tribunal (NCLT) for initiating the resolution process. Operational creditor needs to give demand notice of 10 days to corporate debtor before approaching the NCLT. If corporate debtor fails to repay dues to operational creditor or fails to show any existing dispute or arbitration, then the operational creditor can approach NCLT.[221]

- **Moratorium**: The NCLT orders a moratorium on the debtor's operations for the period of the IRP. This operates as a 'calm period' during which no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can take place against the debtor.[222]

  In **Schweitzer Systemetek**,[223] wherein NCLT, Mumbai has held that moratorium will not be applicable to the Guarantors and Section 14 is clear that the moratorium will only cover the properties of Corporate Debtor as the Guarantors are not covered in terms of Section 14 of IBC and the aforesaid view of the NCLT has also been upheld by the Appellate Tribunal. The similar

[220] Trilegal, The Insolvency And Bankruptcy Code, 2016 Key Highlights (May 1st 2018), http://www.mondaq.com/india/x/492318/Insolvency+Bankruptcy/The+Insolvency+And+Bankruptcy+Code+2016+Key+Highlights.
[221] Gayatri Athare Mohapatra, SUMMARISING THE INSOLVENCY AND BANKRUPTCY CODE, 2016 9May 1st, 2018), http://www.indialaw.in/blog/blog/commercialcorporate/summarising-insolvency-bankruptcy-code-2016/.
[222] Insolvency and Bankruptcy, 2016, No. 1 (S. 14).
[223] M/s Schewitzer Systemtek India Private Ltd. V. Phoenix ARC Pvt. Ltd., (2017) T.C.P. No. 1059/ I&BP/NCLT.

 ISBN 978-81-948082-8-2

issue again traversed recently in the matter of **Veesons Energy Systems Pvt. Ltd.**,[224] wherein the NCLT, Chennai has passed an order restraining the Financial Creditor from proceeding against the Guarantor of the Corporate Debtor during the moratorium period. One might argue that the judgments passed in both the matters are conflicting. However, if we examine the facts, both the judgments operate in different spheres.

- **Appointment of Resolution Professional**: The NCLT appoints an insolvency professional or 'Resolution Professional' to administer the IRP. The Resolution Professional's primary function is to take over the management of the corporate borrower and operate its business as a going concern under the broad directions of a committee of creditors. This is similar to the approach under the UK insolvency laws, but distinct from the "debtor in possession" approach under Chapter 11 of the US bankruptcy code. Under the US bankruptcy code, the debtor's management retains control while the bankruptcy professional only oversees the business in order to prevent asset stripping on the part of the promoters. Therefore, the thrust of the Code is to allow a shift of control from the defaulting debtor's management to its creditors, where the creditors drive the business of the debtor with the Resolution Professional acting as their agent.[225]

- **Creditors Committee and Revival Plan**: After submission of the claims, the insolvency professional shall form a creditors committee and all the creditors whose claims get admitted shall be the part of creditors committee. The creditor's committee will decide upon the question of the reason for the inability of the corporate debtor to pay back its debts and if they are justified that the reason is a business crisis but not the financial crisis, then creditors committee shall either go for restructuring repayment plan to the creditors or for the liquidation process.[226]

WINDING UP PROCEDURE UNDER INSOLVENCY & BANKRUPTCY CODE, 2016

[224] Mr. V. Ramakrishnan Vs. M/s Veesons Energy Systems Pvt. Ltd. & State Bank of India (2017) IA CP/510/IB.
[225] *Id*. at 54.
[226] Anubhav Pandey, Insolvency and Bankruptcy Code, 2016 – Key Highlights (May 2nd 2018), https://blog.ipleaders.in/insolvency-and-bankruptcy-2/.

ISBN 978-81-948082-8-2

2016 Code proposes a paradigm shift from

the existing regime of 'Debtor-in-Possession' to

'Creditor-in-Control'

2016 Code proposes a paradigm shift from

the existing regime of 'Debtor-in-Possession' to

'Creditor-in-Control'

2016 Code proposes a paradigm shift from

the existing regime of 'Debtor-in-Possession' to

'Creditor-in-Control'

2016 Code proposes a paradigm shift from

the existing regime of 'Debtor-in-Possession' to

'Creditor-in-Control'

Code of 2016 relating to Insolvency brought a paradigm shift from *'debtor in possession'* to the *'creditor in control'*. It aims to consolidate all the laws in India relating to the insolvency and the liquidating of the insolvent corporate entities. Most important part of the said code is Part II which deals with the insolvency and the liquidation proceedings which is to be tackled by the registered insolvency resolution or insolvency liquidation professionals under the supervision of the court. Following is the process of the liquidation of the insolvent companies under the code[227]:

Code provides that the liquidation occurs in the event of failure to submit the resolution plan to the NCLT within the prescribed period of 180 days or 240 days[228] or 135 Days[229], or rejection of resolution plan for non-compliance with the requirements of the Code, or decision of creditors' committee based on vote of majority, or contravention of resolution plan by the debtor.[230]

[227] Jyoti Singh & Vishnu, Shriram Insolvency and Bankruptcy Code, 2016: Concepts and Procedure 34 (Bloomsbury, 2017).
[228] Insolvency and Bankruptcy, 2016, No. 1 (S. 12).
[229] Insolvency and Bankruptcy, 2016, No. 1 (S. 56)
[230] Insolvency and Bankruptcy, 2016, No. 1 (S. 33).

ISBN 978-81-948082-8-2

IBC code further provides the liquidation of the company in four scenarios as follows:

Where the adjudicating authority is of the view that the resolution plan does not meet the criteria set out under the code[231], which says "The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;

(b) provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board."[232]

Secondly, where the adjudicating authority does receive the resolution plan on or after the expiry of the period permitted for the submission of the same. Thirdly where at any time before the confirmation of the resolution plan the committee of the creditors resolve by 75 percent majority of the voting shares that the corporate debtor is to be liquidated and lastly, where the corporate debtor violates the term of the resolution plan and on an application by a person whose interest are adversely affected by such violation, the adjudicating authority determines that corporate debtor has violated the terms as aforesaid.[233] If the adjudicating authority approves such application for the liquidation, it shall be considered as a moratorium on the initiation of any proceedings by or against the corporate debtor except appeals in Supreme Court or High courts.[234]

[231] Insolvency and Bankruptcy, 2016, No. 1 (S. 30 (2)).
[232] Insolvency and Bankruptcy, 2016, No. 1 (S. 33).
[233] C.A Kamal Garg, Insolvency & bankruptcy Code Ready Reckoner. 45 (Bharat Law House Pvt Ltd., New Delhi, 1st edition., 2018).
[234] *Supra* at 47.

ISBN 978-81-948082-8-2

3.Appointment of Liquidator

Section 34 of the IBC, 2016, provides the procedure for the appointment of the liquidator wherein The Resolution Professional shall act as liquidator unless replaced. Provided that the adjudicating authority shall take into consideration the followings:

If the resolution plan submitted by the resolution professional under section 30 of IBC, for insolvency resolution was rejected for the failure to meet the requirements mentioned in sub section 2 of section 30 as mentioned above. If the Board Recommends the replacement of the resolution professional to the adjudicating authority for reasons to be recorded in writing.[235]

Board shall propose the name of another Insolvency professional within ten days of direction issued by the adjudicating authority under sub section 5 of section 34.[236] The adjudicating authority shall on the receipt of such, by an order appoint an Insolvency professional as the liquidator.[237] An Insolvency professional shall charge such fee for the conduct of liquidation proceedings in such proportion to the value of the assets, as may be specified by the Board.[238]

Section 34 provides for the appointment of the insolvency professional for the purpose of the liquidation proceedings and on such appointment, fee will be chargeable out of the liquidation of assets of the corporate debtor. The fee, however is subjected to the regulations by the Insolvency and Bankruptcy Board of India. Appointment by the Board shall ensue that the person is well acquainted with the financial condition of the company and that it will perform with efficiency to bring as much value as possible of the asset for the benefit of the company.[239]

For the purpose of liquidation however, the liquidator has some special powers that are different from those of the resolution professional. Under section 36 the liquidator forms a liquidation estate where liquidator holds all the properties of corporate debtor as a fiduciary, for the benefit of the creditors. Another major function of the liquidator is the consolidation and verification of the claims submitted to him, determination of their value. While the resolution professional also has the power to call for and collate the claims, there are a few differences in procedure collation of

[235] Insolvency and Bankruptcy, 2016, No. 1 (S. 34 (2)).
[236] Insolvency and Bankruptcy, 2016, No. 1 (S. 34 (6)).
[237] Insolvency and Bankruptcy, 2016, No. 1 (S. 34 (7)).
[238] Insolvency and Bankruptcy, 2016, No. 1 (S. 34 (8)).
[239] Jyoti Singh & Vishnu Shriram, Insolvency and Bankruptcy Code, 2016: Concepts and Procedure 67 (Bloomsbury, 2017).

ISBN 978-81-948082-8-2

claims in CIRP and the liquidation. In the liquidation process, the liquidator has the power to reject claims raised[240] and if a claim is rejected, a creditor can appeal against this decision to the Adjudicating Authority.[241] Additionally, claims once made can be withdrawn.[242] The liquidation assets are then sold and the proceeds are distributed according to the order of priority (given under section 53 of Indian Insolvency Code). Following this, the liquidator makes an application to the Adjudicating Authority for dissolution of the Corporate Debtor.[243]

3.2 Treatment and Priority of Claims

From the date of commencement of the liquidation proceedings, the liquidator shall consolidate the claim according to the order of priority of claims. The Code significantly changes the priority waterfall for distribution of liquidation proceeds. After the costs of insolvency resolution (including any interim finance), secured debt together with workmen dues for the preceding 24 months rank highest in priority. Central and state Government dues stand below the claims of secured creditors, workmen dues, employee dues and other unsecured financial creditors. Under the earlier regime, Government dues were immediately below the claims of secured creditors and workmen in order of priority.[244]

Section 38 of the IBC stipulates the time period of thirty days for the collection of claims by the liquidator. It also specifies the method by which different category of creditors can submit and prove their claims. Notably, financial creditor can prove their claims by providing the record of the claim as stored in an information utility. Further, section 39 lays down the procedure for the verification of the claim wherein the adjudicating authority can ask any creditor or corporate debtor to produce any document in support of the claim. Section 40 provides the admission or rejection of the claim in whole or in part and to record the reasons as well in writing if rejected. The communication of the same shall be provided to the creditors and corporate debtor within seven

[240] Insolvency and Bankruptcy, 2016, No. 1 (S. 40).
[241] Insolvency and Bankruptcy, 2016, No. 1 (S. 54).
[242] Insolvency and Bankruptcy, 2016, No. 1 (S. 38).
[243] Michael Murray & Jason Harris, Keay S Insolvency: Personal & Corporate Law and Practice 34 (Thomson Reuters Australia, Limited, 2018).
[244] Trilegal, The Insolvency And Bankruptcy Code, 2016 - Key Highlights 1ST May 2018), http://www.mondaq.com/india/x/492318/Insolvency+Bankruptcy/The+Insolvency+And+Bankruptcy+Code+2016+Key+Highlights.

 ISBN 978-81-948082-8-2

days of the acceptance or the rejection of the claim. Section 42 of the IBC confers power upon the creditor(s) to appeal before NCLAT within fourteen days of such rejection. [245]

3.3 Preferential Transactions

IBC code lays down the rule of avoidance of preferences given by the corporate debtor in the run up to insolvency. This provision is intended to strike at the transaction which disturb the *pari passu* distribution of assets in the liquidation of a corporate debtor. Thus, it invalidates the transfer of any property or interest thereof given during a relevant time to a person for the benefit of the creditor, surety on account of antecedent debt or other liabilities which have the effect of putting such creditor, surety or guarantor in a better position than the position in which he would have been if such transfer had not been made.[246]

It also provides the relevant time for avoidance of transaction, which may amount to preferences, the preference must have been given during the two years preceding the commencement of insolvency proceedings if given to the related parties and one year preceding if given to other persons. [247]Providing longer periods for preferences given to the related parties would be important for avoiding such transactions as number of transactions diminishing creditor wealth entered into with related parties occur not only in the zone of insolvency but as soon as early signals of trouble are visible. Related parties are found often to have superior information of the corporate debtor's financial affairs and may collude with the corporate debtor to siphon of assets with the knowledge that the corporate debtor may become insolvent in the near future.[248]

Voluntary Winding up under IBC, 2016

A corporate debtor being a company may choose to be wound up voluntarily under several circumstances including winding up as a result of expiry of the operation fixed in its constitutional documents or occurrence of any event provided in its constitutional document for its dissolution.

[245] Kashyap, Amit, Corporate Insolvency Law and Bankruptcy Reforms in the Global Economy 48 (GI Global, 2018).
[246] Insolvency and Bankruptcy, 2016, No. 1 (S. 43 (2)).
[247] Jyoti Singh & Vishnu Shriram, Insolvency and Bankruptcy Code, 2016: Concepts and Procedure 80 (Bloomsbury, 2017).
[248] C.A Kamal Garg, Insolvency & bankruptcy Code Ready Reckoner p.no. 52 (Bharat Law House Pvt Ltd., New Delhi, 1st edition., 2018).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

While the procedure to be followed for voluntary liquidation proceedings is largely similar to the procedure followed in insolvency proceedings, there are some differences.[249]

When the corporate debtor provides for the liquidation under this code, board of directors has to make a declaration of the solvency of the company and that such liquidation is not to defraud anyone. Such declaration has to be accompanied by (i)- the audited financial statement of the company, (ii)- a record of the business of its operation for the period of two years or the period of its incorporation. Further a report of the assets of the assets of the company prepared by a registered valuer has to be provided. Within four weeks of the declaration, a member's resolution in favour of the voluntary winding up of the company and the appointment of the liquidator has to be passed. Further where a corporate debtor is a company, creditors representing in two third value of the debt owed to the company have to support the resolution within a specified period. The company also has to notify the registrar and the Insolvency and Bankruptcy Board of India of such resolution and the approval of such creditors.[250]

Once the affairs of the corporate debtor have been wound up and its assets completely liquidated, the liquidator shall make an application to the adjudicating authority for the dissolution of the same and hence, company comes to an end with the order of the Adjudicating authority thereon.[251]

Judicial Approach to IBC, 2016

Companies Act of 2013 established NCLT (National Company Law Tribunal) and NCLAT (National Company Law Appellate Tribunal), with effect from 1.06.2016. NCLT has been conferred with the adjudicatory powers under insolvency and bankruptcy Code, 2016 and also NCLAT continue to enjoy the appellate powers under IBC, 2016.

By approaching the judicial decisions, researcher attempt to trace the development of the IBC by mentioning the critical issues which started from the 1st years of its operation. Followings are the

[249] Jyoti Singh & Vishnu Shriram Insolvency and Bankruptcy Code, 2016: Concepts and Procedure 80 (Bloomsbury, 2017).
[250] C.A Kamal Garg, Insolvency & bankruptcy Code Ready Reckoner p.no. 62 Part II (Bharat Law House Pvt Ltd., New Delhi, 1st edition., 2018).
[251] *Ibid.*

 ISBN 978-81-948082-8-2

judgements by Supreme Court of India and by NCLAT which throws a light on the development and the progress by IBC in governing the insolvency of companies.

Alpha & Omega Diagnostics (India) Ltd. v Asset Reconstruction Company of India Ltd.[252]; The question in the present case was whether the moratorium should take into recourse the personal assets and the properties of the promoters of the company debtors. NCLT held that "Insolvency resolution process will include only the assets of the corporate debtor and not any assets, movable or immovable property of the third party, like any promoter or director or other and so far as guarantor' is concerned, there was no expression of any opinion, as they fall within the meaning of corporate debtor individually', as distinct from the principal debtor who has taken a loan. In the appeal, has upheld the view of Ld. NCLT".

Prowess International Pvt. Ltd. v Parker Hannifin India Pvt. Ltd[253]

Corporate debtor settled the dispute with the operational creditor after knowing that the order has been passed by the adjudicating authority and other creditors applied pursuant to the notice of such order and filed an Interlocutory application for withdrawal of the petition. NCLT rejected the withdrawal of the application as such cannot be allowed once it is accepted.

Further, NCLAT holds that once the resolution plan is agreed upon and accepted by the court, it is not mandatory that the order is to be given after waiting for 180 days and such can be approved after recording its satisfaction that all the creditors have been paid or satisfied and any other creditor do not claim any amount in absence of default and required to close the insolvency resolution process.

Era infra engineering Ltd. v Prideco Commercial Projects[254]

If the application under section 9 is made and admitted without giving an opportunity of being heard to the debtor, it would not be maintainable as in contravention to the principles of natural justice and thus the merits of the application admitted would be set aside.

If such an application is reversed then all the actions taken by the insolvency resolution professional shall be declared as illegal.

[252] (2017) Company Appeal (AT) (Insol.) No. 116.
[253] (2017) Company Appeal (AT) (Insol.) No 89.
[254] (2017) Company Appeal (AT) (Insol.) No. 31.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Conclusion

After a careful discussion on the Insolvency Code of 2016, the researcher comes to the crux that IBC, 2016, has brought a major change in the corporate Insolvency regime in India. It is tackling the insolvency proceedings with such consideration and at such speedier rate than any other Companies Law did since the history of the enactment of corporate laws in India. With the passing of the IBC, 2016, simultaneous actions were taken by the Indian government when the uncountable number of frauds cases were discovered by the Insolvency authorities in India.

Researcher here thinks that the decision of the demonetization in the month of November, 2016 and the passing of the GST bill in the Year 2017 are the consequential action to deal with the corrupt offices of public as well as private sector.
However, awaken by the decisions since IBC, 2016, researcher would like to suggest the following points:

Audi alteram partem is the essence of justice in every country. It assures a fair procedure of law. Hence, in the IBC, 2016, the communication to the corporate debtor is to be made about the admissal of the application under section 9 for the IRP. The corporate debtor must be given a reasonable opportunity to present its case before the adjudicating authority as to why the company is unable to pay. The period of 10+14 days seems to be falling short from the definition of the reasonable period of time. As far as companies with huge capital is concerned, the assets are numerous and it should be given a time period to present its case before the IRP, and if easily such companies are chained to pursue the IRP and then Winding up then it would have a huge adverse effect on the economy of the country. Therefore, researcher suggest that the decision in the case of *Era infra engineering Ltd. v Prideco Commercial Projects* is a step forward in this regard.

Also, pursuing the nature of the contract of guarantee, the guarantor is responsible for violation of the terms of contract by the principal debtor. As warranted by section 128 of Indian Contract Act, 1872, the liability of surety is co-extensive that of the principal debtor that means the surety is liable to the same extent as the principal debtor. Also, if the principal debtor is not liable for debt for some reason, then surety is also not liable for the same. This is a clear-cut interpretation of the nature of the contract of guarantee. However, IBC, is conflicting with the aforesaid section. The

 ISBN 978-81-948082-8-2

decision in the cases of *Schweitzer Systemetek,*[255] *& Veesons Energy Systems Pvt. Ltd.,*[256] lay down two different judgement on the same subject and hence the chaos occur.

Section 14(3) of the Code introduced vide 2018 amendment which states that provisions of sub-section (1) of Section 14 shall not apply to a surety in a contract of guarantee for corporate debtor. The amendment is retrospective in nature. As per the opinion of the researcher, guarantors should also be protected during the moratorium period as that of a principal debtor following the objectives of section 128 of the Indian Contract Act, 1872.

[255] M/s Schewitzer Systemtek India Private Ltd. V. Phoenix ARC Pvt. Ltd., (2017) T.C.P. No. 1059/ I&BP/NCLT.
[256] Mr. V. Ramakrishnan Vs. M/s Veesons Energy Systems Pvt. Ltd. & State Bank of India (2017) IA CP/510/IB.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

OBSCENITY IN THE INTERNET AGE AND INTERMEDIARY LIABILITY

AUTHORED BY – PALLAVI LAKHERA & MR. SUNNY

INTRODUCTION

As law is dynamic and not a static one the sphere of law is also changing from time to time and place to place also at a given point of time law may be different at different place of a country the concept of obscenity would differ from country to country, society to society, region to region depending on the standard of morals of contemporary society.

Obscenity may be moral as well as legal but it is the legal obscenity with which are concern here

The definition of obscenity is depend upon the nature of society in which the prohibition is to operate.

In this article I wish to draw the attention of this aspect of individual interest vs societal interest as it is balance between freedom of speech vs public decency and morality.

I will start from the origin of obscenity and its situation in the different countries and then I will show the position of obscenity in India under the constitutional guaranteed fundamental rights and under the Indian penal code 1860 and under the Information Technology Act, 2000 covering its exception and burden of proof and highlighting the change occurred by the amendments in the information technology act.

I will go through the case laws in which the various test were followed showing the obscenity jurisprudence in India from Hicklin test to community standard test, the test of ordinary man, the rule of social purpose and profit, the rule of strict liability under Indian penal code to intermediary immunity (safe harbour regime under European law) under information technology act.

ORIGIN

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

"Obscenity is the legal concept used to characterize sexual material as offensive to the public sense of decency"[257]

Since the legal obscenity is different from moral obscenity as the scope of moral obscenity may be wider than the legal obscenity because it is only that area which is protected by the law falls under the legal obscenity.

The restrictions on art and literature was present in ancient times restrictions on the content of literature and works of visual art have existed since ancient times it was in the 4th century for the first time the roman catholic church banned heretical works.[258]

By the middle ages huge work was banned and it was in 1542 pope paul suppresed heretical and immoral books.[259]

With the advancement of technology and the social phenomena of people the law of obscenity was also changed in the 15th century especially with the development of printing press and As the books and prints containing sexually explicit material was widely available by the 17th century throughout the Europe publishers and distributers were arrested by the government and church authorities. Such kind of instances also occurred in various countries as also in japan where the colour woodblock printing ended up creating a sizable industry in erotic pictures.[260]

In England

In England the law relating to obscenity was not there because of which in the early 18th century the defendent charged with obscenity are set free and temporal courts failed to pass judgment for want of any law proscribing publication of obscene material. It was with the passing of the obscene publications act 1857 in the Great Britain publication of obscene material was prohibited it was the first legislation in England dealing with publication of obscenity.[261]

Though the definition of obscenity was not defined under the act and was defined in Britain in *Regina* v. *Hicklin* (1868) known as Hicklin test in which the court held that obscene material is

[257] Obscenity (no date) Encyclopedia Britannica. Available at: https://www.britannica.com/topic/obscenity.
[258] Id.
[259] Supra note 1.
[260] Id.
[261] Id.

 ISBN 978-81-948082-8-2

marked by a tendency "to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."

In USA

The first amendment to the United States Constitution adopted on December 15, 1791.

Wherein absolute prohibition was imposed on the abridgment of freedom of speech. Since the constitutional provision contained no exceptions, these had to be evolved by judicial decisions.

It was in the case of *Chaplinsky* v. *New Hampshire*[262] , wherein the courts recognized "obscenity" as an exception to an absolute freedom guaranteed by the American constitution.

USA state governments in the 1820s began passing obscenity laws and 1842 the federal government enacted legislation that allowed the seizure of obscene pictures. Comstock act 1873 was one of them which provided for the fine and imprisonment of any person mailing or receiving "obscene," "lewd," or "lascivious" publications.[263]

Until the mid of 20th century, the U.S. courts followed the definition of obscenity as followed in Hicklin case. In 1934 a New York circuit court of appeals discarded the Hicklin standard in permitted the novel of **James Joyce's** which was 'Ulysses' and discussed the test to decide obscenity and hold that it is to be judge from the whole of its effect and not from some isolated part of it.[264]

Shift in sexual morality in late 20th and early 21st century

With the change in time the social standards also changes and this also happened with regard to sexual morality in different countries which was reflected in 1960s when the obscenity laws in some countries such as Australia, Canada, the United States, and western European countries where the law was made liberal such instances also take place similar developments occurred in countries in eastern Europe following the collapse of communism there in 1989. For example, the

[262] 315 U.S. 568.
[263] *Supra* note 257.
[264] Id.

ISBN 978-81-948082-8-2

development of pornography industries in the Czech Republic and Poland in the 1990s, and the government did not choose to be harder on them.[265]

Obscenity and Pornography in Indian Context

In the Constitution Of India the fundamental rights provided under part 3 are not absolute because of the express provision under the same part provides exception to these rights. Article 19[266] provides for the freedoms in which article 19(1)(A) provides the right to speech and expression on which the parliament by law impose reasonable restriction under article 19(2) on ground of 1. sovereignty and integrity of India 2. Friendly relations with foreign states 3. Security of the state 4. Incitement to an offence 5. defamation 6. Decency 7. morality 8. contempt of court 9. Public order.

Hence the law of obscenity is protected on ground of public morality Obscenity under Indian penal code, 1860 Section 292 and section 354-c Obscenity related provisions under the information technology act, 2000 Sections 66E, 67, 67A, 67B, 67C the definition of obscenity is provided under section 292 of IPC the primary object of this section is to prevent circulation and traffic in obscene literature. The purpose behind the provision is to preserve such moral values on which there is universal consensus

Section 292. Sale, etc., of obscene books, etc.-

(1) For the purposes of Sub-section (2) book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene, if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effects of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) Whoever- sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation or for purposes of sale, hire, distribution public exhibition of circulation, makes produces, or has in

[265] Id.
[266] The Constitution of India, Art. 19.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

(a) Possession any obscene book, pamphlet, paper, drawing painting, representation or figure or any other obscene objects whatsoever, or

(b) Imports, exports or conveys any obscene objects for any of the purposes, aforesaid, on knowing or having reason to believe that such objects will be sold let to hire, distributed or publicly exhibited or in any manner put into circulation or

(c) takes part in or receives profit from any business in the course of which he knows or has reasons to believe that such an object are for any of the purposes aforesaid, made produced, purchased , kept, imported, exported, convey, publicly excited, or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) Offers or attempts to do any act which is an offence under this section, shall be punished [on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or

subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.] [Exception- this section does not extend to-

(a) any book, pamphlet, paper, writing, drawing, painting, representation of figure-

(i) The publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or

(ii) which is kept or used bona fide for religious purpose;

(b) any representation sculptured, engraved, painted or otherwise represented on or in-

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958(24 of 58), or

ISBN 978-81-948082-8-2

(ii) any temple, or any car used for the conveyance of idols, or kept or used for any religious purpose.]]

Section 292 was discussed in the case of *Maqbool Fida Husain* v. *Raj Kumar Pandey*[267] wherein it was stated that Section 292 IPC was inserted through the Obscene Publications Act to implement Article I of the International Convention for suppression of or traffic in obscene publications to which India is a signatory. By Act 36 of 1969, It was by amending Section 292 the word 'obscene' was provided with clear and certain meaning and also some exception were also inserted for publication of matter which is proved to be justified as being for the public good, being in the interest of art, science, literature or learning or other objects of general concern.

Before the amendment obscenity was not defined in section 292 and after amendment the section does not provide for a definition of 'obscenity' inasmuch as it introduces a deeming provision.

On perusal of this deeming provision the sub-section (1) of Section 292 it provides three conditions of whom any one of them to be satisfied and then only the deeming provision shall operate which means that a book etc. shall be deemed to be obscene if (i) it is lascivious; or (ii) it appeals to the prurient interest, or (iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter alleged to be obscene.

It is only once the impugned matter satisfies any of the above three conditions then only the question of whether the impugned matter falls within any of the exceptions contained in the section would arise.

Section 67 of the Information Technology Act, 2000 relevant for the subject under discussion reads as follows:

Section 67-Publishing of information which is obscene in electronic form.--Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the

[267] 2008 CRLJ 4107 (DEL).

 ISBN 978-81-948082-8-2

event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees.

On the bare reading of section 292 of IPC and section 67 of the IT act it is found that the obscenity under section 292 of the Indian penal code and under section 67 of the information technology act is the same and the basic difference between two is that the former deals with all types of circulation and publication whereas the later deals with publication and circulation in electric form.

In the cyber space Section 67 of the IT act is the first statutory provision dealing with obscenity. It must be observed that the language used to define 'obscenity' in deemed form is same both under the Indian Penal Code, 1860 and the Information Technology Act, 2000 thus the test to determine obscenity is also same. Therefore, it is necessary to understand the broad judicial parameters of the law laid down by the courts in India and their development, in order to determine "obscenity".[268]

The Indian Penal Code on obscenity is based on the English Law and the supreme court in defining obscenity laid down the law and held in the case of *Ranjit D. Udeshi* v. *State of Maharashtra* wherein the test laid down by the English Court in Hicklins Case Supra was adopted in which it was held by lord Cockburn who is also known for giving the Mcnaghten's rule that "the word "obscene" in the section is not limited to writings, pictures etc. intended to arouse sexual desire. At the same time, the mere treating with sex and nudity in art and literature is not per se evidence of obscenity." It is to be considered that a matter as a whole is such which can suppress its literary importance over obscenity but if obscenity is so trivial which can be overlooked and the other test is that the matter to be seen from the perspective of the author what actually he want to convey by his work if he is using the nudity just to put forward his idea and that is justified in context to the matter to be conveyed that any person who will see it will not likely to deprave and corrupt his mind and he will also be able to see the idea conveyed through it.[269]

The 'obscenity' must be differentiated from 'pornography' the distinction between obscenity and pornography is as such of 'intention' as in case of pornography the matter is intended to arouse sexual desire but in case obscenity it is having that likelihood that it may cause mind to corrupt

[268] Id. Para 33.
[269] Id. Para 34.

 ISBN 978-81-948082-8-2

and deprave. As in case of Innuendo which does not shown to have defaming anybody but have that possibility to defame someone in his hidden meaning.

The Delhi high court in the case of ***Vinay Mohan* v. *Delhi Administration***[270] **Pradeep Nandrajog J.** while dealing with a case of obscenity held "that it is a recognized principle of law that concept of obscenity is moulded to a great extent by the social outlook of people and hence in relation to nude/semi-nude pictures of a woman it would depend on a particular posture, pose, the surrounding circumstances and background in which woman is shown with respect to the fundamental right to speech and expression the supreme court in *S. Rangarajan* v. *P. Jagjivan Ram and Ors*[271], while interpreting Article 19(2) this Court borrowed from the

American test of clear and present danger which was laid down in case of Schenek v. United States[272] by Justice Holmes and observed:

That the freedom of speech and expression must be protected in the community interest and where the freedom of expression is of such a nature which may endanger the interest of community in that case such freedom should not be protected and with regard to the danger he observed that the danger he held that "The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest."

Public decency and morality cannot be endangered for the sake of protection of free speech and expression, and thus a balance approach should be maintained between freedom of speech and expression and public decency and morality and if the former encroaches upon the latter such encroachment must be rejected.[273]

Test of ordinary man

[270] 2008 II AD (Delhi) 315 also referred in *supra* note 11 para 43.
[271] 1989 SCR (2) 204, 1989 SCC (2) 574.
[272] 249 U.S. 47 (1919) also referred in *supra* note 267 para 63.
[273] *Supra* note 11 para 64.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

As usually the test adopted by the judiciary to check any impugned material is of a man of ordinary prudence and not an extraordinary man which is also followed in case of intellectual property rights what we known as lay observer test or lay hearer test.

Always the perspective is of ordinary man is taken and same is the situation with the concept of 'obscenity' as followed in *M. F. Husain case supra* The test for judging a work should be that of an ordinary man of common sense and prudence and not an "out of the ordinary or hypersensitive man".

Some other considerations which justifies the use of obscenity are also necessary to be considered while deciding any matter the exception under section 292 is also based on public good and in the interest of art, science, or literature and some other public concern.

One of them is:

Social purpose or profit

in which case we permit the obscenity because of some social message etc which overrides the obscenity and the obscenity is gets blurred in such cases because the larger interest of society

example. Nudity in cases of a campaign to draw attention on breast cancer or some other physical concern relating to human body cannot by itself amount to obscenity.

But on the other hand the same nudity without any such or other social purpose can not attract immunity and is punishable.

Though the general rule of *mens rea* is also being gradually relaxed in case of obscenity under the IPC and the rule of strict liability is followed where knowledge on the part of accused is immaterial means whether he knows that the matter contained obscene content or not does not makes any difference to attract liability this is known as rule of strict liability.

In deciding obscenity the test applied in *Maqbool Fida Hussain* v. *Rajkumar Pandey*[274] is as follows:

[274] *Supra* note 267 para 98-99.

 ISBN 978-81-948082-8-2

That on perusal of the provisions of obscenity under the law and the judgments relating to that the law is well settled and clear in India as well as in other countries the court held that "On applying the said tests governing obscenity, in my considered view, the said painting cannot be said to fall within the purview of Section 292 thereby making it obscene. The impugned painting on the face of it is neither lascivious nor appeals to the prurient interests. At the same time, the person who is likely to view the said painting would not tend to be depraved or corrupted." Though the court also observed that on seeing the mother India in nude prima facie some may feel offended but that in itself is not justified to carry that matter into the shadow of obscenity and as there is no particular face of that painting which can offend anyone personally the painting also not lost its artistic value.

Keeping in view the ancient artistic history of our nation as well as culture where nudity is mostly used and community have no objection with that the court find no offence of obscenity is being committed by the artist.

The court also taken the view of artist and observed that A piece of art should not ordinary be considered to be offensive and it should also be seen from the perspective of the artist that what he tried to represent in his work and if he is successful in conveying that through use of some nudity or sex which are not per se considered obscene and that should not be taken as offensive when it has nothing more than just nudity or sex which can easily be ignored.

With regard to the test of obscenity the major shift accrued when "More recently, in *Aveek Sarkar* v. *State of West Bengal*[275] ('Aveek Sarkar'), the Supreme Court has discarded the earlier, Hicklin test adopted in *Ranjit Udeshi* v. *State of Maharashtra*[276] ('Ranjit Udeshi'), which had focused the depraving or corrupting influence on "lascivious, prurient or sexually precocious minds" by individual or partial aspects of an allegedly obscene object."[277]

In this article the test laid down previously by supreme court was reiterated and it was observed that in Ranjit Udeshi Case we look a matter partially and from an individual's perspective means if any part of such matter contain any obscene object or it has tendency to deprave or corrupt an individual without anything more than that we can conclude it as obscene but in the aveek Sarkar

[275] (2014) 4 SCC 257.
[276] AIR 1965 (SC) 881.
[277] Geeta Hariharan, "our unchanged sexual selves: a case for the liberty to enjoy pornography privately", 7 NUJS L. REV.89 (2014), available at http://nujslawreview.org (last visited on 31/03/2022).

 ISBN 978-81-948082-8-2

case the supreme court taken a 'community standard' approach and states that nudity is not per se obscene, "unless it has the tendency to arouse feeling or revealing an overt sexual desire". A social message, such as the anti-racial message in Aveek Sarkar case, may dilute nudity from the charge of obscenity. And followed a similar standard as followed in Ranjit udeshi case and states, "Only those sex-related materials which have a tendency of 'exciting lustful thoughts' can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards."[278]

Now we move to the obscenity in internet age wherein it is difficult to reach the actual source of the alleged obscene material because at many times it is difficult to trace the accused who may be located in any foreign country. This created a necessity to catch those who acts as a mediater or facilitator to commit such offence through cyber space which we known as Intermediary liability which is based on the ground of necessity.

Intermediary liability

Intermediary liability was first acknowledge as a serious issue in case of *avinish bajaj* v. *state*[279] *(nct of delhi).*

The use of market platforms, email, social networking, peer to peer network and texting services in the cyber space makes it difficult to find the accused.[280]

This is the reason why the legal process not restrict itself to the accused but also to the facilitators of cyber space or the intermediary who causes the wide circulation of illegal material there is a chain of intermediaries who are responsible for such circulation they are the internet service provider (ISPs) such as, airtel and Vodafone whose work is to physically connect with the internet, web based service providers and platforms such as yahoo etc, and word press enable us to share content.[281]

[278] Id.
[279] 2008 Delhi HC.
[280] Chinmayi Arun, "Gatekeeper liability and article 19(1)(A) of the constitution of India", 7 NUJS L. REV. 73 (2014), available at http://nujslawreview.org last visited on 04/04/2022.
[281] Id.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

The main function of these intermediary entities is that they function as gatekeepers to the illegal content. making gatekeepers liable for enforcing law is a common choice example; instead of merely forbidding underage individuals from driving cars it also imposes liability upon their parents since they are gatekeepers facilitating the misconduct.[282]

As the criminal law have two essential characteristics such as *Mens Rea* and *Actus Reus* and liability can not be imposed on any person if he lacks any of these characteristics on its part and hence law also provides Immunity under the information technology act.

Section 79 of the information technology act provides conditional immunity which is as follows:

Section 79 Exemption from liability of intermediary in certain cases

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link hosted by him.

(2) The provisions of sub-section (1) shall apply if–

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored; or

(b) the intermediary does not–

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act

and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if–

[282] Id.

 ISBN 978-81-948082-8-2

(b) the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act;

(c) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner;

Explanation — For the purpose of this section, the expression 'third-party information' means any information dealt with by an intermediary in his capacity as an intermediary."

Umbrella of immunity

Prior to amendment, section 79 offered immunity to intermediaries with respect to offences under the it act only and not for offences under other legislations means in mms scandal the bazee.com was not immune from liability under Indian penal code.[283]

though you may suggest that there was no mens rea as intention or knowledge on part of Avinish Bajaj but was attached with liability because of strict liability principle where lack of knowledge is irrelevant under section 292.

Consequences of Strict Liability Standard

in Avinish bajaj the Delhi high court followed Ranjit Udeshi case and find managing director of bazee.com guilty though supreme court acquitted him on procedural grounds and observed that as the company was not made party and principle of vicarious liability does not apply under the IPC.

After amendment under IT act internet intermediaries are conditionally immune not only under IT act but also under under IPC, as now the immunity extends "under any law for the time being in force" however booksellers and librarians are not having any kind of immunity.

[283] The Information Technology (Amendment) Act, 2008.

ISBN 978-81-948082-8-2

SAFE HARBOR REGIME

It is a international standard contained in European union directive on e-commerce which we have accepted as intermediary liability immunity

BURDEN OF PROOF

The burden of proof was also changed with the amendment. The distinction which is as follows

Prior to amendment –it is upon the intermediary to prove that "the offence or contravention was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence or contravention to avail the safe harbour protection."[284]

Post amendment- however after the amendment the intermediary receives safe harbour protection if it does not initiate transmission, select the receiver of transmission and select or modify information contained in the transmission and it also observes 'due diligence' while discharging its duties.[285]

Now it would be up to prosecution to prove against the intermediary that it did not comply the due diligence for protection which means knowledge is essential for intermediary to be liable.

Due diligence may be shown by technical mechanisms like filters and inbuilt storage intelligence which can block/eliminate the alleged objectionable and obscene content

The degree of care expected by term 'due diligence' is classified by information technology (intermediary guidelines) rules, 2011

These rules require intermediaries to remove 'grossly harmful, obscene, blasphemous, defamatory, disparaging, harmful to minors and any unlawful content' within 36 hours of receiving actual knowledge that it is being stored, hosted or published on its system.[286]

[284] *Supra* note 280.
[285] Id.
[286] Id.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

The process to remove content by intermediaries was also settled down by the supreme court in *Shreya Singhal* v *Union of India*[287] supreme court held that to bind the intermediary to remove content the internet users have to give notice of court order requiring removal of content, but the order of court is required in cases relating to Article 19 of the constitution and in case of other matters such as IPR infringement cases the affected party can direct approach intermediary to remove disputed content.

Conclusion

The law of obscenity is basically the law based on morality and public decency the jurisprudence of obscenity in our country was based on English law from Hicklin test to contemporary standard test of US courts as we have so far tried to define obscenity and now the matter to taken as a whole to check whether it is obscene or not .

In this electronic age the cases of obscenity in cyber law are more and the intermediary immunity is granted to them if they acted with due diligence

So obscenity is a dynamic concept as the public morality and decency changes the law on obscenity will also change and will enter in a new phase.

COMPETITION LAW AND SOCIAL TRANSFORMATION

[287] (2013) 12 SCC 73.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

Authored By - Dr. Suman Mawar
Assistant Professor
Government Law college,
Ajmer, Rajasthan

Introduction

In 2002, the Competition Act was enacted by the Parliament of India. The legislative intent behind enactment of the Act can be gathered from the preamble which states that "…keeping in view of the economic development of the country … to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect interests of consumers and to ensure freedom of trade …".[288] Economic theory explicitly reveals that the overall profit in a monopolistic industry is higher than the total profit of all firms in a competitive industry. Simultaneously, consumer welfare tends to suffer under monopolistic market owing to rising prices when contrasted to a far more challenging setup. This, in my opinion, is the fundamental premise underlying competition law. The Act seeks to limit any activity that could jeopardize consumer welfare or even the individual liberty to compete freely and fairly in the economy. As a result, the three major areas for the Competition Act to consider are:

i. "Cartelizing behavior of the firms,
ii. Abuse of dominant position, and
iii. Mergers and acquisition."

Cartels can be defined as a collaborative effort by companies within an industry to raise prices above what is reasonable under competitive environment.

Numerous study results have shown us that cartels can exist even in free markets. Abuse of dominance occurs when a company uses its monopoly position in one market to stretch it to other marketplaces, thereby hampering the competitive environment in those markets. Correspondingly, mergers and acquisitions, by definition, lower market competition. Each of these practices has the potential to harm welfare of the consumers and can happen as a result of free market conditions.

[288]The Competition Act, 2002 (12 of 2003).

ISBN 978-81-948082-8-2

Consequently, implementation of a competition act is mandatory to deter firms from engaging in activities that have adverse effects on consumer welfare.

Presently, industrial policy of our country is very inconsistent from the pre-1991 era which was characterized by improper static allocation of resources, resulting in a dynamic and inefficient system that hampered innovation, technological advancement and development. Along with the other aspects of the licensing regime, the nearly unqualified protection offered to domestic market facilitated a high-priced industrial structure which was ineffective in resource utilization and inadequate to compete globally. The gamut of reforms that altered our country's economic structure was intended to enhance market competiveness, with the expectation that doing so would boost Indian sector's competitive edge and make a significant contribution to overall growth of the economy.

The spectrum of reforms, which altered the economic architecture of our country, was designed to increase market contestability with the presumption that it would increase competitiveness of Indian industry and contribute to the overall economic growth.

That's not to declare that deregulated markets are necessarily competitive. They are still susceptible to disruptions effected by huge monopolistic corporations or groups of corporations working together. Such distortions sever the relationship between liberalized markets and the profitability and innovation gains that are expected to result from them. As a consequence, "the importance of competition law and policy for the development of efficient markets as a tool for growth cannot be exaggerated."

Surprisingly, as the channels of communication between competition and the economic system are revealed, the two apparently different areas of antitrust law and development economics are becoming a basis of mutual interest. Until lately, market competition was viewed as an end in itself rather than as a tool for economic development. The large numbers of jurisdictions that have implemented competition law statutes seem to be in developing countries.

Company-level innovation has been linked to the economy, highlighting the need of competitive environment for productivity, efficiency and advancement. The importance of well-performing markets in attaining strategic goals has also been acknowledged in the development literature. When federal policies restrict competition, more profitable firms are unable to replace less ones. Consequently, the economic growth stagnates over time and nation remains in the clutches of

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

poverty.[289][290] The Competition Law of India is positioned in this backdrop and thus its utility must be comprehended in this scenario.

Throwing Light on the Preamble of the Competition Act, 2002

The Act's Preamble establishes the organizational context for the CCI. It states: "*An Act to provide, keeping in view of the economic development of the country*." It's a rather distinct and unequivocal recognition of the relationship between the small scale working of individual markets and the country's growth and transformation imperatives.

The Preamble of the Act signifies the mandate of the Competition Commission of India. It seeks to-

- "*forbid such practices that have an adverse effect on the competition,*
- *foster and sustain competition across all markets,*
- *safeguard the interests of consumers by working with the objective of consumer welfare, and*
- *Allow individuals/participants to trade freely and fairly in markets.*"

The above-state four, although distinct, goals must be viewed in tandem. All four, albeit distinct, goals must be viewed in tandem. Let us try to decipher the aforementioned goals and conceptualize what outcome(s) appear when such definite parts are viewed as an aggregate of parts of the whole. The Indian Competition Act, like several other jurisdictions, prioritizes the preservation of market mechanisms and the freedom to participate in commerce. These are perceived as analogous with removing or precluding unreasonable competition restraints. Other related goals include flexibility to trade, freedom to choose, and market access.

Nevertheless, ever since antitrust laws were introduced, a line of thinking developed which merited competition laws by claiming that they significantly enhanced economic efficiency of a country.

[289]William W. Lewis, *The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability* 103 (The University of Chicago Press, Chicago, 2004).

[290]Deborah Platt Majoras, *National Champions: I don't Even Think it Sounds Good,* International Competition Conference/EU Competition Day, Held at (Munich, Germany on March 26, 2007), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/national-champions-i-dont-even-think-it-sounds-good/070326munich.pdf (last visited on July 29, 2021).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

In essence, the rationale of static assessments of economic efficiency as well as the rhetoric of protecting the competitive industry, along with the objective of welfare of consumers, happened to coincide frequently.

Is still the Commission's involvement in market place confined to safeguarding individual competitors or office-bearers, or even to ensuring well-organized markets for the costumers as well? The afore-stated conjunction of the objectives of the Competition Act 2002 finds their place in the Preamble of the Act. Moreover, these goals are also restated in Section 18 of the Act. This section mentions that-

"Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India."

Antitrust is regarded as a public policy intended to promote general welfare, namely competition. However, competition is a nebulous concept, and some deluded or restrictive perceptions of competition may trigger measures which are contrary to the law's eventual desired outcome. We presume that the law's Preamble not only irrefutably promotes the buyer as the central objective of compliance, but also establishes the standard for the welfare of the customers in the wake of economic growth.

Consequently, to attain the goal of economic development, welfare of the customers will have to be sacrificed in some cases in order to achieve economic efficiency. Considering the incongruity between distributive and dynamic efficiency, the Preamble of the Act permits for a broader definition of efficiency that includes both dynamic and static efficiency. As a result, the Preamble of the competition law establishes the tone of the law's instrumentality.

Reliance on economic objectives invariably brings economy into play, where antitrust problems are formulated in favor of fiscal concepts such as market dominance, competitive effects, admission into market, and efficiencies, and to evaluate the detailed facts pertaining to a specific sector and certain challenged practices using the rational framework given by economic principles. The above approach necessitates a thorough examination of the effects of the contested conduct

ISBN 978-81-948082-8-2

on competition, including pinpointing the market or markets wherein competition has been and may be adversely affected, as well as the process through which contested conduct does so.[291]

The belief that antitrust law must strive to facilitate some form of economic wellbeing is intrinsically tied to the impact of economics, specifically welfare economics, buyer theory, and related disciplines in competition law review.[292]

In the further discussion, we shed light on our interpretation of the underlying objectives of the enforcement of the important sections of the Competition Act, 2002.

Anticompetitive Agreements: A Brief Analysis

Section 3 addresses two types of agreements that may be in violation of the Act. Section 3(3) of the Act addresses horizontally placed company agreements such as bid rigging, collusive bidding, cartels, and so on. These agreements are dealt with on a presumptive standard that can be rebutted by the concerned parties. A stringent presumptive standard, justifiably so, is based on the idea that such agreements are most harmful to consumers and thus must be dealt with harshly.

Agreements among companies working at different levels of the manufacturing/distributing chain, such as producers and suppliers, manufacturers and distributors, wholesalers and retailers, and so on, are covered by Section 3(4) of the Act. Such agreements are typically used to address issues that arise in a vertical relationship, where maker's and supplier's individual self-interest may often clash with their mutual interest. As a result of such vertical agreements, downstream companies' rewards can be lined up with those of upstream companies.

Nevertheless, these agreements could lead to less competition at the producer and/or supplier stages. Vertical agreements, with exception of horizontal agreements, are analyzed using a consequences-based approach because they have respectively benefits and drawbacks on competition as well as customers.

[291]Jonathan B. Baker and Timothy Bresnahan, "Economic Evidence in Antitrust: Defining Markets and Measuring Market Power", *Stanford Law and Economics Olin Working Paper No. 328* (2006).
[292]Ioannis Lianos, "Some Reflections on the Question of the Goals of EU Competition Law", *CLES Working Paper Series 3/2013* (2013).

ISBN 978-81-948082-8-2

The Competition Commission of India has to consider certain factors while assessing whether an agreement has an appreciable adverse effect on competition as per Section 3 of the Act. The factors are listed as follows:

a) "creation of barriers to new entrants in the market;
b) driving existing competitors out of the market;
c) foreclosure of competition by hindering entry into the market;
d) accrual of benefits to consumers;
e) improvements in production or distribution of goods or provision of services;
f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services."

Sections 19(3) (d), (e), and (f) explicitly provide for reconciling the detected anticompetitive effect of such vertical agreement behavior with the accumulation of consumer benefits, producer efficiency gains, and development impact. Demonstrably, ascertaining an appreciable adverse effect on competition necessitates the commission taking into account both the efficiencies created as well as the impact of the agreements on consumer welfare. Numerous purely vertical activities, such as vertical geographic restrictions and numerous instances of tying or exclusive negotiating, might not always result in increased commodity prices whatsoever but may have economic advantages that explain them.

In such instances, balancing is simple, and no matter what, consumer welfare can be granted more emphasis; thus, customer harm can never be bartered for some company-level efficiency.

Abuse of Dominance: An Overview

"According to many observers, there is no clarity in the Act whether a per se illegality (form-based approach inference drawn based on examination of the formal features of the impugned conduct) or a rule of reason (effects-based approach decision based on holistic assessment including actual or probable anticompetitive effects on relevant market) is to be applied in the adjudication of Section 4 of the Act."[293]

[293]Payal Malik, "Competition Law in India: Developing Efficient Markets for Greater Good" 41 *Competition Law in India: Perspectives* 178 (2016).

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

"The High-level Committee on Competition Policy and Law states that the key questions for adjudication on abuse of dominance are as follows: (a) how will the practice harm competition? (b) Will it deter or prevent entry? (c) Will it reduce incentives of the firm and its rivals to compete aggressively? (d) Will it provide the dominant firm with an additional capacity to raise prices? (e) Will it prevent investments in research and innovation? (f) Do consumers benefit from lower prices or greater product and service availability?[294]"

Evidently, the commission intended to apply Section 4 of the Act in a consequences-based manner. Such an approach recognizes that many business activities can have diverse impact depending on the circumstances, such as altering competition in certain cases and encouraging efficiencies and innovative thinking in others. An antitrust policy approach which straightforwardly confronts this dichotomy will protect customers (by precluding potential harm) whilst also boosting overall higher productivity and expansion.

An economics-based approach makes it increasingly challenging for firms to subvert competition law restraints by seeking to accomplish the same end results via the use of distinct business practices by fixating on the impact of a company's acts instead of the form which these acts may end up taking. Around the same time, such a method offers a far more uniform treatment of practices because any particular practice is evaluated in terms of its end result, and two practices that eventually lead to the same result will thus be treated similarly.

"Abuse of dominant position contravention requires competition authorities to show the presence of significant anti-competitive consumer harm, while the dominant firm should bear the burden of establishing credible efficiency arguments. Competition authorities when applying the law have to be careful that statutory provisions do not unduly thwart pro-competitive strategies. Developing a consistent theory of consumer harm provides a logically consistent approach to the assessment of any impugned anticompetitive conduct. Second, it makes it much harder for internally inconsistent or speculative competition concerns to survive the process of assessment."[295]

[294] *Ibid*.
[295] *Id*. at 179.

ISBN 978-81-948082-8-2

Similarly, the explanation appended to Section 4(2) (a) (i) and (ii) enable to adopt a rule of reason approach when applying the law by permitting efficiency increasing competitive practices which favor discrimination.

"Explanation—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition."

"Section 19(4) that lists the factors for the assessment of a dominant position by the commission among which 19(4) (l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; (m) any other factor which the commission may consider relevant for the inquiry—provide sufficient flexibility to the commission in interpreting dominance."[296]

Decoding the Regulation of Combinations

In several jurisdictions, horizontal takeovers are assessed using a rule of reason analysis, with the assumption that they frequently provide significant efficiency gains. It is also truly the case under competition law of India. According to Section 20(4), in evaluating whether a combination will have the effect of or is probable to have an appreciable adverse effect on competition in the concerned market, the committee shall take into account numerous factors, couple of which express the concept of the merger system contemplated by the Act:

"20(4)(m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition; 20(4) (n) whether the benefits of the combination outweigh the adverse impact of the combination, if any."

In terms of the sections mentioned above, it is clear that an overall welfare approach has been proposed. This was also supported by the then Finance Minister of India at a merger workshop conducted by the Competition Commission of India. As per him, as long as imports are

[296] *Ibid*.

ISBN 978-81-948082-8-2

competitive, the merger rule must enable the creation of certain level of scale in order to make Indian companies competitive at the global level.

Forecasting long-run outputs, on the other hand, is a completely volatile endeavor, whereas estimating customer losses is somewhat a sure bet! It is extremely difficult to predict and assess post-merger efficiencies. In this case, too, antitrust law allows for weighting consumer welfare—price increases are indeed a variable in analyzing the effects of mergers, but productivity and innovation effects are also quite critical in identifying the competitive effects of the merger.

Interplay of Antitrust Law and Innovation Interface

The significance of dynamic efficiency as a legit and persuasive goal of antitrust policy has also been highlighted in the literature. As stated in the introductory part of this article, antitrust law cannot be viewed in exclusion from a country's development goals. The quest of static efficiency, in which the competition system seeks to accomplish instant welfare objectives without any long-run trade-offs, could be incompatible with the goal of economic advancement.

If an antitrust authority, through its ability as an off-market operator, maintains and facilitates a framework to warrant competition, it can act as a motivating factor, causing companies to reinvent in order to obtain a pricing power, position their products differently, and/or introduce new products to market. Competition is indubitably the most powerful factor for companies to innovate.

Nevertheless, appropriate incentives for well-to-do innovations are required, such as positioning the inventor in a quasi-monopoly scenario, generating large rent prospects, or bestowing the innovator intellectual rights when such breakthroughs are important enough. As a result, the relationship between innovation and competition is intricate, and it is strongly influenced by the IPR regime. Enabling unstable monopolies to incentivize innovation is a fine line to walk for the CCI, given the ramifications of dynamic efficiency and long-term profitability.

The above such reliance on the vibrant aspects of change, as well as the acknowledgement of the businessman's pivotal role, runs counter to cost theory's emphasis on static customer surplus and antitrust regulation's classical fixation with customer choice.

While deciding such cases, it might be necessary to adopt a broad overview of competition—concentrated marketplaces would have to be sacrificed for rendering benefits to consumers. One

ISBN 978-81-948082-8-2

core principle that might be followed is that only when there are specifically identified customer issues can an interference be regarded to be a proper regulatory response—and besides that, only to an extent proportionate to the issue. Regulatory responses must only aim unacceptable consumer-harming activities, leaving other pro-competitive consumer-benefiting behavior unchecked.

The social objectives influencing the interpretation and execution of antitrust law of India are changing and are heavily influenced by political and institutional scenarios. Even so, it is critical that the implementation of law be steered by much more objective economic goals in order for it to deliver. Incorporating an economic outlook to the implementation of antitrust law results in a pretty compelling and competent structure for generating welfare of the customers and economic efficiency.

Compliance with Antitrust Law in India: An Overview

Corporate adherence is an important component of corporate governance initiatives around the world. Cartels, like other unauthorized corporate activities such as embezzlement or bookkeeping fraud, create a threat for corporate governance. Cartels engage in behaviors such as predatory pricing, market division, bid rigging, and group bans, inter alia. In the context of antitrust law, reducing the danger of cartel behavior occurring and attempting to enforce compliance by firms remain major concerns in corporate governance, especially given the massive fines for cartels and the considerable reputation loss that follows upon a cartel finding.

Since the antitrust law compliance acts can take several forms, we shed light on the compliance function particular to cartel-related regulation, as cartels and exchange of data between competing companies have become by far the most considerable focus in current years in detecting illegal activity and prosecuting it internationally, even in India. Cartel regulation has gone global, due to increased global cooperation to enhance enforcement among antitrust authorities. Consequently, businesses should now be worried about adherence, detection, and sanctions not just in a few countries, but globally. What used to be regarded appropriate conduct by the authorities is now widely acknowledged to be detrimental to consumers worldwide. Moreover, we accept that any competition law compliance initiative will almost always be part of a larger, corporate-wide compliance program that deals with various ethical and legal risks.

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

We believe that most suitable approach to antitrust law implementation necessitates businesses to think past just a warning in order to move further than the conventional implementation approach that several officials and scholars take. Alternatively, establishing pro-compliance cultural practices in businesses should be a key component of antitrust law enforcement. Such measures in antitrust law compliance add to existing compliance programs in companies across the length and breadth of India following the Satyam scam.

Firms must be openly encouraged to play a more fundamental part in transforming values and securing legit compliance efforts to support enforcement of competition law. In order to that compliance takes shape, a firm must ensure that it has relevant internal incentives to harmonize its policies and practices with the existing rules and regulations. This is truly the case for antitrust authorities: in order to achieve a shift in normative values and the adaptation of a compliance culture, antitrust authorities must be more ingenious in their implementation activities, as well as maintain that robust compliance initiatives are promoted and adequately incentivized.

In cases when antitrust law officials, like the Competition Commission of India, were more thoughtful about the way compliance initiatives of antitrust law could be utilized as part of enforcement, they might be able to persuade a broader range of businesses to devote more time and efforts to adherence. This innovative thinking might take a variety of forms, the most apparent being the provision of reduced penalties or defenses if firms can prove they have standard procedures in place. Consider dropping parental accountability for subsidiaries' actions if the parent firm has a credible program for complying with antitrust law that the subsidiary undoubtedly flouted. Furthermore, antitrust law enforcement officials may consider integrating an antitrust law compliance initiative in settling case and making relevant enforcement decision-making. However, the wish to reduce penalties fines should not be the sole consideration of an antitrust compliance initiative. The initiative's key aim should be to ensure legal compliance as well as to facilitate ethical behavior within and among firms.

In competition law, there exists several behavioral drivers of adherence and non - compliance activities. Most of the behavior may be motivated by financial benefits, whereas in other instances, the misconduct may be driven by emotional and personal considerations like one's ego or where a person is driven by vengeance. According to the Organization for Economic Co-operation and Development (OECD), the forces that result in failure to adherence include company's vague

ISBN 978-81-948082-8-2

commitment—or lack thereof—to compliance, ambiguity about regulatory obligations, staff naiveté and/or a small mistake, rogue employees, smugness, and conflicting interests from relevant compliance arenas. Prospective policy responses must be shaped by the above-stated factors.

Assessing the factors that influence adherence and non - adherence has significant ramifications. The comparative advantages and disadvantages of adherence may influence corporate behavior and the course of action to abide by the law. Several firms will invest more in corporate compliance over others, and certain business models, business practices, and norms enable to shape a clear commitment to compliance. Organizational risk evaluations can be used to tackle numerous behavioral factors. Risk analysis varies from company to company, based on corporate level, industry, nation, and prevailing standards. Thus, a singular strategy to deal with every company/firm is hard to implement and likely ineffective. Firms may not efficiently weigh the impact of non - compliance in certain cases. The incapability or failure to recognize such risk factors has an impact on business behavior. If, on the other hand, a corporation fails to take into account regulatory issues, illegal or potentially illegal behavior could become ingrained as part of the company rule over time. At certain point, a company's culture may attain a critical point wherein illegal conduct becomes one of the primary characteristics of a company.

A strong adherence initiative can combat such a drop in organizational culture toward illegal activity as a cultural practice. Modifying a firm's culture entails changing strategies to improve compliance. The cost of detecting misconduct may be reduced by modifying company culture and behavior, since more employees within the firm will be constantly vigilant to identify illegal activities and have a stronger incentive to disclose it to the concerned authorities. A company where a pro-compliance culture exists will pose significant difficulties for the participants of the cartel activity. Since the chances of detection and getting reported to the authorities will increase, a potential cartel member will have to contemplate the risk of participation in such activity. When people are rewarded for their cartel participation, monitoring of cartel behavior is weak within the firm, and national-level norms about collusion do not signify a moral failure on the part of society, these standards may end up reinforcing unlawful and illegal conduct within an organization.[297]

[297]D. Daniel Sokol, "Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement", 78 *Antitrust Law Journal* (2012).

ISBN 978-81-948082-8-2

Even though antitrust regulators are largely participating in discussion threads with businesses about the positive effects of encouraging compliance, the talk on the officials' side frequently focuses exclusively on implementation, penalties, and leniency. While implementation is still necessary, and penalties clearly play an important role, the real argument must be about how to alter normative social attitudes so that adherence to antitrust law is on the policy not due to a fear of sanctions, but because ethical and lawful business is the way to go. In the future, firms in India must allocate adequate resources and support to concerns associated with antitrust law. This should be done both nationally and internationally. Businesses in India can save substantial amounts of money by being pro - active.

Increasing the Effectiveness of Antitrust Law in India with the help of Commitments and Settlements

The Competition Act, 2002, represents a pivotal shift in Indian antitrust law, transitioning from the command - and - control system of the Monopolies and Restrictive Trade Practices Act and toward facilitating and boosting competition in Indian markets.

The transition was motivated by the desire to provide participants with a competitive market to enhance innovation and productivity, provide buyers with options, and secure free trade. The emphasis has shifted to creating a robust environment that benefits both buyers and sellers.

Implementation Issues faced by Competition Commission of India

“One is the CCI’s realization of monetary penalty, as is evident from the statistics. As per the CCI Annual Report 2018-19, out of Rs. 13,881 crore, only Rs. 60 crore could be realized, which is less than 0.5%.” “Second, the number of appeals filed against the orders of the CCI has increased from year to year, with an average of 35% cases being appealed against. One of the primary reasons for this was the window available for challenging a prima facie order of the CCI under writ jurisdiction and the basic confusion surrounding the ‘quasi-judicial’ nature of the regulator, arm’s length relationship between the investigative arm, the DG office, etc. Further, final settlement of jurisprudential points took many years. For example, the crucial ‘relevant turnover’ issue raised in 2011 could only be decided in 2017. Out of the 530 cases appealed, 217 have been allowed with

ISBN 978-81-948082-8-2

133 being remanded back to the Commission for reconsideration." "Third, the CCI has received a somewhat cold response to its leniency mechanism, with only about such 10 decisions. Probably, the carrots didn't work in the absence of sticks.[298]"

Efficaciousness of Agency under Competition Law Regime

"One of the major purposes of reforms is to improve competition agency effectiveness. William Kovacic, former US-FTC Chairperson, has spoken about two criteria for measuring good agency performance. The first criterion deals with agency's impact on improving economic performance and social welfare in terms of improvement in quality, reduction in cost and increase in innovation. This aligns with the objective of CCI 'to promote and sustain competition in markets'. The second one deals with having transparent and superior administrative techniques and a commitment to seeking continuing improvements in its operations and its substantive programs. It is about focusing on outcomes rather than focusing on inputs."

Introduction of Reforms under Antitrust Law in India

"Against this background, the Injeti Srinivas Competition Law Review Committee (CLRC) has adequately identified issues requiring reform in Competition Law and policy in India with the prominent ones being promulgation of penalty guidelines and the need of 'settlement and commitment mechanisms' for speedier resolution of Competition Law cases." "The recommendations are made in view of the new age indicators of business activity (number of procedures, time taken, and cost involved) and the need to have an enforcement regime which focuses more on positive outcome than the allegiance to rigid processes." "CLRC is of the view that 'procedural economy and efficiency of enforcement action shall be the motivating factor' in Competition Law enforcement. This would also rationalize the scarce resources of the Commission to better use.[299]"

Provisions pertaining to Commitment and Settlement

[298]"Dr. Vijay Kumar Singh, "Settlement and Commitments: Potential recipe for improving effectiveness of Competition Law in India", *Bar and Bench*, Jan. 7, 2021, *available at:* https://www.barandbench.com/columns/settlement-and-commitments-effectiveness-competition-law-india (last visited on August 8, 2021)."
[299]"*Ibid.*"

Volume 2 Issue 7 | January 2023 ISBN 978-81-948082-8-2

"These are consensual remedies in antitrust cases used as enforcement tools by competition authorities to terminate an investigation by accepting commitment/settlement proposed by the parties to address the competition concerns identified by the agency. Legally speaking, commitment and settlement are different with respect to accepting/not accepting the antitrust violation and liability. Commitments are offered by parties without admission of guilt, whereas settlement happens when the regulator believes that there are prima facie grounds for a detailed investigation. Commitments are common in combination matters. For other competition law matters, however, this is a relatively recent phenomenon in several jurisdictions, except in the USA, where the first consent decree case (Otis Elevator Company) was witnessed in 1906."

"Major international enforcement agencies have strongly endorsed the use of settlement and commitments. For example, a United States submission to an OECD report on Commitment Decisions reported:"

"Settlements are an important procedural tool, because they let the agencies and the target parties resolve their disputes effectively, quickly, and thoroughly."

"Former Vice President of the European Commission responsible for Competition Policy Joaquin Almunia said in a speech-"

"All this shows that, although still young, settlements … are becoming an established practice and I am determined to build on their good record."[300]

Private settlement under Indian Competition Law

"The above commitment and settlement processes have to be differentiated with a private settlement arrived at between the informant and the alleged violator of antitrust laws. The Competition Act does not have any express provision dealing with settlements." "The Madras High Court in Tamil Nadu Film Exhibitors Association case (2015) had read CCI's power to pass residuary orders to the extent of entering into compromise or settlement by parties. Similarly, in the Lokhandwala Kataria case, the Supreme Court allowed an individual financial creditor to settle

[300] *Ibid*.

ISBN 978-81-948082-8-2

after the initiation of the Corporate Insolvency Resolution Process (CIRP) a process much like the CCI operates in rem.[301]"

Provisions relating to Settlement under Securities Law of India

"The Securities and Exchange Board of India (SEBI) had issued regulations on Settlement of Administrative and Civil Proceedings in 2014, which recently got revamped in 2018 on the recommendations of the Justice AR Dave Committee." "Interestingly, the Dave Committee also referred to the CCI Lesser Penalty Regulations, 2009 on the point of "settlement with confidentiality". "The settlement mechanism under the SEBI regime has been a success as is evident from the latest SEBI Annual Report 2018-19. SEBI received 419 applications for settlement as compared to 241 applications received in the previous year. During 2018-19, SEBI disposed of 137 applications by passing appropriate settlement order. For 137 applications settled during the year, SEBI collected Rs. 46.1 crore towards charges compared to Rs. 30.9 crore in the previous year.[302]"

Existing and recommended categories of commitment and settlement under Competition Law of India

"Cartel Cases – These are the most pernicious of antitrust violations involving price fixing, bid rigging, market allocation, etc. Leniency provisions (settlement with confidentiality) are available in such cases, which is basically reduction/waiver of penalty for a cartel member which becomes an informer and supports the competition agency in prosecution of the cartel."

"Combination cases – Commitments are common wherein the merging parties offer modifications to their proposal (behavioral remedies) to ameliorate the possible 'consumer harm' identified by the competition agency."

For the future, the CLRC has proposed new commitment and settlement provisions in these categories too:

[301] "*Ibid*."
[302] "*Ibid*."

 ISBN 978-81-948082-8-2

"Vertical agreement cases– There is always scope of examining the appreciable adverse effect on competition (AAEC) and hence rule of reason standards apply."

"Abuse of dominance cases– These are cases in which the dominant player in the relevant market abuses its position."

"At present, we do not have settlement/commitment provisions with reference to vertical agreements and abuse of dominance cases in India. Regretfully, this restricts CCI from exploring the imposition of conditions or securing a win-win pro-competitive commitment from the infringing firms. Commitments are available after a prima facie order, but prior to submission of the DG Report, and settlements are available only after submission of the DG Report, except in cases of cartels.[303]"

Issues and Challenges

"One of the greatest challenges in implementing the provisions relating to settlement and commitments is sufficient clarity on the guidelines. Once the substantive provisions are in place, detailed regulations on commitment and settlement would be required. SEBI has done the same with sufficient clarity on the process and formula of arriving at the settlement terms. Secondly, transparency in the process shall be of utmost importance, as the matter would involve consensual discussion between the officials of the commission and the enterprises in conflict with antitrust law. CCI officials are used to negotiating merger commitments and already have an exposure to the nuts and bolts involved. However, some training on negotiation, mediation and conciliation skills would be essential, including a change in culture and mindset of enforcement. This would enable the officers to use the 'commercial knowledge advantage' of the market operators in crafting optimal outcomes. Performance metrics of CCI officials based on the number of cases filed and litigated in courts should be reconsidered. On the flip side, concerns about possible under-enforcement of any major precedent-setting matter would be taken care of by the constitutional courts through cases filed by aggrieved persons, including public interest litigation."[304]

"As India is moving rapidly towards Aatmanirbhar Bharat, reforms relating to removing procedural obstacles require swift action. This is in the best interest of securing a high ranking for

[303] "*Ibid*."
[304] *Ibid*.

ISBN 978-81-948082-8-2

India in the 'ease of doing business', 'global competitiveness' and 'attracting investors' indices. Competition Law in India has been awaiting reform for a long time. The Competition Amendment Bill of 2012 lapsed and the Amendment Bill of 2020 is yet to see the light of the day. High among other reforms proposed in the Bill, commitment and settlement provisions require quick attention by policy makers. This is even more important when there is no exclusive appellate authority for competition matters [powers now being exercised by the National Company Law Appellate Tribunal (NCLAT), which also handles matters under the Companies Act and the Insolvency and Bankruptcy Code (IBC)]."[305]

"'Economy of procedure' is the mantra for increasing ease of doing business. The ultimate test for a strong Competition Law regime shall be the amelioration of consumer harm and increase in competitiveness of markets, rather than cases reaching up to Supreme Court for merely vindicating a legal point. While setting precedents on some key issues is important, in the majority of matters, the focus must be rooting out anticompetitive conduct quickly. Commitments and settlement mechanisms offer much needed flexibility to the Commission in this regard, as has been witnessed by several major jurisdictions with these provisions. It would provide a window to the Commission to extract wider-ranging remedies for meeting the long-term goal of promoting and sustaining competition in markets in India leading to economic development."[306]

Conclusion

Characterizing public interest is vital in carrying out competition law. Of equivalent significance is the combination between competition policy, law and public interest in developing innovative markets that cover stage markets and markets for thoughts. The elements of rising market structures, where innovation and customer inclination are contributing variables to monopolistic

[305] *Ibid*.
[306] *Ibid*.

ISBN 978-81-948082-8-2

market structures' antitrust examination, should zero in on a more nuanced comprehension of purchaser advantages and public interest. Competition advances purchaser government assistance, and public interest plainly shows that augmentation of customer government assistance ought to be at the focal point of both competition policy and law.

The meaning of dynamic productivity as a genuine and influential objective of antitrust policy has additionally been featured in the writing. As expressed in the starting piece of this article, antitrust law can't be seen in avoidance from a country's advancement objectives. The journey of static productivity, in which the competition framework looks to achieve moment government assistance targets with no since a long time ago run compromises, could be incongruent with the objective of monetary headway.

On the off chance that an antitrust position, through its capacity as an off-market administrator, keeps up with and works with a structure to warrant competition, it can go about as a rousing element, making organizations rehash to acquire an estimating power, position their items in an unexpected way, as well as acquaint new items with market. Competition is obviously the most remarkable factor for organizations to improve.

Several developed countries have had comprehensive antitrust policies and the resulting antitrust law in place for some time. However, India has only recently joined the club. Consequently, this legislation is still in its infancy in the Indian scenario. In Europe and the United States, legal precedent has evolved over time via a series of discussions, deliberations, and assessments between different parties such as legislators, the courts, academia, and the sector. Such discussions are necessary for Indian competition law to be efficacious and yield positive outcomes.