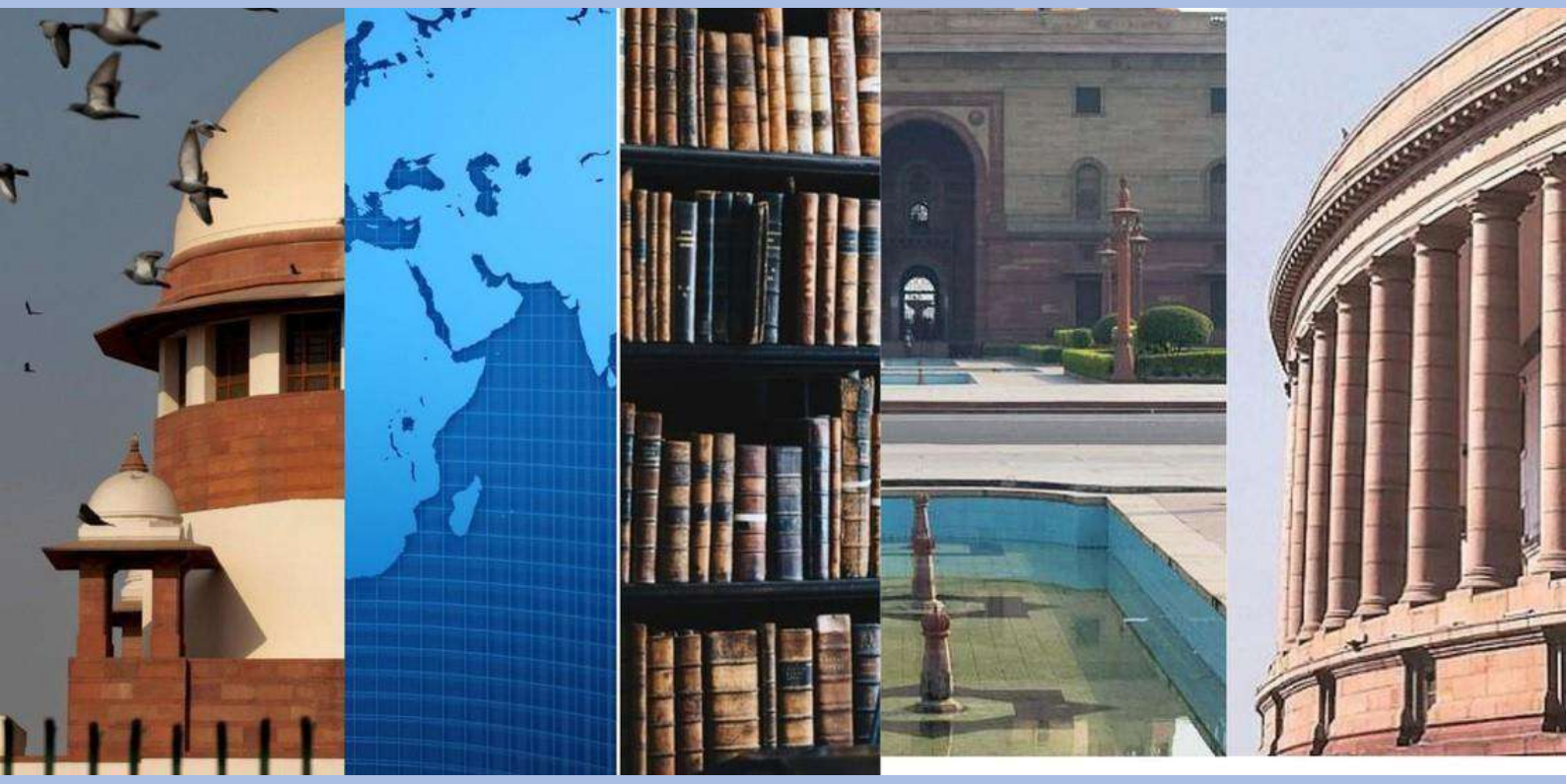
Journal of Global Research & Analysis

A Multi-Disciplinary Peer-Reviewed Research Journal

RNI-HARENG/2012/59126 ISSN: 2278-6775



Volume 13(1) June 2024

Journal of Global Research & Analysis

[A Bi-Annual (June & December)

Multi-Disciplinary Peer-Reviewed Research Journal]

editorjgra@geetalawcollege.in **RNI-HARENG/2012/59126** **ISSN: 2278-6775**

PEER REVIEW PANEL

Journal Website: https://www.geetalawcollege.in/academics/list-of-journals/

OWNED BY

K.R Education Society, 547, Sector-11 (HUDA), Panipat, Haryana

Published by Nishant Bansal (On Behalf of) K.R. Education Society, Panipat**.**
Address of Publisher – H.No. 547, Sector -11 (HUDA), Panipat, Haryana, **Printed By –** Jitender Nandal**, Address of Printer** – Nandal Enterprises, Printing #39, 1st Floor, Kissan Bhawan, Assandh Road, Panipat, 13(1)2103 (Haryana), **Owned by** K.R. Education Society, 547, Sector 11 (HUDA), Panipat, Haryana, **Editor –** Dr. Subhash Kumar, **Place of Publication**– K.R. Education Society, 547, Sector -11 (HUDA), Panipat, Haryana, India.

Annual Subscription-Rs.
1000/- Single Copy- Rs. 500/-

Bank Draft drawn in favour of K.R. Society and Payable at Panipat may be sent to the following address: The Editor (Dr. Subhash Kumar), Journal of Global Research & Analysis, Geeta Institute of Law, Karhans, Samalkha, Panipat- 132101 (Haryana).

DISCLAIMER

JOURNAL OF GLOBAL RESEARCH AND ANALYSIS

Journal of Global Research & Analysis (JGRA) is "**A Bi-Annual Multi-Disciplinary Peer-Reviewed Research Journal**" (Print) in English for the enhancement of research published by Geeta Institute of Law (GIL) under the aegis of K. R. Education Society, Panipat.

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

ARTICLES

SETTING FAIR STIPENDS: EMPOWERING JUNIOR ADVOCATES

KHATHIJA A.*

ABSTRACT

The legal profession for newly enrolled advocates, securing employment and gaining experience in law is challenging, especially in the initial years of practice. This article highlights the challenges faced by newly enrolled advocates, including the high cost of basic necessities and the associated difficulties. It is the function of the BCI to safeguard the interest of advocates of the bar. This paper clearly discusses about the Judicial Interpretation of fixing fair and minimum remuneration for the newly enrolled advocates.

In India, roll of Advocates are having the right to practice in any state, court, any country only as he pursues his/her degree in Law, after which he gets enrolled in State Bar Council of Jurisdiction of residence. Later, avails a Temporary ID Card and Certificate of Enrollment for a period of 2 years. As the person enrolls themselves with the State Bar Council as an advocate, they can take as many AIBE exams as required. However, the notification released by the Bar Council of India, the advocate who doesn't clear the ***All-India Bar Exam*** *within* ***two years*** *of enrollment with the State Bar Council will be barred from practicing law.*

Keywords: Advocates, Judicial Interpretation, Remuneration.

*Research Law Assistant, High Court of Madras.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

I. Introduction

The legal profession is widely recognized for its commitment to justice and ethical conduct. In Legal practitioner's life it is very hard to achieve success in their career. It is a gradual journey; new entrants of the legal profession encounter prolonged waits and significant initial challenges. Many talented young lawyers wrestle to secure opportunities or gain exposure in their field. Where in the early days of practice, the junior advocates receive meager stipends, compounded by the absence of legislation addressing this issue, making it difficult for them to afford basic necessities such as food, lodging, and transportation. Despite their talent and efforts, progressing in their careers becomes challenging. It often takes years of relentless hard work and perseverance to get to know for his work and reputation and achieve success.

In the legal fraternity, each day presents new challenges for many people. Those who establish practices immediately after joining the legal profession often find it difficult to stabilize them. Whereas some lawyers continue to face hardships throughout their careers yet choose to remain committed to the profession. In spite of their talent and efforts, progressing in their legal field turns out to be challenging. It often takes years of relentless hard work and perseverance; some fortunate lawyers manage to establish a reputation and achieve success. This paper focuses on the legal lacuna regarding the stipends to the young junior advocates.

2. Law as Profession in India:

Development of Legal profession had taken place in Ancient Period, Medieval Period and evolved in British Period in Charter of 1726. Judicial Institutions of English Law had established in the Presidency Towns of Bombay, Calcutta and Madras continued to establish till 1926. After Independence, All India Bar Committee, 1951 was formed under the chairmanship of Justice S.R. Das. The Committee Report recommended the formation of All India Bar Council and State Bar Council which recommends the powers of the enrollment, suspension and removal of advocates from the Bar Council. The Committee further proposed that no further recruitment of non-graduated pleaders.

Later, The Advocates Act, 1961[1] was enacted by Parliament in 12th year of Republic, the Central Government was in force in whole India which brought Revolutionary changes in the

[1] THE ADVOCATES ACT, 1961

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

legal profession which empowers the Advocates to achieve the utility and dignity in profession of law throughout India.

Law being a noble profession has to go through hardships in a row, toil to be successful in that profession. Initially, young advocates will have to be in a queue for a prolonged period of time and struggle through hardships and hardly get proper opportunity to represent themselves in the profession. In initial stage of profession, young advocates suffer with meager stipend. They struggle to manage their food, accommodation and transportation. Despite the efforts, they are unable to achieve in their profession. The Advocates, who gets into practice after enrolment, strive to settle down in life as well as in profession.

2.1 Importance of Fair Remuneration:

Remuneration is necessary to every person to live life of dignity. The constitution of India in Article 21[2] which is expanded by the judiciary over the period of time talks about the Right to lead a life with dignity. It is a settled position that fair remuneration will come under the scope of article 21. Professional Courses like Chartered Accountants, Company Secretaries, Cost Accountants and Doctors have a provision that the new members of the profession are bound to be paid at least the minimum sum of remuneration as fixed by their respective professional bodies. Young advocates are underpaid and are facing financial difficulties, due to the gap between the demand and supply of legal practitioner in the legal system. The issue of non-payment or incentives to the junior advocates is still prevailing. Justice Kaul observed that "Even to impart training, the financial liability for paying the lawyers could not be borne by the Bar Council of India"[3]. This shows the euphoria around the issue by the courts regarding the issue.

2.1.1 Role of BCI:

Section 6[4] and 7[5] of the Advocates Act, 1961 enshrines the functions of State Bar Council and Bar Council of India respectively which states to safeguard the rights, privileges and interests of the practicing advocates of the Bar. The Functions of Bar Council to make sure that the livelihood of the Advocates is protected by fixing minimum stipend when engaging the

2 THE CONSTITUTION OF INDIA, ART 21
3 BAR COUNCIL OF INDIA V. BONNIE, 2023 LIVE LAW SC 96
4 The Advocates Act, 1961
5 The Advocates Act, 1961

services of the junior Advocates, who have enrolled in the Bar. Bar Council of India is required to maintain discipline and control of advocates on the roll in their legal profession. The Functions of Bar Council of India and State Bar Council is divided so that any such overlaps.

3. Judicial Approach:

The Hon'ble Five –Judge Bench of Supreme Court Mr. Justice Kaul has observed in the case of Bar Council of India v. Bonnie Foi Law College & Ors. 2023[6] Live law SC 96

"Even if there is a constitutional interpretation, this problem will persist if we don't address this issue. Even if BCI helps the students be placed, the payment of the stipend is an issue. If we stretch ourselves, in construing that the power to frame such a rule exists, the implementation itself will become a problem. If the suggestion is to have compulsory training, then the issue of paying the stipend becomes a real problem."

Similarly, in 2022 A Public Interest Litigation was filed by 12 young lawyers of Maharashtra seeking stipend for Advocates with Income Less than Rs.1,00,000/- during first 3 years of practice. Their contention was that "*Same kind of affirmative action is expected from the Hon'ble High Court. The petitioners are hopeful that some quick action in favour of the new and junior advocates facing economic complexities will be ordered by the Hon'ble High Court,* as a result of this PIL, the Bombay High Court issued Notice to Bar Council of Maharashtra & Goa. Such affirmative action was taken by these by the High Courts of Delhi, Telangana, Kerala, Cuttack, Calcutta, Tamil Nadu, Jharkhand and Andhra Pradesh to support young lawyers. In the Case of Vivek Tiwari and another v. Bar Council of India and another (PIL) – In the Court of Punjab & Haryana High Court had issued Notice to Bar Council of India and Bar Council of Punjab, Haryana & Chandigarh for "*standardized stipend and remuneration guidelines"* for minimum stipends for young lawyers and law interns.

3.1 *Simran kumari v. Bar Council of India & Anr*[7]

The Division Bench of Delhi High Court comprising of Acting Chief Justice Manmohan and Justice Manmeet Pritam Singh Arora directed the Bar Council of India and Bar Council of

[6] Bar Council of India v. Bonnie, 2023 Live law SC 96
[7] Simran Kumari v. Bar Council of India, 2024 Live law (Del) 149

Delhi for seeking effective implementation of the stipend or remuneration guidelines for young advocates

"The absence of fair remuneration not only create hurdles in the life of young law graduates but also contributes to the decision to shift to another safer profession," This contention shows the complexity of the issue at hand.

3.2 *M. Karpagam v. Home Secretary*[8]

The Division Bench of Madras High Court held clearly that if there is any lawyer who fulfils shall be eligible to obtain the stipend, subject to fulfillment of the other conditions of the notification. And the State should extend the benefit of the stipend to all eligible junior lawyers attaining eligibility criteria and not falling foul of any of the ineligibility criteria.

3.3 *Pankaj Kumar v. Bar Council of Delhi*[9]

The Division Bench Delhi High Court has held that young advocates have the right to claim stipend. It is well settled that a writ can lie only for the enforcement of the right that recognized by law, and Article 21 of the Constitution of India does not extend to include a right for advocates to demand a monthly stipend from Bar associations.

The Chief Justice of India, DY Chandrachud in a Function organized by the Bar Council of India to felicitate him for taking up as the Chief Justice of India had issued an urgent call to action to senior members of the bar to remunerate their juniors fairly in order to enable them to live a life of dignity. And quoted that "Junior Lawyers are not slaves, pay them decent salaries, Legal Profession should not be an "Old Boys' Club". In legal profession if a young lawyer has to survive on his own. He/She has the responsibility to take care of their well-being and rent to pay, transportation, and food. This practice must change, and the burden of providing is on us, as senior members of the legal profession," the Chief Justice said.

"For too long we regard young members of our profession as slave workers. Why? Because that is how we grew up. We can't now tell young lawyers that is how we grew up. This was the old ragging principle in Delhi University. Those who were ragged always ragged people who

[8] M. Karpagam v. Home Secretary, 2021 SCC OnLine Mad 2445.
[9] Pankaj Kumar v. , 2022 SCC OnLine Del 3071

were below them because it was passing on blessing of being ragged. Sometimes it got very bad. But the point is seniors today cannot say that are how I learnt law in the hard way and therefore I will not pay my juniors. Those times were very different, families were smaller, and there were family resources. And so many young lawyers who could have made it to the top never made it for the simple reason that they had no resources"

While these were the stances of the several courts in the country, Division bench of Madras High court took a radical stance by setting the minimum stipends for the junior advocates. The Division Bench of Madras High Court in the case of Farida Begam v The Puducherry Government and Others[10] in W.P.No. 17976 of 2019 has directed the advocates in the State Bar Council of Tamil Nadu and Puducherry to pay a monthly minimum stipend of Rs. 20,000 for young lawyers practicing in Chennai, Madurai, and Coimbatore and a stipend of Rs 15,000 for lawyers in other districts. The court also added that the amounts to be fixed by taking into account of the basic cost of living and the expenditure costs. The court also stressed that is the duty of all stakeholders in the legal profession to create an inclusive environment where every advocate should be valued and respected. The Court also endorsed that monthly stipend for young lawyers is necessary to foster their development, emphasizing these stipends should be provided universally, regardless of the gender identity. One of the important aspects of this judgment is that it took account of the exploitation endured by the junior advocates, Justice S.M. Subramaniam opined, “Extracting work from Junior Advocates without payment is exploitation and in violation of fundamental rights.” The court highlighted the need of addressing gender pay disparities and recognized existing state welfare schemes for junior lawyers while advocating for a sustainable support system within the profession. The Court underscored the potential of young lawyers from marginalized backgrounds and urged unified efforts to propel their success, asserting that a profession's success hinges on the opportunities it creates for newcomers. Additionally, the court previously recommended the bar council to set a minimum stipend for junior lawyers to safeguard their livelihoods.

4. Government Scheme to Support Young Advocates in Legal Practice

4.1 Kerala Young Advocates Monthly Allowance Scheme

In the State of Kerala, High Court of Kerala had recently criticized the State Bar Council for

[10] Farida Begam v. The Puducherry Government, 2024 Live Law (Mad) 240.

the delay in implementing a government order that approved stipends for junior lawyers. The stipend of Rs. 5,000 per month was intended for Advocates under the age of 30 with less than three years of practice and who are having an annual income below Rs.1,00,000/- The Court reprimanded over the prolonged delay in disbursing stipends to eligible young advocates, and highlighted the issues with execution and compliance within the legal framework.

In 2021, followed by High Court Order, the Government of Kerala Sanctioned Rs.3,000/- as Monthly Stipend for Junior Advocates. The Kerala Advocates' Stipend Rules and Section 9 of the Kerala Advocates Welfare Fund Act, 1980 empowers the Trustee Committee to provide monthly stipends to junior lawyers who are under 30 years and having less than three years of practice. These stipends are disbursed from the Fund by the Committee on a monthly basis, as determined by the Trustee Committee, and are deposited into the bank account of the young Advocates. The application for stipend shall be forwarded through and recommended by the Bar Association of that Court where he is a member. No application shall be entitled for stipend as a matter of right, but it will be subject to the satisfaction of the Trustee Committee as to the applicant's eligibility and continuation in practice.

4.2 *Andhra Pradesh The Scheme "Yrs. Law Nestham"*

In December, 2019, the scheme "YSR Law Nestham" has implemented by the Law Department, Govt. of Andhra Pradesh. It provides a monthly stipend of an amount of ₹ 5,000/- to the Junior Advocates where an applicant should be in the rolls of Advocates and it is maintained by the Andhra Pradesh State Bar Council under Section 17 of the Advocates Act, 1961 is applicable only to the graduates in law and who were passed out in the year 2016 and afterwards.

4.3 Tamil Nadu Young Advocates Monthly Allowance Scheme

In July, 2020 the Bar Council of Tamil Nadu and Puducherry had requested the Chief Minister of the State sanctioning a monthly stipend of Rs.3,000/- for a period of two years to the young Advocates who are practicing in the state of Tamil Nadu. Such, memorandum was submitted before the Chief Minister Edappadi K Palaniswami insisted him to grant monthly stipend of Rs.5,000/- per month to the newly enrolled junior lawyers.

5. Recommendations:

1. Cost of Inflation**:** Economic conditions, inflation rates, and cost-of-living adjustments have to considered in determining income levels. Regular review and adjustments have to be made in line with economic realities. When discussing income for young potential advocates, the reality is stark: despite working tirelessly day and night, many are compensated with meager amounts, sometimes as low as Rs. 5000/- per month. This insufficient amount is hardly reflective of their effort and dedication they pour into their work.

2. Sustaining In Metropolitan cities, like Bombay, Delhi and Chennai the inflation rates to be reviewed, where the cost of living is significantly higher, this inadequate income becomes even more challenging. The Cost of Inflation Index, which measures the rise in prices of essential goods and services, underscores the importance of considering living expenses when determining fair remuneration. The disparity between the basic stipends offered to young advocates and the actual cost of living in urban centers creates a financial strain that affects their quality of life and professional development and growth of him as a professional.

3. Fair Remuneration: Fair remuneration or financial structure is necessary for an individual to sustain and achieve, become something in life. Despite these financial constraints, many young advocates persevere in their pursuit of a legal career, driven by their passion for justice and their commitment for making the difference in society. However, the disparity between income and living expenses highlights a pressing need for reform and support in the legal profession, ensuring that young advocates are adequately paid for their valuable work, contributions and affording the opportunity to thrive professionally.

4. Employee Benefits: In the legal profession, Employee benefits in the legal profession go through challenges for newly enrolled young advocates. Due to their independent nature of their work and the hierarchical structure prevailing in law firms and chambers of Senior advocates.

5. Independent Profession: The Legal Profession is of wholly self-employed professionals. Hence, they are responsible for generating their own income and won't be able to receive employee benefits like health insurance or retirement plans from an employer like the corporate offers.

6. Professional Associations: Being Professional Associations, the Bar Council and State Bar Council of India has to give opportunities, and access to resources and address the issue of fair remuneration to

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

the newly enrolled.

6. CONCLUSION

The Common grievance of the young junior advocates is that they were overworked and underpaid. As a result of this, the bright, young potential Advocates of underprivileged backgrounds, after studying for six years, it becomes difficult for them to sustain themselves for the upcoming years are being financial exploited. Because, the ideology of Senior Advocates are that legal practice meant for learning on the job. Paying minimum stipend to the Advocates would be a great support to young advocates which will significantly contribute to maintain high standards within the legal profession which would help young advocates to work in the field of law and become great advocates and eminent jurists in the future. This proactive approach ensures that the legal community remains robust and capable of fostering top-tier talent, thereby enhancing the overall quality and reputation of legal practice. Highlighting a stark disparity in earnings between minimum wage laborers and when compared with degree holders in the IT sector. Specifically, while a minimum wage laborer earns around Rs. 12,000 per month, IT sector degree holder earns approximately Rs. 25,000. This disparity reflects the significant gap in income levels based on education and sector of employment, reflecting broader socio-economic inequalities. Whereas, a young potential advocate with 5 years of educational qualification, yet works under a Senior Advocate and lacks in sufficient income for living and economic status in society. Such young advocates are underpaid and which results in financial exploitation and also violate their fundamental right to earn livelihood enshrined under Article 21 of the constitution.

References:

1. Sanjay Row., *The Advocates Act: A Commentary* (LexisNexis,2016).
2. Comprehensive Note on the Advocates Act, 1961 (legalserviceindia.com), last visited on 20th July of 2024.
3. Legal Profession in India: Evolution, Historical Development, and Regulations (legalserviceindia.com), last visited on 20th July of 2024.
4. Analysing Legal Practice in India and future of Indian Legal Profession (legalserviceindia.com), last visited on 20th July of 2024.

5. Sharma, A., and Verma, R., *Rights and Privileges of Advocates* (Law Books International, 2019).

6. Gupta, S. (Ed.), *Legal Ethics and Professional Conduct: Advocates' Rights and Responsibilities* (Legal Insights, 2020).

7. Singh, P., *The Law of Legal Practitioners: A Guide to Advocates' Rights* (Indian Law Publishers, 2018), Foreword by R. Sharma.

Journal of Global Research & Analysis **Volume 13(1)**
(A Multi-Disciplinary Peer-Reviewed Research Journal) **RNI-HARENG/2012/59126, ISSN: 2278-6775**

CORPORATE GOVERNANCE VIS-À-VIS INDEPENDENT DIRECTORS

DR. ISHA WADHWA SHARMA*

ABSTRACT

Independent directors (IDs) have become indispensable and they are seen as an essential component of corporate governance. Around the world, the expert committees on corporate governance have advocated for their presence on the board for bringing efficiency as they can inhibit fraud and mismanagement. IDs as generally understood are those who do not possess any material interest in a company and only receives a remuneration. In India, clause 49 of the SEBI Listing Agreement was introduced by SEBI in the year 2000, which mandated public listed companies to have IDs. Realizing the importance of independence of the board, the Companies Act, 2013(1) mandates appointment of IDs under section 149. This paper attempts to analyse the concept of IDs and its evolution. Further emphasis will be on critically analysing the provisions under the Companies Act, 2013(1) relating to IDs, their appointment, role, liability, and envisaged duties and evaluating how far they are independent. The shortcomings of the current approach will be outlined and suggestions will be made regarding changes required in the existing framework.

Assistant Professor, Law Centre-II, Faculty of Law, University of Delhi.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

I. INTRODUCTION

Corporations are regarded as a replica of the society in which they exist. W.T. Gossett pointed out that, "the modern corporation is a social and economic institution that touches every aspect of our lives, in many ways it is an institutionalized expression of our way of life…industry in corporate form has moved from the periphery to the very center of our social and economic existence… we live in a corporate society."[1]

This led to the notion that a corporation is a congregation of numerous stakeholders, which includes, employees, customers, investors, government and society[2] and while operating, they must be fair and transparent to its stakeholders. Resultantly, companies must work within the parameters established by law and regulations and the boundaries set by those who own and fund them, but should also fulfil the expectations of its stakeholders.[3] Certain limited boundaries were prescribed by the law; however, these limited boundaries did not take into consideration the interest of every individual related to the company. Therefore, questions were raised that the company must carry out the business by complying with all the ethical rules of business, because the activity of the management not only affects the shareholders, but also other stakeholders.

Corporate governance is akin to the ethical conduct of the corporates in their operation, which is beyond the domain of law. It is correctly stated that, "corporate governance is not an abstract goal, but exists to serve corporate purposes by providing a structure within which stockholders, directors and management can pursue most effectively the objectives of the corporation." [4] The Hampel Committee Report also pointed out that,[5] "the importance of corporate governance lies in its contribution both to business prosperity and to accountability." According to Gower, "corporate governance is a modern term for an issue as old as the emergence of the large public company."[6]

[1] Cited in Indrajit Dube, *Corporate Governance* 2 (Lexis Nexis, Delhi, 2009).
[2] See generally, Thomas Donaldson and Lee E. Preston, "The Stakeholder Theory of the Corporation: Concepts, Evidence and Implications" 20(1) *The Academy of Management Review* 65 (1995) and R. Edward Freeman, Andrew C. Wicks and Bidhan Parmar, "Stakeholder Theory and The Corporate Objective Revisited" 15(3) *Organization Science* 364 (2004).
[3] Sir Adrian Cadbury, "The Essence of Corporate Governance" in Sanjiv Agarwal, *Corporate Governance: Concept and Dimensions* 13(1) (Snow White Publications Pvt. Ltd., Mumbai, 2003).
[4] See, U.S. Business Round Table, "White Paper on Corporate Governance" (September, 1997).
[5] Ronnie Hampel, "Committee on Corporate Governance: Final Report" (January, 1998).
[6] Paul Davies, *Gower's Principles of Modern Company Law* 66 (Sweet and Maxwell, London, 1997).

The origin of corporate governance may be traced back to Berle and Means' work titled 'The Modern Corporation and The Private Property,' which for the first time identified the fundamental elements of evolution in a corporate structure.[7] The concept was further shaped by the academia and it was adopted as a voluntary business practice by many companies but eventually, some components of corporate governance were given statutory recognition.

It is difficult to define the term 'corporate governance'. In the current global context, it essentially means rule of law, openness, accountability, and preservation of public interest while operating the company.[8] Corporate governance, as per the Cadbury Committee Report, is "the system by which companies are directed and controlled."[9]

In India, Kumar Manglam Birla Committee[10] described the concept of corporate governance as:

"Three key constituents of corporate governance as the Shareholders, the Board of Directors and the Management and has attempted to identify in respect of each of these constituencies, their roles and responsibilities as also their rights in the context of good corporate governance. Fundamental to this examination and permeating throughout this exercise is the recognition of the three key aspects of corporate governance, namely; accountability, transparency and equality of treatment for all stakeholders."

Similarly, other committees in India also did not define the term. The Naresh Chandra Committee indicated that the agency costs are the fundamental theoretical underpinning of corporate governance.[11] Whereas, the Narayan Murthi Committee mentioned that, "corporate governance deals with conducting the affairs of the company such that there is fairness to all stakeholders and that its actions benefit the greatest number of stakeholders."[12]

There are numerous components of corporate governance that varies from country to country, but the fundamental framework of corporate governance includes increasing accountability

[7] Adolof Berley and Gadinar Means, *The Modern Corporation and the Private Property* (The Mac Millan Company, 1932).
[8] Reeti Sonchhatra and D. Raghavendar Rao, "Corporate Governance in India: Whether the existing framework needs a modification?" 8 *Madras Law Journal* 120 (2008).
[9] Adrian Cadbury, "Report of the Committee on the Financial Aspects of Corporate Governance" (December, 1992).
[10] "Draft Report of the Kumar Mangalam Committee on Corporate Governance" (September, 1999).
[11] Naresh Chandra Committee, "Report of the Committee on Corporate Audit and Governance" (2002).
[12] SEBI, "Report of the SEBI Committee on Corporate Governance" para 1.1.3 (February, 2003).

through voluntary disclosure, by reorganising the corporate board, recognising the rights of stakeholders and corporate social responsibility, reaffirming the rights of shareholders, and using an appropriate regulatory environment. [13]

II. Corporate Governance and Board of Directors

The company is a legal person and has a separate existence from its members. However, human involvement is required either at the stage of policy formulation or its implementation.[14] Numerous interconnected issues have arisen because of the growing economic power of corporations and the ramifications of the separation of ownership from control in such corporations. [15] The primary goals of corporate governance, as emphasised by Kevin Keasey and Mike Wright, are to improve company performance through the supervision or monitoring of the management performance and to ensure the accountability to numerous stakeholders.[16]

One of the significant attributes of corporate governance is restructuring the board to create more checks and balances within the board so that it can be accountable for their action.[17] It has been rightly stated that, "the relation of board and management with stockholders should be characterised by candor; their relationship with employees should be characterised by fairness; their relationship with the communities in which they operate should be characterised by good citizenship, and their relationships with government should be characterised by a commitment to compliance."[18]

Various concerns have been raised in relation to the board of directors, such as how to enhance the board's performance; whether the board's performance is dependent on its composition; whether the composition contributes to the board's independent decision-making process; and whether the board's independent decision-making process is indispensable for the greater economic and social interest. The answers to all these concerns have been affirmative and have been attributed to the concept of 'independent directors.'

[13] *Supra* note 1 at 16.
[14] *Supra* note 1 at 108.
[15] Kartikeya Singh, "Role and functions of Non-Executive Directors- Some perceptions" 73 *Corporate Law Adviser* 71 (2006).
[16] Kevin Keasey and Mike Wright (eds.), *Corporate Governance* 2 (John Wiley & Sons, Chichester, 1997).
[17] *Supra* note 11.
[18] The Business Roundtable, "Principles of Corporate Governance" (May, 2002).

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

III. Corporate Governance and Independent Directors

Globally, the importance of IDs is at the centre of the debate on corporate governance. Generally, it is presumed that the IDs are better in bringing efficiency in the company,[19] their significance is well recognised in both the corporate governance model, outsider model in the UK and the USA and the insider model in India, however, the reasons attributed for giving statutory recognition to the IDS are different though similar for resolving the agency problems.[20]

Apart from resolving the agency problems, there are many other reasons attributed for the development of the concept of IDs. They are said to bring objectivity to the decision making as they can challenge the policy decisions and strategies of the company, thereby bringing accountability. Also, their presence on the board can protect and balance varied interest of numerous stakeholders and the lack of affiliation allows them to fulfil their responsibilities more efficiently.[21] In this context, it was rightly pointed out that their decisions are premised on the corporate merits rather than extraneous consideration or influences.[22]

Independent Directors: Indian Context

In India, significant economic changes towards economic liberalisation were initiated in 1991, ushering in a new age in corporate governance. In order to effectively regulate the Indian securities market, the Securities and Exchange Board of India (SEBI) was founded in 1998. The Confederation of India Industry (CII) recommended a code for "Desirable Corporate Governance" in 1998, which was voluntarily embraced by some corporations. Following that, a committee chaired by Kumar Mangalam Birla submitted a report to SEBI, to promote corporate governance in listed companies.

The SEBI introduced clause 49 in the Listing Agreement of the Stock Exchanges premised on the recommendations of the Kumar Mangalam Birla Committee Report, [23] and this clause was

[19] *Supra* note 1 at 129.
[20] Umakanth Varottil, "Evolution and Effectiveness of Independent Directors in Indian Corporate Governance" 6(2) *Hastings Business Law Journal* 281 (2010).
[21] Pranav Mittal, "The Role of Independent Directors in Corporate Governance" 4 *NUJS Law Review* 285, 290 (2011).
[22] *Unitrin, Inc.* v. *American General Corp*, 651 A.2d 13(1)61 (Del. 1995).
[23] See, "Report of the Kumar Mangalam Birla Committee on Corporate Governance" *available at:* https://www.sebi.gov.in/sebi_data/commondocs/corpgov1_p.pdf. (Visited on March 20, 2024).

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

enforced in a phased manner. It was amended various times to make qualifications for IDs more stringent.

However, no concrete corporate governance reforms were seen in the Companies Act, 1956. Only few amendments were made like an amendment in the year 2000 to mandate an audit committee consisting of non-executive directors by insertion of section 292A. It was only through the Companies Bill, 2008 that an attempt was made to give statutory recognition to the appointment of IDs. Meanwhile, pending formal legal changes, the Task Force constituted by CII made recommended modifications in the corporate governance norms in India in November 2009. The Task Force encouraged the companies to voluntarily adopt and implement the amended regime. Also, the Institute of Company Secretaries of India (ICSI) issued its own set of recommendations. Based on these and other proposals, the Ministry of Corporate Affairs (MCA) issued the Corporate Voluntary Guidelines, 2009 in which the significance of IDs was discussed and elaborated guidelines were provided regarding their appointment, remuneration and responsibilities etc.

Further, in the year 2011, the Companies Bill was introduced but it was sent to the Standing Committee for its recommendations, which submitted its report recommending various amendments. The MCA examined the recommendation and eventually in the year 2013(1), the Companies Act was passed. In the Companies Act, 2013(1), the elaborate legal framework for IDs is provided under section 149 (4) to 149 (10) read with schedule IV and section 150. Clause 49 of the Listing Agreement was also amended after coming into force of the Companies Act, 2013(1). Presently, the Companies Act, 2013(1) (hereinafter referred to as the Act) and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter referred to as the LODR Regulations) provides the statutory framework regarding the appointment, remuneration, role and functions of the IDs.

Definition (Qualifications)

Generally, IDs are understood as those who have no material interest in a company and only receives a remuneration. The Kumar Mangalam Birla Committee Report defined it as, "directors who apart from receiving director's remuneration do not have any other material pecuniary relationship or transactions with the company, its promoters, its management or subsidiaries, which in the judgment of the board may affect their independence of judgment."

It is preferable to have a broad and flexible definition of the term 'ID' so that it is not a constraint in their selection. In almost all jurisdictions, the term is not defined rather criteria have been prescribed to determine the independent character of a director.

According to section 149 (6) of the act, 'independent director' is defined as "a director who is not a managing director or a whole-time director or a nominee director" and who meets the following requirements:

- The first requirement is qualitative in nature, should be a person of integrity and should possess relevant expertise and experience, in the opinion of the board. Rule 5 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that, "an independent director shall possess appropriate skills, experience, and knowledge in one or more fields of finance, law, management, sales, marketing, administration, research, corporate governance, technical operations or other disciplines related to the company's business."

- The second requirement relates to prohibited professional relationships. "A person to be appointed as an independent director should not be:
    - a promoter of the company,
    - a person related to promoter or directors,
    - a person who holds any position of key managerial personnel or a person who is an employee of the company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed,
    - a person who is an employee or proprietor or a partner in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed:
        - of firms of auditors or company secretaries in practice or cost auditors.
        - in any legal or a consulting firm (has or had any transaction with the company amounting to ten per cent or more of the gross turnover of such firm).

  Further, the person or his relatives should not be a Chief Executive or director of any non-profit organisation receiving twenty-five per cent or more of its receipts from the company or that holds two per cent or more of the total voting power of the company."

- The third requirement is regarding no pecuniary relationship. He should have no pecuniary tie, other than remuneration or transactions with the company that do not exceed ten per cent of his total income or such amount as prescribed during the two immediately preceding financial years or the current financial year. Furthermore, any person related to him should not have any other pecuniary relationship or transaction with the company that amounts to two per cent or more of its gross turnover or total income singly or in combination with the other transactions. Any person related to him should not hold any security or interest in the company during the two immediately preceding financial years or during the current financial year.[24] Further, any person related to him should not be indebted to the company in excess of such amount as may be prescribed during the two immediately preceding financial years or during the current financial year.

- The fourth requirement is regarding restrictions on voting rights. The person or his relative shall not possess together two per cent or more of the total voting power.

The provisions regarding the qualifications of IDs are relatively more detailed under the Companies Act, 2013(1) in comparison to the clause 49 of the Listing Agreement (before amendment). Various pecuniary relations are expressly included under the Act which were not there in the clause. However, the definition was aligned with that of the act, after the amendment to the clause. Regulation 16 of the LODR Regulations also contains similar qualifications. Further, according to Rule 6 of the Companies (Appointment and Qualification of Directors) Rules, 2014 as amended in the year 2019, all IDs must pass an online proficiency self-assessment test conducted by the Indian Institute of Corporate Affairs before their appointment. However, by an amendment in the year 2021, individuals with at least ten years' experience as an advocate, practising chartered accountant, cost account or company secretary are exempted from taking the online proficiency test.

Number

According to section 149(4), a listed public company is mandated to have at least one-third

[24] However, the relatives are allowed to hold security or interest in the company of face value not exceeding fifty lakh rupees or two percent of the paid-up capital of the company or such higher sum as may be prescribed.

IDs. The Central Government is empowered to prescribe the minimum number of IDs for any public companies. Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 prescribes that the public companies with paid-up share capital of ten crore rupees or more; or with a turnover of one hundred crore rupees or more; or with outstanding loans, debentures, and deposits exceeding fifty crore rupees shall have at least two IDs.

Regulation 17(1) of the LODR Regulations states that listed entity must consist of at least 50% non-executive directors. If the chairperson is a non-executive director, at least one-third must be IDs in the board of directors, and if the listed entity does not have a regular non-executive chairperson, at least half must be IDs. However, if the regular non-executive chairman is a promoter of the listed entity or is related to any promoter[25] or individual holding management roles at the level of the board of directors or one level below the board of directors, at least half of the board must be IDs. Further, in case the listed entity has outstanding SR equity shares, at least half of the board of directors must be IDs.

Remuneration

The IDs are not eligible for stock options under Section 149(9) of the Act. They may, however, receive remuneration or reimbursement of expenses for participation in the Board or other meetings, and profit-related commissions. The stock option, however, was permitted under clause 49 of the Listing Agreement. However, IDs are not eligible for stock options under Regulations 17(6)(d) of the LODR Regulations.

Tenure

Section 149(10) allows an ID to hold office for a period of five years. However, he is only eligible for reappointment if a special resolution is passed. According to section 149(11), IDs are not permitted to hold office for more than two consecutive terms. They shall be eligible for appointment only after the expiration of three years of ceasing to be an ID. During this three-year term, an ID shall not be directly or indirectly associated with the company. Under clause 49 of the Listing Agreement, no specific tenure for IDs was stipulated, however this was revised in light of the Companies Act. According to regulation 25(2) of the LODR Regulations,

[25] The LODR Regulations, Explanation to Regulation 17(1). It provides that the expression 'related to any promoter' in the case of the listed entity shall mean its directors other than the independent directors, its employees or its nominees and in the case of the unlisted entity shall mean its directors, its employees or its nominees.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

the maximum tenure of IDs must be in compliance with the Companies Act, 2013(1).

Liability

Under clause 49 of the Listing Agreement, there was no specific provision relating to the liability. However, according to section 149(12) of the Companies Act, 2013(1), an ID shall be held liable for acts, the knowledge of which can be attributed to him through board process or acts with his consent or connivance or where he had not acted diligently. Similar liability is imposed on IDs under regulation 25(5) of the LODR Regulations.

Manner of appointment

According to section 150(2), the appointment of an ID must be approved in a general meeting, and the justification for selecting the appointee must be attached to the notice of the general meeting. This provision, in particular, ensures that there is no abuse of the discretion by the company in selecting the ID. According to section 169(1), a company may remove a director by ordinary resolution before his term expires after providing him a reasonable opportunity to be heard. An ID re-appointed for a second term shall be removed only by special resolution and after giving a reasonable opportunity of being heard. Regulation 25(2A) of the LODR Regulations provides that the appointment, re-appointment, or removal of an ID for the listed entity is subjected to the approval of shareholders by a special resolution. According to regulation 25(6), an ID who resigns or is removed from the listed entity must be replaced by a new ID as soon as possible but no later than three months after the vacancy occurs.

Maintenance of databank

Section 150 of the Act states that an ID may be chosen from a data bank of persons maintained by a body designated by the Central Government. According to Rule 3 of the Companies (Creation and Maintenance of Databank of Independent Directors) Rules, 2019, the Indian Institute of Corporate Affairs shall create and maintain a databank of eligible persons which shall be available on the website of the institute. According to Rule 4, the institute shall conduct an online proficiency self-assessment test and provide individuals with the option of taking advanced assessments.

Code of Conduct

Section 149 (8) of the act puts an obligation on the IDs to follow the provisions outlined in Schedule IV, which lays down the code for IDs. It contains:

- Guidelines of professional conduct: They must act objectively and should uphold ethical standards of integrity. He should not abuse his position and should spend sufficient time to his professional obligations. Further, in case any circumstance arises which makes him lose his independence, he should directly inform the board.
- Role and functions: They shall bring an independent judgement in the deliberations of the board and objectively evaluate the performance. He should seek to protect the interests of all the stakeholders and determine appropriate amount of remuneration for members of management.
- Duties: They must refresh their skills and knowledge on a regular basis. They shall make every effort to participate in the board meetings and shall actively engage in board committees. They must report concerns about any unethical behaviour.
- Separate Meetings: They must hold at least one meeting to examine the performance of the non-independent directors and the board in every financial year.
- Evaluation of performance: The board of directors shall evaluate their performance and on the basis of the report, their term shall be extended.

Clause 49 of the Listing Agreement empowered the board of directors to lay down the code of conduct for the IDs. Similar power is conferred under the regulation 17(5) of the LODR Regulations. The code must include the duties of IDs as mentioned in the Companies Act. Also, regulation 25(7) requires the listed entity to acquaint the IDs through various programmes about the company.

Other Provisions

The first proviso to section 173(3) states that a meeting of the board can be held on short notice, provided that at least one ID, if any, is present. The second proviso of the said section states that in the absence of any such ID, decisions made at such a meeting must be circulated to all directors and will be final only after ratification by at least one ID. Section 177(1) states that an Audit Committee must have at least three directors, with IDs constituting the majority. Similarly, under section 178(1), the Nomination and Remuneration Committee shall comprise of three or more non-executive directors, at least one-half of whom must be IDs. Furthermore,

under section 13(1)5, the Corporate Social Responsibility Committee must be composed of three or more directors, one of whom must be an ID.

INDEPENDENCE OF INDEPENDENT DIRECTORS

"The word 'independence' should connote not just a lack of financial ties to management, but also a willingness to bring a high degree of rigor and sceptical objectivity to the evaluation of company management and its plans and proposals."[26]

The concept of corporate governance and the rules made have expanded the role of IDs. Many critics, however, have suggested that IDs are unable to fully discharge their duties due to inadequacies in their personal attributes as well as structural elements of the organisation.[27] In this context, one question is possibly raised in every country and which poses a serious concern on the contribution of the IDs in effective corporate governance, that is, how far an ID is really independent.[28] What actually constitutes independence has also been a matter of debate, as rightly said by Professor Victor Brudney that, "the concept of independence does not carry a clear meaning for many of its proponents or the same meaning for all its proponents."[29] Independence of the IDs can be judged on various factors (though not exhaustive) like:

- compensation that is paid to them
- mode of appointment and removal
- their liabilities.

Compensation

ID should not be involved in any material gain; hence, compensation to the ID becomes an important issue in corporate governance. It is presumed that the ID is a person of efficiency and high credential and will spend quality time in the affairs of the company. For this, obviously, adequate compensation must be given to them. It has been advocated that the remuneration offered to them will decide how objectively and independently they act.[30] But at

[26] Usha Rodrigues, "The Fetishization of Independence" 33 *Journal of Corporate Law* 463 (2008).
[27] Daniel Marchesani, "The Concept of Autonomy and the Independent Director of Public Corporations" 2 *Berkeley Business Law Journal* 325-326 (2005).
[28] Donald C Clarke, "Three Concepts of Independent Directors" 32 *Delware Journal of Corporate Law* 73 (2007).
[29] Victor Brudney, "The Independent Director- Heavenly City or Potemkin Village?" 95 *Harvard Law Review* 598-599 (1982).
[30] Nithya Narayanan and Manali Gogate "Skin in the Game: A Case for Incentivising Independent Directors" (2012) 1(6) *Journal on Governance* 695.

the same time, a deep monetary compensation will hinder their independence as they will be heavily relied on the board and therefore, a careful line must be drawn.

Further, whether the remuneration should be paid through stock option or in cash as a means of fees has been a matter of debate amongst different committees. Some argue that with appointment as the ID, one should mandatorily acquire substantial stake of the company, because once a person will invest money in the stock of the company, he will be more responsible towards his functions as an ID.[31] On the other side, some argue that an ID need not necessarily hold stock in the company as it might lead to interest creation of the ID with the company and might act as impediment in his independent way of functioning.

In India, under clause 49 of the Listing Agreement, stock option was provided to the IDs, however, the maximum number of stock options that can be granted was fixed by the shareholder's resolution. Under the Companies Act, 2013(1) and the LODR Regulations, they are not entitled to stock options but only to sitting fees and profit linked commission.

The Kotak Committee on Corporate Governance suggested that "a risk-reward balance in the compensation would make it more attractive for competent people to accept appointment as independent directors." It was recommended that a listed entity shall pay certain minimum compensation to the IDs and the same shall be fixed under the regulations.[32]The SEBI Consultation Paper on Review of Regulatory Provisions Related to IDs has proposed that instead of profit linked commission, an Employee Stock Ownership Plan (ESOP) be given to the IDs for a period of 5 years.[33]

Appointment and removal

Clause 49 of the SEBI Listing Agreement, initially did not have any procedure for nomination, appointment and removal of IDs and therefore they were appointed in the same manner as any other director under the Companies Act, 1956. As per section 263, "the appointment of each director is to be voted at a shareholders' meeting by way of a separate resolution and such

[31] *Ibid.*
[32] SEBI, Report of the Committee on Corporate Governance (October 2017), *available at:* https://www.sebi.gov.in/reports/reports/oct-2017/report-of-the-committee-on-corporate-governance_36177.html. (Visited on March 20, 2024).
[33] SEBI, "Consultation Paper on Review of Regulatory Provisions Related to Independent Directors" *available at*: https://www.sebi.gov.in/reports-and-statistics/reports/mar-2021/consultation-paper-on-review-of-regulatory-provisions-related-to-independent-directors_49336.html. (Visited on March 20, 2024).

appointment has to be approved by a majority of shareholders present and voting on such resolution." Similarly, for the removal, a simple majority of shareholders present and voting is required as per section 284.

Hence, the directors appointed by promoters *per se* cannot be independent because their continuance depends on the pleasure of the promoters. Also, lack of a particular method for nomination, appointment and removal undermines the independence of the IDs. In this framework, it was difficult for the IDs to work independently as it created a level of allegiance towards the controlling shareholders. To overcome this, various suggestions were made like:

- Maintaining panel of the IDs by the stock exchange.
- Cumulative or proportional voting rights to minority shareholders.
- Requirement of a nomination committee for recommending appropriate IDs.

However, none of these suggestions alone can ensure their independence but all together can be an effective means for ensuring their independence. Under the Companies Act, 2013(1) many concerns were addressed in relation to their appointment. Firstly, under section 150, there is a creation of a data bank from which an ID may be selected. Secondly, explanatory statement attached to the notice of the general meeting must mention the justification for choosing the appointee. Lastly, section 178 mandates every listed company to form a Nomination and Remuneration Committee comprising of three or more non-executive directors, one-half of whom must be IDs. The committee has to identify individuals who are eligible to be IDs and shall develop the criteria for determining their independence. However, these reforms under the Companies Act are still insufficient because the final appointment and removal of the IDs are wholly in the hands of the shareholders. The SEBI Consultation Paper on Review of Regulatory Provisions Related to Independent Directors correctly pointed out that:[34]

> "…the present system of appointment of independent directors may be influenced by the promoters- in recommending the name of independent director and in the approval process by virtue of shareholding. This may hinder the "independence" … and undermine their ability to differ from the promoter, especially in cases where the interests of promoter and of minority shareholders are not aligned. Additionally, considering that the

[34] *Ibid.*

primary duty of independent directors is to protect the interest of minority shareholders, there is a need for minority shareholders to have greater say in the appointment / re-appointment process.."

Accordingly, the Consultation Paper proposed that their appointment and re-appointment shall be subject to "dual approval" i.e. approval by shareholders and approval by simple majority of the minority shareholders. If it is not approved by either, the person would not be appointed/re-appointed. Then, either a new candidate will be proposed or the same person will be proposed for a second vote of all shareholders after a 90 days cooling-off period but within 120 days. The approval for appointment/re-appointment has to be through a special resolution and the reasons for proposing the same person must be included in the notice of shareholders. Furthermore, the system of dual approval was also proposed for removal of IDs subject to approval through ordinary resolution in case of removal in the first term and through special resolution in the second term.

Liabilities

All over the world, including India, non-executive directors have been appointed as IDs. Non-executive directors are distinguished by the fact that they are not required to participate actively in the day-to-day affairs. Furthermore, because non-executive directors serve on the boards of multiple companies, it is practically impossible for them to participate in the active-decision making. In this context, it is difficult to fix their liability. Since the IDs do not participate actively in the decision making of the company, can they be held liable for the acts committed by the executive management? Also, can they be completely exempted from their liability just because they do not participate actively in the affairs of the company?

It has been strongly urged that the IDs, being distinguished individuals, should be exempted from the penal provisions so that eminent people can come forward for the appointment as IDs. However, almost all the statutes across various jurisdictions, initially, were silent on the liabilities of the IDs and therefore the courts adopted a very flexible approach while fixing the liability of IDs and have taken into account various factors before determining their liability such as the nature of their position, task assigned to them, knowledge about the transactions etc.

There are various cases, where the IDs were exempted from any liability. In *Hamilton Bank and Trust Co.* v. *Holliday,*[35] the court observed that:

> "It is unrealistic to require outside directors of a corporation i.e., those who are not full-time employees of the corporation to investigate the corporations incidental securities transactions carried on by or participated in by the corporate officers without the directors actual knowledge or participation."

Similarly, in *Rowen* v. *Le Mars Mutual Insurance Co. of Iowa,*[36] there was a sale of control of the insurance company, however the same was not disclosed to the outside directors by the inside directors and there was no participation by the outside directors in the transaction. Taking into consideration the fact that the outside directors believed in the ability of the inside-management to take a right decision, the court absolved the outside directors from any liability. The court held that the same responsibilities and duties that of a director who dictate day-to-day policy cannot fall on the outside director.

However, in *Francis* v. *United Jersey Bank,*[37] the outside director was unable to understand the financial statements of a closely held insurance company and he was unable to make reasonable efforts to prevent the conversion of trust funds. The court held that the outside director is liable to the creditors as inability and inefficiency in management affairs are no excuse for non-performance of the duties assigned. It is expected of an outside director to be competent enough to justify the task assigned.

Therefore, largely it can be said that the liability of IDs depends on the facts and circumstances of the case. However, the courts have been inclined in favour of the IDs and have exempted them from liabilities when they did not have any knowledge about the act.[38]

In India, there was no clarity on duties or liabilities of IDs before the Companies Act, 2013(1) and it was left upon the courts to fix the liability. Initially, IDs were hauled up for any default committed by a company whether they were aware of it or not.

---

[35] 469 F. Supp. 1229 (1979).
[36] 282 N.W. 2d 639. (1979).
[37] 87 N.J. 15 (1981).
[38] *Smith* v. *Van Gorkom,* 488 A. 2d. 858 (1985) and *Lexi Holdings Plc (In Administration)* v. *Luqman,* (2008) EWHC 1639 (Ch).

There are many such instances where IDs were held liable. In *Bhopal Gas Leak,*[39] Mr. Keshub Mahindra, the erstwhile ID of Union Carbide India Limited was held liable for the shortcomings in meeting the safety requirements by the company. The court refused to accept that a company's board meetings could be held without the relevant data and that Mr. Mahindra being the chairperson was not in knowledge of the technology being used and safety measures put in place. The court held that being the chairman; he ought to have been aware of the fact which company he was presiding over and the duties attached to the position and what liability he might incur because of that.

In India, the Satyam and Nagarjuna Finance scams resulted in a resignation of a large number of IDs.[40] Despite the fact that no liability was imposed on the IDs in both these cases, the directors had to suffer a grave loss of reputation. However, to come to the rescue of IDs, the MCA issued a circular in the year 2011, to all its subordinate offices to spare IDs and the government-appointed nominee directors from routine prosecution under the Companies Act, 1956. The said circular highlighted the provision of "officer who is in default" as defined under section 2 (31) read with section 5 of the Act, 1956 and directed the Registrar of Companies to relook into the cases where prosecutions have been launched against the IDs. Before this circular even, for getting relief from apprehended prosecution, the IDs used to take recourse of section 633 and relied on section 5 of the Companies Act, 1956.[41]

But, now after the Companies Act, 2013(1), the position is settled and section 149(12) clarifies the liabilities of the IDs. This provision had made things abundantly clear that the liability is limited but at the same time, they are not absolutely relieved of the liability. In a true sense, this act as a balancing mechanism and nowhere hinders their independence since they are made liable for all those acts about which they had knowledge. The MCA issued a directive via circular dated March 2, 2020[42] which further clarifies that the IDs should not be made a party in any criminal or civil case unless the requirements of section 149(12) is met and it must be

[39] *State of Madhya Pradesh* v. *Warren Anderson,* (2011) 8 Comp LJ 78.
[40] Abha Bakaya, "Independent Directors on Quitting Spree", Economic Times, April 20, 2009 and Ranju Sarkar, "Why Independent Directors are Quitting in Droves", Business Standard, May 14, 2009.
[41] *Ved Prakash Malhotra* v. *State of Maharashtra,* (2008) 110 Bom LR 2588; *Madhavan Nambiar* v. *Registrar of Companies,* (2002) 108 Comp Cas 1 (Mad); *Raymond Synthetics Limited* v. *Union of India,* (1992) 73 Comp Cas 762 (SC); *Santanu Ray* v. *Union of India*, (1989) 65 Comp Cas 196 (Del) and *Om Prakash Khaitan* v. *Shree Keshariya Investment Ltd.*, (1978) 48 Comp Cas 85 (Del).
[42] Ministry of Corporate Affiars, General Circular No. 1/2020 (March 2, 2020), *available at:* https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=MTM2MDM=&docCategory=Circulars&type=open. (Visited on March 20, 2024).

ensured that no unnecessary proceedings are initiated against the IDs.

The Supreme Court addressed the issue of the liability of the IDs under the Negotiable Instruments Act, 1881 for dishonour of cheque in *Sunita Palita* v. *Panchami Stone Quarry.*[43] The court observed that the liability is determined by the role played in the affairs of a company. It does not depend on the designation or status alone. The court concluded that the accused was not involved in the day-to-day affairs of the company and was an ID and therefore, the court quashed the criminal case under the NI Act. The court further clarified that non-signatory directors will be liable only if they are involved in the day-to-day affairs of the company and specific averments are made in the pleadings to support such a claim.[44]

Therefore, undoubtedly the provisions under the Companies Act, 2013(1) and the amendments made thereafter have brought greater transparency and independence in the working of the boards specifically in respect to the functions and responsibilities of IDs. However, the said provisions need further improvement specifically regarding their appointment and removal.

CONCLUSION

It can be concluded that the objectives of corporate governance cannot be properly realised without the presence of IDs on the board. Their presence tends to bring more transparency, objectivity, efficiency and can act as a tool to balance varied conflicting interests. However, serious questions were posed globally and even in India, on their roles in the light of various scams which took place even in their presence on the board and in this context, doubts were put on the legal framework regulating them. Also, various empirical studies across the globe stated that the board independence is not significant for the efficient working of the company.[45] Despite all this, their significance in effective corporate governance cannot be denied and their failures can be attributed to the weak legal framework governing them.

Even in India, a shift has been seen in the legal framework regulating them from clause 49 of the Listing Agreement to a statutory recognition under the Companies Act, 2013(1). The

[43] (2022) 10 SCC 152.
[44] Also see, *S.M.S Pharmaceuticals Ltd.* v. *Neeta Bhalla,* (2005) 8 SCC 89 and *Pooja Ravinder Devidasani* v. *State of Maharashtra,* (2014) 16 SCC 1.
[45] B. Balasubramanian, B. Black and V. Khanna, "Firm-Level corporate governance in emerging markets: A case study of India", ECGI Law Working Paper 119/2009, *available at:* http://ssrn.com/abstract=992529. (Visited on March 20, 2024).

statutory framework as discussed, along with the recent amendments and the rules made thereunder have clearly defined their qualifications, duties, functions, responsibilities and liabilities which will empower the IDs and will give them a greater voice in ensuring that the interest of all shareholders is protected. The Companies Act, 2013(1) has strengthen corporate governance by empowering IDs and holding them accountable by incorporating provisions like:

- Defining their liability.
- Laying down guidelines of professional conduct.
- Elaborating their role, functions and duties.
- Mandating their separate meetings.
- Evaluation of their performance.

However, the procedure of their appointment and removal still needs a consideration and even the Companies Act, 2013(1) even after various amendments fails to address the concerns completely. Further there is a need to strengthen the whistleblower mechanism, so that it can be used by independent directors. A formal forum for independent directors is required so that they can share their experiences and the government should set up more institutes for professionally training individuals.

Effectiveness and independence of board cannot in complete sense be enforced through legislation because of its own limitations. It is the responsibility of the board as well as the IDs to ensure that they contribute effectively and adequately in the decision making of the company. As aptly said by Nawshir Mirza, Professional ID that, "independence is a state of mind and unless the inclination to adhere strictly with principles of corporate governance comes from within, no matter what the composition is, the board will never be independent in practice."[46]

[46] Cited in, FICCI and Grant Thornton, "Corporate Governance Review 2009: India 101-500: A review of corporate governance practices at the mid-market listed companies in India" (March, 2009), *available at:* https://ficci.in/spdocument/20282/FICCI-GT-CGR-2009.pdf. (Visited on March 20, 2024).

CONTROL OVER DELEGATED LEGISLATION: A BALANCED APPROACH.

Shiva Artatran Pawar*

Aakash Dubey**

ABSTRACT

This research explores the mechanisms of control over delegated legislation in India, highlighting judicial, legislative, and other authoritative oversight. Delegated legislation, defined as law enacted by an authority other than the sovereign power, relies on a superior authority for its validity. The judiciary plays a critical role in scrutinizing delegated legislation through the doctrines of substantive and procedural ultra vires. Substantive ultra vires applies when legislation is unconstitutional, excessive, or arbitrary, while procedural ultra vires involves breaches of mandated procedures. Legislative control is exercised through mechanisms like "laying on the table," allowing for parliamentary scrutiny and potential annulment of executive regulations. Additionally, other safeguards such as antenatal publicity and public consultation aim to prevent misuse of delegated powers. However, the effectiveness of legislative control is often limited by the government's majority in the House, leaving judicial review as a vital check against arbitrary rule-making. The study concludes that a balanced approach involving judiciary oversight and robust legislative procedures is essential to ensure the proper exercise of delegated legislative powers. Effective control mechanisms are crucial in maintaining the integrity of delegated legislation and preventing its misuse, thereby ensuring that such powers are exercised within the boundaries of law and public interest.

***Keywords**: Delegated Legislation, Judicial Review, Substantive Ultra Vires, Procedural Ultra Vires, Legislative Control.*

* Student, Amity University, Raipur, Chhattisgarh.

** Student, Amity University, Raipur, Chhattisgarh.

INTRODUCTION

The great legal scholar, Sir John William Salmond KC defines delegated legislation as *"that which proceeds from any authority other than the sovereign power and is therefore dependent for its continued existence and validity on some superior or supreme authority."*[1] The term "Any other authority" in this context refers to the authority to whom power is assigned, and "sovereign power" might be understood to represent the Parliament of today. This indicates that by Parent Acts, the Parliament or legislature transfers its legislative powers to any other body. Legislation created by such an authority is known as delegated legislation. Due to this reason, on ***"Sukhdev Singh & Ors. v. Bhagatram Sardar Singh Raghuvanhi & Anr.,"***[2] C.J. Ray said that delegated legislation includes all bylaws, orders, regulations, rules, and schemes enacted under statutory authority.

Delegated legislation or delegating legislative power can be used in lose as well as strict sense. As observed by Faizal Ali J.-

"...the expressions "delegated legislation" and "delegating legislative power" are sometimes used in a loose sense, and sometimes in a strict sense. These expressions have been used in the loose sense or popular sense in the various treatises or reports dealing with the so-called delegated legislation... There can be no doubt that if the Legislature completely abdicates its functions and sets up a parallel Legislature transferring all its power to it, that would undoubtedly be a real instance of delegation of its power. In other words, there will be delegation in the strict sense if legislative power with all its attributes is transferred to another authority".[3]

It is impossible for the Parliament to sit to pass a law regulating each and every thing. Even if the House is in session for 12 months it cannot be done. It cannot go into each and every finer detail and if it does so, there is no guarantee that the law made thereby would be effective in every situation. Therefore, the need for delegated legislation was observed. The reasons could be numerous like, for purpose of ease of administration, technical expertise, flexibility, secrecy and emergency. The Supreme Court in the famous case of "***Gwalior Ryan Mills Mfg. (Wvg.)***

[1] P J Fitzgerald, *Salmond on Jurisprudence* 116 (Sweet & Maxwell, Mytholmroyd, 12th edn., 1966).
[2] AIR 1975 SC 1331.
[3] In re. Delhi Laws Act, AIR 1951 SC 332(338).

Co Ltd. v. Asstt. Commissioner of Sales Tax",[4] observed that the guiding ideas and statutory philosophy are outlined in the majority of contemporary socio-economic laws that have been established by lawmakers. Due to the constraints brought on by time, legislators seldom delve into specific issues. As a result, provisions are provided for delegated legislation to achieve adaptability, pliability, adventure, and the chance for exploration. The contemporary welfare state's pragmatic demands have led to the evolution of the policy of granting an authority to the executive so that they may to enact few subordinate laws that are within a designated legislative domain.

It is relevant to highlight here that executive always has a greater likelihood of making arbitrary laws if it is granted such vast powers. Due to this reason, the famous philosopher, Wade has stated that the powers have two fundamental qualities: (i) they are neither absolute or unrestricted, and (ii) they are also prone to misuse.[5] As a result, we require a control system to prevent the arbitrary use of these authorities. Thus, over a period of time, three types of controls have been evolved in the nation. These are:

1. Control by Judiciary;
2. Control by Legislations;
3. Control by other Authorities.

All these controls have been delineated in later part of this paper.

CONTROL BY JUDICAIRY

The judiciary examines the bureaucratic acts in the present scenario as delegated law is within the purview of judicial review. Concurrent with the Constitution's ratification, Indian judges endeavoured to establish barriers and limits to the authority of delegated legislation—the mechanisms through which the executive branch enacts laws. The administration's rule-making authority was granted, but with a crucial disclaimer that the legislative role of formulating policies and imposing prescriptive penalties should not be usurped. Consequently, the "explosion of administrative law" emerged, in which judges actively monitored the

[4] AIR 1974 SC 1660 (1667).
[5] William Wade and Christopher Forsyth, *Administrative Law* 4-5 (Oxford University Press, Oxford, 10th edn., 2009).

implementation of delegated legislation rather than merely nullifying it. Thus, the administration may enact binding regulations, but courts have taken it upon themselves to scrutinise and perhaps invalidate certain administrative rulemaking efforts. Over the course of reviewing administrative actions, a startling variety of judicial approaches have emerged.[6]

Substantive ultra vires:

In order to take down any delegated legislation it is required that it must be unconstitutional or excessive or arbitrary. Firstly, if the Parent/Main Act is *ultra vires* to the Constitution, or if the statute made under the Parent/Main Act is *ultra vires* to the constitution, then the Court would take the delegated legislation down under this head as void. To determine whether the Parent Act or the law made under the same is ultra vires or intra vires test of Art. 13 must be applied. If it would be in derogation with the Part 3 of the Constitution, which talks about Fundamental Rights, then it would be declared as unconstitutional. Secondly, if the legislature has delegated such functions which are prominent on the part of the legislature to perform like, amending any law, repealing the law, object of the Act or the legislative intent, these all are referred as essential legislative functions, to the executive then it can be taken down on the grounds of excessive delegation. In ***"Jalan Trading Co. (P) Ltd. v. Mill Mazdoor Sabha"***,[7] the Apex Court held that the Payment of Bonus Act, 1965, through its Section 37, gave an authority to the Central government wherein it may issue any order needed to clear up any ambiguities or challenges that may arises in applying the Act's stipulations and provisions. The Court ruled that Section 37 is *ultra vires* to the Constitution due to overreaching delegation and noted that the Act gave a capacity to the government through which it decides the purposes of the Acts, which essentially amounts to the government exercising its inalienable legislative power.

Thirdly, any delegated law may be overturned by the courts on the basis of arbitrary actions. This implies that the executive's laws must also pass the fairness standard that is outlined in Article 14 of the Constitution. An important pronouncement relating to this aspect was given by the Apex Court through its decision in ***"Khoday Distilleries v. State of Karnataka"***[8]-

"…the test of arbitrary action which apply to executive actions do not necessarily apply to the delegated legislations. In order to strike down any delegated legislation as arbitrary it must be

[6] Upendra Baxi, "The Rule of Law in India" 3 *International Journal on Human Rights* 22 (2007).
[7] AIR 1967 SC 691.
[8] AIR 1996 SC 911.

manifestly arbitrary."

The Court further said, every delegated legislation must undoubtably, pass through the scrutiny of Article 14 enshrined int the Constitution.

If the delegated legislation is unconstitutional, arbitrary or excessive then it could be turned down as void and all these would come under substantive ultra vires. Like, in the verdict of ***"Chintaman Rao v. State of Madhya Pradesh,"***[9] the Dy. Commissioner is empowered under the Parent Act to forbid the bidi's manufacture in specific locations during the farming season. However, since the Act violates Article 19(1)(g) of the Constitution, the order issued by the Dy. Commissioner under the Act was deemed to be *ultra vires* to the Constitution. The Court gave further reasoning that this Act gave excessive, power than that was required, and unreasonable or arbitrary power to the Dy. Commissioner. It is an epic example for the substantive ultra vires because all the three grounds mentioned above were present.

Procedural ultra vires:

Procedural ultra vires applies when the executive surpasses the authority granted by the Parent Act. In the case of ***"Municipal Corp. Of Greater Bombay v. Nagpal Printing Mills"***,[10] the Corporation was granted authority by the Parent Act to impose fees solely on the water that is delivered and used. Regardless of utilisation, the regulation permitted the imposition of fees based on a specified volume. The Supreme Court ruled that it is impermissible as it violated the provisions of the Parent Act.

Furthermore, the procedural ultra vires may involve one additional thing. In the event that the executive disregards the Act's authorized procedures, it should be remembered, nonetheless, that following the instructions exactly does not always make the regulations void. If a legislation expressly states that no act done or action taken will be brought into question before any court of law solely on the basis of any fault or abnormality in that action or proceeding, this means that it does not impact the true substance of the matter available in the case. This is known as the "conducive evidence clause" or "omnibus curative clause" or the "Ganga Clause."

[9] AIR 1951 SC 118.
[10] AIR 1988 SC 1009.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

CONTROL BY LEGISLATION

The legislative branch of the government is responsible for passing laws in parliamentary democracies. Along with this, the legislature has the right and the duty to monitor how its agent, i.e., the Executive, performs the duties assigned to it if it wishes to transfer its legislative authority to the latter for whatever reason. As the legislature is the one who grants the administration the authority to enact laws, it is essentially its duty to oversee and manage the actual implementation of this authority, ensure that it is not abused, misused, or unjustified by the administration, and guarantee that the legislative power is exercised properly by the executive.[11]

There can be two methos to exercise the legislative control.

Laying on table (Direct Control):

This control has two purposes. Firstly, it is informative, informing the legislature about regulations that are established by the administration. Secondly, it gives the legislature a chance to contest or enquire about the regulations. Laying can be of various types. These are:[12]

i. Simple laying: The process of "laying on the Table" of the Legislature is adhered to in nearly every Commonwealth nation. It accomplishes two goals: first, it assists in educating the legislature on all regulations enacted by the executive branch in the execution of delegated legislation; second, it gives lawmakers a platform to raise objections to new or existing regulations.

ii. Laying with immediate effect but subject to annulment: In this, the regulations are proposed and subject to House resolutions for annulment. In legal parlance, it is known by the name of negative laying. Under this process, the negative laying procedure comes first, not after, the legality of delegated legislation. The parliamentary role in this method is ex post facto; the outcome is negative instead of positive, and it allows for rejection as opposed than approval.

[11] Supra Note 5 at 764- 766.
[12] Aparajita Kumari, "Control Mechanism Over Delegated Legislation" 6 *International Journal of Creative Research Thoughts* (2018).

iii. Laying in draft subject to affirmative resolution: In this, the houses are provided with a draft of the regulations. When the houses adopt a resolution confirming the regulations, they become operative. Generally, rules or regulations formed under a statute of legislature must be presented to both chambers of parliament for approval. Parliament is able to monitor them and offer avenues for critique. Any argument may be made against any rules or regulations that are presented to Parliament. The system's goal is to maintain its overall political power, which is why policy is usually the basis for opposition in Parliament. *"Laying before Parliament is done in number of different ways. The regulations may merely have to be laid; or they may be subject to negative resolution within forty days; or they may expire unless confirmed by affirmative resolution; or they may have to be laid in draft. Occasionally, they don't have to be laid at all, because Parliament has omitted to make any provision."*[13] The document will be submitted to the House of Commons' votes and procedures office if it just has to be put, or laid in draft, before Parliament. Parliamentary process does not offer a chance for the bill to be addressed, but at least the legislator will be made aware of its availability, and the Ministers are likely to face questions on it rather than having it put before Parliament altogether. For a long time, the issue of laying was unclear in India. Many legislation are required to be laying in simplified manner after regulations were issued, while many failed to include any such requirement. However, almost every central law now uses a common laying formula.

Legal consequences of non-compliance with the laying provisions: In England, laying provisions are required for the validity of statutory instruments under Section 4(2) of the Statutory Instruments Act, 1946. However, in India, the repercussions of breaking the laying restrictions vary according to whether the enabling Act's provisions are directory or mandatory in nature. If laying requirements are not combined with the need for laying regulations in form of draft and House acceptance, they are considered directory requirements. In the second instance, the necessity of laying is seen as essential as the regulations are prerequisites to coming into effect and require approval from both chambers of Parliament..

[13] William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, Oxford, 10th edn., 2009).

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

Scrutiny committees (indirect control):

This strengthens the control over the delegated legislation. In Indian Parliament, there are two properly functional scrutiny committees. These are:

A. Lok Sabha Committee on Subordinate Legislation;
B. Rajya Sabha Committee on Subordinate Legislation.

They are the watchdogs who bark and wake up their owner when they discover a threat on the grounds.

The Committee's primary responsibilities are to investigate:

i. Whether the regulations align with the main goals of the Act;
ii. Whether there is any matter covered in the regulations that would be better addressed in the Act;
iii. Whether it operates from a previous period of time;
iv. Whether it explicitly or implicitly precludes the authority of any court;
v. Other inquires of similar nature.

In 1953-1961, the Committee examined over 5,300 directives and regulations, and it produced 19 publications. The Rajya Sabha body's establishment has greatly increased the effectiveness of Parliamentary Control over delegated legislation in India since the two committees are able to examine far more regulations annually than may be possible for one body to undertake alone.

CONTROL BY OTHER AUTHORITIES

In addition to the measures stated above, there are a few more that serve as important checkpoints to prevent the delegate from abusing their authority or to maintain supervision over them. If the Act itself provide for the safeguard. This could be done by not providing an Act having ambiguous texts and thereby providing for wide powers. The extent of power should be properly defined leaving no room for arbitrary exercise. Use of broad language should be avoided. Additionally, the courts must interpret the legislation such that no room remains for the arbitrary use of authority. This could only be done by a good draftsman. In ***"Daiichi Sankyo Co. Ltd. v. Jayram Chigurupati & Ors.,"***[14] The Supreme Court stressed that in order to correctly comprehend administrative regulation, a "Object and Reason Clause" is

[14] (2010) 7 SCC 499.

mandatory to be included in the delegated statute.

Other could be the antenatal publicity. This allows the public to submit suggestions and promotes their involvement in the creation of rules by publishing the regulations in draft form. In view of this, the General Clauses Act, 1897, through its Section 23, provides that:

A. The regulations be released in the Gazette in draft form;
B. Complaints and recommendations are welcome from the date indicated therein;
C. The received complaints and recommendations be taken into account by the body that is making the rules.

It is important to remember that this process only pertains to byelaws, regulations, and rules. Executive rulemaking under other heads, such as notices, is not included in this domain.

Many authors have given one more safeguard that is consultation with affected persons calling it a more democratic process which would increase the acceptability and effectivity. But it should be noted that it is not mandated by any law in force in India. If the Parent Act provides for the same then it may be ok but if not then it is not necessary at all. If the Parent Act provides so then there is a problem. The prior consultation to the affected people before making a law would amount to observance of natural justice but the Legislature is not at all bound by the notion of *audi alteram partem* specially in terms of passing legislation. It was upheld by the Apex Court in the dictum of ***"State of Punjab v. Tehal Singh & Ors."***,[15] where the Gram Sabha was constituted by an order of the Executive, the Petitioners contended that administration should have consulted with them first. The Supreme Court ruled that legislative acts are not subject to the standards of natural justice.

CONCLUSION

Legislation enacted by the Executive is known as delegated legislation. As Wade noted, every power possesses two intrinsic characteristics: firstly, they are neither absolute and unrestricted, and secondly, they are likely to be misused. If they are granted such authority, it follows that there is also a requirement to manage them. Therefore, we must exercise control through the court, which allows a delegated law to be contested as unconstitutional, exorbitant, or irrational only on the grounds that it violates procedural or substantial ultra vires. Following this is the

[15] (2002) 2 SCC 7.

legislature's control through committees of oversight or house proceedings. In our country, we have two such committees. they are: (i) Lok Sabha Committee on Subordinate Legislation, and (ii) Rajya Sabha Committee on Subordinate Legislation. Though we tend to have control of Parliament over the Delegated Legislation it is only a hypothetical control. The government creates rules which are placed before the house. If the government enjoys majority in the House, then it would get those laws passed easily. Similarly, rules are also passed. So, Executive does not have much trouble. If you have good opposition then only it can be expected to have good control over the delegated legislation via debates and discussions. Now a days it can be seen that laws are passed within minutes. So, the ultimate hope of the citizen is the left with the Judiciary that is the Judicial Control.

There are few other safety mechanisms like drafting the Parent Act in such a language that it leaves no room for arbitrary exercise of power, antenatal publication and consultation with affected people. The problem with the last one is that in legislative acts the observance of natural justice is not at all required.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

MARITIME SECURITY AND THE CONVENTION ON THE LAW OF THE SEA

K. Prakasha Nikhila*

ABSTRACT

Protecting the vast expanses of the world's oceans stands as a critical priority for both nations and the global community. Central to establishing a legal structure for maritime security is the Convention on the Law of the Sea (UNCLOS), a comprehensive treaty ratified in 1982. UNCLOS significantly influences the regulatory framework governing maritime security by addressing threats, outlining responsibilities, and promoting collaborative efforts among nations to ensure the safety of the seas. Exploring the interconnection between maritime security and UNCLOS involves understanding how the Convention tackles challenges, sets forth duties, and encourages international coordination to preserve the oceans.

The LOSC stands as a pivotal international legal tool fostering cooperative strategies for maritime security. It upholds an international order reliant on the rule of law, emphasizing the crucial need for precise regulation and adherence to both customary and established international law principles. This includes judicial rulings, additional protocols, traditions, and legal expertise. Striking a balance between matters of state sovereignty and collective concerns, the Convention explicitly and implicitly champions overarching security matters. It delineates precise mandates for enforcement and jurisdiction that states must adhere to, endorsing a framework that supports broader security interests. Through the Convention, states establish a legal structure enabling the coordination of their military and law enforcement resources. This facilitates the propagation of safety and security via global networks and alliances. Specifically, it addresses the handling of unlawful actions within the maritime sphere, particularly in areas classified as international waters. Maritime security law encompasses both multinational and bilateral legal frameworks aimed at eradicating criminal activities in the global maritime domain. Complementing the Convention, various legal mechanisms such as the Suppression of Unlawful Acts at Sea (SUA Convention), the Proliferation Security Initiative (PSI), and entities like the International Maritime Organization (IMO) regulate actions from open waters to coastal harbors. Addressing the extensive spectrum of illegal activities proves challenging as they often masquerade within

legal trade practices, leveraging technology, methods, and approaches employed by the maritime industry to streamline operations and minimize risks. Consequently, a diverse array of legal frameworks and institutions becomes imperative to disrupt and diminish the capabilities of criminal entities operating unchecked.

Keywords: *The Convention on the Law of the Sea, International Maritime Organization, Proliferation Security Initiative, Suppression of Unlawful Acts at Sea Convention, Maritime security.*

*Assistant Professor of Law, VIL, Vignan (Deemed to be) University.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

1. FOUNDATIONS OF UNCLOS AND MARITIME SECURITY

The world's oceans encounter an array of security issues across diverse domains, demanding adaptable and specific responses tailored to each threat. The United Nations Convention on the Law of the Sea (UNCLOS) establishes a comprehensive regulatory framework for ocean governance. It fosters a collaborative approach to resolving regional differences, whether bilateral or multilateral, that impact the ever-evolving dynamics of maritime security worldwide. This effort receives reinforcement from various other conventions focused on preserving the oceans and ensuring their sustainability for generations to come. Nevertheless, the successful execution of these measures hinge upon the willingness and dedication to implement them effectively. Highlighting particular areas of concern, there's an opportunity to explore how UNCLOS can be optimally utilized to tackle a wide spectrum of challenges—both kinetic and non-kinetic in the maritime sphere, through streamlined and efficient regional and multilateral governance structures.[1]

The 1982 UN Convention on the Law of the Sea (UNCLOS) forms the cornerstone of an efficient regional maritime security structure. Nonetheless, despite its comprehensive nature, this extensive Convention is not exempt from limitations. Instances of apparent non-adherence to its standards and principles abound, with the United States, a pivotal figure in regional maritime security, notably not being a signatory. Fundamental challenges in East Asia stem from inherent conflicts of interest among regional nations regarding law of the sea matters, compounded by the inherent ambiguity present in several crucial UNCLOS provisions and the intricate geographical layout of the area. This document delves into the principal constraints of UNCLOS, specifically examining the use of territorial sea baselines, navigational regulations, exclusive economic zones (EEZs), and various other facets covered by the Convention, encompassing issues like piracy, hot pursuit, and the responsibilities entrusted to flag states.[2]

2.1 Maritime Security: A Global Imperative*:*

Maritime Domain Awareness (MDA), as defined by the International Maritime Organization, encapsulates a comprehensive comprehension of all elements linked to the maritime sphere

[1]Portions of this chapter were adapted in part from Timothy Urban, "Blue Water Asymmetry: Transnational Crime, Networks, and the International Rule +of Law in the Maritime Domain," 2017.
[2] James Kraska, "Grasping 'The Influence of Law on Sea Power,'" SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, June 20, 2009), https://papers.ssrn.com/abstract=1423107.

that might influence security, safety, economic aspects, or the environment. The maritime domain encompasses every facet within, on, under, or in proximity to seas, oceans, or navigable waterways, encompassing activities, infrastructure, individuals, cargo, vessels, and related conveyances. Consequently, delineating a country's sea borders remains an intricate and multifaceted endeavor due to this expansive definition.[3]

According to The International Law of the Sea and Indian Maritime Legislation by the Indian Navy, the historical foundation of international maritime law centered on the principle of "freedom of the seas" across centuries. Beyond the limited coastal zone designated as territorial waters, the seas were open for unrestricted use by all nations for navigation and fishing purposes. Initially, coastal nations focused on exclusive rights solely within their narrow territorial waters. The emergence of oil and gas discoveries in the shallow waters of the continental shelf prompted the United States to issue the Truman Proclamation in 1945. This proclamation claimed sovereign rights over the resources of the continental shelf adjacent to its coastline. Concurrently, coastal nations realized that their coastal fishing areas were being depleted by larger and more advanced fishing vessels from distant foreign states. These dual occurrences, along with the rise of newly independent countries following the decolonization of Asia and Africa, triggered a wave of individual claims by coastal nations. These claims aimed to expand national jurisdiction over extensive sea regions adjacent to their territories, primarily to safeguard their fishing resources.[4]

Under United Nations General Assembly Resolution 2749, the Declaration of Principles Governing the Seabed and Ocean Floor was embraced by 108 nations, asserting the preservation of the deep seabed for peaceful purposes as the "Common Heritage of Mankind." In 1982, the concept of the Common Heritage of Mankind was officially linked to the seabed, ocean floor, and their subsoil beyond national jurisdiction as outlined in Article 136 of the United Nations Convention on the Law of the Sea Treaty (UNCLOS). Following extensive deliberations over several decades in international forums, the exploration rights of various nations were defined, including those specifically recognized for India, which are outlined in the corresponding box. International maritime boundaries indeed present challenges due to

[3]*Id.*
[4]Natalie Klein, Maritime Security and the Law of the Sea, 1st pbk. edition, Oxford Monographs in International Law (Oxford: Oxford University Press, 2012), 18.

their porous and expansive nature. Unlike land or airspace, implementing stringent border management measures at sea proves considerably more complex. The accessibility of sea routes allows unrestricted passage to all vessels without discriminating based on their intent. This lack of differentiation poses difficulties in effectively distinguishing between vessels exercising innocent passage rights and those potentially bearing hostile intentions within areas of maritime interest. Military operations conducted in international waters are subject to various legal frameworks. As there isn't a singular entity solely responsible for ensuring maritime security, the Navy collaborates with the U.S. Coast Guard to uphold both international and domestic laws. The U.S. Navy Regulations highlight the obligation of commanders to adhere to principles of international law at all times. When necessary to fulfill this obligation, deviations from other provisions within Navy Regulations are permissible. Despite this hierarchical structure, domestic and international laws often complement each other. [5]

For instance, Article 98 of the Convention and U.S. Navy Regulation 0925 prioritize the safety of the life at sea. They mandate naval vessel commanders to provide assistance and grant them the authority to render aid when necessary. These provisions play a pivotal role in maritime security, ensuring, among other things, the right of approach for naval ships. Laws governing maritime security operations are built on the principle of the universal nature of crime, emphasizing that unlawful actions carried out on the high seas contradict the fundamental principles of international law, disrupting order and the inherent freedom associated with maritime spaces.

Specifically, according to Article 110 of the Convention, if a boarding is conducted based on reasonable suspicion of particular illicit activity, but no illegal actions are found upon investigation, the visited ship holds the right to claim compensation for any loss or damage incurred during the process. Hence, the choices made by a commander during boarding operations can carry significant consequences if sound judgment is not applied. The criteria outlined in the LOSC are quite expansive, meaning the precise rights of a vessel hinge upon the unique circumstances and the activity in question. Articles 95 and 96 offer immunity to warships from the jurisdiction of any State except the flag-bearing State, and to civilian ships

[5]John G. Morgan VADM and Martoglio, Charles W., RADM, "The 1,000 Ship Navy: Global Maritime Network," USNI Proceedings, November 2005, 18, http://www.usni.org/magazines/proceedings/2005-11/1000-ship-navy-global-maritime-network., cited in Klein, Maritime Security and the Law of the Sea

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

utilized in non-commercial government service. Consequently, settlements of claims are handled by international courts or tribunals.[6]

The rules concerning the right of visit are intertwined with regulations governing the use of force. Naval commanders consistently maintain the inherent right and responsibility of self-defense.[7] Acts of hostility directed at U.S. ships, U.S. forces, or, in specific situations, U.S. citizens and property, can be met with responses aimed at neutralizing or eradicating the threat.

Article 25 of the Convention serves as the primary guideline regarding the extent of force permissible in enforcement actions. However, its language pertains solely to the rights of the coastal state, lacking specific guidance regarding rights on the high seas. For further insights into military functions within maritime security, additional references might prove valuable.

2. Varieties of Transnational Crime in the Maritime Domain

Maritime trafficking routes tend to align closely with established commercial shipping lanes, and the methods and technologies employed by criminals often surpass those used in legitimate trade. The vast expanse of oceans, the intricate nature of maritime transportation systems, the substantial volume of cargo exchanged at ports, and the limited capacity for cargo inspections present ample opportunities for criminal activities. The commercial trade within the maritime realm typically follows distinct "oceanic roads" based on weather patterns and currents. Leveraging the reliability of shipping routes and the sheer quantity of cargo transported, traffickers effectively utilize the commercial shipping industry. Shipping lanes and sea routes provide a cloak of anonymity for criminals, allowing illicit activities to be camouflaged within legitimate trade, giving the appearance of legality.[8]

Criminal activities, particularly the illicit trade involving narcotics, humans, and weapons, have expanded to such an extent that both States and corporations might find themselves entangled in these unlawful enterprises. The individuals implicated may hail from diverse nationalities, the vessels involved might be flagged to different States, multiple ships could be part of the network, navigating through various States waters and making stops at different ports before

[6]James T Conway GEN, Gary Roughead ADM, and Thad W Allen ADM, "Naval Operations Concept 2010" (U.S. Government, 2010),
[7]Klein, Maritime Security and the Law of the Sea, 10.
[8]LOSC, Article 110; Klein, Maritime Security and the Law of the Sea, 116.

reaching their final destination. Despite the existence of numerous laws aimed at combating illicit trafficking and the apparent determination to curb specific crimes, governments struggle to effectively stem the global flow of illegal goods. This challenge persists due to the overwhelming volume and intricacy of the markets supporting illicit trade[9]. In the realm of maritime security operations, the collaboration between the Navy and Coast Guard serves to disrupt illicit supply chains and dismantle criminal networks. Cooperation and coordination between military forces and law enforcement entities equipped with the authority and capability to uphold the rule of law emerge as the most effective approach in combating transnational crimes at sea[10]. The high seas, beyond the jurisdiction of any single State, are collectively overseen by all States through international law, necessitating a collaborative approach to combat crimes occurring at sea or perpetrated using the maritime domain.[11] Piracy, illicit trafficking of narcotics, humans, and weapons stand as the primary forms of transnational crime addressed within the Convention.[12] Article 110 of the Convention discusses the customary norm allowing warships to execute "approach and visit" on the high seas concerning any vessel suspected of engaging in piracy, human trafficking, unauthorized broadcasting, lacking nationality, or, when displaying a foreign flag or refusing to display any flag, if the ship indeed aligns with the nationality of the warship in reality.[13]

3. **Narcotics Trafficking**

Article 108 mandates member States to collaborate and authorizes them to provide aid in suppressing drug trafficking, particularly concerning vessels flagged by other states. Historically, drug traffickers primarily utilized overland routes. However, over the past two decades, their transportation routes have shifted—westward into the Pacific Ocean and eastward into the Atlantic Ocean. Traditionally concentrated in coastal areas and frequently within territorial waters, drug trafficking has now expanded due to advancements in technology, intricate methodologies, and the use of larger vessels.[14] Traffickers have extended

[9] "U.S. Navy Regulations 1990" (U.S. Government, 1990),

[10]United Nations Convention on the Law of the Sea, Article 29, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC]. (available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/part2.htm).
[11]Klein, Maritime Security and the Law of the Sea, 17.
[s]Secretary-General of the United Nations, "Oceans and the Law of the Sea," Report of the Secretary-General (New York, N.Y: United Nations General Assembly, September 1, 2015), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/269/73/PDF/N1526973.pdf?OpenElement.
[13]Klein, Maritime Security and the Law of the Sea, 326.
[14] UNODC, "UNODC Global Maritime Crime Programme," United National Office on Drugs and Crime, 2016,

their operations further into "blue water" zones, surpassing the 12-nautical mile mark and often venturing beyond the 200-mile Exclusive Economic Zone (EEZ) of any country. This transition across domains and geographical regions is metaphorically described as "squeezing a balloon," symbolizing the shifts in supply and demand for various illicit goods. The United States, being the world's largest consumer of illegal drugs, places significant emphasis on patrolling the source and transit zones between Latin America and the U.S. border. Navy ships, often operating with Coast Guard law enforcement detachments (LEDETs) onboard, adhere to a stringent set of controls aligned with domestic law, in compliance with the Convention, and reflective of bilateral agreements established between the U.S. and the majority of Latin American states.[15]

4. **Piracy and Armed Robbery at Sea**

Piracy, one of the oldest and enduring forms of maritime crime, is subject to stringent treatment within maritime security law, with provisions in the LOSC directly stemming from customary international law. Article 101 of the LOSC specifically defines piracy as "any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship or private aircraft on the high seas against another ship or aircraft... outside the jurisdiction of any State."[16] The latter part of this definition holds significance: piracy constitutes a form of transnational crime perpetrated by non-state actors in international waters. Article 105 of the LOSC empowers every State with the authority to seize any vessel or aircraft, along with associated property, and to apprehend individuals engaged in piracy. Courts within the seizing State possess the jurisdiction to prosecute the pirates under domestic law and determine the fate of the seized vessels. However, in many instances, these courts are inadequate or lack sufficient support, posing challenges to effective prosecution and resolution. Piracy emerged as a critical international security concern over the past fifteen years, notably in the Horn of Africa, Gulf of Aden, and the Red Sea regions. However, following the establishment of Combined Task Force-151 (CTF-151) with a specific focus on countering piracy, and Combined Task Force-150 (CTF-150) concentrating on maritime security,

[15]U.S. Customs and Border Protection, "CBP OAM, Interagency Partners Interdict Semi-Submersible Vessel with 8 Tons of Cocaine," U.S. Customs and Border Protection, July 22, 2015,
[16]"CTF 151: Counter-Piracy," Combined Maritime Forces, September 17, 2010, https://combinedmaritimeforces.com/ctf-151-counter-piracy/.

incidents of piracy in those areas have significantly diminished. Backed by several U.N. Security Council Resolutions, these task forces collaborate with regional and other partners, working to enhance capacity and bolster relevant capabilities aimed at safeguarding global maritime commerce and ensuring the freedom of navigation. The recent attacks originating from Yemen against both commercial and government vessels indicate a potential shift in piracy, highlighting the adoption of sophisticated tactics and cutting-edge technology. These assaults, involving the use of underwater autonomous vehicles, advanced surface-to-surface missiles, and coordinated small boat swarming tactics, represent a significant departure from traditional piracy methods. The evolution in tactics employed by pirates poses a heightened challenge to maritime security in the region, necessitating adaptations in current anti-piracy measures. Addressing these refined and advanced methods will demand an overhaul or augmentation of existing strategies to effectively combat these emerging threats to maritime safety. Views on piracy are often influenced by incomplete data, particularly in the Pacific-Asia region. Actual instances of piracy in this area are likely underreported, and among the reported cases, many are of such minor scale that they obscure the true extent of major piracy incidents. This limited reporting clouds the accurate assessment of the actual volume of significant piracy events. Moreover, akin to the analogy of the "squeezed balloon" in narcotics trafficking, while piracy has been relatively contained in eastern Africa, it has surged in western Africa, specifically in the Gulf of Guinea. This upsurge may be linked to increased activities such as trafficking in narcotics from Latin America, illegal fishing, or human trafficking. Nonetheless, it underscores the persistent and widespread challenge that piracy poses to maritime security. Recent activities in Somalia and Yemen suggest the potential resurgence of piracy in the region. This resurgence seems to be supported by the availability of advanced small arms and light weapons, access to ship monitoring and tracking devices, and the utilization of unmanned systems and long-range communications. These developments highlight the evolving nature of piracy and its continuous threat to maritime security. The LOSC, by itself, doesn't offer adequate provisions for prosecuting captured pirates. The IMO has urged coastal states to take all necessary measures, emphasizing regional cooperation, to prevent and combat piracy. They advocate for investigating piracy incidents and prosecuting perpetrators in accordance with international law.[17] A 2010 UN Secretary-General report

[17]Kenneth Scott, "Prosecuting Pirates: Lessons Learned and Continuing Challenges" (One EarthFuture), http://oceansbeyondpiracy.org/sites/default/files/attachments/ProsecutingPiratesReportDigital.pdf.

highlights two crucial approaches for bringing pirates to justice under international law. Firstly, it recommends empowering domestic or state courts to prosecute pirates. Secondly, it suggests supplementing domestic courts with specialized piracy courts in international or regional arenas for investigation and prosecution. However, the fulfillment of these goals hinges on the resources, experience, and political will of many coastal states in Africa and elsewhere. Without adequate support in these areas, effective prosecution and punishment of captured pirates remain challenging, potentially undermining increased maritime security efforts.[18]

3.1 Slavery, Human Trafficking, and Illegal Migration

At sea, the law categorizes individuals being trafficked into two groups based on their intent and the nature of their activity: migrants, encompassing asylum seekers or those trying to evade immigration laws, and victims of trafficking, including kidnapped individuals or those coerced or exploited. The U.N. Office on Drugs and Crime (UNODC) provides the following clarifications:[19]

- Consent: Migrant smuggling, while often undertaken in dangerous or degrading conditions, involves consent. Trafficking victims, on the other hand, have either never consented or if they initially consented, that consent has been rendered meaningless by the coercive, deceptive or abusive action of the traffickers.

- Exploitation: Migrant smuggling ends with the migrants' arrival at their destination, whereas trafficking involves the ongoing exploitation of the victim.

- Transnationality: Smuggling is always transnational, whereas trafficking may not be. Trafficking can occur regardless of whether victims are taken to another state or moved within a state's borders.

[18]Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia" (United Nations, July 26, 2010),8,http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3 CF6E4FF96FF9%7D/Somalia%20S2010%20394.pdf.

[19]J. Ashley Roach, "Initiatives to Enhance Maritime Security at Sea," Marine Policy 28, no. 1 (January 2004): 41–66, doi:10.1016/j.marpol.2003.10.010., quoted in Klein, Maritime Security and the Law of the Sea, 123.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

- Source of profits: In smuggling cases profits are derived from the transportation of facilitation of the illegal entry or stay of a person into another county, while in trafficking cases profits are derived from exploitation.

Article 99 of the Convention addresses the slave trade and grants freedom to all slaves on the high seas, but makes no distinction between those being trafficked and those being smuggled; therefore, in the maritime domain a legal reference to slavery connotes both trafficking and smuggling. Furthermore, the language makes it clear that a visiting vessel on the high seas only has the responsibility to report slavery to authorities of the trafficking vessel's flag state. While these distinctions are important, the issues of territoriality and jurisdiction that they present hamper response and risk human life.[20] Human trafficking represents a widespread issue where interconnected transnational groups traffic around four million people annually as 'human cargo,' using both land and sea routes. This illicit trade has been estimated to generate annual earnings ranging between $5 billion and $7 billion, impacting nearly every state. The Syrian civil war, for instance, has resulted in the external displacement of four million individuals, with approximately one million seeking asylum in Europe. Stringent border controls in neighboring nations have led many refugees to flee by sea, utilizing trafficking routes toward Greece, Italy, and North Africa. The U.N. High Commissioner for Refugees (UNHCR) reported a total of 65.3 million forcibly displaced individuals by the end of 2015, a significant increase from 59.5 million the preceding year, with a considerable portion undertaking sea journeys. Projections indicate a potential rise in these numbers due to conflicts involving coastal or maritime states, such as those in Syria and various parts of Africa. The Institute for Foreign Policy Analysis highlights the dual challenge posed by human trafficking—stemming from both the sheer volume of displaced individuals and the authorities' limitations in addressing this issue.[21] Managing human trafficking proves especially difficult for law enforcement as it demands a distinct set of capabilities and initiatives that surpass the conventional tools of local police and border guards. To address these challenges, the UNHCR has established global offices, acting as a liaison between local and regional law enforcement agencies and international organizations. This role involves offering guidance on handling

[20]"United Nations Office on Drugs and Crime," UNODC, January 12, 2016, http://www.unodc.org/unodc/en/human-trafficking/faqs.html.
[21]United Nations High Commissioner for Refugees, "Syria Emergency," UNHCR, accessed January 2, 2024, http://www.unhcr.org/syria-emergency.html.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

human trafficking specifically at sea, facilitating coordination and cooperation among various stakeholders involved in combating this pervasive issue.[22]

3.2 Small Arms and Weapons of Mass Destruction (WMD)

The 2015 Small Arms Survey approximated that the illicit global trade in small weapons amounts to nearly $2 billion annually, introducing roughly eight million small arms tailored for individual or small group use into the global market. Similar to the illegal drug trade, the illicit market for small arms and light weapons exploits vulnerabilities within the commercial shipping industry, notably within container ships. However, unlike the drug trade, weapons trafficking is more concentrated and diverse, generating significantly less revenue for traffickers compared to shipments of cocaine.

In the aftermath of 9/11, the proliferation of Weapons of Mass Destruction (WMD) became a paramount concern for governments worldwide. The prevalence of high-capacity freighters, containerization, and a black market for fissile materials prompted the development of new international laws addressing gaps in maritime security. The Proliferation Security Initiative (PSI), alongside the Container Security Initiative, runs parallel to the Convention, aiming to intercept precursor materials, weapons, and delivery systems at any stage of the transportation process. Adopted by most signatories of the Convention, the PSI has effectively curtailed the proliferation of WMD. The maritime industry has made significant investments in enhancing maritime security. While the international community has placed substantial emphasis on combating drug, weapon, and human trafficking, the cost-benefit analysis prompts innovation within the private sector. Post-9/11, the United States spearheaded maritime security measures that set a global standard. Much of this technological advancement centered on the detection of Weapons of Mass Destruction (WMD) and precursor materials. The introduction of new technologies applicable in the maritime domain, particularly those geared towards detecting WMD and precursor materials, has already facilitated the development of consistent and reliable intelligence and information capabilities. These advancements, combined with existing information-sharing systems like the Automatic Identification System (AIS), the Maritime Safety and Security Information System, and Shipboard AIS and Radar Contact Reporting

[22]United Nations High Commissioner for Refugees, "Global Forced Displacement Hits Record High," UNHCR, accessed January 2, 2024, http://www.unhcr.org/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.html.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

(SARC-R), alongside the utilization of underwater autonomous vehicles, seabed sensors, and swarming micro-drones, hold the potential to bolster the capacity of maritime law enforcement to gather, interpret, and disseminate information pertaining to illicit activities within the maritime domain.

4. Conclusion

While the Convention specifically outlines particular types of transnational crime impacting maritime security, various combinations of criminal activities affect safety and security across waters, from high seas to internal waters. Harmonizing domestic laws with international law is crucial, requiring collaborative partnerships between States, law enforcement, and militaries to combat illicit activities, transcending political complexities often associated with more stringent legal frameworks. Enhanced information and intelligence sharing, innovative tactics, techniques, and procedures (TTPs), and unconventional use of existing technologies can aid navies and coast guards in upholding the freedom of seas. In summary, the Convention serves as a robust framework, and collective multilateral endeavors to deter and combat criminal activities across all maritime zones can foster a more secure and safer operational environment. However, the persistent challenge of effectively prosecuting and penalizing wrongdoers, whether involved in piracy or human trafficking, underscores the ongoing work required in this domain.

REALITY OF MENTAL HEALTHCARE IN INDIA:

A DETAILED STUDY"

Smayra*

Shahastranshu Mishra**

ABSTRACT

Mental health is a critical yet often neglected public health issue in India, a nation of nearly 1.3 billion people. This paper aims to examine the complex challenges faced by individuals with mental illness in India, exploring the intricate web of cultural, social, and economic factors that contribute to their suffering and hinder access to adequate care and support.

The research will span several key areas, providing a comprehensive analysis of the mental health landscape in India. These include, the prevalence and types of mental illnesses, offering a statistical backdrop to the issue. The cultural context and stigma surrounding mental health, which often exacerbate the suffering of those affected. The state of the healthcare system and barriers to accessing mental health treatment. The profound economic and social impacts of mental illness on individuals, families, and society at large. The unique challenges faced by vulnerable populations, including women, children, and the elderly.

By delving into these issues, the paper seeks to shed light on the often-invisible struggles of millions and chart potential paths toward improvement. This investigation aims to provide insights into the widespread problem that affects all societal levels in India, from thriving metropolises to isolated rural communities.

* Student, Faculty of Law, Jamia Millia Islamia, New Delhi.

** Student, Faculty of Law, Jamia Millia Islamia, New Delhi.

Mental Illness in India

In India mental illness has been an ignored, stigmatized and a topic which is as taboo to talk about as sex, even sometimes more than that. Mental health cannot be discussed among friends, family, relatives or anywhere because a very prominent population of India still thinks that mental health is nothing just an excuse or even sometimes labelled as a technique to draw attention.

According to the National Mental Health Survey 2015-16[1], approximately 150 million Indians need mental health care services. Common disorders include depression, anxiety, and substance use disorders. The lifetime prevalence of mental disorders in India is estimated at 13.7%, which is comparable to global averages but likely underreported due to stigma and lack of awareness.

The National Mental Health Survey was undertaken as a large-scale, multi-centered national study on the various dimensions and characteristics of mental health problems among individuals aged 18 years and above, across 12 Indian states during 2014–2016. As per the survey, overall weighted prevalence for any mental morbidity was 13.7% lifetime morbidity and 10.6%[2] current morbidity. In this regard, the Government of India started to make efforts to improve the mental health services in the form of formulating the National Mental Health Policy (NMHP), 2014 and Mental Healthcare Act (MHCA), 2017. The latter was enacted with the support of all parties in both Houses of the Parliament (notified on May 29, 2018)[3]

In India, the way mental illness is seen and dealt with is intricately woven together by customs, social mores, and cultural beliefs. This cultural background has a big influence on how people see mental health and frequently adds to the stigmatization of those who are mentally ill.

Traditional Beliefs and Misconceptions

1. Supernatural Explanations: Mental diseases are frequently linked to supernatural origins in many regions of India, particularly in rural areas. There are many people who believe in

[1] Murthy, R Srinivasa. "National Mental Health Survey of India 2015-2016." *Indian journal of psychiatry* vol. 59,1 (2017): 21-26.
[2] Math SB, Basavaraju V, Harihara SN, Gowda GS, Manjunatha N, Kumar CN, Gowda M. Mental Healthcare Act 2017 - Aspiration to action. Indian J Psychiatry. 2019 Apr;61(Suppl 4).
[3] Murthy, R Srinivasa. "National Mental Health Survey of India 2015-2016." *Indian journal of psychiatry* vol. 59,1 (2017): 21-26.

black magic, spirit possession, or divine punishment. These justifications may persuade someone to seek assistance from tantrics or religious healers rather than doctors.

2. Karma and Reincarnation: Many Indian religions base their doctrines on the ideas of karma and reincarnation, which can lead to the belief that mental illness is a result of past transgressions or crimes from a former life. This notion may lead to apathy as opposed to proactive treatment seeking.

3. Moral Failings: Mental health issues are frequently viewed as personal weaknesses or moral failings rather than legitimate medical conditions. Depression might be seen as laziness, anxiety as cowardice, and addiction as a lack of willpower.

Social Stigma and Discrimination

1. Family Honor: Family reputation is very important in collectivist societies like India. Since mental illness is sometimes perceived as bringing disgrace to the family, efforts are often made to conceal the sufferer's condition or themselves from the public.

2. Marriage Prospects: The stigma associated with mental illness can severely impact marriage prospects, not just for the individual but for their siblings as well. This can lead families to keep mental health issues secret, fearing that disclosure would make their children "unmarriageable."

3. Workplace Discrimination[4]: Individuals with known mental health conditions often face discrimination in the workplace, including difficulty in finding employment, limitations in career advancement, and social isolation from colleagues.

4. Gender Disparities: Women with mental illnesses face double stigmatization, often being labelled as "hysterical" or "difficult." They may be more likely to be abandoned by spouses or face domestic abuse due to their condition.

[4] Bjørnshagen, Vegar. "The mark of mental health problems. A field experiment on hiring discrimination before and during COVID-19." *Social science & medicine (1982)* vol. 283 (2021).

5. Media Portrayals[5]: Sensationalized or inaccurate portrayals of mental illness in Indian media, particularly in films and television, often reinforce negative stereotypes and misconceptions.

Ernst (1987) characterised the expansion of mental asylums in British India as a more subtle form of social control[6]. These institutions, primarily influenced by British psychiatric practices, were largely focused on custodial care rather than therapeutic treatment, serving mainly European soldiers stationed in India. The development of mental asylums began during the early colonial period, spanning from 1745 to 1857, just before the first Indian independence movement. The first mental hospital in India was set up in Bombay in 1745, initially accommodating around 30 patients. Surgeon Kenderline established one of the earliest asylums in Calcutta in 1787. Additionally, a private lunatic asylum, managed by Surgeon William Dick and rented to the East India Company, was recognized by the Medical Board. The first government-operated asylum opened on April 17, 1795, in Monghyr, Bihar[7], specifically for soldiers. The first mental hospital in South India was founded in Kilpauk, Madras, in 1794 by Surgeon Vallentine Conolly. During this era, treatments for agitated patients included opium, hot baths, leech therapy, and occasionally, music therapy to soothe patients. The general population relied on local communities and traditional Indian medicine practitioners, including those trained in Ayurveda and Unani medicine, for mental health care[8]. The mid-colonial period, from 1858 to 1918, saw a notable increase in the number of mental asylums. This era was marked by the enactment of the first Lunacy Act (Act No. 36) in 1858, which was later revised by a committee in Bengal in 1888. During this time, new asylums were established in various locations, including Patna, Dacca, Calcutta, Berhampur, Waltair, Trichinapally, Colaba, Poona, Dharwar, Ahmedabad, Ratnagiri, Hyderabad (Sind), Jabalpur, Banaras, Agra, Bareilly, Tezpur, and Lahore[9]. The period also saw the introduction of

[5] Srivastava, Kalpana et al. "Media and mental health." *Industrial psychiatry journal* vol. 27,1 (2018).
[6] Ernst, W. "The rise of the European lunatic asylum in colonial India (1750-1858)." *Bulletin of the Indian Institute of History of Medicine (Hyderabad)* vol. 17,2 (1987): 94-107.
[7] Nizamie, S Haque, and Nishant Goyal. "History of psychiatry in India." *Indian journal of psychiatry* vol. 52,Suppl 1 (2010): S7-S12.
[8] Sharma, Shridhar M.D., F.R.G.Psych. (U.K.), D.P.M., F.A.P.A., F.R.A.N.Z.C.P., F.I.C.A.1,; Varma, L.P. M.D., F.R.C.Psych. (U.K.) HISTORY OF MENTAL HOSPITALS IN INDIAN SUB-CONTINENT. Indian Journal of Psychiatry 26(4):p 295-300.
[9] Nizamie, S Haque, and Nishant Goyal. "History of psychiatry in India." *Indian journal of psychiatry* vol. 52,Suppl 1 (2010): S7-S12.

"moral management" techniques and drug treatments such as chloral hydrate, primarily to manage patient behaviour and provide relief through sleep. The outbreak of World War I in 1914 marked a significant turning point, leading to notable changes in the Indian psychiatric system[10].

The Indian Lunacy Act of 1912[11] was the principal legislation governing the treatment of individuals with mental illnesses in colonial India. Rather than treating and rehabilitating mentally ill people, the act largely addressed their custodial care. Patients experienced stigmatization and marginalization as a result of the treatment of mental illness as a criminal or social deviance. The Act lacked sufficient protections against the mistreatment of asylum patients, which frequently led to cruel and humiliating treatment. Furthermore, no arrangements were made for community-based mental health services or outpatient care, both of which are essential for the successful treatment of mental diseases. Inconsistencies in treatment and care resulted from the Act's absence of a systematic approach to the identification and classification of mental diseases.

The 1912 Act mandated that a patient could only be admitted to a mental hospital through a reception order from a judicial authority such as a Magistrate or Police Commissioner. This process was strikingly similar to that for imprisonment, raising the question of whether suffering from mental illness should be equated with a criminal offence, which it was not.

A notable flaw of the Act was its provision that once admitted, patients were often confined for life, reflecting the prevailing belief that insanity was a permanent condition. In response to various criticisms, the law was eventually updated. The Mental Health Act of 1987 was enacted to address the deficiencies of the previous legislation and introduce more effective and timely methods for admitting and treating individuals with mental disorders.

Mental Healthcare Act 1987[12]: The new ray of hope

Indian Lunacy Act 1912 was repealed due to act's lack of sensitivity and care towards people

[10] Varma, L.P. M.D. (Pat), D.P.M. (Load). HISTORY OF PSYCHIATRY IN INDIA AND PAKISTAN. Indian Journal of Psychiatry 4(4):p 138-164, Oct–Dec 1953.
[11] Somasundaram, O. "THE INDIAN LUNACY ACT, 1912: The Historic Background." *Indian journal of psychiatry* vol. 29,1 (1987): 3-14.
[12] Math, Suresh Bada et al. "Mental Health Act (1987): need for a paradigm shift from custodial to community care." *The Indian journal of medical research* vol. 133,3 (2011): 246-9.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

suffering from mental illness. It was replaced by The Mental Healthcare Act of 1987 which had much more humane approach towards mentally ill people. It introduced a lot of progressive measures, such as the establishment of mental health authorities, the regulation of psychiatric hospitals, and the promotion of community-based mental health services. The Mental Health Act marked a significant shift towards a more comprehensive and compassionate approach to mental health care in India. It provided a clear definition of mental illness, eliminating outdated and pejorative terms like 'imbecile' and 'idiots.'

The treatment, rehabilitation, and reintegration of mentally ill people into society became the primary focus of this Act. It sought to provide mental treatment with a more sympathetic and humanistic approach. The Act provided improved protections against abuse and neglect by emphasizing the rights and dignity of people with mental illnesses. It brought in procedures to safeguard patients' rights. The integration of mental health services into the general healthcare system, outpatient treatment, and community-based mental health services were all given a lot of weight. In order to supervise and control mental health services, the Act established mental health authorities at the federal and state levels. This was done in an effort to provide high-quality, uniform treatment for all citizens. It encouraged the construction of cutting-edge mental health and psychiatric hospitals using the latest technology in both medicine and psychology. The Act offered a thorough legal framework to safeguard patients' rights, including as the rights to secrecy, information, and consent. In order to ensure that patients or their guardians are included in decision-making processes, it underlined the necessity of informed consent for treatment. The procedural challenges associated with the Mental Health Act of 1987 have led to concerns that it may deter mentally ill patients and their families from seeking help. This reluctance can increase stigma, drive individuals toward unproven treatments, and even result in families abandoning their loved ones. In light of these issues, there was a consensus that the 1987 Act was outdated and in need of revision. The Indian Psychiatric Society advocated for the replacement of the existing Act with a new one that better reflects the cultural context of Indian society and the realities of available resources. The current Act is seen as impractical in many parts of the country because it relies heavily on institutional care, which is limited, and fails to leverage the support provided by families

and communities[13].

On December 13, 2006, The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD abbreviated for this paper)[14], was adopted. It is a comprehensive international treaty aimed at protecting and promoting the rights and dignity of persons with disabilities, including those with mental illnesses. The UNCRPD marks a significant shift in the perception and treatment of disabled individuals, advocating for their full and equal participation in society.

The Convention outlines essential rights that individuals with disabilities should have in a just society. It is one of the nine core human rights treaties of the UN. According to Article 1, its primary aim is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity." A central goal is to eliminate discrimination by guaranteeing that these rights are enjoyed on an equal footing with others. The UNCRPD specifically tailors these rights to the needs of people with disabilities, a group that is infrequently addressed in those other treaties. Notably, the drafting and negotiation process for the UNCRPD involved significant and active participation from organisations representing people with disabilities, such as the World Network of Users and Survivors of Psychiatry.

It is, one of the most progressive advocating equal rights, dignity and respect for people who are by any manner disabled, till date. UNCRPD valued mental illness with the same degree as it valued physical illness. A global shift towards more inclusive policies and practices has been sparked by the UNCRPD. In order to promote a more welcoming and helpful atmosphere for people with mental health disorders, ratifying nations are obligated to harmonize their national laws and policies with the convention's requirements. This involves modifying mental health legislation to guarantee that it upholds individuality, respect, and non-discrimination.

It had several provisions for people with disability such as-

[13] Trivedi, J K. "Implication of erwadi tragedy on mental health care system in India." *Indian journal of psychiatry* vol. 43,4 (2001): 293-4.

[14] https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities (last accessed 29/07/24)

- Equality and Non-Discrimination (Article 5)
- Accessibility (Article 9),
- Right to Life, Liberty, and Security (Articles 10 and 14),
- Equal Recognition Before the Law (Article 12),
- Access to Justice (Article 13),
- Freedom from Torture and Abuse (Articles 15 and 16),
- Right to Health (Article 25),
- Living Independently and Being Included in the Community (Article 19)

These provisions ensure that people with disabilities are treated exactly like other people i.e. with dignity and equality.

Now as India is a signatory of this convention, hence India had to amend the existing statute dealing with people with mental disability, which was The Mental Healthcare Act of 1987 which did not comply with the requirements of the UNCRPD, as the act wasn't fulfilling the criterion of the UNCRPD.

The 1987 Act frequently permitted forcible admission and treatment without providing proper protections or systems to enable informed decision-making, failing to appropriately acknowledge the autonomy of people with mental diseases.

Involuntary entry and treatment were permitted by the Act, often without sufficient procedural protections, which may have violated the person's right to security and liberty. The Act did not adequately support community-based mental health services or the deinstitutionalization of mental health treatment, instead focusing exclusively on institutional care. It did not offer thorough safeguards against mistreatment, exploitation, or cruel treatment of patients in mental health facilities.

The Act did not completely embrace a rights-based approach; instead, it frequently emphasized the rights and social inclusion of people with mental health concerns while seeing mental health issues through a medical or custodial perspective. Additionally, it did not guarantee that people with mental diseases or their representatives would be adequately involved in the decision-making processes pertaining to mental health services and policies.

Due to all these shortcomings of the 1987 Act, India was bound to prepare a new legislation which would comply with the requirements of the UNCRPD.

Hence the new statute Mental Healthcare Act was brought in 2017[15](abbreviated as MHCA for this paper), which is till now the legislation used to govern rights of the people suffering from mental illness.

India now has a comprehensive and forward-thinking framework for mental health care according to the Mental Healthcare Act of 2017. It promotes the autonomy, dignity, and social inclusion of people with mental disorders by making substantial advancements in their rights and safeguards. The Act raises the bar for mental health treatment in the nation by correcting the flaws in earlier legislation and harmonizing with global norms.

Some of the key features[16] of MHCA are

- Rights-Based Approach

The Act protects the equality, dignity, and autonomy of those who suffer from mental diseases. It ensures the freedom from cruel, inhumane, or humiliating treatment; it also provides the right to live in a community and the ability to seek mental healthcare. Additionally, the Act decriminalizes the much awaited[17], suicide by classifying it as a mental health condition rather than a crime.

[15] Mishra, Abhisek, and Abhiruchi Galhotra. "Mental Healthcare Act 2017: Need to Wait and Watch." *International journal of applied & basic medical research* vol. 8,2 (2018): 67-70. doi:10.4103/ijabmr.IJABMR_328_17
[16] Chadda, Rakesh K. "Influence of the new mental health legislation in India." *BJPsych international* vol. 17,1 (2020): 20-22. doi:10.1192/bji.2019.18
[17] https://www.thehindu.com/news/cities/Kochi/decriminalise-offence-of-attempt-to-suicide-hc/article65372789.ece (last Accessed on 29//07/24)

- Access to Mental Healthcare

All people, especially those living in distant and rural locations, must have access to mental health treatments, according to the Act. It also guarantees free mental health care to those who fall below the federal poverty level, improving accessibility for those who are more susceptible.

- Advance Directives

Individuals can make advance directives specifying their preferences for treatment and appoint a nominated representative to make decisions on their behalf if they become incapacitated.

- Mental Health Review Boards

The Act establishes Mental Health Review Boards to oversee the implementation of the Act, address grievances, and ensure compliance with the rights of individuals with mental illnesses.

- Regulation of Mental Health Institutions

The Act requires the registration and regulation of mental health institutions, ensuring they meet prescribed standards of care and treatment.

- Community-Based Care

The Act promotes community-based mental health care and the integration of mental health services into general healthcare, reducing reliance on institutional care.

Apart from these MHCA brought a groundbreaking provision of Nominated Representative. Under the Mental Healthcare Act of 2017, the selected representative's job is to safeguard the rights and autonomy of people with mental disorders while making sure they get the treatment and assistance they require. The Act encourages a more person-centered approach to mental health treatment and is in line with modern human rights standards by formalizing the role of a trusted advocate in the decision-making process.

The nominated representative is empowered to make decisions on behalf of the person with mental illness regarding their treatment and care, especially when the individual is unable to make

informed decisions. They act as an advocate for the rights and preferences of the person with mental illness, ensuring that their choices and best interests are considered in all aspects of care and treatment, providing emotional and practical support to the individual, facilitating their participation in community life and access to necessary services.

The Mental Healthcare Act, 2017 mandates the centre to create a Central Mental Health Authority (CMHA) to regulate the standard of mental health services in India. Such authorities must be established at the state-level as well. Under the Act, state-level Authorities must constitute a Mental Health Review Board (MHRB) to protect specific patient rights.

The Committee observed that several states are yet to fill crucial vacancies in their Mental Health Authorities and constitute the MHRBs[18].

On-ground situation of Mentally Ill people

Even after such a legislation we are still facing a grave shortage in facilities available for people suffering from mental illness.

Albeit changes have been made in the legislation and the situation seems to be in favour of the people, the ground reality differs. According to research[19], it was found that In 2017, 197·3 million (95% UI 178·4–216·4) people had mental disorders in India, including 45·7 million (42·4–49·8) with depressive disorders and 44·9 million (41·2–48·9) with anxiety disorders. We found a significant, but modest, correlation between the prevalence of depressive disorders and suicide death rate at the state level for females (r2=0·33, p=0·0009) and males (r2=0·19, p=0·015). The contribution of mental disorders to the total DALYs in India increased from 2·5% (2·0–3·1) in 1990 to 4·7% (3·7–5·6) in 2017. In 2017, depressive disorders contributed the most to the total mental disorders DALYs (33·8%, 29·5–38·5), followed by anxiety disorders (19·0%, 15·9–22·4), idiopathic developmental intellectual disability (IDID; 10·8%, 6·3–15·9), schizophrenia (9·8%, 7·7–12·4), bipolar disorder (6·9%, 4·9–9·6), conduct disorder (5·9%, 4·0–8·1), autism spectrum

[18] PRS India, *Mental Health Care and its Management*, PRS Legislative Research (2024), https://prsindia.org/policy/report-summaries/mental-health-care-and-its-management. (last accessed on 29/07/2024)
[19] The burden of mental disorders across the states of India: The Global Burden of Disease Study 1990–2017, The Lancet Psychiatry, Volume 7 Number 2 p109-216, e5-e7

disorders (3·2%, 2·7–3·8), eating disorders (2·2%, 1·7–2·8), and attention-deficit hyperactivity disorder (ADHD; 0·3%, 0·2–0·5); other mental disorders comprised 8·0% (6·1–10·1) of DALYs. Almost all (>99·9%) of these DALYs were made up of YLDs. The DALY rate point estimates of mental disorders with onset predominantly in childhood and adolescence (IDID, conduct disorder, autism spectrum disorders, and ADHD) were higher in low SDI states than in middle SDI and high SDI states in 2017, whereas the trend was reversed for mental disorders that manifest predominantly during adulthood. Although the prevalence of mental disorders with onset in childhood and adolescence decreased in India from 1990 to 2017, with a stronger decrease in high SDI and middle SDI states than in low SDI states, the prevalence of mental disorders that manifest predominantly during adulthood increased during this period[20].

[20] The burden of mental disorders across the states of India: The Global Burden of Disease Study 1990–2017, The Lancet Psychiatry, Volume 7 Number 2 p109-216, e5-e7

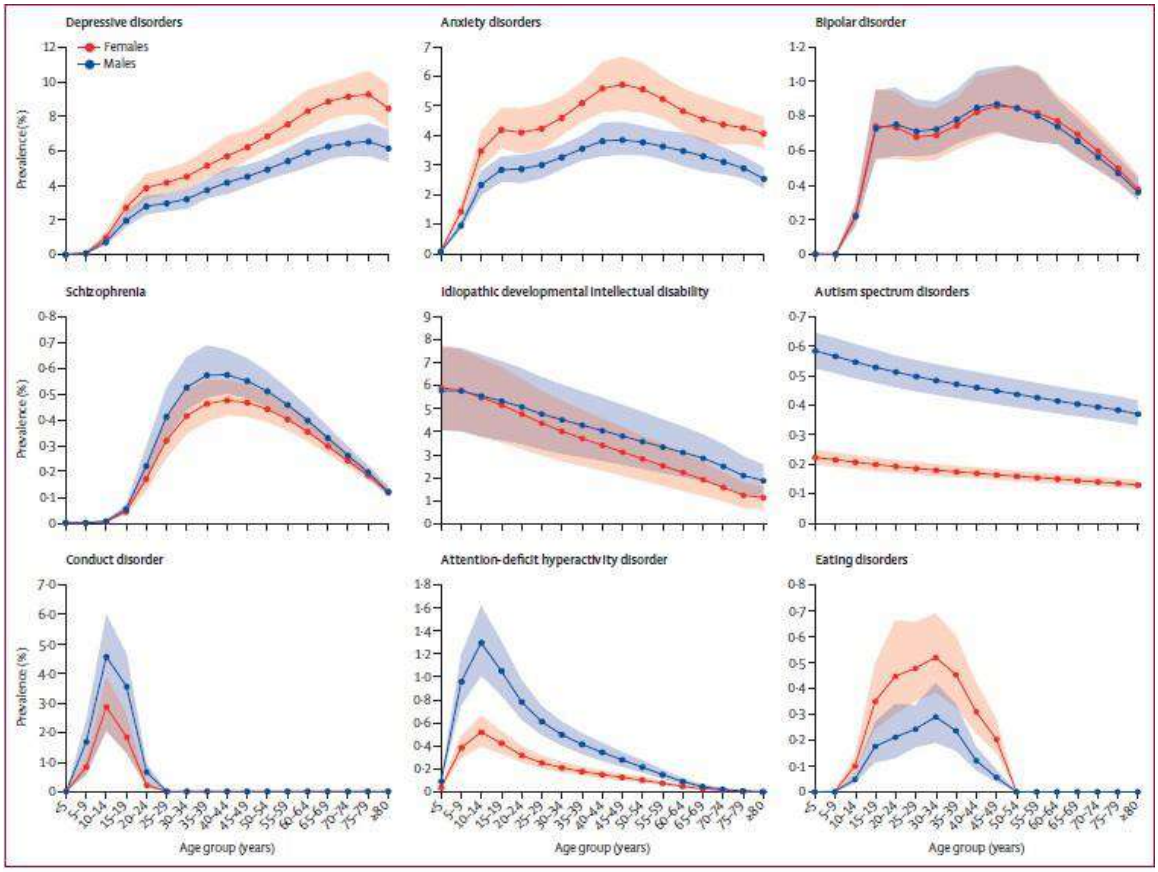


Figure 2: A age-specific and sex-specific prevalence of mental disorders in India, 2017
Shaded areas show 95% uncertainty intervals.

One in seven Indians were affected by mental disorders of varying severity in 2017. Yet, the overall current mental health morbidity was 10.6% of which 10% prevalence was accounted for by Common Mental Disorders (CMDs), which include depression, anxiety, and substance abuse. Literature highlights that child and adolescent age group are severely affected, and suicide is emerging as a major concern with 1% population reported to have high suicide risk. Despite efforts to provide care, a huge treatment gap exists for all types of psychiatric disorders. Mental illness results in poor quality of life, decreased productivity, and lower earning potential[21].

In a recent report published by the parliamentary standing committee on health and family welfare, it was found that India currently has 0.75 psychiatrists per lakh people, which is significantly low.

[21] Singh, Om Prakash. "Closing treatment gap of mental disorders in India: Opportunity in new competency-based Medical Council of India curriculum." *Indian journal of psychiatry* vol. 60,4 (2018): 375-376.

The Committee observed that if India targets having three psychiatrists per lakh people, it will need 27,000 more psychiatrists. This scenario is similar for other professionals such as psychologists, psychiatric social workers, and nurses. The Committee also suggested increasing the seats for MD Psychiatry courses.

India has a severe shortage of mental health facilities. As of 2021, there are only 43 state-run mental hospitals[22] for a population of over 1.3 billion. Many of these facilities are overcrowded and under-resourced. The country has only 0.29 psychiatric beds per 100,000 population, far below the global average of 2.04 beds per 100,000 population. The concept of community-based mental health care is still in its infancy in India. There's a lack of day-care centers, halfway homes, and rehabilitation facilities for individuals with mental illness.

Mental health services are poorly integrated with the primary healthcare system, making early detection and treatment difficult.

Availability of Medical professional who can deal with mentally ill people is not adequate.

India faces a severe shortage of mental health professionals. There are only about 9,000 psychiatrists in the country, which translates to 0.75 psychiatrists per 100,000 people[23], far below the recommended 3 per 100,000.

1. Lack of Psychologists and Social Workers: The shortage extends to clinical psychologists (0.07 per 100,000) and psychiatric social workers (0.06 per 100,000)[24].

2. Uneven Distribution: The available mental health professionals are concentrated in urban areas, leaving rural regions severely underserved.

3. Brain Drain: Many trained mental health professionals leave India for better opportunities abroad, further exacerbating the shortage.

[22] https://pib.gov.in/newsite/PrintRelease.aspx?relid=112890 (last accessed on 29/07/2024)
[23] Indian Council of Medical Research, Public Health Foundation of India, and Institute for Health Metrics and Evaluation. (2017). India: Health of the Nation's States - The India State-Level Disease Burden Initiative.
[24] Khandelwal, S. K., Jhingan, H. P., Ramesh, S., Gupta, R. K., & Srivastava, V. K. (2004). India mental health country profile. *International Review of Psychiatry*, *16*(1–2), 126–141.

Accompanied with such a shortage in the facilities for the Mentally ill people stigma till now plays a very deterrent role in worsening the status of mentally disabled people.

Even in the modern era, a lot of intelligent and well-read people still feel stigmatized when they discuss their mental health or the mental health of anybody connected to them. As a society, we come to realize that recovering from such circumstances calls for a multifaceted strategy that includes community involvement, policy changes, media lobbying, and public education. Some of the additional suffering caused by stigma on persons who are already dealing with mental illness may be lessened by dispelling myths, encouraging mental health literacy, and creating a more welcoming social environment.

While mental illness can affect anyone, certain groups in India are particularly vulnerable due to various social, economic, and cultural factors. Unfortunately, the majority of the Indian population is vulnerable of this till now. There are many unique challenges faced by women, children and adolescents, and the elderly population in the context of mental health.

Women and Mental Health[25]

- Gender-Based Violence: Women in India face high rates of domestic violence, sexual assault, and other forms of gender-based violence, which significantly increase their risk of developing mental health issues such as depression, anxiety, and PTSD.

- Societal Pressures: Traditional gender roles and expectations, including pressure to marry early, bear children, and manage household responsibilities, can contribute to stress and mental health problems.

- Postpartum Depression: There is a dearth of understanding and stigma around postpartum depression, which contributes to the estimated 10–20% of Indian women who experience it going misdiagnosed and untreated.

- Economic Dependence: Many women in India are economically dependent on male family

[25] Malhotra, Savita, and Ruchita Shah. "Women and mental health in India: An overview." *Indian journal of psychiatry* vol. 57,Suppl 2 (2015): S205-11.

members, which can limit their ability to seek mental health care independently.

- Double Stigma: Women with mental illness often face double stigmatization - for being women and for having a mental health condition. This can lead to increased social isolation and reduced access to care.

- Lack of Gender-Sensitive Care: There's a shortage of female mental health professionals and gender-sensitive mental health services, which can deter women from seeking help.

Children and Adolescents[26]

- Early Life Stress: Many children in India face adverse childhood experiences such as poverty, malnutrition, and exposure to violence, which can have long-lasting impacts on mental health.

- Academic Pressure: The highly competitive education system in India places intense pressure on students, contributing to high rates of anxiety and depression among adolescents.

- Child Labor and Abuse: Despite legal prohibitions, child labour and abuse remain prevalent in parts of India, severely impacting children's mental health.

- Lack of Child Mental Health Services: There's a severe shortage of child psychiatrists and specialized mental health services for children and adolescents in India.

- Substance Abuse: Adolescent substance abuse is a growing concern, particularly in urban areas, yet specialized treatment programs for young people are scarce.

- Impact of Technology: Increasing internet and social media use among Indian youth has been associated with issues like cyberbullying, internet addiction, and sleep disturbances, affecting mental health.

[26] Hossain, Md Mahbub, and Neetu Purohit. "Improving child and adolescent mental health in India: Status, services, policies, and way forward." *Indian journal of psychiatry* vol. 61,4 (2019): 415-419.

- LGBTQ+ Youth: Despite recent legal progress, LGBTQ+ youth in India often face discrimination and stigma, leading to higher rates of depression, anxiety, and suicide risk.

Elderly Population[27]

- Social Isolation: Changing family structures and urbanization have led to increased social isolation among the elderly, a significant risk factor for depression and cognitive decline.
- Chronic Illnesses: The elderly population often suffers from chronic physical illnesses, which can co-occur with and complicate mental health issues.
- Economic Insecurity: Many elderly individuals in India lack financial security and adequate pension systems, leading to stress and anxiety about their future.
- Dementia: With a rapidly aging population, dementia is becoming increasingly prevalent, yet specialized geriatric mental health services remain scarce.
- Elder Abuse: Elder abuse, including emotional and financial abuse, is a growing concern that significantly impacts mental health.
- Lack of Geriatric Mental Health Services: There's a severe shortage of geriatric mental health specialists and services tailored to the unique needs of the elderly.
- Ageism: Societal attitudes that devalue older adults can contribute to depression and lowered self-esteem among the elderly.

D. Other Vulnerable Groups[28]

- Scheduled Castes and Tribes: These historically marginalized groups often face discrimination and social exclusion, which can contribute to higher rates of mental health

[27] Shaji, K S et al. "Better mental health care for older people in India." *Indian journal of psychiatry* vol. 46,4 (2004): 367-72.
[28] https://ukhsa.blog.gov.uk/2017/07/06/mental-health-challenges-within-the-lgbt-community/ (last accessed 29/07/24)

issues.

- Refugees and Internally Displaced Persons: India hosts significant populations of refugees and internally displaced persons who may have experienced trauma and face ongoing stressors.

- People Living with HIV/AIDS: This group often faces severe stigma and discrimination, leading to higher rates of depression and anxiety.

- LGBTQ+ Community: Despite the decriminalization of homosexuality, LGBTQ+ individuals continue to face societal discrimination and higher rates of mental health issues.

- Farmers: High rates of farmer suicides in India highlight the severe mental health crisis in agricultural communities, driven by factors such as debt, crop failures, and climate change.

Economic issues continue to exist in addition to all of these pre-existing issues when we consider mental health, therapy, mental health care, and other associated issues. Treatment for mental health issues can be expensive and may involve medication, counselling, and sometimes even hospitalization. In India, where the availability of health insurance is restricted, families frequently pay for these expenses out of pocket. Families sometimes have to pay more for incidentals, lost earnings from caring for family members, and transportation to medical facilities. Since many mental disorders are persistent, these expenses may continue for years, possibly forcing families into debt or poverty.

In the fiscal year 2024-25, the allocation for mental healthcare constitutes only 1 percent of the overall healthcare budget, which is significantly inadequate given the scale and gravity of the issue. There exists a substantial treatment gap for mental disorders in India, estimated to be between 70-92 percent, indicating that a large majority of affected individuals do not have access to necessary care. The expenses associated with mental health treatment can be prohibitive for many Indians, thereby hindering timely and sufficient care.[29]

[29] PRS India, *Interim Union Budget 2024-25 Analysis*, PRS Legislative Research (2024), https://prsindia.org/budgets/parliament/interim-union-budget-2024-25-analysis.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

Family members, particularly women, may have to give up employment or educational opportunities to care for a relative with mental illness. The financial strain on families can affect the educational and career prospects of children, potentially perpetuating a cycle of economic disadvantage.

The status and prognosis of mentally sick individuals in India can be greatly enhanced by increasing knowledge of mental disease from an early age. We can raise a generation of people who comprehend, tolerate, and assist those who suffer from mental disorders by implementing age-appropriate mental health education in households and schools from an early age. Early understanding lessens the stigma and misconceptions around mental health concerns, which can result in discrimination and social isolation. Growing up with a sophisticated awareness of mental health can help children identify signs in others and themselves, which can prompt early intervention and improve treatment results. Additionally, kids are more likely to grow sympathetic and empathetic views toward those who suffer from mental illness, which promotes a more inclusive community. This change in public perceptions may promote candid conversations about mental health and ease the process for those who may otherwise be afraid to ask for assistance.

Following the same line of thought, the Hon'ble Delhi High Court through a landmark judgement of Devina Singh vs. Government of NCT and others[30], laid down instructions to introduce mental healthcare guidelines according to MHCA. In the same judgement the learned Court also recognized the efforts taken by the various governments for mental health being of students and burden free education, but also said the government to look into this matter with utmost importance and also directed schools, coaching institutes and other educational bodies to have councellors onboard for students who want to have access to such facilities if they feel so or their teachers feel so.

Conclusion

In light of the arguments and statistics presented in the paper, it is apparent that India's population is slowly moving towards a mental health pandemic. Whilst the number of people grappled with

[30] Devina Singh vs. Government of National Capital Territory and others, 2023 OnLine Del 3818

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

anxiety, depression and various other mental disorders keeps increasing exponentially, the number of mental health institutions and trained psychiatrists, psychologists and healthcare professionals remain abysmally low. Adding on to the complication is the taboo regarding mental health. The fear of judgement and harassment.

Worried about the society, victims chose to keep their mouths shut instead of coming out and seeking help, accepting and leading a life of absolute misery. The Mental Healthcare Act, 2017 was a drastic step towards positively changing the situation of the mentally ill in the country, but a legislation stripped of an effective implementation has never had fruitful outcomes. Mental health is an essential part of the overall well-being of an individual, yet remains ignored. It is high time that India works its way forward and begins this conversation.

Since it is obvious that the state of the Indian mental healthcare sector is appallingly terrible, we provide some suggestions for change here. At the grassroots level, we must bring about change, include mental health in the curriculum for our children, and improve societal acceptance, tolerance, and sensitivity toward those who suffer from mental illness. It is necessary to implement initiatives like aggressive advertising campaigns and programs in order to lessen the stigma attached to mental illnesses. To effect change, the stigmatized representation of mental illness in television and other media should be lessened and replaced with a more relatable representation.

Suicide prevention hotlines and mental health hotlines that monitor situations and assist clients in quickly recovering and rehabilitating must be made much more widely available. Psychiatrists and psychologists should be available in all government clinics and hospitals to assist those in distress and to offer therapy and medicines at reduced costs. More funding must be provided by the federal government to support the establishment of mental health facilities. More students will be encouraged to pursue careers in psychology and the shortage of mental health specialists in India would be lessened with more knowledge of this field of study.

INTERPRETING IRRETRIEVABLE BREAKDOWN THEORY OF DIVORCE IN PERSONAL LAWS

Surya Jain*

Abstract

This study is about the irretrievable breakdown of marriage theory and its scope to be included under the Hindu and Muslim personal laws. As divorce cases are rising and it is jurisprudential not correct to recognize only the consent and fault theories of divorce, there is need to recognize the irretrievable breakdown of marriage theory. Several judgments have been passed by courts recognizing this theory and granting a divorce on it, however, it is still not included in the statutes by the legislature. The study aims to assess the possibility of interpreting the irretrievable breakdown of marriage theory in the existing Hindu and Muslim personal law so that courts can grant a divorce under this theory without explicit mention of it. This will not only help unhappy couples seek divorce more easily, but will also reduce the pendency of cases in family courts. Further, this paper analyses the impact of a divorce on irretrievable breakdown theory from a financial aspect and from the aspect of children as well. The Law Commission of India too has recognized the need for inclusion of this divorce theory. Therefore, the author has made an attempt to interpret it in the existing legal framework.

Keywords: breakdown of marriage, divorce, interpreting personal laws, complete justice, Naveen Kohli.

*Student, Maharashtra National Law University, Nagpur.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

1. INTRODUCTION

A marriage is a union of a man and woman (in most cases) to the exclusion of others. It is considered a sacred relation between two individuals governed and solemnized by customary rites and practices of respective religions, being followed from time immemorial. A divorce is a permanent termination of a marriage, ending the status of the individuals as husband and wife and also their rights and liabilities that they owe to each other.

Normally, a divorce is not the priority of a couple to seek. Neither the court recommends the couple to get a divorce in the first instance. Even the legislature understands the hardships to divorce; it has named the law governing marriage and divorce among Hindus as the Hindu Marriage Act and not the Hindu Marriage and Divorce Act, clearly signifying that the intent or object of the Act is marriage and not divorce. However, under certain unfortunate circumstances, there might arise a need for the couple to get a divorce. For this, the Indian law provides for various grounds for the couple to seek a divorce from a competent court.

The Hindu Marriage Act, 1955 (HMA) states nine grounds for divorce: adultery; desertion, cruelty; conversion to another religion; incurable insanity or mental disorder; virulent leprosy; venereal disease in a communicable form; renunciation of the world; and presumption of death (i.e., seven years of unheard absence). There are four more grounds where the wife alone can seek divorce: another wife of the husband's pre-Act polygamous marriage being alive; the husband has been guilty of rape, sodomy or bestiality; cohabitation between the parties has not taken place for one year or upwards after the passing of an order awarding maintenance to the wife under Section 125 of the Code of Criminal Procedure 1973, or under Section 18 of the Hindu Adoptions and Maintenance Act 1956; and the marriage of the wife (whether consummated or not) was solemnized before she attained the age of fifteen years and she had repudiated the marriage after attaining that age but before attaining the age of eighteen years.[1]

Nowhere in the HMA there is a mention of the irretrievable breakdown of marriage to serve as a valid ground for divorce. Divorce can either be obtained on mutual consent or by one party committing a matrimonial offence. This paper focuses on the aspect of divorce in Indian marriages, primarily focusing on the theory of irretrievable breakdown of marriage and why or why not it

[1] Vijender Kumar and Vidhi Singh, "Divorce by Mutual Consent Among Hindus: Law, Practice and Procedure*"* 1 *Contemporary Law Review* 1-16 (2017).

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

must be included in relevant Indian personal laws. The study has been territorially limited to India and the scope is only for one type of divorce.

The study has been focused such because the number of divorce cases in India are rising exponentially. Even after setting up family courts to deal with these matters, the pendency is increasing. Most divorce cases are among the urban and semi-urban people being in the middle to upper income strata. Couples between the age of 25 and 35 constitute 70% of all people who seek to get a divorce.[2]

2. IRRETRIEVABLE BREAKDOWN OF MARRIAGE DEFINED

Irretrievable breakdown of marriage simply means that a marriage can no longer sustain due to fault of neither party. It becomes an "empty shell" and the spouses cannot enjoy the love and affection that a marriage promises. So, it is better to dissolve the union than to continue it in utter misery. A simple inference of an irretrievably broken-down marriage can be drawn when the spouses live separately for an unreasonably long period of time. This concept has been recognized under Hindu law and incorporated in the HMA, but not as an irretrievable breakdown of marriage. The High Court of Delhi also recognized the need of this theory in the case of *Ram Kali v. Gopal Das*[3] as early as in 1971.

The big merit of propounding this theory is that it is the court which decides whether a marriage has broken down irretrievably or not. So, even though one-party refuses to file for divorce under the mutual consent theory, he or she cannot forcefully keep the other party in the union as the court can grant a divorce on the irretrievable breakdown grounds without any fault of either party.

3. INTERPRETING IRRETRIEVABLE BREAKDOWN UNDER HMA

The HMA was amended in 1964 and in 1976 by an amendment act wherein a new breakdown theory was introduced by amending section 13.[4] Under this theory, there is no fault of either party. Both the husband and wife are entitled to seek a divorce under this theory. The Parliament modified clauses (i) and (ii) of section 13 (1A) keeping in view the theory that living in separation for a period of one year after a decree of restitution of conjugal rights or judicial separation is a clear sign of failure of marriage or of the fact that marriage has broken down irretrievably. So, it

[2] Vijender Kumar, "Causes of Divorce in India: An Analysis" 1 NLUALPR 48-60 (2015).
[3] (1971) I.L.R. 1 Delhi 10 (F.B.).
[4] Vijender Kumar, "Expending Horizons of Divorce Under The Hindu Marriage Act 1955: An Academic Review" 5 ANDHRA LAW TIMES 21-29 (2013).

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

becomes redundant to retain the marriage under such circumstances. It is pertinent to note here that law still requires that the aggrieved party must prove before the court that he or she is innocent, else the decree of divorce may not be granted.[5]

This logic is on the lines of the irretrievable breakdown theory, though not exactly the same. In the interest of justice, equity, and good conscience, even the Supreme Court has recognized evolving theories of divorce and granted divorce on the irretrievable breakdown theory.

Using the liberal principles of interpretation of statues, it can very well be interpreted that the divorce grounds under the HMA are insufficient and not fit for the present society. So, by applying the golden rule to section 13, judges must grant divorce under the irretrievable breakdown theory. Even the Supreme Court has granted a decree of divorce on this theory, so the lower courts also must be mindful of the existing principles of interpreting the law, and in pursuit of justice, give a liberal interpretation to the letter of law to find its true spirit, instead of a literal interpretation. This way, the society will be more progressive and laws will be reflective of the changing social needs. The Apex Court has adopted this practice before in a number of landmark cases that need not be mentioned here, so the lower courts must also interpret the law liberally here as well.

4. INTERPRETING IRRETRIEVABLE BREAKDOWN UNDER MUSLIM LAW

The Muslim law allows divorce on three grounds – by the will of husband without any intervention of court; by mutual consent without any intervention of court; and by the intervention of a court on a suit presented by either party.[6] For the purpose of trying to interpret the irretrievable breakdown theory, we must look at the second ground of divorce as that is the need of the hour. In the *mubara'at* form of divorce, the husband and wife mutually decide to get a *talaaq*. It is a dissolution of marriage by mutual agreement. Similar is the *khula* form of divorce wherein the wife gives a divorce to the husband. The reason for either of the two is not mentioned in the textual authority of Mulla.[7] However, it can be reasonably construed that such divorce can be on the basis of an irretrievable breakdown of marriage. If either party feels that their marriage has broken down irretrievably, they can give a divorce. Though it might be difficult in the *mubara'at* form of divorce as it requires consent of both parties, it is very much possible in *khula* as that is a unilateral divorce. So, it is necessary to look deeper into the two forms of divorce under Muslim personal law and

[5] Paras Diwan and Peeyushi Diwan, *Modern Hindu Law* 75-76 (25th ed. 2022).
[6] Mulla, *Principles of Mahomedan Law* 453 (23rd ed. 2022).
[7] *Ibid.* p. 469.

recognize that an irretrievable breakdown of marriage is covered within the ambit of the two. This needs to be recognized by courts of law and by practitioners of Islam as well, to give it a full effect. So, just by interpreting the already existing laws we can see the beauty of the law and the lawmaker's intent as indirectly an irretrievable breakdown of marriage has been incorporated. It is only the need of the hour that the society recognizes it.

5. JUDICIAL PRONOUNCEMENTS REGARDING IRRETRIEVABLE BREAKDOWN

The Supreme Court has been granted powers under article 142[8] to do complete justice by passing any order or decree as it deems fit. It is pertinent to note that this power has not been granted to High Courts. So, effectively only the Supreme Court can invoke the power to do complete justice and provide relief similar to irretrievable breakdown of marriage. Some of the relevant judgments regarding the same have been mentioned below-

A. *Ashok Hurra v. Rupa Bipin Zaveri*[9]

The Supreme Court has held that under article 142, the Court may grant interim relief to parties without waiting for the statutory period of six months required by section 13B of the HMA.

B. *Anil Kumar Jain v. Maya Jain*[10]

The Supreme Court invoked its power under article 142 when it was satisfied that the marriage between the parties had broken down irretrievably. It provided the required relief to the parties in terms of a relief that can be classified under the irretrievable breakdown theory.

C. *Devinder Singh Narula v. Meenakshi Nangia*[11]

In this case, the Court opined, *"it is no doubt true that the legislature had in its wisdom stipulated a cooling period of six months from the date of filing of a petition for mutual divorce till such divorce is actually granted, with the intention that it would save the institution of marriage. It is also true that the intention of the legislature cannot be faulted with, but there may be occasions when in order to do complete justice to the parties it becomes necessary for the Court to invoke its powers under Article 142 in an irreconcilable situation".*[12]

[8] The Constitution of India, 1950.
[9] AIR 1997 SC 1266; (1997) 4 SCC 226.
[10] AIR 2010 SC 229; (2009) 10 SCC 415.
[11] Civil Appeal No. 5946 of 2012, arising out of SLP (C) No. 21084 of 2012.
[12] *Ibid.* para 9.

D. *Vimi Vinod Chopra v. Vinod Gulshan Chopra*[13]

In this case it was held that the Supreme Court can invoke its power under article 142 to grant divorce without waiting for six months in case the Court is satisfied that the marriage has broken down irretrievably without any scope of reconciliation.

Similarly, the cases of *Anita Sabharwal v. Anil Sabharwal*[14] and *Aditi Wadhera v. Vivek Kumar Wadhera*[15] can be referred to understand when and why the Court can grant divorce by invoking its power under article 142 to do complete justice.

All in all, it can be clearly inferred that the Supreme Court prefers to look at the spirit of law rather than the letter of law when imparting justice. Instead of going strictly by the statutory provisions, the Court gives the HMA a wide scope by indirectly incorporating a provision for an irretrievable breakdown of marriage as ground of divorce.

E. *Naveen Kohli v. Neelu Kohli*[16]

In this case the Supreme Court has said that a theory based on fault of either party is inadequate in dealing with matters of divorce and so it is prudent to take into account a theory where no party is at fault. If the theories on divorce always look at the fault of one party, it would be harmful to the society. A marriage without love only has a legal tie and not a practical future. So, such a marriage does not preserve the sanctity of marriage but on the other hand refuses to accept the feelings and rights of the parties.

In earlier cases wherein the marriage had broken down irretrievably, the Supreme Court refused to grant a divorce under the irretrievable breakdown theory. Two such cases are of *Chetan Das v. Kamala Devi*[17] and *Praveen Mehta v. Inderjit Mehta.*[18] In both these cases, the facts inferred that the marriage had broken down irretrievable without fault of either party. However, the Court did not grant a divorce in either of them. The latest view of the Court in *Naveen Kohli*[19] is a progressive stance in divorce jurisprudence. The Court went on to opine that by forcing the parties to live together, the law is not preserving the sacrosanct nature of the marriage, but shows scant regard

[13] (2013) 15 SCC 547.
[14] (1997) 1 SCC 490.
[15] AIR 2016 SC 3840.
[16] AIR 2006 SC 1675.
[17] AIR 2001 SC 1709.
[18] AIR 2002 SC 2582.
[19] *Supra* no. 16.

towards the feelings of each party. Thus, it can be inferred that the Court has moved on to focus more on individual liberty and choice rather than a social aspect to marriage. Still, the Court clarified that it is keeping public interest in mind, as public interest demands recognition of a broken-down marriage. The Court went on to the extent of recommending the state to amend the HMA to incorporate the irretrievable breakdown theory as a valid ground for divorce.[20]

6. SCOPE AND ANALYSIS OF IRRETRIEVABLE BREAKDOWN AS GROUND OF DIVORCE IN INDIA

The 71st Law Commission Report says that the need for irretrievable breakdown of marriage under Hindu law is needed because in other personal laws (Christian, Parsi, and Muslim), it is easier to get a divorce. This results in unnecessary delay in Hindu divorces, conversions, and a generally more unhappy relation. So, Hindu law should be liberalized on the lines of European laws.[21]

The Report has very clearly stated on page 12 that limiting divorce on fault grounds causes injustice to parties when none is at fault yet they do not wish to continue in the union. If the substance of the marriage has disappeared or exhausted, then there is no justification for continuing the marriage. The Report describes the merits and demerits of the theory in detail, so it is prudent not to reproduce them in this paper for the sake of brevity.

Speaking of the financial aspects of the irretrievable breakdown theory, we need to first look at what will happen if divorce under this theory is not granted to a couple. Let us say that there is no fault of either party, they are living together, but are not happy in their marital relation. The spouses never talk to each other and are not concerned of each other's presence. Here, the marriage has clearly broken down beyond repair. Now let us say that the husband wants a divorce but the wife does not want a divorce. In this case the husband cannot seek divorce because statutorily there is no ground of divorce available to him. This leaves the husband tied in a matrimonial knot. The wife on the other hand is enjoying the common home, maintenance by the husband, and other conjugal rights that the husband cannot deny. If the husband denies any of these, the wife may file a criminal complaint under the Protection of Women from Domestic Violence Act or the IPC. This

[20] *Supra* no. 16 p. 1690.
[21] Law Commission of India, "71st Report on The Hindu Marriage Act, 1955 – Irretrievable Breakdown of Marriage as a Ground of Divorce" (1978).

fear of imprisonment drains the financial capacity of the husband leaving him with no remedy in law.

Adding on to the hypothetical situation, there is an increasing level of mental and emotional stress in the mind of the spouse so tied in the marriage. The situation can be vice-versa in terms of the sex as well.

Considering the life of children growing during the subsistence of a marriage broken down irretrievably, we can infer that there must be an immense level of emotional trauma on them. This may also lead them to not becoming healthy citizens of the country who can contribute back to the society. When there is general dissatisfaction inside the home, especially amongst the parents, children will definitely face the consequences. A better option for the welfare of the kids may be a divorce in some extreme situations.

If the irretrievable breakdown theory is incorporated in the statues, it would help in the speedy disposal of cases as judges will then have the written law in front of them to decide the case. This will reduce ambiguity and scope of a judge's discretion on the matter. Further, speedy disposal of cases will be done as the judge will no longer have to interpret the law in order to provide an effective remedy.[22] This view was also taken by the court in the case of *Ashok Hurra*.[23]

7. CONCLUSION

The Law Commission of India has made a wonderful report on the irretrievable breakdown theory. The Supreme Court has drafted a well-researched judgment in *Naveen Kohli*.[24] There have been numerous articles written by jurists explicitly advocating for the need for the irretrievable breakdown of marriage theory. All these aspects clearly tell us that there is a need for the inclusion of the theory. However, the legislature has been hesitant to incorporate it in the statues. One possible reason can be a backlash from people who oppose it in the name of religion and sanctity. The society needs to understand that times have changed and it is now needed that the theory be incorporated and accepted in the society. Social engineering in this aspect by the legislature will

[22] Jaya V.S., "Irretrievable Breakdown of Marriage as An Additional Ground for Divorce" 48 (3) JILI 443 (2003).
[23] *Supra* no. 9.
[24] *Supra* no. 16.

only give impetus to a progressive society.

Further, till the time the theory is statutorily incorporated, the courts can interpret the theory under various personal laws and provide adequate remedy to the aggrieved party. The courts have been vested with the power to interpret statues, and interpreting personal laws as well is also needed to ensure complete justice. In furtherance, there is a need for education in the judiciary as many judges in family courts still do not approve of divorces under any of the three theories of divorce. Judges are still of the notion that divorce must be given only in rare circumstances. The judicial academies should frequently educate judges about the changing social constructs and jurists' opinions. If there is no uniformity in judiciary, there can be no reform in law and justice.

We all are stakeholders in the situation, and so it is necessary that we all work together and understand what is needed and let go of the orthodox beliefs.

***

UNLEASHING ARTIFICIAL INTELLIGENCE VIS-À-VIS LEGAL AND ETHICAL DIMENSIONS IN INDIA

DR. RAMNEEK KAUR*

1.1. INTRODUCTION

Artificial Intelligence (AI) refers to the development of computer systems that can perform tasks that typically require human intelligence, such as problem-solving, decision-making, and language understanding. AI is a rapidly evolving technology that has the potential to revolutionize sectors, including healthcare, finance, and manufacturing industries worldwide, including various sectors in India. The development of AI also brings several legal and ethical challenges that need to be addressed by lawmakers and regulators. While AI offers numerous benefits, it also presents several legal challenges and concerns. In India, the legal framework around AI is still evolving, and there is a need for a comprehensive legal framework to regulate the development and deployment of AI systems. [1]

1.1. DEFINITION OF ARTIFICIAL INTELLIGENCE

Artificial Intelligence is often implemented using machine learning algorithms, which allow computers to learn and improve their performance over time without being explicitly programmed. AI can be defined as the development of computer systems that can perform tasks that typically require human intelligence, such as learning, reasoning, perception, and problem-solving.

In India, there is no specific law or act that defines AI. However, there are several laws and regulations that touch upon aspects of AI. For instance, the Information Technology (IT) Act, 2000, which is the primary law governing the use of digital technology in India, defines

*Assistant Professor, Amity Law School, Amity University Punjab, Mohali.

[1]Naik, Nithesh, *et al.* "Legal and Ethical Consideration in Artificial Intelligence in Healthcare: Who Takes Responsibility?" *Frontiers in Surgery*, Vol. 9, Jan. 2022, *available at:* https://doi.org/10.3389/fsurg.2022.862322 (Last visited on 26 June 2024).

"computer" as *"any electronic, magnetic, or optical device that can perform logical, arithmetic, or memory functions, and therefore encompasses computers that utilize AI technologies."*[2]

Additionally, the Digital Personal Data Protection Act, 2023, sets out guidelines for the collection, processing, and storage of personal data, which is often used to train AI systems. The Act also requires companies to obtain explicit consent from individuals before collecting their personal data and imposes penalties for violations of data protection standards.

1.2. LEGAL AND ETHICAL IMPLICATIONS

The rise of artificial intelligence (AI) has brought significant changes to various sectors in India. However, with the advent of AI, there have also been several legal and ethical implications that need to be addressed. AI has brought up numerous ethical and moral questions, making it crucial to regulate its use to ensure that it does not pose any harm to individuals or society as a whole[3].

One of the most significant ethical implications of AI in India is the potential loss of jobs. With AI being capable of automating tasks that were previously done by humans, it is feared that many people may lose their jobs. This raises the question of how to manage the transition to a world where AI is a significant player in the workforce. The ethical implications of AI also extend to issues of privacy and security. The use of AI in surveillance, for instance, raises concerns about privacy violations, which need to be addressed to prevent abuse of power by government or private entities.

Another legal implication that needs to be addressed in the use of AI in India. The use of AI for decision-making, for instance, raises questions of accountability and liability. In situations where AI is used to make decisions that have a significant impact on individuals or society as a whole, it is important to establish accountability for the outcomes of such decisions. This also requires

[2]"Cyber Law In India: IT Act 2000" *available at:* https://www.legalserviceindia.com/legal/article-836-cyber-law-in-india-it-act-2000.html. (Last visited on 22 June 2024).

[3] Marda, Vidushi "Artificial Intelligence Policy in India: A Framework for Engaging the Limits of Data-Driven Decision-Making." 37 *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences*, 2133, *available at*: https://doi.org/10.1098/rsta.2018 (Last visited on 12 August 2024).

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

establishing legal frameworks that enable individuals to seek legal recourse in case they are negatively affected by AI-generated decisions.

Certain ethical concerns also arise with the advent of AI about the bias and fairness of its decision-making processes. The algorithms used in AI systems can incorporate biases that may lead to discrimination against certain individuals or groups. This makes it essential to develop ethical guidelines that promote fairness and non-discrimination in the use of AI.

Another issue of the impact of AI is that on human rights in India. AI can be used to enhance human rights, such as improving healthcare, education, and access to information. However, it can also be used to violate human rights, such as the use of AI-enabled surveillance or facial recognition technology. The ethical and legal implications of AI in relation to human rights need to be carefully considered to ensure that AI is used in a manner that promotes and protects human rights in India.

There is the issue of transparency and accountability in the use of AI. The use of AI can often be opaque, making it difficult to determine how decisions are being made and who is responsible for those decisions. This raises concerns about accountability and transparency, which need to be addressed to ensure that the use of AI is transparent and accountable.

1.3. DATA PROTECTION AND PRIVACY IMPLICATIONS OF AI IN INDIA

The rise of Artificial Intelligence (AI) has revolutionized the way data is being collected, processed, and analyzed in India. However, with the growing use of AI, there have been concerns about data protection and privacy implications. India has been working on a comprehensive data protection framework, which culminated in the Digital Personal Data Protection Act, 2023. The Act aims to provide a legal framework for the processing of personal data and to protect the privacy of individuals. It defines personal data as any data that can be used to identify an individual, either directly or indirectly. The Act also establishes a Data Protection Authority (DPA) that will oversee the implementation of the Act and ensure the protection of personal data.[4]

[4] Mahawar, Sneha "Data Protection Laws in India." *iPleaders*, 3 Feb. 2023, available at: https://blog.ipleaders.in/data-protection-laws-in-india-2/ (Last visited on 26 May 2024).

AI systems rely heavily on data, which means that they have access to vast amounts of personal data. This raises questions about the protection of personal data and the privacy of individuals. One of the main concerns is that the use of AI could lead to the profiling of individuals and the creation of detailed profiles that could be used for discriminatory purposes.

To address these concerns, the Digital Personal Data Protection Act, 2023 has specific provisions that apply to the processing of personal data by AI systems. Under the Act, individuals have the right to be informed about the use of their personal data by AI systems. They also have the right to access their personal data and request that it be deleted or corrected. The law also requires AI systems to comply with certain data protection principles, such as the principle of purpose limitation, which requires that personal data be collected only for a specific purpose and not used for any other purpose.[5]

Apart from the Digital Personal Data Protection Act, 2023 there are also other laws and regulations that address data protection and privacy in India. The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, for instance, require companies to implement reasonable security practices and procedures to protect sensitive personal data. The rules also require companies to obtain the consent of individuals before collecting and using their sensitive personal data.

Similarly, the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 regulates the collection and use of biometric data for identification purposes. The act requires companies to obtain the consent of individuals before collecting their biometric data and to take reasonable security measures to protect the data.

In addition to the legal framework, there are also industry-specific guidelines that address data protection and privacy in India. The Reserve Bank of India (RBI), for instance, has issued guidelines on the use of third-party service providers for payment systems. The guidelines require

[5] Vidhi Centre for Legal Policy "Privacy Concerns with Emerging Technology and Their Redressal through PDP Bill." *Bar and Bench*, 4 March 2022, *available at:* https://www.barandbench.com/columns/privacy-concerns-emerging-technology-their-redressal-through-pdp-bill (Last visited on 26 May 2024).

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

companies to ensure that third-party service providers comply with the data protection and privacy requirements of the RBI.

Overall, while India has made significant progress in establishing a legal and regulatory framework for data protection and privacy, there is still a need to ensure that the framework is effectively implemented and enforced. The Data Protection Authority (DPA) established under the Personal Data Protection Bill, 2019 will play a crucial role in ensuring compliance with the provisions of the Bill and protecting the privacy of individuals.

1.4. IMPLICATIONS OF AI ON THE EMPLOYMENT SECTOR IN INDIA

The rise of artificial intelligence (AI) in the workforce has brought up several legal implications in the employment and labor sector in India. While AI is expected to bring about increased efficiency and productivity, it is also feared that it may lead to job losses and pose ethical concerns. One of the most significant implications of AI in the employment sector is the potential loss of jobs. With AI being capable of automating tasks that were previously done by humans, it is feared that many people may lose their jobs. This raises the question of how to manage the transition to a world where AI is a significant player in the workforce. The Indian government has recognized the need to reskill and upskill the workforce to ensure that individuals can adapt to the changing nature of work.[6]

Another significant implication of AI in the employment sector is the need to establish guidelines for ethical AI practices. AI systems can incorporate biases that may lead to discrimination against certain individuals or groups. This makes it essential to develop ethical guidelines that promote fairness and non-discrimination in the use of AI. The Indian government has also recognized the need to ensure that AI is used in a responsible and ethical manner and has taken steps to establish ethical frameworks for the use of AI.

[6] Deranty, and Corbin, "Artificial Intelligence and Work: A Critical Review of Recent Research from the Social Sciences." *AI and Society*, June 2022, p. 17, *available at:* https://doi.org/10.1007/s00146-022-01496-x. (Last visited on 23 May 2024).

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

There is also the issue of accountability and liability in the use of AI in the employment sector. In situations where AI is used to make decisions that have a significant impact on individuals or society as a whole, it is important to establish accountability for the outcomes of such decisions. This also requires establishing legal frameworks that enable individuals to seek legal recourse in case they are negatively affected by AI-generated decisions.

Another implication of AI in the employment sector is the potential for AI systems to replace human decision-making entirely. This raises questions about the role of humans in the workforce and the need to ensure that AI systems are designed to complement human decision-making rather than replace it entirely. It is also essential to ensure that AI systems do not lead to discriminatory or biased decision-making.

In terms of employment, AI also raises questions about the rights of workers in relation to the use of AI in the workplace. The Indian government has recognized the need to establish guidelines to protect the rights of workers in relation to the use of AI. These guidelines include ensuring that workers have access to training and reskilling programs to adapt to the changing nature of work and that workers are not subjected to discriminatory or biased decision-making[7].

There is also the issue of data protection and privacy in the use of AI in the employment sector. AI systems can collect and process large amounts of personal data, raising questions about how this data is collected, stored, and used. The Indian government has established legal frameworks, such as the Digital Personal Data Protection Act, 2023 to protect the privacy and security of personal data in the use of AI.

1.5. AI RELATED LIABILITY ISSUES

The use of AI in decision-making also raises questions of accountability and liability. In the absence of any specific law governing liability in relation to AI, the existing legal frameworks,

[7] Ghosh, Yashvardhan. "Impact of Automation on Indian Labor Laws." *TaxGuru Consultancy*, 23 April 2023, *available at:* https://taxguru.in/corporate-law/impact-automation-indian-labor-laws.html. (Last visited on 3 May 2024).

such as contract law and tort law, can be used to establish liability in cases where AI causes harm to individuals or society as a whole.

1.5.1 Causation

One of the primary challenges in establishing liability in relation to AI is the issue of causation. In cases where AI causes harm, it can be difficult to establish a direct link between the actions of the AI system and the harm caused. This is because AI systems are often complex and can generate outcomes that are difficult to predict or explain. As a result, it may be necessary to develop new legal frameworks that take into account the unique features of AI[8].

1.5.2. Control

Another challenge in establishing liability in relation to AI is the issue of control. In some cases, it may be difficult to determine who has control over the actions of the AI system. This is because AI systems can learn and adapt to new situations without human intervention. As a result, it may be necessary to establish legal frameworks that hold both the developers of AI systems and the users of such systems accountable for any harm caused.

In India, the Information Technology Act, 2000 (IT Act) is the primary legal framework governing liability in relation to AI. The IT Act provides for civil and criminal liability for a wide range of offenses, including unauthorized access, hacking, and data theft. However, the IT Act does not specifically address liability in relation to AI. As a result, it may be necessary to update the IT Act or introduce new legislation that specifically addresses the issue of liability in relation to AI.

In addition to the IT Act, other legal frameworks can be used to establish liability in relation to AI. For instance, contract law can be used to establish liability in cases where a contract between the developer of an AI system and the user of the system is breached. Tort law can also be used to establish liability in cases where the actions of an AI system cause harm to individuals or society as a whole.

[8] Bartneck, *et al*. "Responsibility and Liability in the Case of AI Systems." *Springer International Publishing*, 1 Jan. 2021, available at: https://link.springer.com/chapter/10.1007/978-3-030-51110-4_5 (Last visited on 3 June 2024).

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

1.5.3. Insurance

As the use of AI becomes more widespread, it may be necessary to develop new insurance products that specifically cover the risks associated with AI. This could include insurance products that cover the costs of any harm caused by AI systems, as well as insurance products that cover the costs of defending against claims of liability in relation to AI.

1.5.4. Product Liability

With the increasing use of AI in products and services, there is a need to establish liability frameworks that hold manufacturers and service providers responsible for any harm caused by AI-powered products or services. In cases where AI-powered products malfunction, for instance, causing injury or harm to users, it is crucial to establish liability for the harm caused and ensure that affected individuals receive compensation[9].

Similarly, there is the issue of liability for autonomous systems, such as self-driving cars, drones, and robots. As these systems become increasingly prevalent in India, it is essential to establish legal frameworks that determine liability in case of accidents or incidents caused by autonomous systems. For instance, in the case of a self-driving car causing an accident, should the liability be on the manufacturer, the owner, or the software developer?

1.5.5. Cyber crime

With the increasing use of AI in cybersecurity, there is a need to establish liability frameworks that hold individuals and organizations responsible for cybercrime committed using AI tools. This is crucial in preventing the misuse of AI in cybercrime, such as in the case of AI-powered phishing attacks or malware.

1.6. BIAS AND DISCRIMINATION IN AI ALGORITHMS IN INDIA

[9] Ghosh, Anindya "Product Liability Law In India: An Evolution." *IndusLaw*, 7 Aug. 2020, *available at:* https://www.mondaq.com/india/dodd-frank-consumer-protection-act/974270/product-liability-law-in-india-an-evolution (Last visited on 3 May 2024).

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

The use of artificial intelligence (AI) in various fields in India has brought immense benefits. One of the major concerns with AI is the potential for bias and discrimination in its algorithms. AI algorithms are designed to learn and make predictions based on patterns in data. However, if the data used to train the algorithm is biased or incomplete, it can lead to biased outcomes that can have significant negative impacts on individuals or groups. In this section, we will explore the issue of bias and discrimination in AI algorithms in India and the legal and ethical implications of such biases.[10]

1.6.1. The problem of bias and discrimination in AI algorithms

AI algorithms are only as unbiased as the data they are trained on. If the training data is biased or incomplete, the algorithm will learn and replicate that bias. This can lead to discriminatory outcomes in areas such as hiring, lending, and criminal justice. For example, if an AI algorithm is trained on data that includes historical hiring decisions that are biased against women or people of certain ethnicities, the algorithm may also make biased hiring decisions.

Similarly, if an AI algorithm is used to determine creditworthiness, and the data used to train the algorithm is biased against certain groups, such as people from low-income areas, the algorithm may also discriminate against those groups in credit decisions. This can lead to a perpetuation of existing inequalities and can have significant negative impacts on individuals and communities.

1.6.2. Legal and regulatory framework in India

In India, there are several laws and regulations that are relevant to the issue of bias and discrimination in AI algorithms. The most relevant of these are the Indian Constitution, the Information Technology Act, and the Digital Personal Data Protection Act, 2023.

[10] Atske, Sara "Worries about Developments in AI" Pew Research Center: Internet, Science & Technology, 16 June 2021, *available at:* https://www.pewresearch.org/internet/2021/06/16/1-worries-about-developments-in-ai/. (Last visited on 3 May 2024).

The Indian Constitution provides for the protection of fundamental rights, including the right to equality and non-discrimination. These provisions can be used to challenge the use of biased AI algorithms that discriminate against individuals or groups.

The Information Technology Act (IT Act) regulates the use of technology in India and provides for penalties for cybercrime. The IT Act is relevant to the issue of bias and discrimination in AI algorithms as it can be used to regulate the use of such algorithms and to provide legal remedies for those who are negatively impacted by them[11].

The Digital Personal Data Protection Act, 2023 has been recently passed by the Parliament, it aims to regulate the collection, use, storage, and processing of personal data in India. The Act includes provisions for the protection of individual rights and provides for penalties for violations of those rights. The Act is relevant to the issue of bias and discrimination in AI algorithms as it can be used to regulate the use of personal data in the training of such algorithms and to provide remedies for those who are negatively impacted by them.

1.6.3. Ethical considerations

In addition to legal and regulatory frameworks, there are also ethical considerations that must be taken into account when designing and deploying AI algorithms. The most important of these is the need to ensure that AI algorithms are fair and unbiased. This requires careful consideration of the data used to train the algorithm, as well as the design of the algorithm itself.

Another important ethical consideration is the need to be transparent about the use of AI algorithms. Individuals and communities impacted by AI algorithms must be informed about how they are being used and how decisions are being made. This includes providing explanations for the decisions made by the algorithm and providing opportunities for individuals to challenge those decisions.

[11] "Cyber Crimes and Information Technology Act" *available at:* https://legalserviceindia.com/legal/article-7974-cyber-crimes-and-information-technology-act.html (Last visited on 3 May 2024).

The issue of bias and discrimination in AI algorithms is a significant concern in India. The use of biased algorithms can perpetuate existing inequalities and can have significant negative impacts on individuals and communities. To address this issue, there is a need for a robust legal and regulatory framework that provides for the protection of individual rights and provides remedies for those who are negatively impacted by biased algorithms.

1.7. SECURITY AND CYBERSECURITY RISKS ASSOCIATED WITH AI IN INDIA

With the increasing use of AI in various sectors in India, the risk of security breaches and cyberattacks has become a significant concern. As AI systems rely on vast amounts of data, they are susceptible to security threats, making it crucial to address security and cybersecurity risks associated with AI. In this section, we will discuss the security and cybersecurity risks associated with AI in India and the legal and regulatory frameworks in place to mitigate these risks.[12]

1.7.1. Cybersecurity Risks Associated with AI

AI systems also pose various cybersecurity risks, including hacking, data theft, and phishing attacks. Cybercriminals can use AI to launch attacks such as spear-phishing, where AI is used to create convincing fake emails to trick people into revealing sensitive information. AI can also be used to launch DDoS (Distributed Denial of Service) attacks, which involve overwhelming a system with traffic to make it unavailable.

In addition, AI systems can also be used to steal sensitive information such as trade secrets and intellectual property. As AI systems become more sophisticated, they can learn to mimic human behavior, making it harder to detect when an AI system is stealing data.

1.7.2. Legal and Regulatory Frameworks

In India, several laws and regulations are in place to address security and cybersecurity risks associated with AI. The Information Technology Act, 2000, and the Information Technology

[12] Jain, Anmol. "Artificial Intelligence in Cyber Security - Impacts and Advancements" *Intellipaat*, 5 July 2021, *available at:* https://intellipaat.com/blog/artificial-intelligence-in-cyber-security/. (Last visited on 3 May 2024).

(Amendment) Act, 2008, are the primary laws governing cybersecurity in India. These laws provide for the protection of electronic data and prescribe penalties for cyber offenses.

In addition, the Reserve Bank of India (RBI) has issued guidelines for cybersecurity in the banking sector. These guidelines require banks to implement measures such as encryption, access controls, and risk assessments to prevent cybersecurity breaches.

The Ministry of Electronics and Information Technology (MeitY) has also developed a national cybersecurity strategy, which aims to build a secure and resilient cyberspace in India. The strategy includes measures such as creating a national cybersecurity architecture, establishing a cybersecurity research and development fund, and promoting cybersecurity awareness among citizens.[13]

The use of AI in India brings with it significant security and cybersecurity risks. To mitigate these risks, it is essential to develop legal and regulatory frameworks that promote the safe and secure use of AI. Laws and regulations governing data protection, cybersecurity, and intellectual property rights are crucial in this regard. The government and private sector must work together to address these risks to ensure that AI can be used safely and securely in various sectors in India.

1.8. GOVERNANCE AND REGULATORY CHALLENGES FOR AI IN INDIA

Governance and regulatory challenges for AI in India are critical aspects that need to be addressed to ensure the ethical and responsible development and deployment of AI systems. While AI has tremendous potential to improve various aspects of society, there are also risks associated with its use that need to be managed. In this section, we will explore the governance and regulatory challenges for AI in India, along with the relevant acts and laws.

One of the primary challenges of governing AI in India is the lack of a comprehensive regulatory framework. Currently, there is no single law or regulatory body that governs the development and deployment of AI systems in India. This has led to a fragmented approach to AI governance, where

[13] "National Cyber Security Strategy" *available at:* https://www.drishtiias.com/daily-updates/daily-news-analysis/national-cyber-security-strategy-1 (Last visited on 3 May 2024).

different government bodies and private organizations have their own guidelines and regulations. As a result, there is a lack of clarity and consistency in the regulation of AI in India.

The lack of a comprehensive regulatory framework for AI in India has also led to challenges in identifying and managing risks associated with AI systems. For instance, the use of AI in sensitive areas such as healthcare, finance, and national security poses significant risks, including data privacy violations, bias and discrimination, and cybersecurity threats. However, the absence of clear guidelines and regulations has made it challenging to identify and mitigate these risks effectively.[14]

Another challenge of governing AI in India is the rapid pace of technological change. AI is a rapidly evolving field, and new AI systems and applications are being developed at an unprecedented rate. This makes it difficult for regulators to keep pace with technological advancements and update regulations accordingly. As a result, regulations may become obsolete or inadequate, leading to regulatory gaps or inconsistencies.

Furthermore, the lack of technical expertise among regulators and policymakers is another significant challenge in governing AI in India. AI is a complex and technical field, and it requires specialized knowledge and skills to understand the potential risks and benefits of AI systems. However, many policymakers and regulators may not have the necessary technical expertise to make informed decisions about AI governance.

In terms of relevant acts and laws, there are several legal frameworks that are relevant to AI governance in India. The Information Technology Act, 2000, is a significant act that governs various aspects of the use of technology in India. The act provides for the protection of electronic records and the regulation of electronic transactions, including those involving AI systems. The act also provides for the establishment of the Indian Computer Emergency Response Team (CERT-In), which is responsible for the protection of critical information infrastructure in India.

[14] "Powering the Digital Economy: Opportunities and Risks of Artificial Intelligence in Finance" 21 *Departmental Papers*, 24 *available at:* https://doi.org/10.5089/9781589063952.087.A001 (Last visited on 3 June 2024).

In addition to these laws, there are also several guidelines and recommendations that have been issued by various government bodies and organizations. For instance, the Ministry of Electronics and Information Technology (MeitY) released a draft National Strategy for Artificial Intelligence in 2018, which outlines a roadmap for the development and adoption of AI in India. The document highlights the need for ethical and responsible AI development and deployment and calls for the establishment of a National AI Mission to coordinate AI-related activities in the country.[15]

Furthermore, the NITI Aayog, which is the government's policy think tank, released a discussion paper on the national strategy on AI in 2018. The paper proposes a multi-stakeholder approach to AI governance, with the involvement of government, industry, academia, and civil society organizations. The paper also emphasizes the need for ethical and transparent AI development and deployment and the importance of developing human resources and research capacity in AI.

In addition to the national strategy on AI, the Government of India has also set up a high-level committee on AI to develop a roadmap for the country's AI strategy. The committee comprises experts from various sectors, including academia, industry, and government, and is tasked with providing recommendations on the ethical, legal, and societal implications of AI. The committee's recommendations will guide the government's policy decisions on AI and inform the development of regulatory frameworks for the technology.

On the regulatory front, India has several laws and regulations that apply to AI development and deployment. For instance, the Information Technology (IT) Act, 2000, governs the use of technology in India and provides for the protection of personal data and information. The act also establishes the Cyber Appellate Tribunal, which has jurisdiction over appeals related to cybercrime.

In addition to the IT Act, India has also enacted the Digital Personal Data Protection Act, 2023, which aims to regulate the collection, use, and storage of personal data in the country. The law

15 Parsheera, Smriti "What's Shaping India's Policy on Cross-Border Data Flows" *available at:* https://carnegieendowment.org/2022/08/31/what-s-shaping-india-s-policy-on-cross-border-data-flows-pub-87769. (Last visited on 6 June 2024).

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

proposes the establishment of a Data Protection Authority to oversee the implementation of the legislation and the protection of individuals' privacy rights.

The Reserve Bank of India (RBI), which is the country's central bank, has also issued guidelines on the use of AI and machine learning in the banking sector. The guidelines require banks to ensure that their AI systems are transparent, explainable, and auditable and that they comply with regulatory requirements.

1.9. CONCLUSION

AI has enormous potential to transform various sectors in India, including healthcare, education, agriculture, and manufacturing. However, the technology also poses significant legal and ethical challenges that need to be addressed to ensure that it is developed and deployed responsibly.

The rise of AI in the employment sector in India has brought about several legal implications. While AI is expected to bring about increased efficiency and productivity, it is also essential to address the potential ethical concerns, establish guidelines for ethical AI practices, and protect the rights of workers in the use of AI.

The use of AI in decision-making raises questions of accountability and liability. In India, there are currently no specific laws governing liability in relation to AI. However, existing legal frameworks, such as contract law and tort law, can be used to establish liability in cases where AI causes harm to individuals or society as a whole. As the use of AI becomes more widespread, it may be necessary to develop new legal frameworks and insurance products that specifically address the unique challenges posed by AI.

The issue of liability related to AI in India is complex and multifaceted, requiring the establishment of legal frameworks that address different liability scenarios. These frameworks should ensure that affected individuals receive compensation for harm caused by AI-powered products or services and hold individuals and organizations responsible for cybercrime committed using AI tools. Additionally, these frameworks should ensure that liability for autonomous systems, such as self-driving cars, is established and that accountability for AI-generated decisions is determined.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

The Government of India has recognized the importance of AI governance and has taken steps to develop a national strategy for the technology. Regulatory frameworks and guidelines have also been established to regulate the use of AI in various sectors, such as banking, data protection, and cybersecurity. It is essential to continue monitoring the legal and ethical implications of AI as technology advances to ensure that it benefits society while minimizing any negative consequences.

ANALYSIS OF ARTICLE 8*BIS* OF THE ICC ROME STATUTE: ECONOMIC & CYBER SANCTIONS AS A CRIME OF AGGRESSION

Mr. Mehul Saravanan*

ABSTRACT

The marginal scope of this provision of law, that which determines those "kinds of crimes of aggression" which are under the jurisdiction of the ICC, is engrained in article 8bis (2) of the Rome Statute [1998] [1]. This article 8bis (2) of the Rome Statute [1998] follows a "List-System" of prescription i.e., it lists out a number of offences that is prescribed by the Rome Statute [1998] as a crime of aggression that is within the jurisdiction of the ICC. As such when prescribing the convictable offences, this provision for crime of aggression ought to be as broad in scope as possible. However the fact of the matter is that a list a system is such that it can only accommodate certain specific kinds of offences that will be recognized as a cognizable crime.

The crux of this research paper delves into the aggressive offence of "sanctioning" by the global states that come outside the scope of article 8bis (2) of the Rome Statute [1998] but that which, ought to be recognized as a "crime of aggression" by way of the signification of aggressive acts on a transnational level as described by the United Nations Charter of 1945[2]. Essentially in furtherance to this discourse, this research paper would propound that these "off-scope" type of sanction-based offences be brought within the jurisdiction of the ICC with regard to article 8bis (2) of the Rome Statute [1998].

Keywords: International Criminal Court, crime of aggression, sanctions, economic instability and cyber-attack.

* Student of Law, Tamil Nadu National Law University.

[1] Rome Statute [1998], International Criminal Court, Art. 8bis (2)

[2] Charter [1945], United Nations Organization

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

1. Introduction: Critically Analyzing the Concept of Crime of Aggression the UN Charter [1945] & Rome Statute [1998]

On 14 December 1974, the United Nations General Assembly adopted by consensus resolution 3314 (XXIX) annexing the Definition of Aggression which had been adopted by the fourth special committee[3]. The meaning of aggression by a State in the conventional sense is the illicit use of arms and warfare by a State against another State[4]. The Rome Statute [1998] of the International Criminal Court, the apex authority of law for major international criminal offences, defines the Crime of Aggression as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations"[5].

In the context of the 4 major criminal offences of international law[6] [i.e., genocide, crimes against humanity, war crimes and crimes of aggression], the crimes of aggression[7] is the criminal offence that is widest in its scope with regard to what constitutes as a crime in international law. The crime of aggression is one that needs to adjudged by the International Criminal Court [herein, referred to as ICC and that which is beyond the applicability of transnational law. It is relevant to note, that the tone of prescription with regard to what a crime of aggression is, is set by the paramount 1945 Charter of the United Nations Organization.

1.1. Crime of Aggression as per the Charter [1945] of the United Nations Organization

This is the first sub-provision of article 8^{Bis} of the Rome Statute [1998]. In the prescriptive sphere of the 1945 Charter of the United Nations, it has been mandated by article 2 of the Charter [1945] that "all member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner

[3] Elizebeth Wilmshurst, Definition of Aggression, [1974] United Nations General Assembly Resolution 3314 [XXIX]
[4] Erin Creegan, Justified Uses of Force and the Crime of Aggression, *Journal of International Criminal Justice*, Volume 10, Issue 1, March 2012, Pages 59–82, https://doi.org/10.1093/jicj/mqs010
[5] Rome Statute [1998], International Criminal Court, Art. 8^{Bis} (1)
[6] Rome Statute [1998], International Criminal Court, Art. 5
[7] Rome Statute [1998], International Criminal Court, Art. 5 (d)

inconsistent with the Purposes of the United Nations"[8] as per forth in the very article of the Charter [1945][9].

As per article 1 (2) of the UN Charter [1945], the member States of the United Nations Organization shall strive to take measures and cease to commit acts that are in contrary to universal peace[10]. The formulation of this provision is such that it is incrementlist in nature i.e., broad in scope so as to accommodate all dimensions of an antagonistic act by a State. As such while this definition of law does not explicitly prescribe or list out all the offences that shall be recognized as a "crime of aggression", it does encompass within its ambit all kinds of mala fide acts of pungency and hostility that was intended to cause detriment to an unsuspecting State. In contrast to the UN Charter [1945], the ICC Rome Statute [1998] narrows down the scope of all those offences that shall be recognized as an "adjudicatory crime" of aggression for the ICC to exercise jurisdiction.

1.2. Crime of Aggression as per the Rome Statute [1998] of the International Criminal Court

The unlawful nature of a crime of aggression has been established in article 5 of the Rome Statute [1998][11]. The meaning or description of what "aggression" amongst States is, has been defined in the entirety of article 8^{Bis} of the Statute [1998][12]. Given that these paragraphs of article 8^{Bis} are prescriptive in nature, the forms of inter-State aggression that comes under the jurisdiction of the ICC are those such offences that which are engrained in article 8^{bis} (2) of the Rome Statute[13]. As such and as aforementioned, it can be asserted that the Rome Statute [1998] in comparison to the UN Charter [1945], is relatively narrower in scope when it comes to defining the crime of aggression.

This article 8^{bis} (2) of the Rome Statute follows a "List-System" of prescription *i.e.,* it lists out a number of offences that is prescribed by the Rome Statute as a crime of aggression that is within the jurisdiction of the ICC. As such when prescribing the convictable offences, this provision for

[8] Charter [1945], United Nations, Art. 2 (4)
[9] Charter [1945], United Nations, Art. 1
[10] Charter [1945], United Nations, Art. 1 (2)
[11] *Supra Note 1*
[12] *Supra Note 6*
[13] Rome Statute [1998], International Criminal Court, Art. 8^{bis} (2)

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

crime of aggression ought to be as broad in scope as possible. However the fact of the matter is that a list a system is such that it can only accommodate certain specific kinds of offences that will be recognized as a cognizable crime.

In an implicative sense, when analyzing the provision of law of article 8^{Bis} (2) of the Rome Statute [1998], it is inferred that every act of aggression described in this provision is militant in nature. In other words, a contentious act such as "unwarranted sanctions" or other non-militant measures of pugnacious nature, is not regarded as an act of aggression that is to be adjudicated by the ICC. This conception put forth by the Rome Statute [1998] of the International Criminal Court is quite problematic in nature.

2. Evolution of the Utilization of Rogue Sanctions as a means of Inter-State Agitation

The universal conclusion that all countries of the World came to at the end of World War-II was that the use of arms and armory for the cause of conflict does not compare in importance to that of human life and property[14]. Political reasons have often been at the core of all kinds of wars of conflict[15] although, after World War-II all countries adopted what is a "pseudo-proactive" behavior wherein they began entering in an "arms race" so as to be prepared for an impending war[16].

This characteristic behavior of the nations of the world was a facet of the then existing global Cold War[17]. This lead to the initiation of a number "anti-war" and "anti-arms" international conventions and agreements such as Non-Alignment Movement [1961][18], Treaty on Non-Proliferation of Nuclear Weapons [1968][19], Anti-Ballistic Missile Treaty [1972][20], Convention on

[14] Cashman, Greg & Leonard C. Robinson, An introduction to the causes of war: Patterns of interstate conflict from World War I to Iraq, Rowman & Littlefield, 2021
[15] Boyce, Robert, and Joseph A. Maiolo, The Origins of World War Two: The Debate Continues, Bloomsbury Publishing, 2017
[16] Dick, James C, Strategic Arms Race [1957-61] - Who Opened a Missile Gap, The Journal of Politics, [1972], pp. 1062-1110.
[17] Brzezinski and Zbigniew, The Cold War and its aftermath, Foreign Affairs, 71 [1991], pp. 31
[18] Charter Committee Report, Non-Alignment Movement or NAM [1961]
[19] Treaty on Non-Proliferation of Nuclear Weapons [1968]
[20] Anti-Ballistic Missile Treaty [1972]

Conventional Weapons [1980][21], etc. These anti-arms movement have further, changed the landscape and nature of the means by which the countries of the World tussle with each other. With the tightened grip on militant means of altercations, countries have resorted to more incorporeal forms of warfare such as "sanctions".

The use of sanctions have become an integral tool for policymakers and international organizations to respond to various major geopolitical issues such as terrorism and conflict[22]. They are not considered as an act of belligerence or war[23]. They may be imposed against a State or a non-State actor (individual, rebel movement, political party) that does not respect its international commitments or when its behavior infringes on or threatens the international public order[24]. The provision of sanctions has be inscribed in **article 41** of the Charter [1945][25] of the United Nations. It is pertinent to note that while the UN Charter [1945] that while the UN Charter does not prohibit malicious use of non-militant means of agitation by a State, it does prohibit "any" and "every" act of aggression[26&27].

The use of sanctions by the States "outside" the UN forum, has become increasingly prominent. In the global book of World peace, the use of arms and ammunition for bending a country to another's will, is unequivocally prohibited[28]. Sanctions have become a masked or "veiled" form of weaponry for a dominant State. Sanction variants like "Economic Sanctions" do quite the same, if not more damage than a militant engagement such as a drone strike or gun-fire. On this regard, the act of rogue sanctions ought to be recognized as a major international crime of aggression under the Rome Statute [1998].

3. Rogue Sanctions as a Major International Crime of Aggression under the

[21] Convention on Conventional Weapons [1980]
[22] Jonathan Masters, What are Sanctions? Council on Foreign Relations [2019], What Are Economic Sanctions? | Council on Foreign Relations (cfr.org)
[23] Albert Camus, Sanctions (Diplomatic, Economic or Military), The Practical Guide to Humanitarian Law, Doctors without borders | The Practical Guide to Humanitarian Law (guide-humanitarian-law.org)
[24] *Ibid*
[25] *Supra Note 11*
[26] *Supra Note 16*
[27] Charter [1945], United Nations Organization, Art. 2 (4)
[28] *Supra Note 14*

Rome Statute [1998]

The conception of the Rome Statute [1998] of the definitive compass of the crime of aggression as prescribed in article 8^{Bis} (2) is lacking in scope. The "act of sanctions" on a State by other State(s) through a resolution of "economic or cyber-attacks" outside the United Nations Organization is an illicit act that should be considered as an improper act of aggression which shall be treated as a major international crime as per the International Criminal Law. Within article 8^{Bis}, the Rome Statute [1998] provides for judicial scrutiny of any military-based actions. As such any kind of militant sanction executed by a State without the permit of the United Nations Security Council would be persecuted by the ICC[29]. But the same cannot be said for all kinds of non-militant sanctions.

It is nonetheless, noteworthy to take into regard that there exist non-militant actions that also have a similar effect to that of militant actions. While sanctions have a militant aspect to it too as per the UN Charter [1945], this research paper shall confine itself to the non-militant aspects in light of the questions of law that this paper aims to address. Furthermore, it is a material consideration to note, that while article 8^{Bis} (2) of the Rome Statute [1998][30] does not provide for the ambit of non-militant sanctions as an act of aggression, **article 8^{Bis} (1)** of the Rome Statute [1998][31] refers to an act of aggression as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations"[32].

By the words "to exercise control to direct political action of a State" suffices to bring non-militant sanctions such as economic and cyber sanctions within the ambit of the crime of "aggression". Sanctions are one kind of a non-militant act of aggression that when intensified, may have the same effect as a militant act of aggression on an unsuspecting State. These could include inflation

[29] *Supra Note 7*
[30] *Supra Note 7*
[31] Rome Statute [1998], International Criminal Court, Art. 8^{Bis} (1)
[32] *Ibid*

of essential commodities[33], water-shortage, public chaos & turmoil due to bogues news[34], hunger[35], political corruption[36], restricted routes of travel[37], geographical confinement[38], etc. In context to the definition of "measures not involving armed forces" as put forth by article 41 of the UN Charter [1945][39], sanctions may be classified into 2 broad categories – **(1)** Economic sanctions and **(2)** Cyber Sanctions.

In both these 2 forms they possess what is a degree of "aggressiveness" that when utilized maliciously and immorally without UN mandate, may be criminalized as a major international crime of aggression since, they possess the same capacity to injure a State as to that of a militant sanction being that they target the very core of the Key Resultant Areas of a global State. When understanding the concept of a State imposing a sanction on another State, it is pertinent to note that the sanction imposed originates from both the former State as well as all his ally countries. This can be recognized as a form of "international bullying" given that it involves a number of States colluding together to economically, politically and socially destabilize an unsuspecting State.

As such it becomes pertinent that the apex International Criminal Law, accommodate for such forms of sanction as a legitimate crime of aggression that is to be subject to judicial scrutiny by the International Criminal Court.

3.1. Rogue Economic Sanctions as an International Crime of Aggression

In subsequence to the end of World War-II, the strategical utilization of sanctions-based measures that target the economy of a country had significantly increased. Economic sanctions are the most prominent form of sanctions imposed by the Security Council of the UN as a coercive instrument[40].

[33] Jerg Gutmann, Matthias Neuenkirch and Florian Neumeier, The economic effects of international sanctions: An event study, Journal of Comparative Economics, Vol. 51, Issue 4, [202] pp. 1214-1231
[34] Fehr, Ernst, and Bettina Rockenbach, Detrimental effects of sanctions on human altruism, Nature 422.6928 [2003], pp. 137-140
[35] *Ibid*
[36] *Ibid*
[37] Kwon, Ohyun, Constantinos Syropoulos, and Yoto V. Yotov, The extraterritorial effects of sanctions, [2022]
[38] *Ibid*
[39] *Supra Note 31*
[40] *Supra Note 36*

Outside the UN forum, sanctions are often used by "relatively developed countries" to coerce relatively under-developed countries fall into the former's ensnare of instability[41]. These forms of sanctions have quite often been used by countries such as the United States of America[42], European Union[43] and China[44] amongst other countries.

The nexus between a country's economic development and the standards of living is a well renowned conception. Additionally, it is to be noted that the quality of the economy also affects the extent to which the Government of the State can secure the rights and prosperities of the State citizens. It is essentially to be noted that an attack to the economy of the State will have the same ill effects to that of a militant attack. This "economic attack" or attack on economy by way of sanctions may come in various forms, some of them include:

(i) **Trade Restrictions:** Trade restrictions is a form of economic pressure whereby, the agitating State attempts to limit the economic resources of the unsuspecting State. These may come in the form of embargoes on specific imports thereby, hindering the targeted nation's access to vital resources or markets. These sanctions may pertain to one particular commodity [such as "oil sanctions" as used against Italy in 1935[45]] or, they may also pertain to sanctions on all kinds of vital resources and essentials. An example- of trade restriction based-sanctions was first utilized by the erstwhile League of Nations against Italy for their "supposed" territorial invasion of Abyssinia in the year 1935.

(ii) **Assets Freezing**: Asset freezes prevent entities from the targeted countries from accessing or transferring their financial assets held in the countries imposed with sanctions. This includes bank accounts, investments, and other financial holdings. This- was executed by the EU nations against Russia on anticipation of their militant activities in the country of Ukraine[46].

---

[41] Meghan L. O'Sullivan, Sanctioning "Rogue States", Harvard International Review, Vol. 22, Issue 2, [2000] pp. 3527

[42] *Ibid*

[43] Gurvich, Evsey, and Ilya Prilepskiy, The impact of financial sanctions on the Russian economy, Russian Journal of Economics 1.4, [2015] pp. 359-385

[44] Himmer, Michal, and Zdeněk Rod, Chinese debt trap diplomacy: reality or myth, Journal of the Indian Ocean Region 18.3, [2022] pp. 250-272

[45] G. Bruce Strang (2008) "The Worst of all Worlds:" Oil Sanctions and Italy's Invasion of Abyssinia, 1935–1936, Diplomacy & Statecraft, [2008] pp. 210-235

[46] BBC Reporter, What are the sanctions on Russia and have they affected its economy? [2024], British Broadcasting Company, What are the sanctions on Russia and have they affected its economy? (bbc.com)

(iii) **Boycott of Exported Goods**: Every country relies on the business of exports for improving the State of their economy. A nation's export prowess is a strong indicator of its economic quality. Robust exports generate foreign currency, which acts like fuel for growth. As such when there is a boycott of the sanctioned country's exports, the economy of that country suffers *for*, (1) there is a diminished rate of foreign currency that enters the flow of the economy and (2) the income *via* customs tax also reduces for the Tax Department which, is a major source of revenue for the Central Government. This form of sanctions was witnessed in 2012 when India and a number of SAARC nations attempted to boycott or, impose an anti-dumping and countervailing customs duty on Chinese products that were being exported to their States[47].

3.2. Rogue Cyber and Communication Sanctions as an International Crime of Aggression

The rogue versions of cyber sanctions are the most notorious forms of sanctions. Unilateral cyber sanctions basically involves the disablement of a State's inter and intra communication systems. Unilateral forms of cyber sanctions are that which includes a broader aspect of cyber-crimes such as cyber manipulation, cyber espionage and other forms of cyber-attack[48].

The main difference between cyber and conventional attacks is the lack of the exertion of kinetic force of the former[49]. In contrast to conventional kinetic attacks, cyber-attacks regularly do not cause damage through direct kinetic force, but rather indirectly through the alteration or destruction of data[50]. Nonetheless, cyber-attacks possess similar capacity to that of a militant attack with regard to intensity of damage inflicted upon an unsuspecting State.

Emergency services like fire departments, ambulances, and police would be severely hampered. Communication between government agencies and officials would be crippled. This could hinder their ability to respond to crises, manage essential services, and maintain public order. The ability to coordinate military operations, gather intelligence, and communicate with allies would also be

[47] Sharanya Manivannan, Are we being fair in boycotting products? [2020], The New Indian Express, Are we being fair in boycotting products? (newindianexpress.com)
[48] Ophardt and Jonathan, Cyber Warfare and the Crime of Aggression: The Need for Individual Accountability on Tomorrow's Battlefield, [2010]
[49] Kai Ambos, Cyber-Attacks as International Crimes under the Rome Statute of the International Criminal Court, [2010] Online Journal and Forum, International Criminal Law Debates, ICC Forum, Cyberwarfare Debate — When Might Cyber Operations Constitute Crimes Under the Rome Statute? (iccforum.com)
[50] *Ibid*

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

severely compromised. This could leave a country vulnerable to militant attack. The people would have difficulty accessing news, information, and updates on the situation. This lack of transparency could lead to the spread of misinformation, rumors and bogus news that could create public chaos[51]. The cyber sanctions can easily be recognized as a major international crime of aggression considering that cyberwarfare is, more narrowly the conduct of a cyber operation by *military* means in order to achieve *military* objectives[52].

3.3. Other forms of sanctions that are to recognized as an International Crime of Aggression

The meaning of "sanction", in its literal sense can be inferred with regard to a form of grant of permission. In furtherance to the functional approach, sanctions possess a degree of penal nature wherein it is meant to have punitive elements. A sanction imposed may come in many forms. While economic and cyber sanctions are in summary, the aggregate kind of sanctions that may be imposed on a State as per article 41 of the UN Charter [1945][53], the ambit of sanctions is wide in scope and that which transcends beyond the legislative framework of the United Nations Charter [1945]. This could include sanctions relating transportation, diplomatic relations etc.

Transport sanctions is a notorious form of sanctions that involves restricting transit lines and channels of a country. This form of sanction literally involves immobilizing a State from entering or leaving a country. While this is a form of economic attack, transportation sanctions bear entrapping connotations. This form of disablement of transit lines can agonize a State that is under-developed and that which is not self-reliant. Diplomatic sanctions involve the cruel ostracization of the sanctioned State's diplomats on international forums. This way the role and significance of the sanctioned State's rights and presence is disregarded so as to weaken it on a political level. This bears indirect connotations of political despotism and oppression.

4. Research Suggestions

In conclusion, any form of rogue sanctions imposed by a State or a group of States on another

[51] *Supra Note 59*
[52] Heather Harrison Dinniss, Cyber Warfare and the Laws of War [2012], 294
[53] *Supra Note 11*

unsuspecting State ought to be scrutinized by the law considering the mala fide and belligerent nature of the act and the objectives of the Rome Statute [1998] of the International Criminal Court. If such a revision of the current legislative framework is not propounded, the implications could mean that such "silent acts of latent aggression" shall devastate various non-self-reliant economies. It is pertinent to note that for such forms of indirect aggression, the Victim State's right to self-defense through militant means is prohibited.

This is again because non-militant means of agitation is not recognized as a crime of aggression as per the ICC Rome Statute [1998]. Therefore, in light of the aforementioned assertions it is thus argued, that article 8^{Bis} of the ICC Rome Statute [1998] ought to include non-militant means of international agitation such as sanctions, within the definitive scope of the "Crime of Aggression".

"Unravelling the Threads of Abatement: Navigating Legal Proceedings Post-Mortem"

Shubhi Singh*

ABSTRACT

The term "abatement" describes a circumstance in which the legal heirs or representatives of a deceased party may carry on the civil lawsuit if the party's right to sue remains and they pass away. However, if the circumstance or scenario where the right to prosecute does not hold up, the grievance will immediately terminate. The ability to sue after the decease of any party is a vigorous component of an essential aspect that affects the abatement because the action can continue if the right to sue endures the demise of the party.

In this case, the basic rule is that only live parties may bring legal action or file a lawsuit. The suit papers may be amended by replacing the deceased's representation or advocate if the person against whom the personal action is initiated passes away before the suit papers designate that person as the defendant. Abatement is nothing more than the end of a legal process for a reason unrelated to the qualities of the dispute. The passing of whichever party or the incomplete litigation are the most frequent explanations for abatement. There are more justifications for suit abatement. These reasons consist of the parties' faults, such as inability or incongruity, etc. These grounds include incompetence or misrepresentation on the part of the parties, improper court jurisdiction, early action beginning, termination of a corporation, and transmission of a party's curiosity in the case. Abatement is the term used to describe the premature or early conclusion of a lawsuit. The defendant may move to abate the act if the plaintiff's pleading does not specify why abatement is necessary. However, the defence will be dropped if the defendant doesn't make an abatement claim. Before announcing a decision, the court examines a request for the abatement of an act since the outcome of the plea will influence the court of law's final decision.

KEYWORDS- *abatement, legal representatives, lawsuit, decease, jurisdiction, defendant, decision, plea, court of law.*

* Student, NMIMS, Navi Mumbai.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

INTRODUCTION

Generally speaking, this means that a lawsuit or action can be brought both by and the main goal of the criminal justice system is to guarantee a fair and just trial. The Criminal Procedure Code (CrPC) is put into effect once a case has been given official notice. The process begins with the police receiving a complaint, after which they investigate the matter and make an arrest. Based on the results of the investigation, the police file charges against the suspects, which makes them the defendants in the case. The case then moves forward to a component court trial, where a full trial is overseen by the competent court. During the trial, witness statements are taken, discovered evidence is scrutinized, and the defendant's arguments are made.

Following the conclusion of the trial, the defendant is either found guilty or found not guilty by the court's final ruling. But it's important to remember that not every trial results in a conviction or an acquittal. Occasionally the trial terminates in the midst without a verdict indicating guilt or innocence. One situation when a trial stops in the middle without a verdict is when the defendant passes away. The ultimate goal of any criminal trial is to punish the defendant if they are found guilty of any crime. Nonetheless, the lawsuit must be halted if the defendant passes away before the entire trial is held. Prosecution of the case following the passing of the demise of the sole defendant is considered to be infructuous and meaningless.

Although the CrPC does not specifically provide for abetment of the trial after the demise of the single defendant, this is a well-established notion according to several Supreme Court and High Court rulings. The CrPC contains express provisions for aiding pleas after the demise of the defendant, even though there is no explicit provision for aiding the trial proceedings following the demise of the sole defendant in a case. Section 394[1] addresses aiding and abetting pleas. It states that pleas arising out of conviction should abet if the single defendant expires throughout the pendency of the trial.

One restriction applies to Section 394: the verdict of penalty cannot be mitigated. Even if the defendant passes away before the plea's final decision is made, the pleas resulting from the penalty

[1] Section 394 of CrPC

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

cannot be dismissed

According to section 70 of IPC[2],

Penalty leviable within six years, or during incarceration—Demise not to discharge property from liability.—The penalty, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the verdict, and if, under the verdict, the offender be liable to incarceration for a longer period than six years, then at any time previous to the expiration of that period; and the demise of the offender does not discharge from the liability any property which would, after his demise, be legally liable for his debts."

JUDICIAL PRECEDENTS AND CASE LAWS

The Supreme Court ruled in January 2020 in the case of **Ramesan (Dead) v. State of Kerala** [3]that a defendant person's plea about their demise under section 394 of the CrPC [4]may only be assisted if the conviction carries a verdict of either capital punishment or incarceration. Section 394 of the CrPC [5]prohibits the abatement of pleas resulting from penalty verdicts. Even in cases when the penalty consists of both a penalty and incarceration, the plea process goes unabated.

The SC convened that verdicts involving both incarceration and penalties ought to be regarded as penalties under section 394 of the CrPC[6], and as a result, these pleas need not be dismissed. The verdict of incarceration in the Ramesan v. State of Kerala case was upheld and declared impractical because the defendant had passed away. Additionally, the penalty imposed on the defendant, Ramesan, was upheld. The penalty will be deducted from Ramesan's possessions.

The court considered Section 394 under Cr.P.C. in **Lakshmi Shanker Srivastava Vs. State (Delhi Administration), (1979)**[7] **SCC 229.** The defendant was condemned to 18 months of incarceration and a penalty of Rs.200. The defendant expired during the plea, and the court argued that the plea abates and cannot be advanced with. The counsel for the defendant raised an introductory

[2] Section 70 of IPC
[3] 2020 Latest Caselaw 63 SC
[4] Section 394 of CrPC
[5] ibid
[6] ibid
[7] AIR 1979 SCC 229

objection, arguing that the appellant's demise during the petition abated the plea. The court also argued that if the plea did not abate, the right to property of the legal councils may be harmfully exaggerated, and the respondent State would consider setting aside the penalty verdict.

The Supreme Court considered the case of **Harnam Singh Vs. The State of Himachal Pradesh[8], (1975) SCC 343**. The defendant was imprisoned under Sections 5(1)(d) and 5(2) of the Prevention of Corruption Act, 1947[9], as well as Section 161 of the Indian Penal Code[10]. He was condemned to rigorous incarceration of two years and a penalty of Rs.300. The argument was raised that the plea would abate as regards the verdict of penalty since the dead was not condemned to pay a penalty only but was penalized with a composite verdict of incarceration and penalty. The court rejected this submission, stating that if by the decision under the plea, a verdict of penalty is imposed either singularly or in combination with a verdict of incarceration, the plea against conviction would be a plea from a verdict of the penalty within the connotation of Section 431. The court clarified that a plea from a command of verdict is generally directed against both the substantive incarceration and the penalty, but it does not cease to be a plea from a verdict of penalty only. The court firmly laid down that even if a verdict of penalty is imposed along with the verdict of incarceration under Section 431, such plea shall not abate. A similar expression, i.e., "except a plea from the verdict of penalty" has been used in Section 394 Cr.P.C[11]. Thus, the plea in the current case where the defendant was condemned for incarceration as well as for penalty has to be preserved as a plea against penalty and was not to abate.

Smt. Saroj Gupta W/O Dev Nath Gupta ... vs State Of U.P. And Ram Ratan Gupta[12] ... on 7 December 2005

The case revolves around Sri Ram Ratan Gupta, who filed a protest petition under Section 156(3) Cr PC.[13] The police examined the matter and submitted a concluding report uttering that no case

[8] AIR 1976 SCC 343
[9] Sections 5(1)(d) and 5(2) of the Prevention of Corruption Act, 1947
[10] Section 161 of IPC
[11] Section 394 of CrPC
[12] Smt. Saroj Gupta W/O Dev Nath Gupta ... vs State Of U.P. And Ram Ratan Gupta ... on 7 December, 2005 (indiankanoon.org)
[13] Section 156(3) of CrPC

was made in contradiction of the defendant. A protest petition was filed, but proceedings were delayed. The court directed the Chief Judicial Magistrate to choose the protest petition. The case was recorded as a complaint case by the Additional Chief Judicial Magistrate. The plaintiff's statement was recorded under Section 200 Cr.PC[14], and after his demise, the statement of witnesses under Section 200 and 202 Cr.PC was recorded only on 22.6.2005. The claimants contend that since the plaintiff is deceased and the offences for which the claimants have been summoned are cognizable offenses, the proceedings of the complaint are accountable to be released. They argue that the provisions of Section 302 Cr.P.C.[15] will come into play because no consent was sought from the Chief Judicial Magistrate for conducting the trial after the plaintiff's demise. However, the court finds this argument unpleasant, as the apex court has dealt with cases relating to matrimonial offence and the power of advocate executed by the plaintiff's heirs. The applicants also argue that the stage of Section 244 Cr.P.C. has not yet arrived, so the provisions of Section 245(2) Cr.PC[16]. will not come into play. The court finds that the passing of the plaintiff does not ipso facto put an end to a criminal prosecution, and there are no provisions for abatement of investigations and trials in the absence of the plaintiff. The court also acknowledges that the protest petition was filed after the submission of the final report on 19.4.2003, but the Magistrate failed to record the statement until a direction was given on 5.10.2004. The court ruled that there are no provisions for abatement of inquiries and trials in the absence of the plaintiff, despite abatement of plea or trial on the demise of the defendant. The case involved a protest petition filed after the final report was submitted, but the Magistrate failed to record the plaintiff's statement until a direction was given. The plaintiff died, and the statement of other spectators was only recorded on 22.6.2005. The court also ruled that the complaint could not be discharged absolutely because the plaintiff was dead. The court concluded that the proceedings could not be quashed solely because the plaintiff was dead.

The case of **Smt. Chhaya Yuvaraj Dahiwal and... vs State Of Maharashtra,[17] Thorugh... on 6 June 2023,** revolves around the allegations against the deceased government servant, Yuvraj

[14] Section 200 of CrPC
[15] Section 302 of CrPC
[16] Section 245(2) Cr.PC
[17] Smt. Chhaya Yuvaraj Dahiwal And ... vs State Of Maharashtra, Thorugh ... on 6 June, 2023 (indiankanoon.org)

Kashinath Dahiwal, for accumulating property disproportionate to his income. The deceased government servant was charged with the crime of abetment under Section 109 of the Indian Penal Code. The investigation revealed that the deceased government servant accumulated property worth Rs.49,08,291/-, which was uneven to his revenue. The defendant, being the wife and son of the deceased government servant, abetted the commission of the offense. The case was filed against the defendant in the Special Court designated under the Prevention of Corruption Act. The Hon'ble Apex Court in the case of State of Tamil Nadu.v/s. K.Nirmala,[18] reported in 2018, categorically held that the demise of the main defendant does not result in abatement of trial. The case involved both public and non-public servants under the laws of the Prevention of Corruption Act and Section 109 of the I.P.C[19]. The demise of the main defendant did not result in abatement of experimental against the co-defendant, who had been roped in by raising Section 109 of the I.P.C[20].

In a Calcutta High Court case, the applicant applied substitution of the heirs and legal councils of the late sole opposite party after setting aside the abatement. The application was filed in 1985 challenging order no. 38 dated 9th March 1985 by which a submission under Order 9 Rule 13 of the Code was allowed. The sole conflicting party died intestate on 1st July 2006. The applicant argued that the demise of the sole opposite party was not communicated to him or he was aware of the same. The learned Supporter, appearing for the substituted heirs, submitted that the ignorance of the demise is not a sufficient ground to set aside the abatement. The Apex Court in the case of **Union of India Vs Ram Charan & Others[21] reported in AIR 1964 SC 215** supported this contention. The court found that the claimant had made out an adequate cause and the application cannot be rejected for lack of necessary and proper particulars and/or explanations. The court should be liberal in considering the sufficiency of the cause and should not adopt the hyper-technical approach. The court found that the span of the delay is not the criterion, but the adequacy of the cause is. Even a delay of a longer period can be condoned if a reasonable cause is shown, while the delay of a briefer period cannot be overlooked in the nonappearance of a proper

[18] LAWS(MAD)-2012-3-496
[19] Section 109 under IPC
[20] ibid
[21] AIR 1964 SC 215

explanation. The delay in praying for setting aside the abatement is condoned, and the abatement of the revisional application is set aside. The advocates, as indicated in the cause title of this application, will be substituted in place of the deceased opposite party.

Katari Suryanarayana & Ors vs Koppisetti Subba Rao & Ors on 8 April, 2009[22]

The Supreme Court of India has ruled in a case involving a dispute between neighbors over the use of a lane. The appellants, who were entitled to use the passage, sought a decree for a mandatory and permanent injunction against the appellants. The respondent, who had purchased property in the disputed land, sought a decree for a decree for a temporary injunction. The court ruled in favor of the appellants, stating that they were entitled to a decree for both. The appellant filed a second plea against a First Appellate Court's judgment, which was dismissed due to the expiration of respondents No.3 and No.2 within the prescribed period. The appellant applied to the heirs and advocates of these deceased individuals in December 2006, but the High Court refused to condone the delay. The appellant's counsel argued that the High Court committed a serious fault and that the provision of Order 22 Rule 10A of the Code of Civil Procedure[23] mandated counsel to inform the Court about the deceased's passing. The respondents argued that the High Court correctly determined the issue. The court ruled that a plaintiff's failure to know the demise of the defendant within a rational period is not sufficient for setting aside the abatement of the suit. The period of limitation agreed upon for making such an application is three calendar months, under Art. 171 of the First Schedule to the Limitation Act.[24] The legislature had provided a further period of two months under art. 176 for an application to set aside the abatement of the suit, which could be justified by the Court in the demonstrated circumstances of the case. The postponement in making such applications should not be for reasons that indicate the plaintiff's negligence in not taking certain steps. The court must use its discretion in defining whether the facts and circumstances of a precise case amount to satisfactory cause or not. The appellants, co-sharers, were not in touch with their lawyers from 1999 to 2006, despite knowing the demise dates of respondent Nos.2 and 3. The High Court found no reasonable cause for delay, and the case is not fit for discretionary

[22] Katari Suryanarayana & Ors vs Koppisetti Subba Rao & Ors on 8 April, 2009 (indiankanoon.org)
[23] 0XXII R10A of CPC
[24] Art. 171 of the First Schedule to the Limitation Act

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

jurisdiction.[25]

Mithailal Dalsangar Singh And Ors vs Annabai Devram Kini And Ors on 16 September, 2003[26]

The case involved an agreement to sell property in favor of three individuals, Bharat Singh, Mithai Lal Singh, and Smt. Nirmala. The defendants filed a suit for specific performance of the agreement, which was granted an ad interim injunction. The deceased plaintiff's legal councils sought to be brought on record, but the defendants objected, arguing that the suit had abated. The learned Single Judge allowed the prayer for condonation of delay in moving the application and set aside the abatement. The Division Bench ruled that the prayer was only for setting aside the abatement of the suit for plaintiff no. 1, and the order was not bad in law. The plea is allowed and the Division Bench's judgment is set aside. Abatement results in rejection of hearing on the qualities of the case, but the plea for setting aside an abatement and dismissal should be considered copiously. The courts should adopt a justice-oriented approach, ensuring litigants have an opportunity to have a list determined on merits. The trial judge's finding on reasonable cause for consideration of delay in moving the application is given weight, and superior jurisdiction should not interfere with it. The trial judge found reasonable cause for consideration of delay in moving the application, which was not open for interference by the Division Bench. The Division Bench argued that the suit filed by three plaintiffs had abated in its entirety due to the demise of one of the plaintiffs and that no prayer was made by the two surviving plaintiffs or the advocates of the deceased plaintiff for setting aside the abatement in its total. The court deemed this approach to be too technical and resulted in injustice. The plea against the order of ad interim injunction passed by the learned trial Judge was not maintainable, as the application for bringing on record the advocates of the late plaintiff-respondent in the plea was not contrasting by the advocates or any of the co-plaintiffs. The court agreed with the view taken by the High Courts, and the pleas were allowed, with the judgment set aside and the order dated 29.3.2001[27] passed by the Learned Single Judge reinstated.

[25] ibid
[26] MANU/SC/0722/2003
[27] ibid

Balwant Singh (Dead) vs Jagdish Singh & Ors on 8 July, 2010[28]

The High Court of Punjab and Haryana at Chandigarh set aside a verdict passed by the Appellate Authority and Rent Controller, stating that the occupant had been deprived of the relationship between landlord and tenant and claimed label to the property. The tenant had denied the relationship and claimed title to the property. The tenant's expulsion petition was based on non-payment of the lease. The court granted leave to plea in 2006. During the pendency of the plea, the sole petitioner expired, and no steps were taken to bring the advocates of the deceased appellant on record. The application for condonation of delay was challenged, arguing that no reasonable cause or sufficient reason has been shown for the delay of more than two years. The court found that the applicants were callous and negligent in pursuing their plea and that they did not approach the court with unguilty. The court rejected the application, stating that the applicants were not aware of the pending plea and that they were not aware of the deceased's advocates. The High Court of Punjab and Haryana at Chandigarh[29] set aside a judgment passed by the Appellate Authority and Rent Controller, stating that the tenant had denied the relationship between landlord and tenant and claimed title to the property. The tenant had denied the association and claimed title to the property. The tenant's eviction petition was based on non-payment of rent. The court granted leave to plea in 2006. During the pendency of the plea, the sole petitioner died, and no steps were taken to bring the advocates of the deceased appellant on record. The application for condonation of delay was contested, arguing that no reasonable cause has been shown for the delay of more than two years. The court found that the applicants were callous and negligent in pursuing their plea and that they did not approach the court with clean hands. The court rejected the application, stating that the applicants were not aware of the pendency of the plea and that they were not aware of the deceased's advocates. The court has emphasized the importance of understanding and applying the words "reasonable cause" in Section 5 of the Limitation Act[30] in a reasonable, pragmatic, practical, and liberal manner. The courts are more generous about applications for setting aside abatement than other cases, as they tend to set aside abatement and resolve the matter on merits rather than dismiss the plea on the ground of abatement. The conclusive factor in the condonation of delay is not the extent of delay, but the adequacy of a satisfactory elucidation. The

[28] (2010) 8 SCC 685
[29] ibid
[30] Section 5 under limitation act

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

amount or degree of clemency to be shown by a court rests on the nature of the application and the shreds of evidence and conditions of the case. Courts view delays in making applications in a pending plea more leniently than those in the institution of a plea. Want of "meticulousness" or "inaction"[31] can only be credited to an appellant when something required to be done by him is not done. The court has consistently followed these moralities and has either allowed or declined to condone the postponement of filing such submissions. The merits of the application in hand were found to be unsatisfactory, with no defensible reason specified in the one-page application.

[31] ibid

EXPLORING THE INTERSECTION OF CHANGE IN CLIMATE AND HUMAN RIGHTS: A CASE STUDY OF THE MK RANJITSINH V. UOI THE HONORABLE SUPREME COURT JUDGMENT

Prapti Chaturvedi*

ABSTRACT

This paper examines the evolving interpretation of the right to life in the context of climate change, particularly from an Indian judicial perspective. Through an assessment of the landmark judgment of the hon'ble Supreme Court of India in *M.K. Ranjitsinh & Ors. v. Union of India & Ors*, this paper attempts to establish that the right to protection from the effects of climate change finds a place within Article 21 of the Indian Constitution on the right to life and liberty, highlighting its significance in recognizing climate change as a human rights issue. It focuses on the growing trend in global courts to make governments and big business liable for human rights violations resulting from climate impacts, such as basic rights like the right to life, good health, food, clean water, and sanitation. The paper presents cases from a myriad of jurisdictions to show how climate litigation is urging climatic action through a rights-based approach. Moreover, this paper looks at the role that the climate change litigation has played in raising awareness among the people. It claims that courts increase the media attention and, subsequently, sensitizing the human dimension of climate change on human rights and increasing demand for climate change solution. The research concludes that *climate change litigation* remains a very influential tool for advancing human rights and achieving an equitable and sustainable future. In demonstrating the mainstreaming of climate change as a human rights issue through legal channels, this paper argues that litigation is a means to combat effectively the challenges associated with climate change and to promote meaningful action.

KEYWORDS*: Right to Life, Climate Change, Environment, Supreme Court of India, M.K. Ranjitsinh Judgement, Sustainable Development, Climate Change Litigation, Human Rights, Environment.*

*Student of Law, Delhi Metropolitan Education, GGSIPU.

"Nature provides a free lunch, but only if we control our appetites"

-William Ruckelshaus

INTRODUCTION

One of the fundamental precepts of the Indian Constitution is the Right to life, which has since been interpreted in a more progressive manner by the courts to mean that everybody has a right to a clean and healthy environment. This paper deals with an extension of this right to mean protection from climate change, which is fast emerging as a threat to human life and well-being. Pioneering cases like the *MC Mehta vs Kamal Nath (2000)*[1] laid down the connection once again, reiterating that a polluted environment directly harms health, livelihood and well-being and, therefore undermines the right to life. Climate change has rapidly become to be conceived as a human rights issue, and the *MK Ranjitsinh v. UOI*[2] hon'ble Supreme Court Judgement is one of the example. The case comprised legal pleadings that demonstrated how environmental degradation and climate change resulted in the violation of fundamental rights. This is further sustained by the present international human rights frameworks, which include *the Universal Declaration of Human Rights and the Paris Agreement*, that provide the way forward on the link between the protection of human rights and the environment. In the future, human rights ought to be integrated into discourses on climate change in order to foster environmental justice and ensure the protection of vulnerable communities on the ground. It is on this basis that climate change, human rights, and environmental justice call for a more holistic approach toward the challenges of the environment. Public awareness and advocacy in human rights are key drivers of progress on human rights in climate change initiatives. An informed and empowered citizenry is better able to engage in accountability processes with their governments over commitment to the environment.

CLIMATE CHANGE

Climate change is characterized as a long-term change in the weather patterns and temperatures on average, usually attributed to human activities that cause these deviations since the mid-1800s.

[1] MC Mehta vs Kamal Nath, 2000 AIR SCW 2878

[2] Ranjitsinh v. UOI, 2024 INSC 280

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

Other factors contribute as well, though the prima cause of such change is through the combustion of fossil fuels: coal, oil, and gas. The process causes the emission of significant amounts of greenhouse gases into the atmosphere, such as carbon dioxide and methane. These gases trap heat, so the temperature increases—an effect called the *greenhouse effect*. Increasingly high global temperatures are associated with increased intensity and frequency of such *extreme weather events as storms and heatwaves, floods and droughts*. The melting of polar ice raises sea levels, enhancing pressure on coastal communities and ecosystems. Climate change poses a threat to *human health through infectious diseases, respiratory conditions, and heat-related illnesses.* Food and water security are threatened as erratic weather patterns keep affecting crop yields and availability of water. *Biodiversity loss* has accelerated since it became a problem for many species to adapt to rapidly changing habitats. The economic and social impacts of climate change are deep, ranging from infrastructural damage to agricultural loses to forced migration, thereby often exacerbating existing inequalities. Estimates point to urgent and coordinated global action *through — Transitioning to Renewable Energy Sources, Sustainable Land-Use Practice, Protection, and Restoration of Ecosystems, and International Cooperation on Implementation of Effective Policies and Adaptation Strategies*. The recent *Sixth Assessment Report by the Intergovernmental Panel on Climate Change*[3] has revealed the conclusion of the climate risks happening much faster and more extremely than it had been expected. 'Individual climate scientists have proven that humans are really the cause of almost all global heating over the last 200 years, with the Earth's average surface temperature now about 1.2°C warmer than in the late 1800s—marking the warmest period in at least 100,000 years.'[4]

According to the report of the IPCC, 3.6 billion people already live in areas most vulnerable to climate change. Low-income nations and small island developing states carry the most disproportionate health burdens, yet their share of global emissions is very minimal. In 2020, the seven largest emitters—China, USA, India, EU, Indonesia, Russia, and Brazil—accounted for about half of all global greenhouse gas emissions, proportionately showing greater responsibility lying with some countries. Mitigation of climate change requires prompt global collaboration. The *Paris Agreement* means that the average increase in global temperature should be well below 2°C

[3] WHO,https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health(last visited July 15, 2024)
[4] UN,https://www.un.org/en/climatechange/what-is-climate-change(last visited July15, 2024)

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

and as close to 1.5℃ as possible above pre-industrial levels. Other bases for action are set out in the *UN Framework Convention on Climate Change and the Sustainable Development Goals*, measures ambiences include transition to renewable energy supplies, sustainable land use, protecting and restoring ecosystems, and collaborating with international cooperation for policies that work best.

Climate control involves huge financial investments. Since 2009, developed countries have vowed to provide developing countries with $100 billion every year towards adaptation and transition to a greener economy beginning in 2020. Industrialized countries pledged to deliver such assistance from 2020. However, the scale is immense.

ROLE OF HUMAN RIGHTS LAW

Human rights law, as related to climate change, could, therefore, be of much more utility as a framework for establishing protection measures for persons and communities against global warming's adverse effects while at the same time ensuring that justice and equitability are insured in the solutions. The linkage of human rights, in relation to climate change, is ranged and was increasingly captured by international institutions and legal scholars. A number of human rights, especially the *rights to life, health, food, water, shelter, and self-determination, are most directly affected by climate change.* The *United Nations Human Rights Council* has underlined that blaming climate change threatens sustainable development and, in some situations, even human survival. These disproportionate effects on vulnerable populations—the poor in developing countries, indigenous people, or low-income classes—raise considerable justice and equity issues. Human rights law provides both a legal and a moral impetus for states to act on climate change. This branch of international law dictates that governments "respect, protect, and fulfill" the human rights of their subjects, including preventing foreseeable harm befalling them through climate change. It is an obligation incumbent on both uniquely state action and state action in cooperation with others, as elaborated in a raft of international documents such as the *UN Charter, the Universal Declaration of Human Rights, and the International Covenant on Economic, Social and Cultural Rights.* The human rights considerations provide invaluable guidance for policy and action in this regard to the problem usually are the ones who suffer the most today. It is embodied in the *United Nations Framework Convention on Climate Change*, which calls for action based

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

upon the equity principle and on common but differentiated responsibilities.

A rights-based approach to climate change emphasizes the protection of the most vulnerable, ensures participatory decision-making, and intends to pursue the stated objective in terms of getting to the root causes of vulnerability.

THE RELATION BETWEEN HUMAN RIGHTS AND CLIMATE CHANGE

'The United Nations Human Rights Council has taken, since 2008, various important initiatives to that end with a range of resolutions and actions. *Resolution 7/23, in 2008*, is the first Resolution that expressed concern about the effects of climate change on people around the world. Further steps were taken in subsequent resolutions, most notably, 10*/4 in 2009 and 18/22 in 2011*, which insisted that climate change had disproportionate effects on vulnerable populations and that human rights principles could be of use in strengthening climate change policy.'[5]

In addition to these resolutions, the Council has held panel discussions, seminars and mandated studies about the relationship of climate variation and human rights—the theme of the *2010 Social Forum* was chosen this issue, an evidence that international debate on the issue is of growing interest.

1. Climate change affects many human rights.
2. Most heavily affected are vulnerable groups.
3. Human rights principles can inform and improve climate policies.
4. The human rights impacts of climate change are an international issue; hence, cooperation at the same level is required to address them.

Beyond the Human Rights Council, a number of other UN bodies and mechanisms have contributed to the debate. The *United Nations Conference on Sustainable Development confirmed in 2012 that human rights are integral to achieving sustainable development.* These efforts have brought very key initiatives to the fore, including the *Geneva Pledge for Human Rights in Climate Action*, in which states committed to sharing best practices between human rights and climate experts.

The Rights of Future Generations

[5] OHCHR,https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf (last visited July 16,2024)

The rights of future generations—generations yet unborn—are not formally recognized in major human rights instruments, but a strong argument can still be provided based on both the human rights principle of equity and several multilateral environmental agreements. Among these are, for instance, the Stockholm Declaration and the Rio Declaration, which reiterate the protection of the environment for present and future generations, along with UNFCCC[6].

Right to Life

Climate change has killed hundreds of thousands of people, and it is growing—specifically in vulnerable communities where the Universal Declaration of Human Rights declares everyone shall have the right to life, liberty, and security. Weather-related disasters, similar to Typhoon Haiyan, engulfs massive loss of life; hence, it points to an existential threat from climatic change.

The Right of Self-Determination.

Article 1 of the UN Charter and the two International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights highlight the right of self-determination.

The Right to Food

Climate change is inimical to food security and impinges on the right to food so enshrined under the ICESCR. Even a 2-degree Celsius increase in global temperature could expose an additional 100-400 million people to the risk of hunger and add over 3 million deaths annually from malnutrition.[7]

The Right to Water and Sanitation.

Climate change is likely to reduce renewable water resources, increasing competition for water. Scarcity will bear down heavier on more vulnerable populations, with special impacts on women and girls who bear the responsibility for fetching water.

The Right to Health

Climate Change enhances the rates of nutrition disorders, vector-borne diseases, and respiratory disorders due to heat-amplified smog—all these those health effects will increase.

The Right to Housing

Weather-related events and rising sea levels undoubtedly jeopardize the right to adequate housing, displacing millions of individuals, and turning certain areas uninhabitable.

[6] United Nations Conference on the Human Environment, Declaration of the United Nations Conference on the Human Environment (Stockholm: United Nations, 1972).
[7] The World Bank, World Development Report 2010: Development and Climate Change (2010), pp. 4 – 5.

The Right to Education

Pressure from climate change forces families to take money away from schools and focus on basic survival by pulling children out of school too early[8]. Besides denying a right to education, this also has serious long-term developmental consequences.

GROWING TREND OF CLIMATE LITIGATION GLOBALLY

The number of court cases related to climate change more than doubles since 2017, with cases filed across the world. A new report published by the U*N Environment Programme and the Sabin Center for Climate Change Law* finds that climate change litigation is proving an increasingly important tool for both action and justice on climate. Key areas of litigation include human rights, non-enforcement of climate laws, keeping fossil fuels in the ground, corporate responsibility, and adaptation to climate impacts. Another important example from the lately famous cases is that *Australia has been ordered liable for human rights violations based on its climate policy affecting citizens from the Torres Strait Islands. The other is a case in Brazil's Supreme Court, ruling that the Paris Agreement is, in fact, a human rights treaty.The Dutch court compelling Royal Dutch Shell to cut by 45 percent CO2 emissions by 2030, the German court striking parts of its climate as unconstitutional, and a Paris court holding France liable for missing carbon budget goals.* In the past years, there have been landmark decisions from both the the *hon'ble Supreme Court of India and the European Court of Human Rights r*especting climate change as a critical matter of human rights. On 9 April 2024, the European Court pointed out *that Switzerland had violated Art. 1 and Art. 8 of the European Convention on Human Rights by not regulating its GHG adequately and lacking appropriate climate action*. The hon'ble Indian Supreme Court spelt out when it reaffirmed that the provision of a clean and healthy environment is part of the government's duties by making *Articles 48A and 51A(g) of the Indian Constitution justiciable*. These cases epitomize a global trend in which mainstreaming human rights into climate policies underlines the duty of states to protect citizens right to a healthy environment and paves the way for international cooperation on climate action*. Article 3(1) of the UNFCCC states that the parties to this convention*

[8] United Nations General Assembly, A/HRC/16/49/Add.2: Report of the Special Rapporteur on the right to food, Olivier De Schutter (2011), para. 13.

have the obligation to protect the climate system for the well-being of present and future generations, attaching a great deal of importance to equity and differentiated responsibilities, especially the commitment of developed nations to take the lead in mitigating the harmful effects of climate change.

State of the Netherlands V. Urgenda Foundation[9],the Supreme Court of the Netherlands has confirmed that lower courts ordered the Netherlands to cut greenhouse gases by at least 25% compared to 1990 levels by the end of 2020. The Court accepted Art. 2 and Art. 8 obligations under the European Convention on Human Rights to protection of the right to life and protection of private and family life and imposed tighter measures on the state in climate policy.

Sacchi, et al. V. Argentina, et al[10], Where it was reported that sixteen children from different countries had sent a communication to the Committee on the Rights of the Child alleging that several states, including Argentina, Brazil, France, Germany, and Turkey had violated their rights under the UN Convention on the Rights of the Child by not taking sufficient measures to reduce greenhouse gas emissions

RAISING AWARENESS

When people notice that there are possibilities of taking legal action, they are most likely to get involved. That would be advocacy with groups, protesting, or even supporting litigation efforts. Higher levels of citizen participation put pressure on the decision-makers and may result in more robust climate policies. For instance, cases like Ridhima Pandey v. Union of India (2017) and all the procedures initiated across France, Belgium, Sweden, Switzerland, Germany, the U.S., Canada, Peru, South Korea, and India act as catalysts for public engagement and awareness.

Part of media attention is necessary for that. High-profile court cases run media publicity, thereby diffusing knowledge and creating interest among the general public. This means that through media coverage, Climate Litigation case details reach far and wide, promoting public awareness and debates related to climate action. *The Paris Agreement, and namely Article 12, opens up the areas of education, training, public awareness, public participation, and access to information, which are legitimized by climate litigation efforts*.

[9] The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Urgenda Foundation, HR 20 December 2019, ECLI:NL:HR:2019:2006, para 2.1

[10] Committee on the Rights of the Child, Sacchi et al. v. Argentina (dec.), 22 September 2021, CRC/C/88/D/104/2019.

Why Climate Litigation is Crucial for India: Understanding M.K. Ranjitsinh and Others v. Union of India

Climate change is not a problem of only a global crisis; it's something India is very seriously concerned about, from biodiversity and air quality to water resources. Recently, during the regime of the outgoing Chief Justice of India, the hon'ble Supreme Court came out with a landmark judgment in the case of M.K. Ranjitsinh and Others v. Union of India, wherein human rights were significantly linked with climate change in what would serve as a precedent for future climate litigation in the country. The hon'ble Supreme Court went ahead to identify freedom from vigorous adversities of climate change as appended to Article 21 that includes the Right to Life and Article 14, which was a landmark decision, for it embedded climate change as an inherent part of basic human rights. The said case was about the protection of the critically endangered GIB from overhead power lines, which become a source of danger for the bird in view of its poor vision and large size.

The judiciary has often prevented intrinsic environmental laws, such as the Forest Conservation Act, 1980, from being deregulated or diluted. At a time when the trend of the government has been to bring in amendments that weaken such laws, the judiciary has turned out to be a safeguard to protect natural resources and biodiversity, cases like *Bombay Environmental Action Group v. State of Maharashtra*[11], the conservation of mangroves was argued as a strategy to combat sea-level rise and biodiversity loss. Similarly, in *Karnataka Industrial Areas Development Board v. Sri C. Kenchappa*[12].

RESEARCH METHODOLOGY

The doctrinal and qualitative approach adopted in this research focuses on primary and secondary material and scrutiny of legal documents pertaining to climate change and human rights in India. Judicial pronouncements from the Supreme Court, theories of environmental law, and international frameworks like the UDHR and Paris Agreement have been analyzed. Climate justice and sustainable development principles form a part of the comprehensive understanding provided by the study.

[11] Bombay Environmental Action Group v. State of Maharashtra, 2005(6)BOMCR574**.**
[12] Karnataka Industrial Areas Development Board v. Sri C. Kenchappa, AIR 2006 SUPREME COURT 2038

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

REVIEW LITERATURE

The area of applicability of human rights law to climate change harms has been the subject of intensive debate among scholars and lawyers in recent years. While there can be no question that climate change holds massive implications for human rights enjoyment, attribution of legal liability for such harms has proved highly problematic (OHCHR 2009. Some more recent decisions in this area—Urgenda case (2018)—give renewed weight to the increased acknowledgment of corporate human rights obligations for climate change, as codified in the UN Guiding Principles on Business and Human Rights. Those other recent legal efforts have targeted the climate impacts associated with the activities of fossil fuel corporations via efforts such as the Carbon Majors petition filed in 2015. Indeed, human rights redress usually avails narrow compensatory relief, but other than that, they are very effective tools for naming and shaming the violators of human rights—Savaresi & Hartmann, 2020.

METHOD

Primarily doctrinal legal research, analyzing relevant legal documents, including hon'ble Supreme Court judgments, scholarly articles on environmental law and climate change within the Indian context, and other pertinent legal texts.

CONCLUSION AND SUGGESTIONS

To conclude, the extension of the right to life under the Indian Constitution for protection from climate change is a far-reaching evolution in the relevant legal landscape. The judgments lay the role of the judiciary and admission of this multi-faceted challenge on issues relating to climate change. By recognizing climate change as a human rights issue, the Court has strengthened the obligations of the government to protect the climate and laid down a base for evolving stricter legal frameworks, which would still be consistent with the harmonization of environmental protection and human rights. The ruling is taken in support of international human rights instruments, including the Universal Declaration of Human Rights and the Paris Agreement, that underscore environmental protection and human rights as instruments of each other. The probable areas of focus could be:

1. *Environment Legislation Strengthening*

2. *Infrastructure that is Climate-Resilient*
3. *Mainstream Human Rights in Climate Change Action Plans*
4. *Stimulating Innovation and Green Technology*
5. *Litigate for Climate Justice, Raising Legal Literacy*
6. *Encourage the Participation of Respective Communities*
7. *Create International Network, Supporting Grassroots Movements*

N.N. GLOBAL AND THE EVOLVING LANDSCAPE OF ARBITRATION AGREEMENTS IN INDIA

Yoshita Manral*
Utkarsh Sharma**

ABSTRACT

Arbitration agreements are the backbone of an efficient and adaptable legal system, guiding parties through the resolution of disputes. Yet, when these agreements lack the necessary stamp duty, they cast a shadow of uncertainty over the arbitration process. This research paper explores the compelling issue of arbitration agreements within the Indian legal system and presents how the seemingly small matter of stamp duty can profoundly impact the enforceability and efficiency of arbitration. This research paper examines the recent landmark ruling in N.N. Global Mercantile Private Limited v. Indo Unique Flame Limited, which addresses arbitration agreements in unstamped contracts. The paper explores its practical implications and alignment with international norms. Advocating for a progressive arbitration regime, it proposes reforms to streamline procedures, reduce judicial intervention, promote institutional arbitration, and integrate technology for efficiency. It also calls for aligning India's arbitration framework with global standards, bolstering enforcement of arbitral awards, and fostering public-private partnerships. At its core, this research paper is a call to action, urging reforms to revitalize Indian arbitration law and ensure that arbitration remains a resilient and attractive mechanism for dispute resolution in India's evolving legal landscape.

KEYWORDS – Unstamped arbitration agreements, UNCITRAL Model Law, Separability doctrine, Kompetenz-Kompetenz principle, Stamp Act 1899.

*Student of Law, Asian Law College, Noida, U.P.
** Student of Law, Asian Law College, Noida, U.P.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

1. INTRODUCTION

In the respected courts of law, where people settle disagreements and fairness is important, arbitration agreements are key to making our legal system work smoothly and flexibly. An arbitration agreement, at its core, is an agreement between parties to settle their disputes through arbitration, outlining the rules and procedures governing the process. It is, in essence, the blueprint for the resolution of potential conflicts. Yet, when these agreements don't have the required stamp duty, legal uncertainty arises. The unstamped arbitration agreements might not seem important at first, but they raise a crucial question: Can an arbitration agreement without the proper stamp count as a legal contract? This question is like a crossroads where the fairness of arbitration and the rules of the law meet. To find the answer, we need to explore the arbitration laws in India.

2. UNDERSTANDING ARBITRATION AGREEMENTS

Arbitration, a method of dispute resolution, holds a prominent position in India's legal landscape. As Lord Denning once wisely remarked, 'Arbitration provides not just a "via ad solution" (path to resolution), but a "porta and iustitiam expedite et flexible" (gateway to expeditious and flexible justice). In simpler terms, arbitration is like an alternative road to resolving conflicts, one that allows parties to choose their guide, so to speak, and solve their disputes in a way that suits them best. Defined under Section 2(a) of the Arbitration and Conciliation Act, 1996, it involves the settlement of diss outside traditional courts, offering parties a more expeditious and flexible alternative.[1] This Act, the cornerstone of arbitration in India, presents a comprehensive legal framework governing arbitration agreements. The Act is a comprehensive law that covers all aspects of arbitration, from the formation of the arbitration agreement to the enforcement of the arbitral award. An "arbitration agreement" is at the heart of this process, as defined under Section 2(b) of the act as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".[2]

Relevant Sections of the Act:-

Section 7- This section sets out the formal requirements of an arbitration agreement. An arbitration

[1] The Arbitration and Conciliation Act, 1996, s. 2(a) (Act 26 of 1996).
[2] The Arbitration and Conciliation Act, 1996, s. 2(b) (Act 26 of 1996).

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

agreement must be in writing and must be signed by the parties. It may be contained in a separate agreement or a clause in a contract.[3]

Section 11- This section gives the parties the freedom to agree on the procedure for the appointment of arbitrators. If the parties fail to agree on a procedure, the Act provides a default procedure.[4]

Section 34- This section deals with the enforcement of arbitral awards. An arbitral award is enforceable in a court of law as if it were a decree of the court.[5]

Section 8- This c sets out the grounds on which an arbitral award may be set aside by a court of law.[6]

In the broader legal framework governing arbitration agreements, Section 89 of the Code of Civil Procedure (CPC) encourages alternative dispute resolution methods, including arbitration, in civil cases. This promotes efficiency and expediency in resolving disputes. Yet, as we delve deeper, the legal narrative takes a twist. Section 3 of the Indian Stamp Act of 1899 casts a shadow over the proceedings.[7] It demands that specific legal documents, including arbitration agreements, bear the mark of legitimacy through proper stamping. The consequences of neglecting this duty are laid bare in Section 33,[8] which grants authorities the formidable power to seize unstamped documents, akin to a legal guillotine hanging over the proceedings. But that's not all. The plot thickens even further when we consider Section 35 of the Indian Stamp Act.[9] This section empowers authorities to recover the unpaid stamp duty along with a financial penalty, effectively making parties pay for their failure to adhere to the stamping requirements. The consequences now encompass both legal and financial consequences, especially when the stakes are high.

In the context of India's legal framework governing arbitration agreements, it's vital to consider the Limitations Act of 1963. This act establishes a critical time frame, allowing parties a limited three-year window to challenge an arbitral award. Moreover, the Appointment of Arbitrator by the Chief Justice of India Scheme, 1996, further bolsters the structure of arbitration proceedings in India. Under this scheme, the judge of India holds the authority to appoint arbitrators, stepping in

[3] The Arbitration and Conciliation Act, 1996, s. 7 (Act 26 of 1996).
[4] The Arbitration and Conciliation Act, 1996, s. 11 (Act 26 of 1996).
[5] The Arbitration and Conciliation Act, 1996, s. 34 (Act 26 of 1996).
[6] The Arbitration and Conciliation Act, 1996, s. 8 (Act 26 of 1996).
[7] The Indian Stamp Act, 1899, s. 3 (Act 2 of 1899).
[8] The Indian Stamp Act, 1899, s. 33 (Act 2 of 1899).
[9] The Indian Stamp Act, 1899, s. 35 (Act 2 of 1899).

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

when parties cannot reach a consensus and bolstering arbitration's credibility.

But Within the arbitration agreements in India lies a critical concern—unstamped arbitration agreements. These are agreements designed to settle disputes through arbitration but lack the essential stamp duty mandated by the Indian Stamp Act of 1899. An unstamped arbitration agreement refers to a contractual arrangement between parties to settle disputes through arbitration that has not been appropriately stamped by the Indian Stamp Act of 1899. In the context of Indian law, stamping legal documents, including arbitration agreements, is a legal requirement to ensure their validity and enforceability. When an arbitration agreement lacks the necessary stamp duty, it is considered "unstamped," raising questions about its legality and enforceability under Indian law. But what remains intriguing is the absence of a dedicated section or clause in the Arbitration and Conciliation Act, 1996, specifically addressing unstamped arbitration agreements. The consequences of unstamped arbitration agreements are not explicitly defined in the Act. This gap raises questions about the enforceability of such agreements, potentially leading to legal disputes and uncertainties. This creates ambiguity in the legal landscape. It will introduce confusion in both the legal arena and the relationships between the parties involved. In the legal field, these agreements can create ambiguity, especially when they escalate to the apex court. With no clear legal guidelines in place, judges and legal experts grapple with diverse interpretations, casting uncertainty over the treatment and enforceability of such agreements. Beyond the courtroom, parties who initially engage in unstamped arbitration adaptables may find themselves embroiled in confusion and disputes. Doubts regarding the agreement's legality and enforceability can affect the hips between these parties. Furthermore, this situation can create an uneven playing field, with one party, particularly if legally savvy, potentially exploiting the absence of stamp duty to their advantage. This inequality can cause progressive arbitration regimes to exacerbate disputes, undermining the core principles of arbitration, which are efficiency and predictability. Thus, the inconsistency in how different courts handle unstamped arbitration agreements makes the process of resolving disputes even more complicated and confusing.

As we bring our in-depth examination of the complex situation surrounding unstamped arbitration agreements in India, our focus naturally shifts to the international framework and prompts a pertinent question: What do international regulations and conventions have to offer in terms of guidance and resolution regarding unstamped arbitration agreements? Our across-borders beyond borders, seeking insights from a global perspective to shed light on this multifaceted legal issue.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

3. INTERNATIONAL PERSPECTIVES ON UNSTAMPED ARBITRATION AGREEMENTS

In the international arena, arbitration stands out as the preferred method for resolving cross-border disputes, thanks to its remarkable flexibility, impartiality, and robust enforcement mechanisms. However, the validity and enforceability of these agreements often hang in the balance, contingent on strict procedural requirements, notably the need for proper stamping. Unstamped arbitration agreements can raise complex issues related to their enforceability and may significantly impact international arbitration proceedings. In the case of international arbitration, the enforceability of unstamped arbitration agreements depends on the applicable legal framework and the jurisdiction where enforcement is sought. Some countries may take a strict stance, insisting on compliance with formal requirements, including stamping, as a prerequisite for enforceability. This poses a challenge for parties to international contracts who may not be fully aware of or compliant with the stamping requirements in various jurisdictions. Such rigid approaches can lead to uncertainty and potential disputes regarding the validity of the arbitration agreement itself. Conversely, other jurisdictions may adopt a more pragmatic approach, emphasizing the substance of the arbitration agreement rather than its form. These jurisdictions may recognize unstamped agreements if they meet the essential requirements for a valid arbitration agreement under the New York Convention,[10] such as the agreement's written form and the parties' mutual consent to arbitration. This approach aligns with the pro-arbitration stance adopted by many countries seeking to promote arbitration as an efficient means of dispute resolution. The leading international arbitration bodies, such as the International Chamber of Commerce (ICC) and the International Centre for Dispute Resolution (ICDR),[11] prioritize substance over form and generally accept unstamped arbitration agreements if they meet essential criteria, such as the clear intention of the parties to arbitrate and the existence of a written agreement, consistent with the New York Convention and Geneva Convention.

Unstamped arbitration agreements wield a broader influence in international arbitration than just

[10] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) *available at* https://www.newyorkconv1ention.org/english (last visited on 20 June 2024).
[11]International Centre for Dispute Resolution, "Clause Drafting" *available at* https://www.icdr.org/clauses (last visited on 20 June 2024).

their enforceability. It can affect the efficiency and credibility of the arbitration process. Unresolved disputes over the validity of an arbitration agreement can lead to costly and time-consuming jurisdictional challenges, causing delays and escalating the overall cost of arbitration proceedings. Additionally, it may undermine the perceived reliability of arbitration as a dispute resolution mechanism in international commerce, potentially discouraging parties from choosing arbitration to resolve their disputes. Furthermore, the issue of unstamped arbitration agreements underscores the need for harmonization and clarity in international arbitration laws and practices. Efforts to promote uniformity in the interpretation and enforcement of arbitration agreements, such as the UNCITRAL Model Law on International Commercial Arbitration,[12] can mitigate the uncertainties surrounding unstamped agreements. The Model Law, which has been adopted by many countries, emphasizes the pro-arbitration approach and recognizes the importance of substance over form.

Turning to the comparative analysis of Indian arbitration laws with international arbitration laws, it is evident that India has made significant strides to harmonize its approach with global standards. Its legal framework is widely regarded as modern and notably pro-arbitration. The Indian Arbitration and Conciliation Act, 1996 (the "Arbitration Act") is based on the UN Model law International Commercial Arbitration (the "Model Law"), which is one of the most widely adopted arbitration laws in the world. This alignment between India's arbitration laws and the Model Law represents a significant step toward adhering to global standards. Additionally, India's accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards reaffirms its commitment to international arbitration norms. This positions India as a contributor to the global objective of promoting arbitration as a dependable means of resolving cross-border disputes. What further resonates India's commitment to international arbitration norms is the supportive stance taken by its judiciary. An exemplary illustration of this support is found in the landmark case of Bharat Aluminium Co. Ltd. V. Aluminium Corporation of China Ltd. (2012),[13] wherein the Supreme Court of India ruled that the Arbitration Act should be interpreted in a manner consistent with the Model Law. This judicial interpretation not only reaffirmed India's dedication to aligning its arbitration laws with international benchmarks but also emphasized the imperative

[12] United Nations Commission On International Trade Law, "International Commercial Arbitration" *available at* https://uncitral.un.org/en/texts/arbitration (last visited on 21 June 2024).
[13] Bharat Aluminium Co Ltd v Aluminium Corporation of China Ltd (2012) SCC OnLine SC 693.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

of maintaining uniformity in arbitration practices.

Recent judgments, especially the revised seven-judge bench decision, have sparked important questions. These rulings prompt us to consider whether India's dedication to international arbitration norms will remain steadfast amid evolving interpretations. As India's legal system evolves, it's important to understand these decisions and their effects on arbitration. The next section will explore these changes and explain how they shape the enforceability and efficiency of arbitration agreements in India.

4. CASE STUDY – N.N GLOBAL MERCANTILE PRIVATE LIMITED V INDO UNIQUE FLAME LTD AND OTHERS

4.1 Background of the Case

The case of N.N. Global Mercantile Private Limited v. Indo Unique Flame Ltd. and Others[14] revolves around the enforceability of arbitration agreements in contracts that are not properly stamped, a matter that has seen conflicting rulings in the past. The genesis of this legal debate can be traced back to the SMS Tea Estates (P) Limited v. Chandmari Tea Company (P) Limited (2011) decision,[15] where a two-judge bench of the Supreme Court held that an arbitration agreement within an unstamped contract could not be acted upon. This ruling established a precedent that an unstamped contract, being legally incomplete, invalidated the arbitration agreement contained within it. In response to such rulings and to minimize judicial interference in arbitration, the Law Commission of India recommended amendments to the Arbitration and Conciliation Act of 1996. Consequently, Section 11(6A) was introduced in 2015,[16] restricting courts to only examining the existence of an arbitration agreement when appointing arbitrators, thus aiming to streamline the arbitration process.

Despite this, the Supreme Court in Garware Wall Ropes Limited v Coastal Marine Constructions and Engineering Limited (2019) reaffirmed that an arbitration agreement in an unstamped contract does not legally exist and cannot be acted upon until the contract is adequately stamped.[17] This decision reinforced the view that the validity of the arbitration agreement was intrinsically tied to

[14] NN Global Mercantile Private Limited v Indo Unique Flame Ltd and Others (2023) SCC OnLine SC 1666.
[15] SMS Tea Estates Pvt Ltd v Chandmari Tea Co Pvt Ltd (2011) SCC OnLine SC 974.
[16] The Arbitration and Conciliation Act, 1996, s. 11(6) (Act 26 of 1996).
[17] Centrotrade Minerals and Metal Inc v Hindustan Copper Ltd (2017) 2 SCC 228.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

the stamping of the contract. However, a significant shift occurred with the N.N. Global Mercantile (P) Limited v. Unique Flame Limited (2021) ruling,[18] where a three-judge bench of the Supreme Court held that the non-payment of stamp duty was a curable defect and did not invalidate the underlying contract. This interpretation suggested that an unstamped contract could still be enforceable, provided the stamp duty was paid subsequently.

The legal landscape shifted once again when a five-judge bench in NN Global 2 Case (April 2023),[19] by a narrow 3:2 majority, declared that the previous decision was incorrect. They held that an unstamped contract was unenforceable, thereby reinstating the view that such contracts lacked legal validity until duly stamped. This ruling had broad implications, leading to the matter being referred to a seven-judge bench for a more inconclusive resolution.

4.2 Issue

The key issue was whether an arbitration agreement is invalid or unenforceable if the underlying contract is unstamped or insufficiently stamped.

4.3 Petitioners' Arguments

The petitioners argued that Section 11(6A) of the Arbitration Act explicitly limits the court's role to examining the existence of an arbitration agreement without delving into the adequacy of the stamping. They contended that the five-judge bench's decision in the NN Global 2 Case effectively nullified the intent of Section 11(6A), which aimed to reduce judicial intervention in arbitration proceedings. According to the petitioners, the arbitration act only permits the court to verify the presence of an arbitration agreement and not scrutinise the underlying contract for stamp duty compliance. The petitioners also emphasised that the arbitral tribunal should have the competence to rule under its own jurisdiction, including issues related to the stamping of the contract. They argued that the non-obstante clause in Section 5 of the Arbitration Act, which restricts judicial intervention, should be harmonised with the provisions of Respondent's. Furthermore, they maintained that the requirement for stamping does not render a contract void but is merely inadmissible as evidence until the necessary stamp duty is paid. This, they argued, is a grave defect and should not affect the validity of the arbitration agreement itself.

4.4 Respondent's Arguments

[18] NN Global Mercantile (P) Limited v Unique Flame Limited (2021) 4 SCC 379.
[19] NN Global Mercantile (P) Limited v Unique Flame Limited (2023) 7 SCC 1.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

The respondents countered that the examination by the court under Section 11(6A) should not be confined to merely confirming the existence of an arbitration agreement. They argued that the court must also assess the validity of the agreement, which includes ensuring that the contract is properly stamped as per the Stamp Act. The respondents highlighted that Section 33 of the Stamp Act mandates courts to impound any unstamped or insufficiently stamped documents, and such documents cannot be admitted as evidence or acted upon until the mandatory stamp duty and penalty have been settled. Furthermore, the respondents concurred that the decision in the NN Global 2 Case correctly emphasised that an unstamped contract is not enforceable, aligning with the objective of the Stamp Act to secure state revenue. They argued that the principle of separability, which treats the arbitration agreement as distinct from the main contract, overrides the mandatory requirements of the Stamp Act. The respondents maintained that ensuring the stamping of the contract is essential to upholding the validity, information, and ability of the arbitration agreement.

4.5 Observations of the Supreme Court

The Supreme Court's seven-judge bench began by addressing the fundamental issue of whether an arbitration agreement embedded in an unstamped or insufficiently stamped contract is legally valid and enforceable. The Court revisited several prior decisions to elucidate the evolving judicial stance on this matter. One critical observation pertained to Section 35 of the Stamp Act, which explicitly states that any instrument chargeable with duty shall not be admitted in evidence or acted upon unless it is duly stamped. The Court noted that while this provision renders an unstamped document inadmissible as evidence, it does not necessarily make the document void or void ab initio. Instead, the defect of non-stamping is curable upon payment of the requisite stamp duty and any applicable penalties. This distinction between admissibility and voidness became a cornerstone of the Court's reasoning.

The Court further emphasised the principle of separability, which asserts that an arbitration agreement is independent of the underlying contract in which it is contained. This principle, recognised under Section 16 of the Arbitration and Conciliation Act, allows for the arbitration clause to survive even if the main contract is challenged on grounds such as non-stamping. By underscoring this principle, the Court reinforced that the arbitration agreement could be valid and enforceable independently of the main contract's compliance with stamp duty requirements. Additionally, the Supreme Court examined the doctrine of "Kompetenz-Kompetenz," which grants

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

the arbitral tribunal the authority to determine its own jurisdiction, including issues related to the validity of the arbitration agreement. This doctrine, enshrined in Section 16 of the Arbitration Act, further supports the view that stamping issues can be addressed by the arbitral tribunal rather than necessitating judicial intervention at the initial stages of appointing arbitrators. In analysing the scope of judicial intervention under the Arbitration Act, the Court noted that the insertion of Section 11(6A) aimed to streamline the arbitration process by limiting court interference to the mere examination of the existence of an arbitration agreement. This legislative intent was driven by a desire to foster a more arbitration-friendly environment in India, reducing delays and promoting efficiency. The Court recognised that extending the court's role to scrutinise the stamping of contracts would be contrary to this objective.

Moreover, the Court emphasised the need for a harmonious construction of the Arbitration Act, the Stamp Act, and the Indian Contract Act, 1872. The Arbitration Act seeks to promote efficient and minimal judicial intervention in arbitration, while the Stamp Act aims to secure revenue for the state. The Court observed that these objectives could be balanced by ensuring that non-stamping does not void the arbitration agreement but rather delays its enforceability until the requisite stamp duty is paid.

4.6 Conclusion of the Judgment

After a thorough analysis, the Supreme Court concluded that arbitration agreements contained in unstamped or insufficiently stamped contracts are indeed enforceable. The Court ruled that while such contracts are inadmissible as evidence under Section 35 of the Stamp Act until properly stamped, this defect is curable. Therefore, non-stamping does not render the contract void or void ab initio but only temporarily unenforceable until the necessary stamp duty is paid. The Court also clarified that objections regarding the stamping of the contract do not fall within the scope of determination under Sections 8 or 11 of the Arbitration Act, which deal with referring disputes to arbitration and appointing arbitrators. Instead, the role of the court under these sections is confined to confirming the prima facie existence of an arbitration agreement. Any issues related to the stamping of the contract should be addressed by the arbitral tribunal as part of its jurisdictional competence.

This landmark ruling effectively overruled the previous decisions in the NN Global 2 Case, SMS Tea Estates Case, and parts of the Garware Case that suggested an unstamped contract could not support an arbitration agreement. By doing so, the Supreme Court reinforced the principle of

minimal judicial intervention in arbitration, aligning with global best practices and promoting India as a favourable arbitration destination. The judgement also underscores the importance of harmonising various statutes to uphold the efficiency and integrity of the arbitration process while ensuring compliance with revenue laws like the Stamp Act. By clarifying that the requirement for stamping does not invalidate an arbitration agreement, the Court has provided much-needed clarity and certainty for businesses and legal practitioners, fostering a more robust arbitration framework in India.

5. A COMPREHENSIVE ANALYSIS AND IMPLICATIONS OF THE JUDGMENT

The seven-judge bench ruling in N.N. Global Mercantile Private Limited v. Indo Unique Flame Ltd. and Others is a landmark decision that has significant implications for arbitration in India. This judgement clarified that arbitration agreements within unstamped or insufficiently stamped contracts are still valid and enforceable, provided the stamp duty is paid. By resolving this long-standing ambiguity, the Supreme Court has brought much-needed clarity and certainty to arbitration proceedings. This ruling is particularly important for businesses and legal practitioners, who now have a clear understanding that procedural defects related to stamping do not invalidate arbitration agreements. This promotes greater confidence in arbitration as a reliable and effective method of dispute resolution.

One of the critical impacts of this judgement is the reduction of judicial intervention in arbitration proceedings. The Court emphasised that issues related to stamping should be addressed by the arbitral tribunal rather than the courts. This aligns with the broader goal of the Arbitration and Conciliation Act, which is to minimise court involvement and expedite the arbitration process. By limiting the role of courts to determining the existence of an arbitration agreement, the ruling helps streamline arbitration proceedings and reduce delays. This is a significant development in India, where the judiciary is often overburdened with a high volume of cases, and it will make arbitration a more attractive option for dispute resolution. The judgement also emphasises the harmonious construction of the Arbitration Act, the Stamp Act, and the Indian Contract Act. This approach ensures that the objectives of these statutes are met without conflict, fostering a more coherent legal framework. This balance is essential for the smooth functioning of arbitration proceedings, reducing potential legal hurdles that parties might face. The clarity provided by this ruling will encourage more businesses to opt for arbitration, knowing that procedural issues like stamping can

be remedied without jeopardising the enforceability of their agreements.

Looking ahead, this judgement is expected to have a positive impact on the arbitration landscape in India, particularly for micro, small, and medium enterprises (MSMEs). Arbitration is often preferred by MSMEs due to its cost-effectiveness and speed. The Indian Institute of Arbitration's initiatives to enhance the arbitration process for MSMEs, coupled with this judgement, will make arbitration more accessible and efficient for smaller enterprises. This will enable MSMEs to resolve disputes quickly and cost-effectively, further encouraging their participation in arbitration. Internationally, this judgement aligns India's arbitration framework with global standards, particularly those set by the United Nations Commission on International Trade Law (UNCITRAL). By upholding principles like the separability of arbitration agreements and the arbitral tribunal's authority to rule on its own jurisdiction, the ruling reinforces India's commitment to global best practices in arbitration. This alignment is crucial for attracting foreign businesses and investors who seek reliable and efficient dispute resolution mechanisms. The enhanced perception of India as a favourable destination for arbitration will likely attract more international arbitration cases, boosting the country's profile in the global arbitration community.

The Supreme Court's systematic and balanced approach to interpreting conflicting statutes sets a strong precedent for future arbitration proceedings, both domestic and international. By ensuring that general laws do not overlap or conflict with special laws like the Arbitration Act, the Court has created a robust legal framework that is easily adoptable by parties and arbitrators. This approach is expected to facilitate smoother arbitration proceedings and foster greater confidence in India's arbitration system. The judgement's clear and balanced interpretation of conflicting statutes will make the arbitration process more predictable and reliable, encouraging more cross-border transactions and agreements.

6. TOWARDS A PROGRESSIVE ARBITRATION REGIME: KEY RECOMMENDATIONS

The Supreme Court’s landmark ruling in N.N. Global Mercantile Private Limited v. Indo Unique Flame Ltd. and Others has laid a robust foundation for the arbitration landscape in India, pivotal for positioning the country as a global hub for arbitration. To build on this progress and ensure India’s emergence as a leading arbitration destination, several key recommendations can be proposed. Firstly, amending the Arbitration and Conciliation Act, 1996 (Arbitration Act) to

explicitly state that procedural issues such as stamping should not invalidate arbitration agreements is essential. Clear guidelines are necessary to swiftly address procedural matters, ensuring arbitration proceedings commence promptly without unnecessary delays. Reducing judicial intervention in arbitration proceedings, as highlighted by the N.N. Global judgement is another critical step. While the ruling limits judicial involvement to determining the existence of an arbitration agreement, strengthening Section 5 of the Arbitration Act to curtail judicial overreach is imperative. Additionally, empowering institutions such as the Indian Council of Arbitration (ICA) and the Mumbai Centre for International Arbitration (MCIA) to administer cases effectively crucial.[20] Furthermore, government incentives, like tax benefits or subsidies, can incentivize entities to choose institutional arbitration, thereby enhancing efficiency and credibility while promoting the adoption of globally recognised arbitration practices.

Tailoring arbitration rules to the specific needs of micro, small, and medium enterprises (MSMEs), a critical sector of India's economy, is essential. Adopting specialised arbitration rules, similar to those introduced by the Indian Institute of Arbitration and Mediation (IIAM), can expedite processes, reduce costs, and simplify procedures for MSMEs.[21] This initiative would significantly enhance access to justice for smaller enterprises, support economic growth, and facilitate timely dispute resolution. Notably, ensuring the quality and competence of arbitrators is fundamental to the effectiveness of arbitration. Establishing a national accreditation body for arbitrators, similar to the Chartered Institute of Arbitrators (CIArb), can standardise qualifications and uphold high standards in arbitration.[22] Mandating continuous professional development (CPD) courses and regular training programmes for arbitrators will keep them abreast of evolving legal and procedural developments, thereby enhancing their reliability and competence in resolving disputes.

Moreover, the integration of technology can revolutionise arbitration by improving efficiency and accessibility. Promoting virtual hearings, e-filing of documents, and digital case management systems is crucial. Amending the Arbitration Act to explicitly recognise and facilitate technological advancements in arbitration proceedings would streamline processes, particularly in

[20] Mumbai Centre for International Arbitration, "Users Council" *available at* https://mcia.org.in/users-council/ (last visited on 23 June 2024).
[21] ADR Services, "ADR Services" *available at* https://www.arbitrationindia.com/adr.html (last visited on 23 June 2024).
[22] Chartered Institute of Arbitrators, "Ciarb | Rules" *available at* https://www.ciarb.org/dispute-services/rules/ (last visited on 23 June 2024).

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

the post-pandemic era where remote interactions have become prevalent, ensuring swift and effective dispute resolution. Effective enforcement of arbitral awards is critical for arbitration's credibility. Narrowly construing the grounds for challenging awards under Section 34 of the Arbitration Act, in line with international standards, is imperative. Introducing stricter timelines for the disposal of enforcement applications can prevent undue delays and bolster confidence in arbitration as a reliable dispute resolution mechanism, further enhancing India's arbitration framework.

Aligning India's arbitration framework with global best practices is essential for enhancing its international reputation. Ratifying and implementing international treaties and conventions, such as the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention), can bolster India's standing in the global arbitration arena. Furthermore, public-private partnerships (PPPs) can play a pivotal role in advancing arbitration infrastructure and services in India. Collaborations between the government, arbitration institutions, and private sector entities can foster the development of world-class arbitration facilities. Encouraging private sector investments in arbitration technologies and facilities through supportive policies can create an environment conducive to arbitration's growth, reinforcing India's arbitration ecosystem. Lastly, raising awareness about arbitration's benefits and educating stakeholders are crucial for its widespread adoption. Government-led awareness campaigns, inclusion of arbitration in law school curricula, and conducting workshops and seminars on arbitration can disseminate knowledge and best practices among legal professionals and businesses. These initiatives will promote arbitration as a preferred method for resolving disputes, contributing to India's emergence as a leading arbitration destination.

By implementing these comprehensive recommendations, India can further enhance its arbitration regime, making it more efficient, accessible, and aligned with international standards. These proactive measures will not only strengthen India's arbitration framework but also solidify its position as a preferred destination for resolving commercial disputes globally.

7. CONCLUSION

In conclusion, the Supreme Court's pivotal ruling in N.N. Global Mercantile Private Limited v. Indo Unique Flame Ltd. and Others marks a significant milestone in India's arbitration landscape, setting forth a progressive framework that addresses longstanding challenges and aligns with

international best practices. This landmark judgment clarifies that procedural defects, such as stamping issues, do not invalidate arbitration agreements, thereby bolstering the enforceability and reliability of arbitration as a preferred method for resolving commercial disputes. Moving forward, India stands poised to enhance its arbitration regime by implementing key recommendations. These include streamlining procedural requirements to minimize delays, reducing judicial intervention to promote arbitration autonomy, and promoting institutional arbitration to improve efficiency and credibility. Moreover, aligning India's arbitration framework with global standards, strengthening enforcement mechanisms for arbitral awards, and fostering public-private partnerships (PPPs) will further bolster India's arbitration ecosystem. By increasing awareness, educating stakeholders, and promoting arbitration as a cost-effective and expeditious dispute resolution mechanism, India can consolidate its position as a preferred arbitration destination.

In essence, the N.N. Global judgment not only reaffirms India's commitment to arbitration but also underscores its readiness to adapt to evolving global practices. With proactive reforms and strategic initiatives, India can manoeuvre through the evolving landscape of arbitration agreements, ensuring equitable justice, economic growth, and international credibility in commercial dispute resolution.

BIBLIOGRAPHY:

1. "Arbitration and ADR - Chapter 2 - Arbitration Agreement" Manupatra, *available at* http://student.manupatra.com/Academic/Abk/Arbitration-and-ADR/CHAPTER-2.htm (last accessed June 23, 2024).

2. "Arbitration And Conciliation Act, Indian Stamp Act, curative petition, SS Rana & Co." Live Law, *available at* https://www.livelaw.in/law-firms/law-firm-articles-/unstamped-arbitration-agreement-arbitration-and-conciliation-act-indian-stamp-act-curative-petition-ss-rana-co-245351 (last accessed June 22, 2024).

3. "Arbitration Clauses In Unstamped Agreements Enforceable: Supreme Court 7-Judge Bench Overrules 'NN Global' Decision" Live Law, *available at* https://www.livelaw.in/top-stories/arbitration-clauses-in-unstamped-agreements-enforceable-supreme-court-7-judge-bench-overruled-nn-global-decision-244387 (last accessed June 22, 2024).

4. “Future of arbitration is already here”: CJI Dr. DY Chandrachud at UK Supreme Court" SCC Times, *available at* https://www.scconline.com/blog/post/2024/06/07/future-arbitration-already-here-cji-dr-dy-chandrachud-uk-supreme-court/ (last accessed June 23, 2024).

5. "Harnessing the power of Artificial Intelligence in Arbitration: A comprehensive analysis of Indian jurisprudence" Bar and Bench, *available at* https://www.barandbench.com/law-firms/view-point/artificial-intelligence-arbitration-analysis-indian-jurisprudence (last accessed June 24, 2024).

6. "ICC International Court of Arbitration® - ICC - International Chamber of Commerce" ICC, *available at* https://iccwbo.org/dispute-resolution/dispute-resolution-services/icc-international-court-of-arbitration/ (last accessed June 24, 2024).

7. "India is undoubtedly going to be a centre for international arbitration in the future: Constantine Partasides explains why" Bar and Bench, *available at* https://www.barandbench.com/interviews/india-is-undoubtedly-going-to-be-a-centre-for-international-arbitration-in-the-future-constantine-partasides-explains-why (last accessed June 22, 2024).

8. "Indian Institute of Arbitration & Mediation" Arbitration India, *available at* https://www.arbitrationindia.com (last accessed June 23, 2024).

9. "N.N. Global III: Supreme Court Performs the Balancing Act by Passing the Stamping Baton to Arbitral Tribunals" SCC Times, *available at* https://www.scconline.com/blog/post/2023/12/15/n-n-global-iii-supreme-court-performs-the-balancing-act-by-passing-the-stamping-baton-to-arbitral-tribunals/ (last accessed June 21, 2024).

10. "Roadmap to Legality and Enforceability of Unstamped Arbitration Agreements" Bar and Bench, *available at* https://www.barandbench.com/law-firms/view-point/roadmap-to-legality-and-enforceability-of-unstamped-arbitration-agreements (last accessed June 23, 2024).

11. "STAMPING OF ARBITRATION AGREEMENTS: UNRAVELLING THE ENFORCEABILITY SAGA'S FINAL VERDICT" Manupatra, *available at* https://articles.manupatra.com/article-details/ (last accessed June 21, 2024).
12. "Unstamped Arbitration Agreements: Awaiting the Light at the End of the Tunnel" SCC Times, *available at* https://www.scconline.com/blog/post/2021/08/02/unstamped-arbitration-agreements/ (last accessed June 24, 2024).
13. "Validity of an Unstamped Arbitration Agreement | Seven-Judge Bench hears arguments against the decision in NN Global - Supreme Court Observer" Supreme Court Observer, *available at* https://www.scobserver.in/journal/validity-of-an-unstamped-arbitration-agreement-seven-judge-bench-hears-arguments-against-the-decision-in-nn-global/ (last accessed June 21, 2024).

PARADIGM SHIFTING FROM CARBON MARKET TO GREEN ECONOMY: ECONOMIC & ENVIRONMENTAL SUSTAINABILITY

Shubhangi Khandelwal*

ABSTRACT

"...within the next couple of decades atomic energy would play an important role in the economy and the industry of countries and that, if India did not wish to fall even further behind the industrially advanced countries of the world, it would be necessary to take more energetic to develop this branch of science..."

- Homi J. Bhabha, Chairman, AEC (1948-1966)[1]

Abstract:

In view of projected energy demands, today's global pattern of energy supply is not sustainable. There is a solid international consensus that fossil fuels are the main source of energy supply. In fact, in India also, almost 90% of the total energy supply is heavily dependent on the fossil fuels that must be controlled as their use adversely affects the atmosphere through emissions of greenhouse gases along with other noxious gases and toxic pollutants.

With the world waking up, India is to realize the need for 'green' energy to meet its ever-gaping energy needs,[2] up to some extent nuclear power is recognised as the solution to overcome the problem of environmental pollution. Also, we will see in future that it is not effective only for environmental aspect but also for technological, policy and market aspects. Though the nuclear power is not completely problem free but have major role in contributing to the goals of sustainable development. For its entire energy chain from fuel production to waste disposal, it has limited emissions of greenhouse gases and other pollutants.

The potential of nuclear power is to generate energy by mitigating the external factors such as the societal costs of climate change, environmental damage, and health effects. And the economic competitiveness of nuclear power would radically change the financial environment in escalating

*Assistant Professor, ICFAI Law School, ICFAI University, Jaipur.

[1] NAWNEET VIBHAW, ENERGY LAW & POLICY IN INDIA 93 (1st ed. 2014).

[2] IPCC FOURTH ASSESSMENT REPORT, (2007 ed.).

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

manner which will help to gain the economic sustainability.

This paper will review that how the evidence base for climate change is building up, what the impacts of climate change might be, and how we are beginning to explore the policies and measures which will be needed to make transition to a low carbon economy. So, in this way, it will try to cover a range of low carbon technologies from renewables through nuclear. Apart from this, this paper will focus on the regulatory framework of nuclear safety globally as well as by Indian perspective also.

International working groups and other programmes in areas of nuclear power plays a critical role in coordinating actions and covering the whole range of energy issues. The researcher tries to cover-up the working groups, programmes and conventions with which India is in collaboration to attain the systematic nuclear power approach.

At last, this paper is going to deal with the challenges and issues which the nuclear community is facing in regard to the availability of nuclear power as a viable option in meeting the energy requirements of the next century.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

Introduction:

Energy plays an important role in improving the quality of life as it leads to the growth in industrialization, growth in sectors like services, agriculture, transportation and information management. It is an important indicator of the economic growth. In more measurable terms we can say that use of energy by its citizen is one such good indicator of the growing prosperity of that nation.

If we speak about India, it is one of the fastest developing nations in the world that requires sustainable, cheap and uninterrupted supply of energy to keep pace with the rest of the world. The requirement of energy in India is directly proportional to its population and growth rate. An analysis of energy resources all over the world resulted to the major contribution of the Oil, Coal and Natural gas in the energy supply in the shorter period of time (around five years) as well as in longer span of time period (around twenty years). unlike the whole world, in India also degradable resources like coal, oil or gas nuclear plant use uranium as raw material plays an important role in contribution in relation to supply of energy. The contribution from renewable resources and nuclear energy although increased but not in the same proportion.

Why there is need for Nuclear energy?

No doubt that Indian coal is an important element in India's energy basket but it suffers from many inefficiencies, poor quality and more importantly greater source of pollution. For the growth of overall and economic development by generating energy from fossil fuels at the cost of environment could be termed as stupid act. Because as we all know, the burning process of fossil fuels results out to emission of CO2 which is a greenhouse gas in nature causing global warming that is not only harmful to the atmosphere but also to the species living on the earth. The catastrophic effect of fossil fuels, their exhaustible nature and absence of any alternatives gives way to evolution of the nuclear energy in the upcoming future.

Growth in the exploitation of the hydro energy is almost stagnating. There are two reasons which forced the gradual shift towards nuclear energy, firstly; due to the long gestation periods of large hydro projects which take long time for construction and secondly; Global warming emissions which are produced during the installation and dismantling of hydroelectric power plants. This

varies with the size of the reservoir and the nature of the land that was flooded by the reservoir. Small run-of-the-river plants emit between 0.01 and 0.03 pounds of carbon dioxide equivalent per kilowatt-hour where as large-scale hydroelectric plants emits approximately 0.06 pounds of carbon dioxide equivalent per kilowatt-hour. Not only the size but the geographical condition where the reservoir is built, also matters. Because hydroelectric plants built in tropical areas or temperate peatlands are much higher in emitting the carbon dioxide which helps in increasing global warming. The reason behind is that after the area is flooded, the vegetation and soil in these areas decomposes and releases both carbon dioxide and methane. The exact amount of emissions depends greatly on site-specific characteristics. However, current estimates suggest that life-cycle emissions can be over 0.5 pounds of carbon dioxide equivalent per kilowatt-hour[34]

Oil and gas industry involves stages of exploration, refining and transportation of oil and gas products on a global scale. In exploration and refining of oil & gas, the major environmental pollutants are i) effluent water contaminated with oily effluents eg oil & grease, chemicals and solids from drilling fluid, ii) formation water produced along with crude oil and iii) gaseous emissions having CO, S02, NOx, hydrocarbons, particulate from gasflare.

To put this into context, estimates of life-cycle global warming emissions for natural gas generated electricity are between 0.6 and 2 pounds of carbon dioxide equivalent per kilowatt-hour and estimates for coal-generated electricity are 1.4 and 3.6 pounds of carbon dioxide equivalent per kilowatt-hour[5]. These factors pushed up India to adopt the Nuclear Energy as a source for generating the energy.

[3] *See*, IPCC SPECIAL REPORT ON RENEWABLE ENERGY SOURCES & CLIMATE CHANGE MITIGATION (2011), *available at*: https://www.ipcc.ch/pdf/special-reports/srren/SRREN_FD_SPM_final.pdf, (Last visited on August 15, 2017).
[4]*Electricity from Renewable Resources: Status, Prospects, and Impediments*, THE NATIONAL ACADEMIES PRESS (2010), *available at:* http://www.nap.edu/openbook.php?record_id=12619, (Last visited on August 15,2017).
[5] *See*, IPCC SPECIAL REPORT ON RENEWABLE ENERGY SOURCES & CLIMATE CHANGE MITIGATION (2011), *available at*: https://www.ipcc.ch/pdf/special-reports/srren/SRREN_FD_SPM_final.pdf, (Last visited on August 15, 2017).

Change in Climate of India due to Carbon Dioxide Emission:

As compare to other countries, India's current CO2 emissions per capita are below but it is an alarming situation for India in regard to country's future emission trends and apprehension. It is expressed that India is an immense population country with rising economic growth where vast consumption of coal resources leads to India's sustainable development in dangerous situation because emission of large amount of green house gases is the main cause.

It is estimated that India's emission increased by 67.1 percent between 1990 and 2012, and are projected to growth of 85 percent by 2030 under a business-as-usual scenario.[6] Coal accounted for 43.5 percent of the total energy supply in 2011, followed by biofuels and waste (24.7 percent), petroleum (22.1 percent), natural gas (6.7 percent), hydropower (1.5 percent) and nuclear (1.2 percent).[7] India pledged under the Copenhagen Accord to reduce its CO2 intensity (emissions per GDP) by 20 to 25 percent by 2020.[8]

Projection of Climate Change over India for the 21st Century-

The following changes have been predicted by some studies due to increase in the atmospheric GHG concentrations that arise due to the increase in global atmospheric emissions:

- It has been predicted by the Indian Institute of Tropical Meteorology (IITM), Pune that the annual mean surface temperature will rise by the end of century, in the range of 3-5* C under A2 scenario (mixed economy) and 2.5-4*C under B2 (self reliance) scenario of IPCC.
- Indian Summer Monsoon (ISM) is a complex manifestation of interactions between land, ocean and atmosphere. It has been indicated by some simulations from IITM, Pune that the

[6]INDIA SUSTAINABILITY INITIATIVE, *available at:* http://mgi2india.blogspot.in/2016/04/sustainable-development-goal-13-fogs.html, (Last visited on August 16, 2017).
[7]CENTRE FOR CLIMATE & ENERGY SOLUTIONS, *India's Climate & Energy Policies,* (2015), *available at:* https://assets.aspeninstitute.org/content/uploads/files/content/docs/ee/SessionI_India-factsheet-formatted-Centre%20for%20climate%20and%20energy%20solutions.pdf, (Last visited on August 16, 2017).
[8]COPENHAGEN PLEDGE, GOVERNMENT OF INDIA (2010), *available at*: http://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/indiacphaccord,, (Last visited on August 16, 2017).

summer monsoon intensity might increase in the beginning of 2040 and around 10% increase by 2100 under the A2 scenario of IPCC.

- Results have shown that fine-scale snow albedo, influence the response of both hot as well as cold events and that the peak increase in extreme hot events are amplified by surface moisture feedbacks.[9]

With the alarming rate at which climate change is taking place, this can lead to scarcity of water, reduction in forest biomass and increased risks to human health with the children, women and the elderly of the household being the most vulnerable. The climate change can also result in the availability of food grains, which can in turn lead to the threat of malnutrition.

Observed changes in Climate and Weather Events in India:

In 2004, India's Initial National Communication (NATCOM 1) & UNFCCC have consolidated some of the climate parameters in India, such as Surface Temperature, Rainfall, Extreme Weather Conditions, rise in the Sea Level and a significant impact on the Himalyan Glaciers.

- Surface temperature:

At the national level, an increase of 0.4* C has been observed in the surface air temperature over the past century. Warming trends have been observed along the western coast, Central India, the Interior Peninsula, and in the North-East India. However, cooling trends have also been observed in North-West India and Southern parts of India.

- Rainfall:

An increase trend of monsoon seasonal rainfall has been witnessed along the Western Coast, Northern Andhra Pradesh, and in the North-Western part of India (additional 10-12% of the normal rainfall has been recorded over the last 100 years) while on the other hand a trend of decreasing monsoon seasonal rainfall has been recorded in Eastern Madhya Pradesh, in the North-Eastern, and in some parts of Gujarat and Kerala (6-8% reduction in the total rainfall has been recorded over the last 100 years).

[9] VIBHAW, *supra* note. 2, at 57.

- Extreme weather Conditions:

Over the past 130 years, instrument records as such do not indicate any significant marked long-term trend in the frequencies of large-scale droughts and floods. Trends however, have been observed in the multi-decadal periods of more frequent droughts, followed by less severe droughts. While states such as West Bengal and Gujarat have reported increasing trends, a decline has been observed in Orissa. While analysing the daily rainfall data set, it has been seen that there has been, (i) a significant increase in the frequency of heavy rains events, & (ii) a decreasing trend in the frequency of moderate events over the central India from1951 to 2000.

- Rise in the Sea Level:

After analysing the records of the coastal tide gauges in the Northern part of the Indian Ocean for more than 40 years, it has been estimated that, the sea level has been between 1.06-1.75 mm per year. These rates have been consistent with the 1-2mm per year global sea level rise estimates of Intergovernmental Panel on Climate Change (IPCC).

- Impacts on Himalayan Glaciers:

The Himalayas which literally mean 'abode of the snow' is home to the planet's highest peaks, Mt. Everest, and it possesses one of the largest resources of snow and ice, and its glaciers form is a source of water for the perennial rivers such as the Indus, the Ganga and the Brahmaputra. The Glaciers melt can impact the long-term flow, which can have adverse impacts on the economy in terms of the water availability and the hydropower generation, that is generated through the flow of rivers.

Need for Nuclear Energy

Even though Nuclear Energy can be considered as a best alternate to fossil fuels but still mass acceptance cannot be taken place. Initially certain number of countries accepted but now the number has been increased and continuously increasing day by day. Where there are major advantages like unfettered availability of energy by using nuclear material, there are lop sided arguments as well that raise certain important questions in relation to the harmful effects on

environment, investment costs and danger factor etc. though nuclear energy is not problem free but if we compare it with conventional resources like coal, oil and natural gases, nuclear power is recognised as having a clear advantage in achieving the goals of sustainable development. Throughout the process from fuel production to waste disposal to procure energy chain, it has limited emission of greenhouse gases and other pollutants. The process includes splitting of a big nucleus into two smaller ones. Splitting of nucleus is called the nuclear fission. The energy liberated out of splitting releases immense amount of heat which is used to drive turbines and in turn generate electricity.

Unlike degradable resources like coal, oil or gas nuclear plants use uranium as raw material in order to harness energy. Uranium is a radioactive material found inside earth and has capacity to create immense amount of energy. The energy in one ounce of uranium is equivalent to the energy in 100 tons of coal. The nuclear reactor allows the breaking down of elements which causes releasing of heat. A reactor is made up of a core, solid rods containing the uranium in the form of an oxide, and the control rods, which are designed to absorb the extra neutrons to prevent a "meltdown". As the rods are gradually withdrawn out of the core, fewer neutrons are absorbed and heat builds up, which boils water, which turns a turbine , which generate electricity.[10] This method of generating electricity is said to be clean, green and efficient. The reason that nuclear power plants produce no air pollutants when generating power is that in a nuclear power plant nothing is burned. The heat which arises due to the reaction is use to spin the turbines and drive the generators.

The Potential of Nuclear Power:

The challenges which are nuclear community facing in regard to the assurance of the nuclear power as a viable option in meeting the energy requirements of the next century. The upcoming generation has needed to understand that it can be a major provider of electricity for base load as well as for urban transport of megacities. Apart from this, it is useful in non-electric applications in district heating, process industries, maritime transport, water desalination,

[10] See, IDSA TASK FORCE REPORT, *Development of Nuclear Energy Sector in India,* INSTITUTE OF DEFENCE STUDIES & ANALYSES (NOV., 2010), *available at:* http://www.idsa.in/system/files/book_NuclearEnergyIndia.pdf, (Last visited on August, 16, 2017).

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

hydrogen production, and for applications in remote areas. It can also contribute substantially to the security of energy supply and it has the potential to be an almost inexhaustible long-term energy resource through the use of breeder reactors.

As we have seen above, many countries are lacking to support it so in this way, this unquestionably constrain the introduction of new plants. Opponents contended that this form of energy exposes people to threat on account of resultant/residual radiations and environmental degradation. These threats include the problem of processing, transport and storage of radioactive nuclear waste, the risk of nuclear weapons proliferation and terrorism, as well as health risks and environmental damage from uranium mining.

As no energy source is risk free, people need to understand that health and environmental issues cannot be completely eradicated from the concerned issues when harnessing energy from conventional and non-conventional resources comes into picture. Studies of nuclear, fossil fuels and renewable energy chains show that the significant impact and issues are inherent in all options but the ratio to mitigate is vary from resources to resources. Nuclear power found to be very appropriate to mitigate with the energy related health and environmental damages.

Recently our prime minister signed an agreement with President Vladimir Putin for two more units of nuclear plants at Kudankulam. It was argued from long term perspective that India should keep the option of nuclear power alive. The other reason is because of the shortage of oil, gas and even coal. More than 70 per cent of petroleum products, 40 per cent of gas and 20 per cent of coal consumption are based on imports. The government observed that to control environmental pollution, constrain on the development of coal plant is not the solution. Installation of plants like fuel desulphurisation plants, electrostatic precipitators to trap particulate matter to reduce local air pollution will only increase the cost of coal power. Emission of carbon dioxide will still remain the same. It can only be controlled by capturing it from the exhaust and storing it underground. In relation to capturing and storing, the cost of carbon capture and storage (CCS) is quite high and requires more energy, so the cost of power

would be some 30 to 50 per cent higher. Thus India cannot rely on coal power for long.[11]

This news highlighted that government of India also concerned for installing the nuclear plants rather than go for coal power, oil and natural gas. This is cheaper in relation to cost also. Data has been put in this news where total costs for per nuclear plant including the installation charges, operating charges and fuel charges etc. estimated about Rs 2.62/kWh while on the other side, solar PV costs at Rs. 2.75/unit with the similar financial charges and lesser storage capacity. Thus installing the nuclear plants is the smarter way to generate the electricity as it is economically effective also.

Advantages of Nuclear Energy:

Apart from reducing pollution from pollutant gases like carbon dioxide and carbon monoxide, it helps in creation of immense amount of energy. Lesser amount of raw materials produce immense amount of energy. Process of fusion inside the reactor goes on for a very long period of time and it helps in generating natural electricity at all times. Production of electric energy is continuous. A nuclear power plant is generating electricity for almost 90% of the hours of the year.[12] A 1,000 MWe nuclear plant, if it replaced an oil-burning plant, would save 30,000 barrels of residual oil per day directly; moreover, if its output were used for resistive heating (instead of the capacity being idle during the heating season), it would save another 20,000 barrels per heating day; if for energizing heat pumps (of which 560,000 were installed last year), perhaps 40,000 barrels per heating day.[13] Unlike other renewable resources like sun and wind which are limited to only certain time frames and conditions, nuclear energy can produce electricity irrespective.

Economic amount of Nuclear Energy: one obvious way to make energy law focus more on

[11] KIRITH PARIKH, *Why We Need Nuclear Power*, THE INDIAN EXPRESS (June 30, 2017), available at : http://indianexpress.com/article/opinion/columns/narendra-modi-vladimir-putin-kudankulam-nuclear-power-russia-india-deal-4728333/, (Last visited on August, 25, 2017).
[12] See, *Supra* note 11.
[13] ALVIN M. WEINBERG, *Is Nuclear Energy Necessary?*, PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY, Vol.124, No.6 (DEC.17,1980), pp.399-403, available at: http://www.jstor.org/stable/986241?Search=yes&resultItemClick=true&searchText=IS&searchText=NUCLEAR&searchText=ENERGY&searchText=NECESSARY&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3DIS%2BNUCLEAR%2BENERGY%2BNECESSARY%2B&seq=1#page_scan_tab_contents, (Last visited on August, 25, 2017).

sustainability is to replace its current functioning energy sources like fossil fuels, and adapt more economically stable sources of energy law. Nuclear energy is more economical. Other forms of energy producing sources like coal, natural gas etc. which they do not have much potential energy as nuclear material. We are fully agreed that nuclear energy is expensive in relation to mine and transport uranium but when mass production of energy is produced with the help of less amount of material, a large amount of money is saved. In environmental circle, the 'three Es'- environment, economy and equity[14] there is no doubt that to establish a nuclear plant, a huge amount investment is required but when result comes out in form of producing large amount of energy compensates the whole investment costs.

If we see from overall health and environmental perspective, nuclear fuel cycle is relatively better than fossil fuel cycle as it is associated by improved techniques to deal with radioactive waste. This would support global sustainable development goals and at the same time increase competitiveness with other energy sources that will be required to adequately deal with their waste. Advanced design has been developed to improve the economics of nuclear power and reducing the risk of accident. Now reactor systems and fuel cycles can be adjusted to minimize waste production.

In highly globally competitive & international market, some key factors not only affect the energy choice but also the extent and manner in which different energy sources are used. These are optimal use of available resources; reduction of overall costs; minimizing environmental impacts; convincing demonstration and safety; and meeting national and global policy needs. These factors help to determine nuclear energy for future at the national & global level.

Legal Framework in India:

Atomic Energy Act, 1962 regulates the nuclear energy regime in India. The identification,

[14] J. WILLIAM FUTRELL, *Defining Sustainable Development Law*, 19 NAT. RESOURCES & ENV'T 9,9 (2004) ("For more than a decade the term 'sustainable development' has denoted an effort to meld concerns for environmental protection, economic well-being, & social justice."); U.N. CONFERENCE ON ENVIRONMENT & DEVELOPMENT, RIO DE JANEIRO, BRAZ., JUN. 3-14, 1992.

positioning, setting up, operation, mining and safety of the atomic reactors are covered under the 1962 Act. After India's Independence, the constituent assembly adopted the Atomic Energy Act, 1948 that formed the basis of 1962 enactment. The use & development of energy has always been a top priority for India. The Act of 1948 included the establishment of an Atomic Energy Commission (AEC). Department of Atomic Energy was set up in 1954 and section 32 of 1962 act repealed the 1948 Act.

The Atomic Energy Act, 1962

India is one of the few countries amongst the other developing and newly emerged countries to frame a law relating to atomic energy. In respect to nuclear energy, India did not only frame laws relating to this but also established the Bhabha Atomic Research Centre (BARC) in 1954 and established two research reactors (APSARA AND CIRUS) in 1956 and 1960 respectively.

Salient features of the 1962 Act:

- Authority with the Central Government only:

Section 3 of the Atomic Energy Act gives the power to government "to produce, develop, use and dispose of atomic energy either by itself or through any authority or corporation established by it or a government company and carry out research into all matters connected therewith" the central government has complete authority to create and manage a company and no private companies are included in it.

This act puts a compulsion on the government to "manufacture or otherwise produce any prescribed radioactive substance or articles which in its opinion are, or likely to be required in connection with the production, development or use of atomic energy or such research as aforesaid, and to dispose of such radioactive substance or any described article manufactured or otherwise produced." This even gives the central government the discretionary power to decide issues based on and related to nuclear energy.

- Regulating use of All Radioactive Materials

The Constitution Order (S.O. 4772)[15] authorises Atomic Energy Regulatory Board (AERB)[16] to maintain nuclear safety. The AERB derives this mandate from Rule 33 of the Atomic Energy (Radiation Protection) Rule of 2004 and its constitution order.[17] Clause 2(i) requires the regulatory body to develop Safety Codes, Guides and Standards for siting, design, construction, commissioning, operation and decommissioning of the different types of facilities, recognising international and national requirements.[18]

- Creation of NPCIL and other important features:

Nuclear Power Corporation of India (NPCIL) was basically established for building and establishing nuclear reactors. 1987 amendment gave section 3 of the enactment stated that the Central Government has the power to "manufacture or otherwise produce any prescribed radioactive substance or articles which in its opinion are, or are likely to be required in connection with the production, development or use of atomic energy or research and to dispose of such described radioactive substance or articles manufactured or otherwise produced"[19] central government has wide powers under section 3.

- Immunity to Government:

Section 29 provides immunity to the Government from any "suit, prosecution or other legal proceeding in respect of anything done by it or him in good faith in pursuance of this Act or any rule or order made thereunder."

Radiation Protection Rules:

The central government has promulgated the Atomic Energy (Radiation Protection) Rules, 2004. These rules were framed to establish the requirement of consent for carrying out any activity for nuclear fuel cycle facilities and use of radiation for the purpose of industry, research, medicine etc. the scope of these rules is limited to "practices adopted and

[15]MOSES RAJ G S, *Nuclear Safety in India: the balancing rope of Energy Demand & International Safeguards Regime*, 4 JSIA, 60,71, *available at*: http://www.jgu.edu.in/JJIA/PDF/vol4/Moses-Raj-G-S.pdf, (last visited on August, 25, 2017).
[16] See, *Supra* note 16, at 70.
[17] See, *Supra* note 17, at 67.
[18]ANNUAL REPORT 2014-15, *Government of India Atomic Energy Regulatory Board*, available at: http://www.aerb.gov.in/images/PDF/report/annrpt2k14-min.pdf, (Last visited on August, 25, 2017).
[19] ATOMIC ENERGY ACT,1962, sec.3, cl. (b)

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

interventions applied with respect to radiation sources.[20] Clause 3 of Rules 2004, enumerates that no person could handle radioactive material or operate any radiation generating equipment except in accordance with the terms & condition of license. License obtainers have to strictly compliance with the safety procedure that includes safety measures and attaining necessary training for performing certain tasks. Considering the wide ambit, these rules are enacted where all kind of situations have been taken into account.

Apart from this, the Atomic Energy (Working of the Mines Minerals and Handling of the Prescribed Substances) Rules, 1984, the Atomic Energy (Safe Disposal of Radioactive Wastes) Rules, 1987, the Atomic Energy (Factories) Rules, 1996 and the Atomic Energy (Radiation Processing of Food and Allied Products) Rules, 2012 that formulate the policy and regulatory framework for control of activities and for ensuring safety in the activities relating to use of atomic energy.

Rules relating to Safe Disposal of Radiation Wastes:

The Atomic Energy (Safe Disposal of Radiation Wastes) Rules, 1987 mentions the necessary requirements for the safe and proper disposal of radioactive wastes in our country. It provides the procedure & mentions the equipments and the safety devices which are required in the installation for conditioning treatment and disposal of radioactive wastes.

In addition to these, the Environment (Protection) Act, 1986[21] & Environment (Protection) Rules are applicable to all atomic energy projects. They provide protection and improvement of environment in relation to matter of nuclear energy. Section 52 of Air (Prevention & Control of Pollution) Act, 1981 provides that for radioactive air pollution the provisions of atomic Energy will apply.

The Indian Civil Nuclear Liability Act

[20] RADIATION PROTECTION RULES, 2004, cl. 1 (2).
[21] ENVIRONMENTAL PROTECTION ACT, available at: http://envfor.nic.in/ legis/env/env1.html, (last visited on last September, 7, 2017).

The Civil Nuclear Liability act, 2010[22] is one of the most powerful pieces of legislation in cases of nuclear accidents. It provides a mechanism for compensating victims of nuclear damage arising from nuclear accidents. Under this act and the Civil Liability for Nuclear Damage Rules, 2011, AERB also has the responsibility of notifying the occurrence of any nuclear incident.[23]

The nuclear liability bill was in controversy as provision on compensation related to capping of nuclear operator liability, the near absence of suppliers liability and the maximum liability amount among others formed the crux of the contentious issue in the bill.[24] So after many national and international conventions and amendments the legislation came into force.

Conventions which the India signed in relation to Nuclear Damage:

- The 1963 Vienna Convention on Civil Liability for Nuclear Damage. 36 countries signed this convention which came into force in 1977.
- The 1988 Joint Protocol relating to the application of the Vienna Convention and The Paris Convention (the Joint Protocol) which came into force in 1922 and 26 countries are parties to it.
- The 1997 Convention on Supplementary Compensation for Nuclear Damage, which is yet to came into force.
- The 1960 Paris Convention on Third Party Liability in the field of Nuclear Energy. It came into force in 1968 and 15 states are parties to it which was revised in 1964, 1982 and 2004.
- The 1963 Brussels Convention Supplementary to the Paris Convention (the Brussels Supplementary Convention) which has 12 states are members to it after came into force in 1974. It was revised in 1964, 1982 & 2004.

But somehow all of the above mostly failed in addressing the nuclear liability issue, hence

[22] THE CIVIL LIABILITY FOR NUCLEAR DAMAGE ACT, available at: http://lawmin.nic.in/ld/regionallanguages/THE%20CIVIL%20LIABILITY%20OF%20NUCLEAR%20DAMAGE%20ACT,2010.%20(38%20OF2010). pdf, (last visited on September 7, 2017).
[23] The Regulatory Body takes necessary steps to keep the public informed on safety issues of radiological safety and significance. It shall also be responsible for notifying to the public, the 'extraordinary nuclear events', occurring in the nuclear facilities in India, as mandated by the Civil Liability for Nuclear Damage Act, 2010.
[24] FLAWED CIVIL NUCLEAR LIABILITY BILL, EPW, Vol. XLV No. 12, 20 Mar., 2010.

therefore most of the countries have chosen to formulate their own legislation in consonance with domestic conditions and laws and India is one of them.

India made a law in relation to solve the dispute of nuclear accidents by providing the compensatory amount to the victims but still somehow fails to do justice upto some extent with the victims, suppliers and the operators. There are many lacunas in Act which need to consider by the government.

Issues which are most debatable and controversial in Act:

Monetary capping on compensation: the Act specified the certain liability in relation to amount of money as compensation. This turns out to be the biggest problem in cases where damage exceeds the limits.

Limited Private Players: the liability is in operation of such nuclear plants is borne by common tax payers because these plants are owned and operated through NPCIL[25] which being a state entity makes the monetary burden of compensation fall on the common man.

Neglect of Additional Costs: Apart from compensation cost, there are many cost which the party at fault needs to bear such as the cost of cleaning and safe disposal of waste. The Act does not provide any provision regard to this.

Liability issues in relation to supplier: the Suppliers claims that the Act is unfair since it does not provide the fix limit of liability of supplier towards the operators if any mishap happens where the supplier is the faultier. In respect to indemnify the operator, initially suppliers tried to bargain but government declared such activity as illegal by enacting the Civil Liability for Nuclear Damage Rules, 2011.[26]

The role of International Atomic Energy Agency (IAEA) in nuclear power development:

[25] NUCLEAR POWER CORPORATION of INDIA.
[26]SYLYINE, *Critical Analysis of India's Civil Nuclear Liability Law,* 2016, available at: https://blog.ipleaders.in/critical-analysis-indias-civil-nuclear-liability-law/, (Last visited on September, 7, 2017)

This is an international organization comprised on number of states as a member to this organization which is aiming to promote the peaceful use of nuclear energy. India is one of the members of IAEA. The Agency plays a catalytic role in co-ordinating actions, covering the whole range of energy issues, undertaken by Member States and different international or specialized organizations.

The IAEA's efforts in nuclear power will focus on the contribution of nuclear energy to sustainable development, with emphasis on:

• promoting design and operation measures necessary to achieve safe development of nuclear power;

• assisting developing Member States in planning and implementing nuclear power programmes and in improving the management of nuclear power projects and operating plants;

• improving operating performance and reliability of nuclear power plants through sharing of operating experience and information worldwide in all areas, including training and qualification of personnel.[27]

Conclusion:

An awareness and understanding of the environmental consequences of past and present energy system is also becoming more relevant and systematic. Energy use contributes to indoor and urban air pollution, acidification, and global warming. As for global warming, the use of fossil fuels leads to major emissions of carbon dioxide and methane, the main greenhouse gases. Fossil fuels use contributes approximately seventy-eight percent of anthropogenic emissions of carbon dioxide and twenty three percent of emissions of methane, as well as a significant fraction of emissions of long-lived small particulate matter, which poses significant risks to human health when inhaled.

The consequences of greenhouse gas emissions from fossil fuel use on global warming are

[27] VICTOR M. MOUROGOV, *Nuclear Power Development: Global challenges & strategies*, 1997, available at: https://www.iaea.org/sites/default/files/publications/magazines/bulletin/bull39-2/39205080208.pdf, (Last visited on September, 7, 2017)

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

particularly worrisome, and are of growing international concern. It is estimated that global emissions of GHG will have to be reduced by sixty percent or more to meet the objectives of the United Nations Framework Convention on Climate Change (UNFCCC). Achieving this while expanding economics now based on the use of fossil fuels is one of the major challenges facing the energy system.

The linkage between energy systems and economic development, social equity, and environmental protection described thus far indicate that a change in present energy system development is required if sustainable development pathways are to be realized. The magnitude of the change required is not small and the ultimate challenge will be finding ways forward that address all the issues simultaneously. Nuclear energy upto some extent fulfilled that criteria. Up to certain extent, it seems as a sustainable form of energy for the future will address main environmental issues. To cover up with the damages that caused by nuclear accident, India has legal framework where liability of nuclear operators has been given according to the damages which has been caused.

Earlier the victim of the nuclear accident had to prove that the owner of such plant is negligent in order to get compensation according to the state laws. It was very time consuming as to prove the owner's fault it involves lot of scientific and technical evidences. Therefore the policy of strict liability was established in the case of nuclear accident where the owner will be strictly liable if there is no fault on his part.

In relation to financial security, there is a provision which gives the orders to the operators to have insurance or other financial security that covers the company's liability in case of nuclear accident so that victim would not been left in a position of unhealed. Also the absolute liability principle has to be followed where not only the operators held to be liable but also the other parties which are involved in its operation. Such parties would be those who supply technology and equipment.

In regard to the operator's liability, there is provision regarding the limit of the nuclear liability on the operators, because it does not serve justice on the part of the operators if he would have asked to compensate and have unlimited liability.

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

But since India is a developing country and has been progressing at a very fast pace towards growth and development in the field of science & technology, it is important to make sure that any of the threats or damages coming out of any technological advancement is accounted for. The victims of Bhopal Gas Tragedy are the examples which reflect the lacunas in the legislation of India in relation to nuclear accident till date. To fill up the gap that has been embodied in form of lacunas in the present Act, the researcher has some suggestions in regard to the controversial issues of some provisions of Civil Liability of Nuclear Damage act, 2010.

- In regard to Monetary Capping liability of operators, the act has to expressly provide for specific provision in respect to the damages over the limit so that it does not lead to the arbitrariness in cases of serious nuclear losses and serve justice to the victim of those nuclear accidents.
- Entry of Private Players in regard to operation of plants has not been restricted. It should be open for every private company so that burden of taxpayer will become less on common man as it is shift towards the private players.
- There should be specific provision in regard to additional costs that come from waste safe disposal and cleaning section. So that the parties who bear this cost should have an idea what particular amount they have to bear. Also by fixing the cost amount, it curtails the arbitrariness power of government in regard to decide the cost amount which leads to overall justice.
- In regard to the liability of the suppliers, the cap should be fixed in relation to the compensation given to operators by the suppliers, so that it does not lead to injustice to the suppliers.

Apart from these there are other lacunas in the Act such as the liability under tort law, ambiguity of economic loss and foreign jurisdiction etc. where the government need to provide certain and specific law which serves the justice to the people in relation to these issues.

Since all energy sources represent some risks, highly depending on different countries culture and economics, there is no problem if India would go with nuclear energy as India is rich with proper legal framework in relation to nuclear accident with slightest modification which the

Volume 13(1)
RNI-HARENG/2012/59126, ISSN: 2278-6775

researcher mentioned above. Because the point needs to be considered that no source for creating energy is problem free. Where there are lop sided arguments which raise the certain questions in relation to environment, investment cost and danger factor, there are major advantages are to be traced like unfettered availability of energy, reduction of pollution from pollutant gases like carbon dioxide and carbon monoxide which does not help only to develop the country but also gives the future prospectus in relation to sustainable development of India.

Bibliography:

Books Referred:

1. Nawneet Vibhaw, Energy Law & Policy in India , Lexis Nexis, 1st ed., 2014.
2. Adrian Bradbrook, Rosemary Lyster, Richard L. Ottinger, The Law of Energy for Sustainable Development, Cambridge University Press, 2005.
3. Karen E Makuch, Ricardo Pereira, Environmental & Energy Law, Wiley- Blackwell, 2012.
4. Martin Kaltschmitt, Wolfgang Streicher, Andreas Wiese, Renewable Energy- Technology, Economics & Environment, Springer Berlin Heidelberg. New York, 2007.
5. Clarisse Frass- Ehrfeld, Renewable Energy Sources- A Chance to Combat Climate Change, Kulwar Law International. The Netherlands, 2009.
6. Major General Ajay Kumar Chaturvedi, Nuclear Energy in India's Energy Security Matrix: An Appraisal, Vij Books India Pvt Ltd. New Delhi. 2014

Article in Journal Referred:

1. Moses Raj G S, "Nuclear Safety in India: The Balancing Rope of Domestic Energy Demand & International Safeguards Regime, vol.4, 60-84, available at: http://www.jgu.edu.in/JJIA/PDF/vol4/Moses-Raj-G-S.pdf, (last visited on August, 25, 2017).

2. Victor M. Mourogov, Nuclear power development: global challenges & strategies 39, no.2 (1997) 2-8, available at: https://www.iaea.org/sites/default/files/publications/magazines/bulletin/bull39-2/39205080208.pdf, (Last visited on September, 7, 2017)

3. P.R. Shukla, India's GHG emission scenarios: Aligning development and stabilization paths 90, no.3 (2006) 384-395, available at: http://www.iisc.ernet.in/currsci/feb102006/384.pdf, (last visited on September, 8, 2017)

4. J. Chand, Environmental Pollution monitoring in oil exploration & exploitation, 1990, 218-219, available at: https://link.springer.com/chapter/10.1007/978-94-009-0431-6_34, (last visited on September, 8, 2017)

5. S.M. Rashad, Nuclear Power & Environment Comparative Assessment of Environmental Health Impacts of Electricity Generating Systems S-2, 1998, 291-305, available at: http://www.iaea.org/inis/collection/NCLCollectionStore/_Public/31/026/31026705.pdf, (last visited on September, 8, 2017)

News Articles:

1. Mark Schrope, "Nuclear Power Prevents More Deaths than Its Causes", Chemical & Engineering News, April 2, 2013, available at: https://cen.acs.org/articles/91/web/2013/04/Nuclear-Power-Prevents-Deaths-Causes.html, (last visited on August, 25, 2017)
2. Kirit Parikh, "Why We Need Nuclear Power", The Indian Express, June 30, 2017, available at: http://indianexpress.com/article/opinion/columns/narendra-modi-vladimir-putin-kudankulam-nuclear-power-russia-india-deal-4728333/, (last visited on August, 25, 2017)

Websites Referred:

1. Union of Concerned Scientist, *Environmental Impacts of Hydroelectric Power*, Accessed on (August 25, 2017); Available from http://www.ucsusa.org/clean_energy/our-energy-choices/renewable-energy/environmental-impacts-hydroelectric-power.html#.WbGZdrIjHIV.

2. Towards Sustainable Energy: The Current Fossil Fuel Problem & the prospects of Geothermal & Nuclear Power, Accessed on (August, 25, 2017); Available from https://web.stanford.edu/class/e297c/trade_environment/energy/hfossil.html.
3. Centre for Climate & Energy Solutions, India's Climate & Energy Policies, (2015), accessed on (August 16, 2017), Available from https://assets.aspeninstitute.org/content/uploads/files/content/docs/ee/SessionI_India-factsheet-formatted-Centre%20for%20climate%20and%20energy%20solutions.pdf.
4. PRS Legislative Research, The Civil Liability for Nuclear Damage Bill 2010 Accessed on (September, 7, 2017); Available from http://www.prsindia.org/billtrack/the-civil-liability-for-nuclear-damage-bill-2010-1042/.
5. Sylvine, Critical Analysis of India's Civil Nuclear Liability Law, 2016 Accessed on (September,7, 2017); available from https://blog.ipleaders.in/critical-analysis-indias-civil-nuclear-liability-law/.

Geeta Institute of Law
Panipat, Haryana, India

Volume 13(1) June 2024