IMS UNISON UNIVERSITY
Nurturing Knowledge. Empowering Minds.

ISSN 2278-8093

Pragyaan

Volume 12, Issue 1, June 2022

Pragyaan: Journal of Law
a bi-annual refereed Journal

Research Papers

Case Comment

Pragyaan: Journal of Law

From the Chief Editor

It is a matter of immense pleasure to present Vol 12 Issue1 of Pragyaan: Journal of Law, which is a platform for the research scholars to present their articles, research-papers, and case comments. The journal serves the part of correspondence and alliance of scholars & academicians around by publicizing their research in our journal.

The theme of journal is to ensure and promote the research individually or collaboratively for the development of researchers, legal fraternity, and society as well. The journal is comprehensive and contains high quality submissions which include innovative, valuable, and current research in the wide array of legal fields.

It inspires the scholars, academicians, and students to come up with the new and challenging topics pertaining to the legal and other disciplines. It thus, ensures vibrant and accessible approach towards the emerging areas of law.

We acknowledge the support of faculty advisors, constant efforts of editorial staff and intrigue posed by the contributors & readers that we have been able to come out successfully twice in a year.

We extend our sincere thanks to all contributors, members of Advisory Board and referees whose untired & constant efforts made the publication of journal possible.

Prof. (Dr.) Gurdip Singh

Pragyaan: Journal of Law

Volume 12, Issue 1, June 2022

CONTENTS

ISSN 2278-8093

Research Articles

Case Comment

The Legal Outlook on the Digital Economy and Tax Evasion in India

Dr. Nitesh Saraswat*
Mr. Naresh Prajapati**

ABSTRACT

The usage of digital technologies is the foundation of a digital economy. The digital economy is also known as the Internet Economy or Web Economy. As the final stage of the economy's evolution, the digital economy has emerged as the model global economy. It is based on the use of information technology in a variety of economic fields, such as in all of our daily activities. During the previous decade, digital businesses have fueled enormous changes in the Indian and worldwide economies. As a result, new ways of communicating and sharing information, as well as new business models and job growth opportunities, have evolved. Because cyber security is a global issue, it requires global cooperation to be effective. It is a source of concern for India, which has a poor track record when it comes to cyber security. Strong public-private partnerships can aid the country's cybersecurity and overall well-being. Typical direct tax challenges connected to e-commerce includes determining the nature of payment and establishing a nexus or link between a taxable transaction, activity, and a taxing jurisdiction, as well as finding the transaction, activity, and identifying the taxpayer for income tax purposes. Digital commerce significantly challenges physical presence-based permanent establishment norms. In 2004, mobile connections in India surpassed traditional landline connections, according to media sources. India is also a major consumer of mobile data. The push for a digital India by Prime Minister Narendra Modi, the Start-up India programme, and demonetization have all boosted the use of digital transactions in India. Researcher has tried to focus on the Legal aspects related to Digital Economy and have tried to establish whether digitalization is a challenge or a boon or it is a tool to evade the taxes.

Keywords: Digital Economy, Tax Evasion, Technology, Cyber Crime, E-commerce

Introduction

A digital economy is founded on the use of digital technologies. The Internet Economy, or Web Economy, is another name for the digital economy[1]. The digital economy has emerged as the model global economy as the final stage in the economy's evolution. It is based on the application of information technology in various economic domains, such as what has occurred in all of our daily activities. Three fundamental components of the 'Digital Economy' concept may be recognized, according to Mesenbourg[2]:

i. *Infrastructure is important (hardware, software, telecommunications, networks, etc.).*[3]

ii. *Electronic commerce (how business is conducted, any process that an organization conducts over computer networks).*[4]

iii. *E-commerce is a sort of online shopping (transfer of goods). Social networking and Internet search are examples of new applications that blur these distinctions and increase complexity.*[5]

Why does it matter ?

Because of the proliferation, integration, and sophistication of information technology and communications, our society and economy are changing. In the digital economy, consumers are becoming more powerful, and firms are facing new obstacles.[6] New ways to gain a competitive advantage Mobile phones, social media, cloud computing, grid computing, and other technologies are reshaping relationships significantly. The Personal Computer and the Internet have already revolutionized digital technology between companies and their clients. Work, education, government, entertainment,

* Assistant Professor, Law Centre II, Faculty of Law, University of Delhi, niteshsaraswat@yahoo.com,
** Student, LL.M 4th Semester, UGC-NET- JRF, Department of Law, School of Legal Studies, Central University of Punjab, Bhatinda, nareshji554@gmail.com,

1 Satish Patel, "Digital Economy in Indian Context" Journal of Environmental Science, Computer Science and Engineering & Technology (2014).

2 T.L. Mesenbourg, "Measuring the Digital Economy" U.S. Bureau of the Census (2001).

3 Available at: https://www.techtarget.com/searchcio/definition/e-commerce (Visited on May 18, 2022).

4 *Ibid*.

5 *Ibid*.

6 Available at: https://unctad.org/system/files/official-document/der2019_en.pdf (Visited on May 18, 20 22).

establishing new market opportunities, and having a significant impact are all areas where it may make a difference. Impact on the economy throughout a wide range of industries. Infrastructures for digital networking and communication give a global platform for people to communicate. Interact, communicate, collaborate, and design and implement new company strategies.

Development of Technology

The digital economy is the outcome of the revolutionary effects of new General-Purpose Technologies (GPT) in the information and communication industries. Transportation, financial services, manufacturing, education, healthcare, the media, and other economic and social sectors have all been impacted.[7] It has far-reaching consequences that go beyond information and communication technology (ICT). Furthermore, the internet enables people to share their ideas in new and innovative ways, resulting in new content, entrepreneurs, and marketplaces.[8] Regardless of the time or place, look for information.[9]

Four key technological developments are driving a tectonic shift in the digital ecosystem:[10]

i. User-generated content and social networking are ever-present.

ii. Cloud: Unlimited storage and on-demand access to supercomputer power.

iii. The Internet of Things (IoT) is a term that refers to the merging of the physical and virtual worlds.

According to Deloitte & Touche Consulting[11], there are six key stages that every government and local government organization must go through to stay current and provide services 24 hours a day, seven days a week, from anywhere. The following are the stages:-

i. Publication and Dissemination of Information

ii. System for Two-Way Transactions

iii. Use of Multipurpose Portals

iv. Personalization of the portal is required

v. Providing Common Services to Everyone and Everywhere

Digital Economy and Information Technology Act

Digital firms have spurred significant developments in the Indian and global economies during the last decade. As a result, new means of communication and information sharing and new business models and sources of job growth have emerged. As a result of these changes, new policy paradigms and regulatory issues have emerged. The ability to nimbly change their products and services, which allows them to jump from one regulatory category to another, is a crucial attribute of innovation-driven digital enterprises.[12]

Traditional legal-regulatory frameworks based on licenses and restrictions lack the flexibility and freedom needed to keep up with the rapid rate of technical change in the digital economy. Governments all across the world are looking for solutions to this challenge. They are discussing whether broader goals-based or principles-based regulations are better than tighter rules-based regulations. The former requires careful calibration and state enforcement capacity, but it is more resistant to technological and business model changes. The latter is easier to enforce, but it is rigid and prevents creativity.[13]

Due to a lack of guiding concepts, a whole-of-government approach to digital economy regulation may be lacking. In India, for example, six different authorities may be in charge of digital markets. The Department for Promotion of Industry and Internal Trade's draught E-Commerce Policy, the Personal Data Protection Bill, 2019, and the expert Committee on Non-Personal Data Governance calls for a new regulator. These efforts are in addition to the Consumer Protection Act of 2019, the creation of a new regulator, the current antitrust authority (CCI), and the telecom regulator's initiatives to participate actively in digital economy regulation.[14]

Line ministries and departments are also throwing their heads in the ring and the expected growth of regulators. The Ministry of Road Transport and Highways, for example, wants to control cab aggregators, while the Ministry of Tourism wants to regulate hospitality apps, and the Ministry of Information and Broadcasting is considering regulating over-the-top video streaming

---

[7] https://unctad.org/system/files/official-document/der2019_en.pdf, (Visited on May 18, 2022).
[8] *Ibid*.
[9] https://www.sciencedirect.com/science/article/pii/S0268401220308082, (visited on 20th April, 2022)
[10] https://www.qlik.com/blog/the-rise-of-digital-and-four-tectonic-technology-shifts, (visited on 20th April, 2022).
[11] Deloitte and Touche Consulting, "At the Dawn of E-Government: The Citizen as Customer" (2000).
[12] Available at: https://static1.squarespace.com/static/5bcef7b429f2cc38df3862f5/t/6033b73f3b981c77c 84e4f4 2/ 1614001988307/Digital_India_Foundation_Nine+Principles+for+India%E2%80%99s+ Digital+Economy.pdf, (Visited on May 18, 2022).
[13] Ibid.
[14] Ibid.

services. On the other hand, a sectoral framework that focuses heavily on outdated regulatory toolkits may not be the best way to deal with the market. The solution is to create a unified framework within a new generation of IT legislation.[15]

A modern IT law in India's digital economy must incentivize innovation so that IP exports can follow in computer services' footsteps. The United States and China control 75% of all blockchain patents, 50% of global IoT spending, more than 75% of the global market for public cloud computing, and 90% of the market capitalization of the top 70 digital platforms.[16] India must catch up, but it will have to do it by leveraging private sector growth rather than relying on government assistance. The country will need to promote fair competition in digital markets to spread the benefits of economic activity and lift all boats.[17]

Platformization will also need to be enabled by new legislation so that Indian businesses can compete on the global stage without being protected. This is critical because India's IT and ITeS ecosystem is export-oriented, allowing Indian platforms to access markets by riding on their coattails. The government should provide three key levers to the private sector: (a) the ability for product businesses to become platforms, (b) the ability for single utility platforms to transition to multi-utility platforms, and (c) the ability for local multi-utility platforms to become global multi-utility platforms.[18]

The IT Act was created to grant legal recognition to digital signatures and facilitate eCommerce in the old ITES/BPO ecosystem. Today, India is at a fundamentally different crossroads, with many digital apps and goods and a slew of unresolved issues stemming from a lack of legal recognition. For example, the RBI prohibited bitcoin in 2018, which the Supreme Court overturned in 2020. Due to the first restriction, there was some confusion about using blockchain technology in other applications. While digital apps and over-the-top (OTT) services are nominally covered under the IT Act, the Telecom Regulatory Authority of India has held regulatory consultations to consider a licensing framework for OTT services that compete with telecom services.[19]

Public interest litigation involving petitions for prohibitions on new applications or regulation of online information is ordinary in Indian courts. The new digital ecosystem needs a new structure for legal recognition so that businesses, consumers, and governments do not have to turn to the courts for answers. It could be due to its light touch registration technique.[20]

Digital Economies Across the World

The Global Practice for Digital Development works with governments to help lay the groundwork for a thriving digital economy. Our research focuses on supply and demand-side barriers to digital transformation, such as universal access to fast, reliable, secure, and affordable internet.[21] We aim to increase demand for digital applications, skills, and digital platforms across the World Bank Group to help governments, businesses, and individuals participate more fully in the digital economy.[22]

Digital technologies are at the vanguard of development, offering governments a one-of-a-kind potential to boost economic growth and connect residents to services and jobs. Digital technologies keep individuals, governments, and businesses linked in times of crisis, from natural disasters to pandemics like the one the globe faced with COVID-19. They can help countries skip traditional stages of growth, from digital banking to blockchain and telemedicine, by unlocking new solutions to complicated development concerns.[24] Despite this, approximately 3 billion people remained offline at the end of 2021, most of whom were in developing countries. The utilization gap is still a problem. Despite living in locations where mobile broadband is available, nearly half of the world's population (43%) does not use it.[25]

The importance of promoting digital inclusivity cannot be overstated. One billion people worldwide cannot verify their identification, limiting their access to digital services and possibilities.[26] The gender divide persists, with 62 percent of men using the internet compared to only 57 percent of women.[27] The proportion of people who use the internet in cities is double that in rural areas. The internet is used by 71% of the world's younger population aged 15-

[15] Ibid.
[16] Available at: https://unctad.org/news/global-efforts-needed-spread-digital-economy-benefits-un-report-says (Visited on May 18, 2022).
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*
[21] Available at: https://digitaleconomy.pmc.gov.au/sites/default/files/2021-05/digital-economy-strategy.pdf (Visited on May 18, 2022).
[22] Available at: https://www.worldbank.org/en/topic/digitaldevelopment/overview#3 (Visited on May 18, 2022).
[23] https://www.oecd.org/coronavirus/policy-responses/the-covid-19-crisis-a-catalyst-for-government-transformation-1d0c0788/ (visited on May 20th, 2022)
[24] https://www.worldbank.org/en/topic/digitaldevelopment/overview#1 (visited on 21st May, 2022)
[25] *Ibid.*
[26] https://www.un.org/development/desa/dspd/2021/02/digital-technologies-for-social-inclusion/, (visited on 21st May, 2022)
[27] https://www.oecd.org/digital/bridging-the-digital-gender-divide.pdf (visited on 21st May, 2022)

24, compared to 57 percent of all other age groups.[28]

Because digital technologies have the potential to improve access to markets and opportunities, the World Bank's work to eliminate poverty and inequality includes assisting nations in investing in digital development.[29] The figures speak for themselves: the digital economy accounts for 15.5 percent of global GDP and has grown at twice the rate of world GDP over the last 15 years. According to research, a 10% increase in mobile broadband coverage in Africa would result in a 2.5 percent rise in GDP per capita. Digitalization initiatives will accelerate across the globe in the post-COVID-19 context, yet most developing countries lack the necessary tools and conditions.[30]

What will it take for countries to fully engage in the global digital economy and reap the benefits of technological advancement?[31]

Closing the Digital Divide on a Global Scale: Despite the fast adoption of new technology worldwide, an estimated 37% of the population — or 2.9 billion people — has never utilized the internet.

Getting ready for tomorrow's jobs: The nature of employment is dramatically altering due to innovation: new jobs are emerging while others are developing. Countries will need to prioritize education and develop their workforce's digital abilities to compete in the digital economy. To put it another way, they must make human capital investments. Developing safe and reliable digital systems: Cybersecurity and data protection skills are becoming increasingly important as the world becomes digital.[32]

The World Bank offers a wide range of services and solutions to ensure that client countries can take advantage of digital development's benefits.[33]

Our work in the sector is based on a digital transformation ecosystem approach that involves strong collaboration throughout the World Bank Group and focuses on five essential factors that, when integrated, constitute the foundation for robust and inclusive digital economies:[34]

Digital infrastructure *(fixed and mobile broadband, fibre-optic cables, and other things) is the backbone of the digital economy. Access to digital connectivity should be universal, safe, and affordable*.[35]

Digital financial services and digital identification *allow individuals, businesses, and governments to interact and conduct transactions*.[36]

Digital innovation and entrepreneurship *need a supportive ecosystem of government regulations and access to financing*.[37]

Digital platforms, *including e-commerce and e-government, drive usage and foster economic activity*.[38]

Digital literacy *and skills create a digitally savvy workforce and boost competitiveness*.[39]

Building knowledge in several other disciplines, such as finance, private sector development, education, labor, and social security, is required to build the five pillars of the digital economy and telecommunications competence. As a result, the digital agenda brings together a diverse group of specialists from the World Bank, the IFC, and MIGA.[40]

As demand for services such as health care, mobile payments, food delivery, and e-commerce grows, the WBG is working to assist countries to boost bandwidth and manage congestion, assure the continuity of key public services, and fuel financial technology. We are working on regional, and country action plans with specific measures. Here are a few examples:[41]

In Malawi, *we help our government counterparts with home-based work, remote working capabilities, and connectivity to health centers and hospitals*.[42]

During the COVID-19 pandemic and for resilient recovery ***in Turkey,*** *the Safe and Quality Schooling and Remote Education Project will provide safe schooling through distance education*.[43]

---

[28] See supranote 24.
[29] *Ibid.*
[30] Supranote 24
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*
[43] *ibid.*

*We are assisting the government of **Mali** in continuing to provide education through several mediums such as radio, television, and the internet*.[44]

In Africa, where only about a third of the population has broadband access, obtaining universal, affordable, and high-quality internet access by 2030 will necessitate a $100 billion investment.[45] A report released in October 2019 at the World Bank Group's Annual Meetings is according to a report that urges immediate action to reduce the internet access gap and lays out a plan to achieve this lofty goal.[46] According to the report, the need to build and maintain broadband networks accounts for roughly 80% of all required investments. However, connecting the unconnected requires more than just infrastructure: around 20% of required investments should develop user skills and local content foundations, with the remaining 2-4 percent going toward infrastructure.[47]

*A World Bank-funded project in **Bangladesh** had a transformative impact by laying the groundwork for the country's fundamental digital governance pillars (including the first national data center, cybersecurity center, and enterprise architecture). The project resulted in 35,000 jobs for young people (more than a third of whom were women) and a 160 percent increase in revenue for the IT industry.*[48]

***In Peru**, where two out of every three women suffer IPV, we utilize technology to prevent and respond to gender-based violence as part of our Peru Centralized Emergency Response System project while also enhancing the efficiency of emergency response and helpline calls in Lima and Callao*.[49]

Around one billion people worldwide lack a formal identification card, limiting their access to services and opportunities. We assist countries in transforming lives through inclusive and trusted ID systems through the cross-global practice Identification for Development Initiative (ID4D). More than 40 countries are receiving assistance from the World Bank to build and implement "excellent" digital ID and civil registration systems, typically with other development partners. More than US$1.2 billion in the pipeline or committed IDA and IBRD funds for execution are included in this support.[50]

Digital Economy and Cybercrimes

Cyber security is a global issue that necessitates worldwide cooperation to be effective. It is a concern for India, which has a dismal track record regarding cyber security. Strong Public-Private Partnerships can help the country with cyber security and wellbeing.[51] Intel has always been a firm believer in the public-private partnership model, and we have been working closely with the government to increase digital literacy in the country and raise awareness about cyber security and wellness.[52] If not helped by a comprehensive security system, the evolution and adoption of various disruptive technologies and the radical change over corporate design, finally shifting towards social, mobile, analytics, and cloud in conjunction with technologies goes for a toss. Building security frameworks and responding to such a dynamic environment requires more significant efficiency.[53] Cyber thieves employ a seemingly limitless assortment of ways to compromise and infiltrate practically every part of the electronic environment. Web-based technologies have grown increasingly important in the global economy.[54]

Traditional IT system defenses such as antivirus software and intrusion prevention systems are no longer sufficient in increasingly complex and varied cyber-attacks. As a result, cybercrime has become an enormous business, with hackers having access to cyber-criminal counterintelligence, which has increased the volume, diversity, and velocity of threats we face.[55]

Degree of Threat: Organizations are being targeted with stealthy hacks to gain consumer secrets and criminal customer information. Traditional tactics will undoubtedly fail to protect against all dangers. Additional layers of security are required, as well as specialized visibility into these threats. In terms of security, corporations are

---

[44] *Ibid*.
[45] https://www.worldbank.org/en/news/press-release/2019/10/17/achieving-broadband-access-for-all-in-africa-comes-with-a-100-billion-price-tag (Visited on 21st May, 2022)
[46] *Ibid*.
[47] *Ibid*.
[48] *Ibid*.
[49] *Ibid*.
[50] *Ibid*.
[51] Available at: http://www.ijbm.co.in/ (Visited on May 18, 2022).
[52] *Ibid*.
[53] Available at: http://www.ijbm.co.in/ (Visited on May 18, 2022).
[54] Available at: http://post.jagran.com/pm-modis-digital-india-project-to-give-employment-to-17crore-yo uth1409050390 see also, available at: http://pib.nic.in/newsite/PrintRelease.aspx?relid=108926 (Visit ed on May 18, 2022).
[55] *Ibid*.

confronted with several issues. Most organizations lack the resources and capabilities necessary to effectively detect and fight against rising cyber threats. Most firms do not realize they have been hacked until too late. Data from cyber intelligence is frequently lacking in the essential enrichment to make it valuable and actionable. Moving to a more proactive, "beyond the horizon" threat awareness posture is critical.[57]

Why has cyber security become the backbone of the industries and enterprises now? No one had heard of cyber security thirty years ago, but no one had heard of hackers or hacking either.[58] The internet is to blame for this. It did not begin with a Big Bang like the Universe, but it is growing in all directions like the Universe and has become all-pervasive. The internet has revolutionized the world. Mobile banking, online buying, online trade, and social networking have all been made feasible by businesses and enterprises' rapid use of technology. Its numerous advantages contribute to business growth by providing new prospects.[59]

However, the internet is not entirely safe because cybercriminals thrive on anonymity. They have figured out how to hack into banks, significant financial and manufacturing firms, industries, and even foreign countries.[60] Their motivations are financial gain, ill-conceived patriotism, notoriety, or just plain destructive fun.[61]

Digital Economy and Ways to Evade Taxes

The difficulty of characterizing the nature of payment and establishing a nexus or link between a taxable transaction, activity, and a taxing jurisdiction, as well as the difficulty of locating the transaction, activity, and identifying the taxpayer for income tax purposes, were all typical direct tax issues relating to e-commerce. Physical presence-based permanent establishment principles are fundamentally challenged by digital business. The essential PE components designed for the old economy, such as place of business, location, and permanency, must be reconciled with the new digital reality if permanent establishment (PE) principles remain effective in the new economy. Countries must build a framework to govern such enterprises and collect a "fair" amount of tax revenue from their revenues. The business strategies of organizations that conduct business through the internet in areas where they do not have a permanent presence are not efficiently taxed in the country where they earn earnings.[62]

There is a significant gap in India's ability to tax offshore technology corporations with a significant market presence in India, such as video streaming and social networking firms. To tackle this, India enacted the Equalization Levy in 2016, Chapter VIII of the Finance Act, 2016, to implement one of the BEPS (Base Erosion and Profit Shifting) Action Plan's recommendations. The equalization levy was introduced to level the playing field by requiring multinational digital firms without a permanent location in India to pay a 6% tax in India. Until June 2016, such businesses in India paid no tax on their earnings. Though the tax's revenue has been steadily increasing since its inception, it only applies to a small portion of the digital economy. Online services are provided by companies such as Amazon, Google, Netflix, Facebook, and Twitter, which have a significant user base in India. In the Finance Act of 2018, India proposed introducing the concept of 'Significant Economic Presence (SEP) in the Income Tax Act under Section 9(1)(i) for taxation of non-residents in India by broadening the definition of 'business link.' SEP was defined as any transaction involving any goods, services, or property carried out by a non-resident in India, including the provision of data or software downloads in India, if the total amount of payments arising from such transaction or transactions during the previous year exceeds the amount prescribed. SEP would also include systematic and ongoing solicitation of its business activities or interaction with a certain number of users in India via digital methods. However, this requires a change to India's tax treaties, which is a lengthy procedure in and of itself.[63]

Digital economy taxation, OECD Roadmap, and suggestions for India: The Organisation for Economic Cooperation and Development (OECD) presented an interim study on the tax problems of digitization in March 2018, building on a previous BEPS report from 2015 under Action 1. According to the paper, multinational corporations (MNCs) profits should be taxed in the country where their consumers are located, regardless of any physical presence in that market, and a formula for such taxation should be developed. The proposed approach to

---

[56] See supranote 53.
[57] *Ibid.*
[58] *Ibid.*
[59] See supranote 53.
[60] *Ibid.*
[61] http://www.ijbm.co.in/downloads/vol2-issue2/49.pdf, (Visited on May 18, 2022).
[62] https://icmai.in/TaxationPortal/upload/DT/Article/53_1_09_03_21.pdf, Also available at: https://www.incometaxindia.gov.in/Documents/vision-mission-values-2020-07012011.pdf, (visited on May 18, 2022).
[63] See supranote 62.

deal with tax concerns from the digital economy has been examined in a recent paper produced by the OECD. It could have far-reaching implications for India as well. The paper puts out a plan to overhaul the nexus and profit-sharing regulations. The paper discussed various possibilities that could be examined, with a common thread running through them all: "the importance of wealth creation in a market jurisdiction through distant involvement." At this time, assigning taxes rights to countries based on remote involvement or value creation is not universally accepted. The study noting the 'fractional apportionment technique' as one of the studied methods is particularly noteworthy from an Indian tax standpoint. It is worth noting that the CBDT's recently issued profit attribution discussion paper also mentions the fractional apportionment technique as a profit attribution mechanism. Furthermore, with the considerable economic presence proposal already being implemented, it suggests that India's efforts to solve issues of digital economy taxation are in line with worldwide trends.[64]

What is the timeline for the implementation of the new road plan? The OECD plan for a new approach to MNC taxation is expected to become a reality once incorporated into a multilateral agreement signed in 2017 to amend all member countries' bilateral tax treaties. By 2020-21, this is projected to happen.[65]

The Digital Economy as a Part of Tax Reform

A Critical Analysis

India's digital economy has risen at an exponential rate during the last two decades. The digital economy is the result of information and communication technology (ICT)-driven transformations that have resulted in enhanced business operations and increased innovation across all sectors of the economy.[66] Greater connectedness, linkages, and networks have come from the exponential rise of ICT during the preceding decade.[67] In 2004, mobile connections in India surpassed traditional landline connections, according to media sources. India is also a major consumer of mobile data. The push for a digital India by Prime Minister Narendra Modi, the Start-up India programme, and demonetization have all boosted the use of digital transactions in India. The taxation challenges are particularly distinctive, as the digital economy has transformed the usual basis for taxing earnings and income due to mobility, reliance on data, network effects, and the emergence of multisided company structures, among other factors.[68] In the absence of relevant tax regulations for digital transactions, tax authorities tend to force-fit existing tax rules built for a non-digital environment, resulting in asymmetry, double taxation, and sometimes disproportionate profit distribution.[69] There is growing concerned about multinational enterprises (MNEs) using loopholes in various tax systems to artificially lower taxable income or shift profits to low-tax jurisdictions where little or no economic activity occurs, resulting in minimal taxation on their global earnings.[70]

Global tax regulations for digital transactions are still in the works, with numerous concepts and perspectives being discussed. As part of its Base Erosion and Profit Shifting Project, the Organization for Economic Cooperation and Development (OECD) has released several papers for international tax authorities to consider, including Action Plan 1 titled "Addressing the Tax Challenges of the Digital Economy" (BEPS).[71]

The Action Plan examined digital transactions' characteristics, problems, and tax implications, including a nexus-based test (substantial economic presence), withholding tax for digital transactions, and an equalization levy (EL). It was advised that countries adopt these approaches in domestic laws if they do not conflict with existing tax treaties or international legal commitments or if they are included in the tax treaties themselves.[72]

Since June 2016, India has been taxing digital transactions through the implementation of EL on internet advertisements. The levy was enacted as part of the Finance Act, and it is the country's first digital-specific tax legislation. Non-residents who provide the following business-to-business services to an Indian resident or a non-resident with a permanent establishment in India are subject to the levy:[73]

---

[64] *Ibid.*
[65] See supranote 62.
[66] Available at: https://kb.icai.org/ (Visited on May 18, 2022).
[67] Available at: https://www.livemint.com/politics/7fpthmfawkpnhf2isufkml/evolution-of-digital-econ%2 0%20%20omy-and-taxation-challenges (Visited on May 18, 2022).
[68] *Ibid.*
[69] *Ibid.*
[70] *Ibid.*
[71] See Supranote 67.
[72] *Ibid.*
[73] *Ibid.*

i. *Online advertisement.*[74]

ii. *Any digital advertising space offering.*[75]

Currently, a 6% levy is levied on the services mentioned above, with the revenue in the hands of the receiver being exempted under the Income Tax Act of 1961 ("the Act").[76] Because the EL is not part of the Act and tax treaties usually grant credit for taxes paid under the Act, this could result in a situation where the tax credit is not available for transactions subject to the EL. However, there is an opposing viewpoint that such taxes paid in India can be claimed as a credit.[77]

The idea of significant economic presence (SEP) was incorporated into Indian domestic law in April 2018, triggering a potential tax exposure for non-residents based outside of India but having a digital presence that exceeds a yet-to-be-determined level.[78] A non-resident may use the SEP for any transaction involving goods, services, or property in India, including data or software downloads. This concept, as written, is comprehensive and might encompass a wide range of transactions. Furthermore, the relationship between SEP and EL transactions is currently unclear, and the tax authorities may need to provide additional explanations.[79]

Apart from India, various other countries are proposing to or have implemented taxes on digital transactions, like:[80]

i. *Australia—Turnover tax called digital services tax is proposed to be introduced, which may be levied on the income of large multinationals providing advertising space, trading platforms, and the transmission of data collected about users.*[81]

ii. *New Zealand—Amazon tax is proposed to tax books and goods bought online.*[82]

iii. *Uganda—Tax on social media wherein WhatsApp, Twitter, and Facebook users will pay a fee.*[83]

As a result, taxing digital transactions has become a global phenomenon. Taxpayers should be aware of the developments, tax implications, and related compliance requirements. As revenue agencies struggle to supplement their revenue collections, tax on the digital economy is likely to garner greater attention soon.[84]

Conclusions and Suggestions

The Indian government expects the country's digital economy to grow from USD 270 billion to USD 1 trillion by 2022, but there is still much groundwork for achieving that goal. National tax policies on digital transactions do not appear to be aligned in this regard, and there is no worldwide consensus on how to tax the digital economy in some ways. The implementation of the GST regime is expected to play a critical role in integrating the manufacturing and services sectors into the digital economy, which will aid India's economic and social development. However, the digital economy framework's stability, reliability, and clarity are contingent on the settlement of flaws and ambiguities in the current tax system. If the one trillion-dollar objective is to be met, such obstacles must be overcome.[85]

Suggestions

i. Both digital technology and crime are rapidly spreading: According to the HBR Digital Evolution Index 2017, more people now have access to a cellphone than a toilet. Cyber-attacks have also increased in frequency and severity, while there has been a rise in cross-border flows of digitally transmitted data. The most recent incident is a data breach report of a prospective 120-minute customer of Internet connectivity provider Reliance Jio.

ii. Digital players have taken over the market. According to stock prices, Apple, Alphabet, Microsoft, Amazon, and Facebook were the most valuable firms in the world on July 6, 2017. Alibaba, based in China, climbed to sixth place overall.

iii. Digital innovations will alter the way people work. "Automation, big data, and artificial intelligence-enabled by the deployment of digital technology might affect 50 percent of the world economy," according to the HBR Digital Evolution Index 2017.

---

[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.*
[79] Available at: https://www.livemint.com/politics/7fpthmfawkpnhf2isufkml/evolution-of-digital-econ%2 0%20%20omy-and-taxation-challenges (Visited on May 18, 2022).
[80] *Ibid.*
[81] *Ibid.*
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] Available at: https://www.journalcra.com/sites/default/files/issue-pdf/32550.pdf (Visited on May 18, 2 022).

With today's technology, over 1 billion jobs worth $14.6 trillion might be automated.

iv. Public policy is critical to the digital economy's success. Economists worldwide, including in India, should implement public-private strategies to encourage innovation in the digital economy. They must also promote improved automation, data, and new technology integration into the legacy sector. Early on, particularly in schools, steps must be done to provide skills essential to flourish in a digital economy.

v. It is vital to identify a country's distinctive digital momentum drivers. Growth drivers for the digital economy must be discovered and increased, taking into account aspects such as the current level of the digital economy and the size of the country. While industrialized economies must prioritize innovation, developing countries must prioritize institutional development.

vi. Guarantee that political changes do not impact a well-defined tax system. Increase the independence and autonomy of tax administration without losing absolute control of the government.[86]

vii. It strengthens and updates audit, tax collecting, depositing, and filing provisions.[87]

viii. Strengthen penalty provisions to avoid non-implementation.[88]

ix. Make it easier for people to pay their taxes through more enticing methods.[89]

x. Provide relief provisions for large taxpayers.[90]

xi. Change in political system or government shall not impact the robust tax system.

xii. Making filing provisions more easy through proper guidance, training and developing skills in auditing, tax collection and deposting tax.

xiii. Relief measures should be innovated to provide some benefit to large tax payers.

xiv. Proper enforcement of anti corruption policy by developing a robust structured Tax administration system and organization.

---

[86] *Ibid.*
[87] Available at: https://enterslice.com/learning/tax-evasion/ (Visited on May 18, 2022).
[88] *Ibid.*
[89] See supranote 87.
[90] *Ibid.*

Enforceability of Browse-Wrap Agreements vis-a-vis Electronic Contract

Kshitij Kumar Rai*

ABSTRACT

In electronic contract, the term Browse-Wrap Agreement (BWA) refers to those legal terms and conditions (T&Cs) to which, when becomes enforceable, the internet users get subjected. The electronic commerce (e-commerce) websites typically provide a hyperlink to the BWA before and/or during the checkpoint process. In other words, it is a form of non-negotiated contract, often being posted inconspicuously on a company website, which contains the T&Cs governing how a website user can use the website but does not require any express conduct on the part of the website user to manifest assent to the T&Cs. The study of BWA has become significant due to its validation as an e-contract and its recent excessive use during the Covid 19 pandemic, where every user was forced to get well convergent with the digital mechanism and technological advancement including the online shopping, electronic-banking and online payment. The scope of the study with reference to legal framework is limited to India only but for the proper understanding on the topic, the help of foreign jurisdiction especially their judicial approach in recognizing and validating the e-contract in context of BWA will also be considered. For instance, the United States through its plethora of cases has attempted to follow a framework with an adequate communication of notice system which is subjected to consumer protection concerns, which has not been followed by India and its judiciary while interpreting the significance of BWAs in present context.

Through this study, the researcher will attempt to understand the significance of Browse-Wrap Agreements in the electronic contracts and its relationship with the Clip-Wrap Agreement, analyze the legal framework and amendments made to recognize the e-contract vis-à-vis the BWA in terms with the Information Technology law and Contract Act, and lastly examine the acceptance of e-contracts in the age of digitalization and technology especially during the Covid 19 pandemic.

Keywords: Brows-Wrap Agreement, E-Contract, Validation, Internet, Covid

Introduction

While browsing on the web, internet users at times find T&Cs on a separate page that proposes to sell goods and services, usually accessible via a hyperlink that appears on the same page. In particular, the end user, does not require to review the T&C or take positive steps suggesting that these T&C have been reviewed, before being able to accept the contract. Hence, the entire agreements cannot be appeared at the same time unless the acceptor click on the terms of the hyperlink and such agreement is known as BWA. As said that the end user is not required to do anything extra that might suggest any notice of the T&Cs, the BWA is becomes more difficult to enforce.[1]

The BWA covers only the access or use of materials being available on a website or downloadable product. Only if the end user agrees to the T&C on the webpage, such end user can access the contents of the web page.[2] In most cases,[3] the BWA on the website, includes a statement assuming the end user's continued use of the website or the downloaded software manifests, their assents those T&C. It has also been found that the T&C mentioned in the BWA are explicitly displayed on the website, but the existence of such BWA is hidden or not easily seen on the webpage.

Regarding electronic-contracts ('e-contracts'), all transactions are done in electronic form. It helps in making agreements and transactions electronically in the physical absence of the parties. Hence it basically aims in making the lawfully binding contracts at a much faster rate with the use of latest technology. In current scenario, the electronic transactions (e-transactions) are used for a variety of purposes including in recognition of digital signatures and electronic records, filing income-tax returns, fillings forms for admissions, paying bills online and others.[4] In addition with the BWA, other agreements including the Shrink-Wrap

* Assistant Professor of Law, IMS Unison University, Mussoorie Diversion Road, Dehradun

1 Christina L. Kunz, John E. Ottaviani, Elaine D. Ziff, Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements, JSTOR, available at https://www.jstor.org/stable/40688197 (Last visited April 18, 2022).

2 Tanisha Gautam, Clickwarp, Browsewrap and Shrinkwrap Agreements in India, JUS CORPUS LAW JOURNAL, available at https://www.juscorpus.com/wp-content/uploads/2021/04/23.-Tanisha-Gautam.pdf (Last visited April 16, 2022).

3 Nancy S. Kim, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS (Oxford University Press, 2013)

4 Ben Lutkevich, Digital Signature, TechTarget, available at https://www.techtarget.com/searchsecurity/definition/digital-signature (Last visited April 16, 2022).

Agreement and Click-Wrap Agreement (CWA) are also commonly used as a contract in the electronic commerce[5] and to make it valid, the Information Technology Act provides legal validity to such e-contracts.[6] The CWA or Click Through Agreement (CTA) is a form of agreement used for software licensing, websites, and other electronic media and requires the user to agree to T&Cs before using a website or completing an installation or online purchase process. Thus, these agreements typically present the terms and conditions followed by a check box with the words "I agree" or "I accept" that the user must click. In India, the CWA has been used efficiently when compared to BWAs. And in case of BWAs or CWAs, to make any contract valid, signatures from both the parties are required and which can attain through digital signature or electronic signature.[7]

Therefore, it can be said that the BWA's are related to a page, which appears as a hyperlink on the internet and asks for acceptance from the web user, by showing certain terms and conditions. It can be in the form of advertisement or promotion of any product or service. The significance of the study lies in the enforceability of BWA in court of law. In many cases, court has interpreted the concept with different mindset which has unfortunately raised various challenges regarding the validity of license of terms and conditions in BWA's. In the coming sections of the article, the legal framework and judicial responses relating to BWA will be discussed to have more clarity on enforceability mechanism and its effectiveness in present world.

Legal Framework Regulating the E-Contracts

In legal terms, a contract is an agreement comprising of offer from one party and acceptance by other party. When the proposal is accepted by another party, to do something or to refrain from doing something, then it becomes the promise. Also, an agreement when becomes enforceable by law, it becomes a contract. Further, to make an agreement enforceable, certain communication is necessary from the promiser to the promise i.e. to make it a contract. But with the advancement in technology, the way of entering into contract has also changed which we can find in the form of e-contract vis-à-vis BWA's.

In India, as per the Information technology law, the legal recognition of electronic records (e-records) occurs, where any information is in writing, typewritten or in printed form, is made available to a user in the electronic form for subsequent reference. In general terms, it means any document which is in the written or typewritten or printed version having equal validity in the electronic form. On the other hand, the Indian Contract Act, 1872, governs the way contracts are made and performed in India, so every contract made should necessarily comply with the provisions of the Act, to make it legally enforceable. Hence, the satisfaction of e-records will include any information or record which are in writing or in the typewritten or printed form, despite anything contained in such law, and such requirement shall be deemed to have been satisfied if such information or matter is rendered or made available in an electronic form and accessible to be usable for a subsequent reference. The accepted and legally recognized form of e-contract has even been found in the earlier Contract Act as well.

It is notable that the Indian Contract Act, 1872 does not provide for any express provision that can regulate such type of BWA. However, according to a Report, a recommendation was made suggesting in creating a separate chapter-IVA and introducing section 67A, where the judiciary should have the power to refuse enforcement of a contract or any part that it holds as unconscionable. But it is still in progress, hence, the judiciary has not been proactive in India when it comes to enforceability of BWAs.

When it comes to BWA, it is the agreement which is in the form of a "term of use" (TOU) or "terms of service" (TOS) which usually exist in the corner of a website in the form of a link. Usually, these types of contracts are not considered to be legally binding in most of the countries. But according to the Indian Contract Act, which defines "offer" as the legal rules applicable to it and provides that offer must be communicated to the offeree.[14] [15] Similarly, in user agreements, the TOS must be specifically communicated and visible to the user and just a link to the terms of the website would not suffice to qualify as intimation to the

---

[5] Id. (f 3).
[6] Sec. 10, The Information Technology Act, 2000.
[7] Sec. 2 (p), The Information Technology Act, 2000, defines the 'Electronic signature" as the authentication of any electronic record by a subscriber by means of the electronic technique specified in the second schedule and it includes a digital signature.
[8] Sec. 2 (b), The Indian Contract Act, 1872.
[9] Sec. 2 (h), The Indian Contract Act, 1872.
[10] Bhagwandas Goverdhandas Kedia vs M/s. Girdharilal Parshottamdas, 1966 AIR 543, 1966 SCR (1) 656
[11] Sec. 4, The Information Technology Act, 2000.
[12] Id.
[13] 103rd Report of the Law Commission of India (May 1984), available at https://lawcommissionofindia.nic.in/101-169/Report103.pdf
[14] Sec. 2 (a), The Indian Contract Act, 1872.
[15] Lalman Shukla v. Gauri Dutt, (1913) All LJ 489.

user.[16] Some big tech companies including Apple,[17] Google[18] and Microsoft[19] have updated their TOU and TOS in such a manner so as to coordinate with their website users in an efficient manner. It is a well applied principle that the terms of the contract should not be changed or modified after taking the approval and acceptance of the user. It is because the user assented to those particular terms only, and hence will be a "voidable" contract.[20]

In US, the website design elements are key to BWAs as has been observed throughout the existing American jurisprudence. The US courts have been critical of elements such as the proximity and recurrence of the terms of hyperlink[21], the size, colour and background of the font[22] , placement of the hyperlink on the webpage at a suitable position not being at the bottom or other links.[23] The hyperlink being placed at the bottom of the webpage and how it works against the requirement of adequate communication for the consumers has remained one of the most commonly recurring issues. Hence, in US, the courts have been more efficient to recognize the BWAs and its enforceability when compared to India and such judgments will be discussed in the later part of this paper.

Hence, any changes if made should specifically and exclusively be communicated to the user to make it a valid contract. Even the Courts have interpreted and delivered the judgment on the principle of communication and knowledge which will be discussed in the later part of the article. Further, if in the contract there are no additional requirements imposed by another law, the e-contracts would be considered valid under the Information Technology Act, 2000 is similar to Section 11 of the UNCITRAL Model Law on Electronic Commerce 1996 and following necessary pre-requisites under the Indian Contract Act, 1872 with regard to offer, unconditional acceptance, lawful purpose and consideration, capacity of parties and free consent.[26]

It is notable that in *Carlill* v. *Carbolic*,[27] the court held that a contract is an agreement enforceable by law and it is the result of a proposal and acceptance of the proposal when two minds come together. Regarding the capacity of parties, in *Mohri Bibi case*[28], the court held that an agreement with a person who is a minor or below the age of 18 years, will be void ab initio. The validation of e-contract is also established through the Indian Evidence Act, 1860 which considers the electronic records and recognized them as documentary evidence.[29]

In 2008, the Central Government through an amendment,[30] validated the contracts through electronic means, which provides that in the process of contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, which are expressed in the electronic form (e-form) or by means of an e-record, such contract shall not be deemed to be unenforceable, solely on the ground that such e-form or its means was used for that purpose. In the present changing world, where every other day, some new technological advancements are taking place, the usage of e- contracts is bound to grow and along with it the various legal issues is bound to come before the court. In 2010, the Supreme Court in *Trimex International*[31], upheld the aforesaid phenomena and recognized the concept of offer and acceptance through e-mails as a valid contract in absence of a formal contract.

Further it can be argued seeing the legal framework relating to e-contract, that the Information Technology law in India, does not provide or cover all aspects of the online contracts and is required to take into consideration the legal mechanism for mobile applications and software as well[32]. Hence, some modifications are required in the

---

[16] Nicole Olsen, 8 Common Issues with Terms and Conditions Agreements, Privacy Policies, (2021), available at https://www.privacypolicies.com/blog/common-issues-terms-conditions/ (Last visited April 18, 2022).
[17] Apple Website Terms of Use, available at https://www.apple.com/in/legal/internet-services/terms/site.html (Last visited April 15, 2022).
[18] Google Privacy and Terms, available at https://policies.google.com/privacy?hl=en-US (Last visited April 15, 2022).
[19] Microsoft Privacy Statement, available at https://privacy.microsoft.com/en-ca/privacystatement (Last visited April 15, 2022).
[20] Sec. 2 (i), The Indian Contract Act, 1872.
[21] Nguyen v. Barnes & Noble Inc., (2014) 763 F.3d 1171.
[22] Pollstar v. Gigmania, (2000) 170 F.Supp. 2d 974.
[23] Specht v. Netscape Communication Corp., (2002) 306 F.3d 17.
[24] Sec. 10 A, The Information and Technology Act.
[25] Art. 11, Formation and validity of contracts, (1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.
[26] Sec. 11-13, The Indian Contract Act 1972.
[27] Carlill v. Carbolic Smoke Ball Co., (1893) 1 QB 256.
[28] Mohri Bibi v. Dharmodas Ghose, (1903) 30 IA 114.
[29] Sec. 65B (1), The Indian Evidence Act.
[30] Sec. 10A, The Information Technology (Amendment) Act, 2008.
[31] Trimex International FZE Ltd. Dubai Vs. Vedanta Aluminium Ltd., 2010 (3) SCC 1.
[32] Reserve Bank of India, Guidelines on Information security, Electronic Banking, Technology risk management and cyber (2011), available at https://rbidocs.rbi.org.in/rdocs/content/PDFs/GBS300411F.pdf (Last visited April 15, 2022).

present legal framework regulating e-contract in order to control and prohibit issues of e-contracts including the challenges in BWA's. Further, there is a need to have certain clarifications regarding the T&C clause of license for Internet users which will be discussed in the further parts of this study.

Enforceability of Brows-Wrap Terms and Conditions in the Internet Age

Presently, the end users are surrounded with the technology, computer advancements and their constant updates. Earlier, the documentation and agreements were drafted in the written or paper form, but as the Information technology revolution has upgraded and modified the ways of entering into contracts, by bringing it in the electronic form i.e., e-contract.[33] But it can be argued that such technological upgradation through e-contracts has posed a lot of challenges and issues which need to be understood.

For instance, most of the prudent website operators include the T&C on their website to make sure for the website users or end users that what basic information they are required to look, before purchasing the products or services being available on their website. The businesses operating online required to ensure the way, their T&C are on their websites, and are sufficiently brought to their end users' attention, or else there is a risk that the T&C will become unenforceable.

In terms of BWA, the T&C are simply put on the website, being typically accessible via a hyperlink appearing on various pages on that website or else at the foot of the website pages, with no requirement that a website user take any affirmation action to indicate assent to the T&Cs. It is notable that in the case of *Bhagwandas* v. *Girdharilal*[34], it was held that an oral contract is as much valid as a written contract; the only condition is they should comply with the essential of a valid contract. In this case, it was observed that ordinary it is the acceptance of offer and intimation which forms a contract binding and this intimation should be through some external manifestation. Hence, in the absence of any specific legislation enforceability of e-contracts cannot be challenged.

In the internet age, the courts of different jurisdictions have held the BWA to be enforceable where it has been sufficiently demonstrated that an end user has seen and accepted the relevant T&Cs before proceeding with a transaction. Hence, the courts have been more focused on whether the website user has both has either actual or constructive notice of the T&Cs prior to using the website or completing the required transaction. In further chapters, the researcher will discuss the enforceability mechanism which the court has applied in recognizing the e-contract especially the BWA, on case-to-case basis in the jurisdiction of India and United States.

Judicial Approach

Through this section, the researcher will explore the judicial approach towards recognizing the e-contract mechanism and the interpretation of the BWA's keeping in mind the interest of user based on knowledge and communication. In *Specht* v. *Netscape*,[35] the Court focused on the enforceability of a browse-wrap contract entered on the Netscape website whereby the users of the website were forced to download free software available on the website by clicking on a tinted button labelled as "download". It was contended that only when a user scrolled down the page to the next screen, they can see an invitation to review the full terms of the program's license agreement, made available by the hyperlink.[36] The plaintiffs, unable to see an agreement, downloaded the software and later sue the company for the violations of federal privacy and computer fraud statutes arising from the use of such software.

Based on that, the Court noted that an essential ingredient to contract formation is the mutual manifestation of assent. The Court further observed that a consumer's clicking on a download button would signify assent to those terms and because the plaintiffs were not informed about the terms, thus not bound by them.[37] The Court finally held that merely clicking on a download button does not show assent to license terms if those terms were not conspicuous and if it was not explicit to the consumer that clicking meant agreeing to the license.[38]

In *Dewayne Hubbert* v. *Dell Corp*.[39], the appellate court, by applying the Texas law, hold purchasers of Dell computers bound by terms and conditions of sale, which were posted and made available on Dell's website at the time of purchase. Significantly, the court held that plaintiffs are bound by these terms although such purchases were available only via hyperlink on Dell's website, and further, that the consumer did not have to affirmatively click an "I

[33] Maren K. Woebbeking, The Impact of Smart Contracts on Traditional Concepts of Contract Law, Journal of Intellectual Property, Information, Technology, E-Commerce, Law (2021), available at https://www.jipitec.eu/issues/jipitec-10-1-2019/4880 (Last visited April 15, 2022).
[34] Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas, AIR 1966 SC 543, (1966) 1 SCR 656.
[35] Specht v. Netscape Communications Corp., 306 F.3d 17 (2d Cir. 2002).
[36] Id., at 19.
[37] Id., at 46.
[38] Id., at 59.
[39] Dewayne Hubbert v. Dell Corp., 359 Ill. App. 3d 976, 835 N.E.2d 113.

accept" icon to indicate his assent to be bound thereby. The Court further held that by purchasing their computers online, plaintiffs entered an online contract which included the terms and Conditions, because they were advised on Dell's website that their purchases were subject thereto.

Further, it was held that plaintiffs bound by the arbitration clause contained in the Terms, which mandated that they arbitrate disputes arising out of the purchase of their computer before the National Arbitration Forum, hence, upheld the validity of arbitration clause. Thus, the court rejected plaintiffs' claims that such a clause was procedurally and substantively unconscionable. Hence, through this case, certain principles relating to e-contract were established including purchases being bound by contract terms available via hyperlink.

Similarly in *Southwest Airlines* v. *Boardfirst*,[40] where the issue was regarding the violation and enforceability of BWA relating to commercial use of website. It was alleged that the defendant has violated the terms of a BWA by entering and use of plaintiffs' website. Based on that, the Court issued a permanent injunction, restricting the defendant from accessing plaintiff's website on behalf of its customers to obtain boarding passes. In this case, the plaintiff's passengers engaged the defendant to obtain the boarding passes in hope of getting better seat assignments on plaintiff's flights as plaintiff airlines had no assigned seating. The passengers seeking the boarding passes within the designated time were awarded "A" Grade boarding passes, which, in turn, allow them to board the flight, and select their seat, on a first basis. The Court found that defendant had the requisite knowledge that its use of plaintiff's website would form a valid browse-wrap contract by virtue, in addition, of its receipt of cease-and-desist letters from plaintiff's appraising it of that fact.[41]

The Court denied plaintiff's motion for summary judgment which sought to hold defendant liable for violation of the Computer Fraud and Abuse Act (CFAA).[42] The Court held that issues of fact as to whether plaintiff sustained the injury need to be sustained as such a claim precluded an award of summary judgment. The Court further held that it could not, at this time, determine whether defendant accessed plaintiff's website without authorization or beyond authorization, an additional prerequisite to a CFAA claim. Finally, the Court found that defendant's conduct being an offensive act,[43] i.e., knowingly accessing a computer network, or computer system without the effective consent of the owner.[44]

Further in *Cairo* v. *CrossMedia Services*,[45] the Court observed that the "Terms of Use" on defendant's websites constitutes a binding agreement between website operator and website user. Such notice on the website provided that the "Terms" will create such an agreement, if a user continues to utilize the website, and plaintiff used the website with both the actual knowledge of the Terms, and with imputed knowledge arising out of repeated use of the sites via a 'robot', hence bound. Although the Court dismissed the plaintiffs' declaratory judgement action for the improper venue, as the "Terms of Use" had mandated that the suit be brought in Illinois, but the plaintiff commenced the suit in California.

Also, in *Nguyen* v. *Barnes & Noble, Inc.*,[46] the defendant, a national bookseller who was operating store and a website for the purchase of books and other items, had advertised a "fire sale" of discontinued "Hewlett-Packard Touchpad tablets (Touchpads)" at a heavily discounted price. The plaintiff purchased two Touchpads from the defendant's website and received an email, confirming his purchase. The next day, plaintiff received an email from defendants regarding the cancelling of his order due to an unexpectedly high demand. On that, the plaintiff filed a suit against defendants in California State Court, alleging the deceptive trade practices and false advertisement thereby violating the California and New York laws.

The defendant filed a motion to compel for the arbitration instead of regular court proceedings referring to the Federal Arbitration Act (FAA). The defendant argued before the court that plaintiff was bound by the website's Terms of Use (TOU), which could be viewed if a user clicks on a hyperlink at the bottom of each webpage. The TOU placed the website users on notice that they were subject to arbitration if they visited any webpage, created a user account, or made any purchase. Although the plaintiff contended that he has not clicked the TOU hyperlink or read any TOU document. The District Court denied defendants arguments and rejected their motion of arbitration. Accordingly, the defendant went for an appeal.

On appeal, defendant challenged the District Court's denial of its motion to compel arbitration against plaintiff under the arbitration agreement contained in its website's TOU. The Appellant Court dismissed the appeal and held

[40] Southwest Airlines v. Boardfirst LLC, (2007) Civ. Act. No. 3:06-CV-0891-B (N.D. Texas).
[41] Id., at 17.
[42] Sec. 1030, 18 United States Code,
[43] Sec. 33.02, The Texas Penal Code.
[44] Id., at 23.
[45] Cairo v. CrossMedia Services, (2005) Case No. C04-04825 (JW)
[46] Nguyen v. Barnes & Noble, Inc., (2015) 763 F.3d 1171.

that there was no evidence to show that the website user had actual knowledge of the arbitration agreement. The Court also held that where a website makes its terms of use available via a "conspicuous hyperlink" on every page of the website but otherwise provides no notice to their users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on, without more, is insufficient to give rise to constructive notice.

Therefore, the Court concluded that nothing could suggest that those browse-wrap terms at issue are enforceable by or against plaintiff, much less why they should give rise to constructive notice of defendants browse-wrap terms. Considering the distinguishing facts, the District Court did not abuse its discretion in rejecting defendant's estoppel argument. Therefore, by upholding the decision of the District Court, the Appellant Court held that plaintiff had insufficient notice of defendant's TOU, thus did not enter into an arbitration agreement.

Further to interpret the notion of constructive notice, in *Joe Douglas* v. *Talk America Inc.*,[47] the Ninth Circuit of US Court held that "customer is not bound by contractual amendments to service contract posted by long distance company on its website of which customer had no notice". The defendant undertook to provide phone services to customers previously serviced by AOL. Thereafter, the defendant attempted to change the terms of its contracts with these customers by modifying the parties' contracts provisions thereby increasing the applicable service charges and compelled customers to arbitrate any disputes they may have with the company.[48] They further included a class action waiver, and a New York choice of law provision and posted all the changes on their website.

On the apparent, the plaintiff, being a former AOL customer, contented that he continued to use defendant's services after the changeover, but was provided with no notice of these contractual changes. The plaintiff further alleged that he had no need to visit defendant's website as he had set-up his account in a manner that all applicable charges will automatically bill to and paid by his credit card.

From the arguments of both the parties, the Court held that plaintiff could not be compelled to arbitrate his disputes with defendant's, arising out of these contractual revisions, and particularly the rate which the defendant increased and mandated. The Court, accordingly, by setting aside the District Court decision of granting motion to compel arbitration, granted the plaintiff's writ of mandamus.

Similarly, in *Re Zappos.com*[49] case, the customers who had their personal information got compromised after hackers successfully breached plaintiff's security and brought a class action claim for damages resulting from such security breach under State and Federal Laws of US. The plaintiff argued that the customers could not bring a class action suit because the plaintiff's website TOU if customers must attend arbitration with plaintiff and thus prohibits class action suits.[50]

The U.S. District Court of Nevada, however, found that the plaintiff's website TOU, including the arbitration and anti-class action lawsuit clauses, were unenforceable. The Court observed that the TOU constitutes a BWA, the enforceability of which depends upon: whether the user had actual or constructive knowledge of the terms? The Court further observed that the plaintiff's website had a hyperlink to its TOU on every page of its website, between the middle and bottom of the page, which were visible if a user scrolls down.[51] The Court also reasoned that there were no distinguishing features of the link as it was the same size font and color as most non-significant links and users were not directed to the TOU when opening an account, logging in or making a purchase.

Ultimately, the Court found that it could not conclude that the website users ever viewed, let alone assented to the TOU. The Court opined that the basic requirement for a contract, including "acceptance" and a "meeting of the minds" are not altered yet because the terms and conditions apply online.

In 2017, a Florida State Appellate Court struck down the validity of an online seller's "terms and conditions" in a dispute with a buyer. The case[52] involved the enforceability of an arbitration clause in a "browse-wrap" agreement – a relatively nascent legal topic and something no Florida court had ruled on before. As such, the case is likely to have a notable impact on the e-Commerce legal landscape.[53]

Further, in numerous cases especially in *Hoffman* v. *Supplements Togo Mgmt.*,[54] *Specht* v. *Netscape Commc'ns*

---

[47] Joe Douglas v. Talk America Inc., (2007) Case No. 06-75424 (9th Cir.).
[48] Id. at 2.
[49] Re Zappos.com, Inc., v. Customer Data Security Breach Litigation, (2018) MDL No. 16-16860 D.C. No. 3:12-cv-00325-RCJ-VPC.
[50] Id., at 15.
[51] Id., at 18.
[52] Vitacost.com Inc. v. McCants, (2017) Case No. 4D16-3384 (Fla. Dist. Ct.)
[53] Stanganelli J, How Not to Do Browsewrap: A Parable (DMN, March 22, 2017), available at http://www.dmnews.com/agency/how-not-to-do-browsewrap-a-parable/article (Last visited April 15, 2022).
[54] Hoffman v. Supplements Togo Mgmt , (2011) 419 N.J. Super. 596, 605-7 (App. Div.).

Corp[55] and *Caspi* v. *Microsoft Network*,[56] the court has held that the pertinent inquiry is whether plaintiff was provided with reasonable notice of the applicable terms, based on the design and layout of the website, then only the enforceability of Browse Wrap will be considered.

Lastly, in the case of Rushing v. Viacom[57], where it was alleged that Viacom violated privacy laws by tracking and selling information on children as they played a mobile game. Viacom requested a stay pending arbitration as per Viacom's user agreement. The court found that there was no obvious evidence of actual or constructive notice to the user, as they had to further click on the option 'more' to review arbitration terms. Automatically making the contentious arbitration provisions in their browse wrap agreement unenforceable as an arbitration is a contractual matter and silence or inaction cannot amount to legal acceptance.

Even during the covid pandemic, the US court in *Rachel Stover*[58] held that a consumer is not bound by the updated T&Cs as the plaintiff accessed a website containing new terms in a browse-wrap agreement, hence not bound by it. A similar approach was adopted in *Skuse* v. *Pfizer.*[59]

On similar line, in *Wollen* v. *Gulf Stream*[60], the New Jersey Appellate Division held that to make the online consumer contract, enforceable, the company must show that the online consumer or user had knowledge of and assented to its terms and conditions (old as well as new). Hence, it emphasized the importance for companies to provide their online consumers with reasonable notice of all terms and conditions.[61] This case also focused on whether the consumer is tech savvy or a reasonably prudent internet user or not. The court did not invalidate the BWA in general, nor does it make BWA a wrong choice for companies. However, it observed that companies need to have periodic check on their website to ensure that its chosen method of communicating, its "TAC" is one, that ensures that knowledge and assent can easily be recognized by the reasonably prudent consumer or user.

Such cases as discussed above demonstrate show how the judiciary have followed a few steps to better understand the laws that regulates BWAs. The first requirement of notice is followed by whether the conditions were fair when consent was received from the end user. When these two steps form the information of the concerned contract, lastly the third step comes concerning the protection of consumers. In all the steps the court has deliberately dealt in detail to make such e-contract enforceable.

Hence, the T&Cs of BWA, should be reasonable enough and be within knowledge of user to make them liable for the same. In the above discussed cases, the BWA has been supported on instances where users while purchasing the products on a website, were repeatedly informed that all sales were subject to the TAC in addition to a conspicuous "hyperlink" to those "TAC" of sale over a series of pages and held that the repeated exposure put a reasonable user on notice of the TAC. Whereas in case of insufficient notice, where the hyperlink to the terms and conditions was found only when a user scrolled down the page to the next screen, the same has been discarded by the court and held such BWA to be invalid and not enforceable against the user. Hence, based on the decisions of the courts, whether a BWA is enforceable or not, it has to be assessed on case-to-case basis, and there are no "bright-line" rules as to whether a given set of terms and conditions agreement is sufficiently conspicuous or not.

Conclusion and Suggestions

From above discussion and notable cases, to make BWA a valid agreement is a fact-specific inquiry depending largely upon on how particular website design elements are implemented on the specific website of a company. However, each of the opinions provide some insight into how those website design elements may be implemented in a manner that may increase the chances that the BWA will be deemed enforceable. In one of the cases, the researcher has attempted to show the court observation regarding the BWA wherein it noted that online retailers would be well-advised to include a conspicuous textual notice with their TOU hyperlinks going forward. For instance, the online retailers might want to consider expressly stating on each webpage (next to the 'TOU' hyperlink) that, by merely using the website the consumer is assenting to the website T&Cs.

In short, it can be concluded that for BWAs, a company must keep the end user's entire interaction with its website in mind. In the age of internet, anyone who purchases a product online or downloads software from a computer, tablet or mobile device is likely to get encountered with BWAs. In certain cases, the court has shown concern towards company as well by observing it such agreements as the bread and butter for the companies that sell or

[55] Specht v. Netscape Commc'ns Corp, (2002) 306 F.3d 17 (2d Cir.).
[56] Caspi v. Microsoft Network, (1999) 323 N.J. Super. 118 (App. Div.).
[57] Rushing v. Viacom, (2018) N.D. Cal 04492.
[58] Rachel Stover v. Experian Holdings, Inc., (2020) Case No. 19-55204 (9th Cir.) https://www.jdsupra.com/legalnews/ninth-circuit-holds-that-a-change-of-89178/.
[59] Amy Skuse v Pfizer, (2020) 244 N.J.30.
[60] Wollen v. Gulf Stream Restoration and Cleaning, (2021) N.J. Super. LEXIS 94 (App. Div.).
[61] Id., at 34.

license products or provide services via websites or web applications, hence they even observe that the end users or customers should see such hyperlinks carefully before clicking acceptance on that page i.e., BWA. If a person sees carefully, with reference to BWA, the user's assent to the agreement's term is inferred from the user's use of the website as has been observed by the court in this article. Hence, the terms of a BWA are accessible from a hyperlink placed on one or more webpages of the company's website.

Even the courts have interpreted the term BWA keeping in mind the day-to-day usage of e-contracts and recommended safety measures which an internet end user must take while purchasing or selling the product or services online. Also, it has been analyzed that the courts have effectively addressed what exactly constitutes a valid, legally binding and enforceable contract including e-contract. The courts have further taken note of sufferings of end users and shown active response towards the interest and protection of such end users who are entering in e-contract. The courts have also made companies liable for putting any derogatory T&Cs on their website and recognizing the enforceability of e-contract. In the BWAs, it is deemed that the end user has accepted the T&Cs. Hence, courts have discovered that it is not a binding or enforceable contract unless the website owner produces evidence that the user had actual knowledge of the T&Cs consented through the website.

Hence, in India there is a need to create regulations for BWAs as being used in the United States and the Indian judiciary is required to be more effective towards recognition and enforcement of such BWAs. It has also been seen that aside from the need for consumer protection requirements, CWA are recognized in India due to their explicit consent requirement where unlike BWAs, there exists no element of ambiguity making it a better solution for most e-commerce platforms to adopt and enforce. The binding nature of BWAs is yet to be tested before the Indian courts.

Environmental Crimes: The Laws in India and Beyond

Aanya Aggarwal*
Richa Sharma**

"Plans to protect air and water, wilderness and wildlife are in fact plans to protect man"
- Stewart Udall

ABSTRACT

Environmental crimes in essence are transgressions against the environment. Environmental crimes are not always a maneuver rather it also include everyday negligent acts of people leading to exploitation of the environment at multiple levels. At present, several judicial pronouncements have paved way for the environment to be recognized as a legal entity. Into the bargain, legislative initiatives have been made to prevent and preserve the nature and its natural resources both at international as well as municipal spheres. This alludes that environmental crimes is not a new emerging area of concern but the question here is what laws are available in this respect and how effective they are in curbing the issue.

Keywords: Environment, Wildlife Trafficking, Natural Resources, Environmental Conservation.

Introduction

It is not because of us that the planet is there; it is because of the planet, which we are here. In today's era, the crimes against nature are one of the most momentous threats on earth. Environmental Crimes are the fourth largest category of crimes in the world and is escalating by five percent every year[1]. In order to gain meteoric benefits, we have consumed or rather exhausted our nature resources and nature in general that too in such an incorrigible manner that we are now forced to face the apparent consequences of our deeds. Environmental crime is a collective term which describes a range of illegal activities harming the environment and which aims at preventing individuals or groups from the exploiting, damaging, and stealing natural resources. The most recognized types of the environmental crimes are pollution, illegal trade in wild life, illegal trade of timber, illicit trade of hazardous waste; illegal, unregulated and unreported fishing, and illegal logging. The failure of the governments to take prompt counter measures against the environment crimes, ill-equipped agencies and lack of priority to such instances has added to this flaming blaze. The environmental crimes have gained the characteristics of conventional crimes in recent times. International environmental crime networks have now acquired the characteristics of organized crime groups.[2]

Is Environment a Legal Entity?

Professor Christopher D. Stone first discussed the idea which attributes giving legal personality to natural objects in 1970. In his article *"Should Trees Have Standing? Towards Legal Rights for Natural Objects."*[3] He states a person with legal entity can't be owned; therefore no ownership can be ascribed to an environmental entity. Entities with standing (law) or locus standi have the right or capacity to bring legal action or appear in the court. He mentions that the environmental entities cannot bring legal action or appear in the court though it could be achieved on behalf of their legal representatives.

In India, discrete environmental elements have been accorded with rights in the recent past, but with no major legislation in this domain, the progress has mostly been brought about by judicial pronouncements. In the case of *Animal Welfare Board of India v. A. Nagaraja & Others*[4] the Supreme Court allowed that the Indian Constitution's Article 21 right to life extends to non-human animals. Similarly, in the case of *T.N. Godvarman Thirumulpad v. Union of India*[5] the apex court of the country pronounced

* Teaching Associate, Himgiri Zee University, Dehradun. aanya5319@gmail.com
** Assistant Professor, Himgiri Zee University, Dehradun. richa.dharmani@gmail.com

1 UNEP-INTERPOL report, 2016 on the rise of environmental crime: A growing threat to natural resources peace, development and security.
2 *Id*.
3 Christopher D. Stone. *"Should Trees Have Standing-Towards Legal Rights for Natural Objects?"* Southern California Law Review 45 (1972): 450.
4 Animal Welfare Board of India v. A. Nagaraja & Others, AIR 2014 SCC 547
5 T.N. Godvarman Thirumulpad v. Union of India & Others (1997) 2 SCC 267

that for proper justice to environment it was necessary to drift away from the then prevalent anthropocentric perspective to a rather eco-centric one.

The most important judicial pronouncement that opined giving legal entity to the environment came in the year of 2017. The Uttarakhand High Court, in the case of *Mohd. Salim v. State of Uttarakhand*[6] ruled that the two rivers, Gangotri and Yamunotri, are 'living entities having the status of legal person with all corresponding rights, duties and liabilities of a living person'. On 30th March of 2017, the Hon'ble bench of Uttarakhand High Court conferred legal personhood on the rivers of Ganga and Yamuna and all its tributaries and streams. The court cited "the Glaciers, including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls are legal entity/ legal person/ juristic person/ juridical person/ moral person/ artificial person having the status of a legal person, with all corresponding rights, duties and liabilities of a living person, in order to protect and conserve them."[7] Nearly a year later the Punjab and Haryana High Court came up with similar ruling regarding the status of "legal personhood or entity" to animals in Haryana in pursuance of promotion of their welfare.[8]

What these developments bring forth is that, the issues like climate change and rights of the nature are taking the center stage in the country. We can choose not to speak for nature and let it respond with drastic consequences to our actions, or rather give voice It the much deserved voice. Apparently, nature can only have a voice if it is given the rights of a legal entity, and this is exactly what the idea of environmental personhood advocates for.

Doctrine of Mens Rea and Environmental Crimes

The concept of Mens rea refers to criminal intent. It is the mental element of a person's intention or knowledge to commit a crime. Unlike most of the criminal offences, environmental offences do not often require specific knowledge or Mens rea. In case of environmental crimes the doctrine of Absolute Liability applies. In the case of *Oleum Gas Leak*[9] case the Supreme Court applied the principle of no-fault liability. The apex court through P.N. Bhagwati opined that the rule of strict liability, evolved in 1868, does not suit to the socio-economic conditions of the 20th century.

Besides, keeping in mind the then occured old Bhopal Gas disaster, the court evolved the principle of Absolute Liability. The court held that when any person is dealing with any inherently hazardous substance, he is absolutely liable for any consequences arising out of it the person cannot avail the exceptions provided under the concept of strict liability.

The application of environmental law typically applies absolute liability; otherwise it would be often be impossible for regulators of prosecutors to take effective enforcement action for many cases.[10] This relaxation in the rule of Mens rea has allowed the courts to take prompt actions in many environmental criminal cases.

Types of Environmental Crime

Environmental crime is the crime which directly harms the environment. These illegal activities involve the environment, biodiversity, wildlife and natural resources. International bodies like European Union, United Nation Environment Programme, G8, Interpol, United Nations Interregional Crime and Justice Research Institute, have recognised the following environmental crimes:

i. **Crime against Wildlife:** Crimes against forests and wildlife is one of the major environmental crimes which exist internationally. It is the fourth largest crime in the world.[11] The illegal tread in wildlife is around 7-23 Billion dollars annually.[12] The criminals use crude, cruel and illegal tools and practices to capture wild animals and to process them into various products. Thereafter they use unlawful means to transport and tread internationally. The international criminal groups also tread the various parts of the animals like tiger skin, rhino horn, elephant ivory etc. The rising demand from booming economy especially for the use in traditional medicines has also made it more profitable for these international criminal groups to engage in crimes against wildlife and forest. Stamping out wildlife crime is a priority for the government as it is the largest direct threat to the future of many of the most threatened and rear species.

---

6 Mohd. Salim v. State of Uttarakhand, 2017 SCC OnLine Utt 367.
7 Lalit Miglani v. State of Uttarakhand, 2017 SCC OnLine Utt 392.
8 Kaenail Singh v. State of Haryana, 2019 SCC OnLine P&H 704.
9 M.C. Mehta v. Union of India, AIR 1987 Sc 1086
10 *"Environmental Liability: In-depth"*. Available at https://app.croneri.co.uk/topics/environmental-liability/indepth (Last visited on 23/12/2021)
11 Samyukta Chemudupati., *"Wildlife Trafficking: Here's What You Should Know",* Human- Wildlife Interactions. Available at www.wildlifeconservationtrust.org (Last visited on 23/12/2021)
12 *Id.*

ii. **Crimes against Natural Resources:** Illegal disposing of waste, endangering the air we breathe, our soil and water. The crimes against natural resources like air, water, soil etc impact our health and safety on a daily basis. The use of harmful chemicals in oil blending affects the quality we breathe; illegal release of mercury released from illegal mining into rivers and the sea endangers the water supply and the whole ecosystem as well. Illegal dumping of waste in landfill sites contaminates the soil where food is grown. As a consequence, the crimes against natural resources directly affect the environmental sustainability, public health and safety.

a. Crimes against natural resources take various forms such as illegal carbon treading, illegal mining activities, illicit trafficking in chemicals etc. The crimes against natural resources are primarily driven by a low-risk with high-reward business model. The various global inequalities such as weak environmental legislation and law enforcement capacity, labour costs etc have created the opportunities for the criminals.

b. Another important reason behind crime against natural resources is rapid industrialization, urbanization and motorization. Air, water, soil is polluted by use of fossil fuels, release of untreated effluents both tread, industrial sewage effluent and fertilizer run off from farming systems, waste, municipal solid waste etc. Globally 91.3% of the world population is exposed to unhealthy levels of pollution.[13]

c. Organized crime has been found to be involved in several cases crimes against natural resources. Transnational and cross-over offences are also related to pollution crimes, requiring a coordinated law enforcement response, both at the national level (inter-agency cooperation) and internationally.[14]

iii. **Crimes related to Hazardous Substances:** The Ministry of Environment, Forest and Climate Change, Government of India defines hazardous waste as any waste which due to its physical, chemical or biological composition is likely to harm health or environment whether alone or in contact with other wastes or substances.[15] These are the byproducts of various industries. The proper treatments of these toxic substances are very expensive and difficult so the companies usually hand over the disposal to other specialized agencies that secretly and illegally dumped these dangerous chemicals throughout the world. Crimes related to hazardous substances include discharge, disposal or dumping of hazardous waste in public spaces and natural habitats, illegal transportation or smuggling of hazardous waste and the storage and treatment of hazardous waste creating a danger to the public and the environment. Illegal hazardous waste dump sites are actually environmental time bombs and the contamination created out of this hazardous wastes risk contamination of drinking water, soil and permanent damage to ecosystem.

International Law and Environmental Crime

International law provides a platform for states to come together and frame a standardized guideline or rules for protection and conservation of environment. Professor Malgosia Fiztmaurice said that "international environmental law is part and parcel of international law" and at the same time "has some special features which have actually contributed to the development of general international law itself. These peculiarities are a reflection of the requirements of environmental protection".[16] UN has played a key role with its various conferences on environmental protection. the principles of Internadtional Environmental Law have been laid down and developed through various conferences and declarations like Stockholm Declaration, the Bruntland Report, the Rio Declaration, Agenda 21, Johannesburg Declaration on Sustainable Development and Johannesburg Plan of Implementation and the Rio+20 Declaration.

i. **Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973:** Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 commonly known as CITES; Washington, 1973 is an international agreement between governments. The main aim of CITES is to protect endangered species by strictly regulating their international tread. It is a legally binding treaty and currently protects more than 5000 species of animal and 29000 species of plants.[17] It encourages the nations to adopt domestic legislation to ensure implementation of its objectives. It works on the concept of permit and prohibition of any of the listed species without its prior permission. It also states that the parties are obliged to take

[13] Florina Pirlea, Wendy Ven-dee Huang., "*The global distribution of air pollution*". Available at https://datatopics.worldbank.org (Last visited on 23/12/2021)
[14] "*Pollution crime*". Available at www.interpol.int (Last visited on 23/12/2021)
[15] Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016.
[16] See Fitzmaurice, M. (2002). *International Protection of the Environment, Recueil des Cours, Collected Courses of the Hague Academy of International Law 2001*, Vol. 293, p. 21.
[17] *Convention on International Trade in Endangered Species of Wild Fauna and Flora (2013).*

appropriate measures including penal measures to prevent violation of the convention provisions through penalization and confiscation on return of treaded goods.

ii. **Convention on Protection of Migratory Species of Wild Animals 1979:** This is the first international treaty which dealt with migratory species. This is an umbrella convention only global and UN-based intergovernmental organization established exclusively for the conservation and management of terrestrial, aquatic and avian migratory species throughout their range. As per a February 2019 press release by the Ministry, India had non-legally binding MoUs with the CMS on the conservation and management of Siberian Cranes (1998), Marine Turtles (2007), Dugongs (2008) and Raptors (2016).[18]

iii. **Basel Convention on the Control of Transboundary Movements of the Hazardous Wastes and their Disposal 1989:** The overreaching objective of the Basel convention is to protect environment and human health against the harmful effects of hazardous wastes. It covers the hazardous wastes and other wastes including household wastes and incinerator as it tries for international cooperation in reduction of hazardous waste generation promotion of proper management restriction of Transboundary movement and a regulatory system. The convention works based on the prior informed consent. The state of export shall notify the state of import and transit and provide them with detailed information on the intended movements of the hazardous wastes and the movement is only possible when all states have assigned with their written consent.

    a. Article 14 of the Convention provides for the establishment of regional or sub-regional centers for training and technology transfers regarding the management of hazardous wastes and other wastes and the minimization of their generation to cater to the specific needs of different regions and sub regions.[19]

iv. **Stockholm Convention on Persistent Organic Pollutants 2001:** Organic pollutants are those pollutants which remain in the nature for a long period of time and adversely affect the environment and ecology.[20] Persistent organic pollutants or POPs include pesticides such as DDT, industrial chemical such as poly chlorinated biphenyl and other chemicals. It recognizes the potential human and environment toxicity of the POPs and stipulates measures to regulate eliminate and manage the disposal of POPs. To target additional POPs the Convention provides for detailed procedures for the listing of new POPs in Annexes A, B and/or C.[21]

v. **Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Tread, 1998:** The Rotterdam Convention is a multilateral treaty to promote shared responsibilities in relation to importation of hazardous chemicals. It deals with the pesticides and industrial chemicals that have been banned or severely restricted for health or environmental reasons on the parties. This creates legally binding obligations on the states with regard to the implementation of prior informed consent procedure and it also encourages the environmentally sound use of the hazardous chemicals.

Indian Law and Environmental Crime

Implementation of International Environmental Law requires that international legal mechanisms are established and enforced at the national level through appropriate legal regimes. This means that the nation-states should take proactive legislative and judicial actions within the states to achieve the compliance with the internationally agreed rules and standards. The environmental crimes in India are mainly categorized into five categories as offences against the following national laws:

i. **The Forest Act, 1927:** The Forest Act 1927 reflects the British interest of commercial exploitation and economic utilization of the resources. The act reflects the British policy of commercial exploitation and economic utilization rather than the conservation of forest resources. It provides the penalties for the violation of its provisions under section 33, 41 and Chapter 9 of the Act.

---

[18] Om Marathi., *What is the Convention on Migratory Species and how does it matter to India?* Indian Express, New Delhi. Available at chrome-distiller://bf7604f9-2cda-4af7-8192-8ec7fc2954c7_1c0c080bb2e6ada4292590543ad1ded2c02a60199a8ba982b1f3c3ed9b82889e/?title=Explained%3A+What+is+the+Convention+on+Migratory+Species+and+how+does+it+matter+to+India%3F+%7C+Explained+News%2CThe+Indian+Express&url=https%3A%2F%2Findianexpress.com%2Farticle%2Fexplained%2Fconvention-of-migratory-species-india-6271330%2F (Last visited on 23/12/2021)

[19] Basel Convention. Available at www.basel.int (Last visited on 23/12/2021)

[20] Article 1, Stockholm Convention on Persistent Organic Pollutants.

[21] Article 8, Stockholm Convention on Persistent Organic Pollutants.

a. The offence against forest is defined under section 2(3) as "forest-offence" means an offence punishable under this Act or under any rule made there under;[22] however the penalty provisions of the Act is so restricted where it says the penalty is imprisonment up to six months or a fine of five hundred rupees or both.

b. Forest offences have been classified into two categorized one is trivial offences covered under section 68[23] where the offences are disposed by compounding of offences and secondly there are offences which do not fall under the first category which attracts the punishment of imprisonment up to six months or fine of five hundreds or both. Even though the Act does not have a conservation and management perspective but the penal provision of the Act has prevented many crimes or interferences in the forest area.

ii. **The Forest Conservation Act, 1980:** The Forest Conservation Act, 1980 was enacted with two objectives i.e. restricting the use of forest land for non forest purposes and for the purpose of conservation of forest that have been reserved under the Indian Forest Act. The Act empowers the central government to constitute a committee to advise it with matters conducted with the forest conservation.

a. Section 3A[24] of the Act provides for the penalty as imprisonment exchangeable up to 15 days for violation of the provisions of the Act.

iii. **The Wildlife (Protection) Act, 1972:** The Wildlife (Protection) Act, 1972 was the first comprehensive Act of the country enacted to provide for the protection of listed species of wild flora and fauna and establishes a network of ecologically sensitive and important protected areas.

a. India is blessed with dense forests, healthy ecosystems within its border. More than 50 wildlife sanctuaries in India have been designated as tiger reserves and are protected areas under The Wildlife (Protection) Act, 1972.[25] The animals such as The Black Buck, Brow Antlered Deer, Chinkara, Capped Langur, Golden Langur, Hoolock Gibbon, Bengal Tiger, Clouded Leopard, Himalayan Bear, Black Duck, Caracal, Cheetah, Dugong, Fishing Cat etc which have been mentioned in Schedule I of the Act.

b. The Act is notable for it's no fault liability that means Mens rea is not required to be proved for punishing an offender. The punishments of any offences under the Act are given section 51 of the Act.[26] The maximum punishment is provided for offences related to animals specified in Schedule I or Part II of Schedule II of the Act. Hunting within a national park or a sanctuary or altering the boundaries of a national park or hunting within a tiger reserve attracts the highest punishment under the Act. The chargesheets of the crimes can be filed directly by the Forest Department and the enforcement can be performed by agencies such as the Forest Department, the Wildlife Crime Control Bureau (WCCB), the Customs and the Central Bureau of Investigation (CBI).

iv. **Water (Prevention & Control of Pollution) Act, 1974:** The Act came into force in 1974 and is applicable to the states of Bihar, Assam, Gujarat, Madhya Pradesh, Rajasthan, Kerala, Haryana, Tripura, West Bengal, Jammu and Kashmir and the union territories. The Act is aimed to control water pollution and to restore and maintain the wholesomeness of water for the establishment. The Act also empowers the established bodies such as the central board and the state board to control the water pollution.

a. The Act functions on the basis of the concept of consent. Under section 25 of the Act says that no person is allowed to set up an industry or start a new operation or processor to any treatment of sewage without prior approval of the state board, the state board may grant him a notice of approval and only after that he is entitled to continue or start a new business.[27]

b. The penalties for the crimes related to water pollution is provided under section 41, 42, 43, 44, 45, 45A. Section 41(2) prescribes the punishment for six years of imprisonment with fine.

---

[22] Section 2, The Indian Forest Act, 1927.
[23] Section 68, The Indian Forest Act, 1927.
[24] Section 3A, The Forest Conservation Act, 1980 with Amendments, 1988.
[25] Kirti Pandey., *"All about India's Wild Life Protection Act, 1972 and the animals protected under the compassionate law"* Times of India. 30th January, 2021.
[26] See Section 51, Wildlife Protection Act, 1972.
[27] See Section 25, Water (Prevention & Control of Pollution) Act, 1974.

v. **Air (Prevention & Control of Pollution) Act, 1981:** The Act was enacted for the prevention control and abatement of air pollution for the establishment. This was the first attempt by the Indian Government in combating the air pollution. The Air Act also function the basis of prior consent. As per a study based on 2016 data, at least 140 million people in India breathe air that is 10 times or more over the WHO safe limit[28] and 13 of the world's 20 cities with the highest annual levels of air pollution are in India.[29] The reasons behind the air pollution are Fuel and biomass burning, Fuel adulteration, Traffic congestion, Greenhouse gas emissions etc.

   a. The penalty provisions were added to this Act later to the Act in 1987 amendment. Section 37, 38 and 39 provides for the penalties for the offences against the air pollution.

vi. **Environment (Protection) Act, 1986:** The Environment (Protection) Act, 1986 was passed by the Indian parliament for implementing the decisions of the Stockholm Conference. It is the general environmental legislation for a comprehensive legal regulatory system in India.

   a. Section 3 of the Act provides the power to the central government to take all measures that are necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environment pollution.

   b. The Environment (Protection) Act, 1986 under section 15 provides the provisions for punishment or penalties or non compliance of the provision of the Act. It provides punishments for the various instances such as non-compliance or violation of the Environment (Protection) Act, 1986, non-compliance or contravention of the Environmental Protection Rules, 1986 and other directions or orders under the rules. Environment (Protection) Act provides with the punishment with imprisonment for a term which may extend to five years or with fine up to one lakh rupees or with both. In case of continued violation an additional fine of up to rupees five thousand per day might be imposed.[30]

vii. **Hazardous Substances Management in India:** When it comes to the hazardous substances in India, the Environmental (Protection) Act, 1986 provides for various rules under which the management of such substances is regulated. The major rules in this regard are the Hazardous Waste Management Handling and Transboundary Rules, 2008, Manufactures Storage and Import of Hazardous Chemicals Rule, 1989, Hazardous Micro-organisms Rule, 1989 etc. the rules make the handler and the transporter liable for any consequences of handling such hazardous substances in India. The violation these rules will attract the penal provisions of the Environment (Protection) Act, 1986.

viii. **Biological Diversity Act, 2002:** The act was passed to provide for the conservation of biological resources sustainable use of its components and fair and equitable sharing of benefits arising out the use of such biological resources and knowledge. Compare to the previous legislations which have been discussed above the Biological diversity Act provides for higher level of penalties. The act stipulates all offences under it as cognizable and non-bailable. It provides penalties under section 55, 56 and 59 for violation of rules regarding permission to obtain natural resources, transferring resource results and IPR applications without permission. The penalties under the Act are imprisonment up to five years or fine up to rupees one lakh or if damage exceeds this amount a commensurate amount is also fined. The obtaining of biological resources without permission the punishment is imprisonment is up to three years and fine up to rupees fifty thousand. Any grievances related to the determination of benefit sharing or order of the National Biodiversity Authority or a State Biodiversity Board under this Act shall be taken to the National Green Tribunal (NGT).

ix. **Authorities and Institution for Enforcement of Environmental Laws:** It is clearly evident that Environmental Crime has an international character and this means an international regulatory agency is well needed. So the Interpol has actually filled up the position of internationally in the last decade. Interpol is the world largest police organization[31] it facilitates international police cooperation and provides technical and operational support to all police forces. Interpol has identified environmental crime as one of the 19 priority crime areas and it focus on illegal wildlife tread, pollution crimes and the emerging types of environmental crimes like carbon trade, water management etc.

---

[28] Bernard, Steven; Kazmin, Amy. "Dirty air: how India became the most polluted country on earth", December 11, 2018.
[29] India's air pollution, health burden gets NIEHS attention (Environmental Factor, September 2018).
[30] See Section 15(1), Environment (Protection) Act, 1986.
[31] Available at www.interpol.int. (Last visited on 23/22/2021) December 11, 2018 Retrieved 19 March 2020.

a. In our country the major authorities or institutes which are engaged in the activities to prevent crimes against environment are the Ministry of Environment Forest & Climate Change, the Central Pollution Control Board, the State Pollution Control Board, State Departments of Environment, Municipal Corporation's enforcement agencies like CBI, Wildlife Control Bureau and the local police authorities. The Wildlife Crime Control Bureau and National Crime Records Bureau supports in the documentation of the reported crimes against environment.

b. The customs also have a major role to play when it comes to international environmental crimes especially illegal trade in wildlife and forest produces.

Environmental Crime and Indian Judiciary

In recent years, there has been a succor focus on the role played by the higher judiciary in devising and monitoring the implementation of measures for pollution control, conservation of forests and wildlife protection. Judicial interventions have mostly been triggered by the persistent incoherence in policy-making as well as the lack of capacity-building amongst the executive agencies.

Indian Judiciary has garnered international respect with regard to the extensive interpretation of Article 21 of Indian Constitution which grants "Right to Life"[32] and extending in to include right to wholesome environment.

i. **Remarkable Principles Propounded by Indian Judiciary:** The Indian Judiciary has pronounced various principals regarding the environmental crimes through the judgments. Some of the principals are as follows:

ii. **The Doctrine of Absolute Liability:** In the case of Union Carbide Corporation v. Union of India[33], the concept of Absolute Liability was invoked by the Supreme Court of India. The apex court stated that an enterprise which is engaged in hazardous or inherently dangerous activity posing a potential threat to the health and safety of the persons working in the factory or residing in the surrounding areas owes an absolute and non delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity.

iii. **Polluter Pays Principles:** In the case of Vellore Citizen's Welfare Forum v. Union of India[34], the Supreme Court imposed a pollution fine on the company for causing river and land pollution. The fine amount was to be utilized for restoring the damaged environment and compensation for the affected persons.

iv. **Doctrine of Sustainable Development:** In case of Rural Litigation and Entitlement Kendra v. State of UP[35], the Supreme Court of India for the first time dealt with the issue relating to the environment and development; and held that, it is always to be remembered that these are the permanent assets of mankind and or not intended to be exhausted in one generation.

In another case the apex court of the country pronounced that sustainable development has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting eco- system.[36]

v. **Oral Evidence or Extra-judicial Confession:** In the case of Sanchar Chand v. State of Rajasthan[37], the Supreme Court of India held that it is not always possible to get direct evidence against the gang leader in such instances their involvement can be proved and they can be convicted or punished on the basis of oral evidence or extra-judicial confession corroborated by other evidences.

Conclusion

"Nature never did betray the heart that loved her"- lamented the famous poet William Wordsworth. Our ancestors not only admired nature but also worshiped the same. However, with the passage of time, our greed especially for the speedy economic growth has disturbed the balance between human and various other components of nature i.e. environment. Several problems like urbanization, industrialization, pollution has made the situation so aggrieved that the survival of mankind is putting heavy pressure on the whole eco system. Thus, the overall affect on the environment has caused deterioration of the natural environment, a global problem.

---

[32] See Article 21 in Indian Constitution, 1950
[33] *Union Carbide Corporation v. Union of India, AIR 1990 SC 273*
[34] *Vellore Citizen's Welfare Forum v. Union of India, AIR 1996, SCC 212*
[35] *Rural Litigation and Entitlement Kendra v. State of UP, AIR 1987, SCC 1037*
[36] *Vellore Citizen's Welfare Forum v. Union of India, AIR 1996, SCC 212*
[37] Sanchar Chand v. State of Rajasthan, AIR 2010, SCC 604

India has drafted various legislations till today to stop the environmental crimes but execution of those laws has been lenient. Lack of strict implementation has created gray areas in the practical life situations which are taken advantage by the environmental criminals. On 28th August 2020, the UN Secretary-General Antonio Guterres said that India can lead the world's transformation to clean energy and become a "global superpower" in war on climate change.[38]

India through its various legislation and has tried to control pollution and environmental crimes. Not only with the various laws but also with judicial activism numerous approaches have been taken to protect the ecology. All we have to do is to be aware and spread the awareness that if we keep on exploiting the nature then the nature will do it to us in a very cruel way. Proper and strict implementation of the existing laws will ensure reduction in crimes related to environment.

[38] IANS. *"India can be global superpower in fighting climate change: Guterres"*. The Business Standard, 28th August, 2020.

A Legal Analysis of the Jus Cogens Status of Enforced Disappearances under International Law and Its Applicability under Domestic Law of India

Farah Hayat*

ABSTRACT

There was a time when enforced disappearance was a tactic used by military dictatorships to tackle the "problem" of political dissent or rivalry. Now, it has perpetrated as an infamous means of political repression of opponents even in democratic nations. Thus, it's no more restricted to a particular region of the world rather it has become a global problem. Enforced disappearance, which is an involuntary abduction of a person with acquiescence of the State or a political organization is a human right violation that has gained the status of a peremptory norm in general international law (*jus cogens*) due to the level of suffering and misery it causes, not only to the direct victim who has disappeared, but also his family members who are the secondary victims of the crime of enforced disappearance. The act of enforced disappearance generally commences with an arbitrary arrest made of persons alleged of some offence, who are then taken to and kept in locations that are confidential and are not even shared with the family of the victims, where they are frequently tortured and in many cases end up dead. Having been removed from the protective precinct of the law and "disappeared" from society, they are in fact deprived of all their rights and are at the mercy of their captors. Even though it's a crime with grave repercussions, it's still not an offence either under the Indian Penal Code or under any special legislation. Through this paper, the author has attempted to study the international principle of *jus cogens* which despite of being an important research area in international academic circles, has not yet been explored much by legal scholars in India. Furthermore, an attempt has also been made to analyze the *jus cogens* status of enforced disappearances in international human rights law and accordingly certain suggestions have been put forward as to how it can be applied in India for a stringent legal mechanism to curb the menace of enforced disappearances.

Keywords: Enforced Disappearances, *Jus Cogens*, International Law, Human Right Violation, International Convention for the Protection of All Persons from Enforced Disappearance, 2006

Introduction

Enforced disappearance is a heinous criminal act that causes suffering to the victim who is disappeared but also causes mental and emotional trauma to his family and friends. In addition to that, if the primary victim is the main breadwinner of the family, then it causes further distress to the family by the material consequences of the disappearance. The emotional upheaval is thus exacerbated by material deprivation.

Cases of enforced disappearances occur in both conflict and non-conflict zones but are far more common in conflict zones or disturbed areas. Although it's a global issue that even the United Nations has taken cognizance of but closer to home, enforced disappearances are extremely common in Jammu and Kashmir and the North-eastern states which have been declared as disturbed areas by law, leading to heavy deployment of military and other paramilitary forces. These forces have been given wide powers of arrest and detention under the Armed Forces (Special Powers) Act, 1958 (hereinafter referred to as AFSPA) and the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (hereinafter referred to as AF (J&K)SPA) to fight the issue of militancy that started in 1989, but sometimes these powers are abused and misused whereby on the basis of suspicion, people are picked up by force from their houses on the pretext of questioning or investigation, sometimes, never to return back. In non-conflict zones, cases of custodial torture by policemen, sometimes leading to death and disappearance, are frequently reported. Most of these cases go unreported due to threats made by the blameworthy police or military personnel or due to fear of them. What makes the situation worse is the necessary requirement of sanction from the government for initiation of prosecution against erring law enforcement personnel.[1] People from all spheres of life and different age groups, from 10 years to seventy years after their arrests have got disappeared including large number of innocent persons and it is reported that more than 2000 people since 1989,

* Research Scholar, Faculty of Law, Jamia Millia Islamia, New Delhi

[1] Sec. 6, The Armed Forces (Special Powers) Act, 1958: Protection to persons acting under Act – No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act; sec. 7, The Armed Forces (Jammu And Kashmir) Special Powers Act, 1990.

after their arrests by the law enforcing agencies, have disappeared.[2]

Both the Rome Statute of the International Criminal Court, which came into force on 1 July 2002, and the International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly on 20 December 2006, state that, when committed as part of a widespread or systematic attack directed at any civilian population, a "forced disappearance" qualifies as a crime against humanity and, thus, is not subject to a statute of limitations. It gives victims' families the right to seek reparations, and to demand the truth about the disappearance of their loved ones.

The Concept of *Jus Cogens* under International Law

There are certain principles of customary international law that have achieved the state of *jus cogens* in the international community. The literal translation of *jus cogens* is 'cogent law'. The primary attribute of *jus cogens* is that it is of a compelling nature- a peremptory norm derogation from which is not permissible under any circumstances. A reasonably simple definition of *jus cogens* can be *"those rules which derive from principles that the legal conscience of mankind deems absolutely essential to coexistence in the international community."* The main impact of a *jus cogens* approach towards human rights and humanitarian conventions is that the State may not derogate from certain rights even during periods of national emergency.[4]

It must be noted that while all *jus cogens* principles are customary international law, all principles recognized as part of customary international law do not have the status of *jus cogens* which are a superior set of principles within principles of customary international law. Moreover, the contents of *jus cogens* keep on evolving.

Jus Cogens and the International Law Commission

The concept of *jus cogens* made its first appearance in the draft article prepared by Hersch Lauterpacht in his first report on the law of treaties. He did not use the term in the draft article as *jus cogens*. Section III of the first draft was entitled "Legality of the object of the Treaty"[5] and contained in Article 15 which says: *"A treaty, or any of its provisions, is void if its performance involves as act which is illegal under international law and if it is declared so to be by the International Court of Justice."*

While commenting on this Article, Lauterpacht observed that all rules of international law were not covered by this article as there were some rules which can be modified by agreement, *Modus et Conventio Vincunt legum*. However, treaties which affected third parties were unenforceable because of the maxim *pacta tertii us nec prosunt nec nocent.*[6] Lauterpacht emphasized that:

> *"The test whether the object of the treaty is illegal and whether the treaty is void for that reason is not inconsistency with customary international law pure and simple, but inconsistency with such overriding principles of international law which may be regarded as constituting principles of public policy (ordre international public)".*[7]

Sir Gerald Fitzmaurice, who succeeded Lauterpacht as the Rapporteur, in his commentary on Article 17 of his draft which incorporated the concept of *jus cogens*, commented that, *"it is…. Only as regards of rules of international law having a kind of absolute and non- rejectable character that the question of the illegality or invalidity of a treaty inconsistent with them can arise."*[8]

Article 13 of the Second Report of Sir Humphrey Waldock, which embodied the notion of *jus cogens*, states that if a treaty infringes a principle of international law that has the status of *jus cogens*, then it is considered to be void, especially if it involves the use or threat to use force going against the principles embodied in the UN Charter or any act of the nature of an international crime or an omission committed by a State for whose suppression or punishment every State has to co-operate as required by international law. But if the treaty does not as a whole infringe a *jus cogens* principle and only a provision, object or execution thereof is causing such infringement, then if it can be severed from rest of the treaty, then only that provision shall be void. However, this Article is not applicable to a general multilateral treaty which abrogates or modifies a rule having the character of *jus cogens*.[9]

---

2 *Enforced Disappearances in Jammu and Kashmir, available at* http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/droi_080716_enforceddisapinjk/DROI_080716_EnforcedDisapinJKen.pdf (last visited on May 2, 2022).

3 U.N. Conference on the Law of Treaties, 1st and 2nd Sess. Vienna, Mar. 26 - May 24, 1968, U.N. Doc. A/CONF./39/1 1/Add. 2 (1971), Statement of Mr. Suarez (Mexico) p. 294.

4 *Ibid*.

5 YEARBOOK OF INTERNATIONAL LAW COMMISSION, Vol. 2, 153 (1950).

6 V. Nageshwar Rao, *Jus Cogens and Vienna Convention on the Law of Treaties*, Vol. 14 INDIAN JOURNAL OF INTERNATIONAL LAW 370 (1974).

7 *Supra* note 5, at 155.

8 Fitzmaurice's Third Report, YEARBOOK OF INTERNATIONAL LAW COMMISSION, Vol. 2, 40 (1958).

9 *Supra* note 6, at 371-72.

When the relevant draft articles were being discussed by the International Law Commission (hereinafter referred to as ILC), Waldock said that he used "*jus cogens*" for the lack of a better term.[10] This statement of Waldock has provided an opportunity to members for alternative terminology. Radha Binod Pal said the term *jus cogens* was not found in most text books on international law and that this term was unfamiliar to lawyers trained in common law systems. He states that in fact he also came to be acquainted with the term as a result of the ILC's discussions.[11] Bridges said that the always avoided the term jus cogens and suggested an amendment to the text of the draft by the use of "a peremptory norm of general international law", Hassan, Pal, Bartos and Tunkin favoured "international public order". As a compromise between the text and the amendment of Briggs, the Drafting Committee accepted "a peremptory norm of general international law" followed by "*jus cogens*" within brackets[12].

Jus Cogens under the Vienna Convention

Article 53 of the Vienna Convention is recognized as setting out the current internationally accepted definition of *jus cogens*. It provides:

> *"Treaties conflicting with a peremptory norm of general international law (jus cogens): A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."*

The word "norm" is sometimes understood to have a broader meaning than other related words such as "rules" and "principles" and to encompass both. It is, however, to be noted that in some cases, the words "rules", "principles" and "norms" can be used interchangeably. The ILC, in its 1966 draft articles on the law of treaties, used the word "norm" in draft article 50 which became article 53 of the 1969 Vienna Convention.[13]

The first sentence of Ar. 53, which concerns the invalidity of treaties, does not form part of the definition. It is rather a legal consequence of peremptory norms of general international law (*jus cogens*). The definition in article 53, though initially used for the purposes of the 1969 Vienna Convention, has come to be accepted as a general definition which applies beyond the law of treaties.[14] Even lack of specific acceptance on the part of one or a few States is no obstacle to a norm from becoming peremptory.[15] Thus, it's clear that once an international norm becomes *jus cogens*, it is absolutely binding on all States, whether they have persistently objected or not.[16]

Whether Enforced Disappearance has achieved the Status of *Jus Cogens* under International Law

The Restatement of Foreign Relations Law of the United States list six prohibitions affecting human rights or *jus cogens* and of such prohibition is causing murder or causing disappearance of individuals.[17] The recognition of the prohibition of enforced disappearance as a norm of *jus cogens* has been particularly consistent in the inter-American system.[18] In the *Osorio Rivera and Family Members* v. *Peru* case, the Court noted that enforced disappearance "constitutes a gross violation of human rights" and "involves a blatant rejection of the essential principles", before affirming that its prohibition was a norm of *jus cogens*.[19]

Numerous international bodies, including the UN General Assembly, the UN Human Rights Council, the Inter-American Court of Human Rights, and the European Court of Human Rights have repeatedly addressed enforced disappearances.[20] The International Convention for the

---

[10] YEARBOOK OF INTERNATIONAL LAW COMMISSION, Vol. 1, 62 (1963).
[11] *Ibid.*, at p. 69, para. 91.
[12] *Supra* note 6, at 373.
[13] International Law Commission, Report on the Work of the Seventy-First Session (2019).
[14] *Ibid.*, at 148-149.
[15] Example, the ICJ recognized that the humanitarian principles on which the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 is based is binding on all States even if there is no conventional obligation (Case of Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May, 1951, ICJ Reports, 23).
[16] Nicaragua v. United States, 1986, ICJ Reports, 114-17.
[17] Sec. 702, Restatement (Third) of Foreign Relations Law, 1987.
[18] Example, the Inter-American Court held in one of its judgement that prohibition of enforced disappearance and the obligation of States to investigate and punish acts of enforced disappearances has *jus cogens* status (Goiburú et al. v. Paraguay, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. ¶ 84 (Sept. 22, 2006), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_153_ing.pdf (last visited on May 2, 2022)).
[19] Osorio Rivera and Family Members v. Peru, Judgment (Preliminary objections, merits, reparations, and costs), Inter-American Court of Human Rights, November 26, 2013, Series C, No. 274, para. 112.
[20] Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention* 9 (2007) at 96, 246.

Protection of All Persons from Enforced Disappearance (hereinafter referred to as CED), a multilateral treaty, which was adopted in 2006 and entered into force in 2010, establishes a legal framework of state obligations regarding enforced disappearances including provisions for preventing such disappearances and providing a remedy structure, if it still occurs, not just for the primary victim, but also his family, friends or the communities that suffer as a whole due to such acts.[21] The CED has recognized that prohibition on enforced disappearance is non-derogable. It also lays down an inclusive definition as to who shall be considered as a victim of enforced disappearance. Furthermore, it recognizes the right to justice, truth, compensation and reparation,[22] of family and friends of such victims and also the obligation of States to punish the perpetrators of such acts. Additionally, the CED provides for the establishment of the Committee on Enforced Disappearances (hereinafter referred to as CED Committee) to examine state reports, possibly receive individual complaints, and institute an "emergency procedure" for contemporaneous instances of enforced disappearances.

Enforced disappearance has been defined by Article 2 of CED as:

> *"The arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."*

The definition is broad, as state involvement is required but the threshold is low, i.e. acquiescence, and there is no intent requirement. Moreover, although CED defines enforced disappearance but it is interdependent upon four other types of human rights violations. The first being arbitrary detention. It is often implicated in the course of an enforced disappearance. Detention, or restriction of liberty, is arbitrary if *"it does not comply with the legal requirements laid down for it or if no such requirements exist at all, thus leaving it to the authorities to detain persons at their own discretion."*[23]

Secondly, it may involve extra-judicial execution, that is, killing someone outside the protection of law, which often occur in the course of an enforced disappearance, and is a severe human rights violation in itself.[24] General Comment 6 of the ICCPR states:

> *"States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities."*[25]

The Special Rapporteur on extrajudicial, summary or arbitrary executions criticized States, including India, involved in practicing extrajudicial executions as part of their policy to tackle terrorists,[26] especially in Jammu and Kashmir because the state disclaimed responsibility and refused to provide information about the victim.

Thirdly, enforced disappearances often involve some degree of incommunicado detention, although it's not always enforced disappearance.[27] For example, police might jail a person and cut him or her off from all forms of communication with the outside world, deny having any knowledge of these circumstances, and refuse to reveal the jailed person's whereabouts; doing so would amount to an enforced disappearance but if the police reveals the jailed person's fate and whereabouts or claim responsibility for the fate of the jailed person, then it will not amount to a case of enforced disappearance.

Fourthly, enforced disappearances may constitute a crime against humanity if carried out as part of a widespread or systematic attack against a civilian population.[28] However,

---

[21] Art. 2, International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177 (2006), *reprinted in* 14 Int'l. Hum. Rts. Rep. 582 (2007), entered into force Dec. 23, 2010 (Article 17 requires the state to legislate regulations that prevent enforced disappearances; article 18 provides the right for families to access information about the detained individual; article 25 outlines the state duty to prevent and punish enforced disappearances under criminal law).

[22] *Ibid*., art.24(4).

[23] Oliver Döll, *Detention, Arbitrary* in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, (2007).

[24] *See* Nigel Rodley and Matt Pollard, *The Treatment of Prisoners Under International Law* 182 (2009) (defining extrajudicial executions as, "killings committed outside the judicial process by, or with, the consent of public officials, other than as necessary measures of law enforcement to protect life or as acts of armed conflict in conformity with the rules of international humanitarian law").

[25] Human Rights Committee, *CCPR General Comment No. 6 The Right to Life (Article 6)*, ¶ 3, (Apr. 30, 1982). *available at* http://www2.ohchr.org/english/bodies/treaty/comments.htm (last visited on May 9, 2022).

[26] Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to India, delivered to the General Assembly*, U.N. Doc. A/HRC/23/47/Add.1 (April 26, 2013).

[27] *See* Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Vol. 9, 9 (2007) (characterizing incommunicado detention as "the second stage of enforced disappearance").

[28] The Rome Statute of the International Criminal Court, 1998.

India has resisted international criminal justice and is not party to the treaty that establishes international jurisdiction over crimes against humanity, the Rome Statute of the International Criminal Court, 1998 (hereinafter referred to as ICC) and specifically objected to the inclusion of enforced disappearances in the Rome Statute.[29] Moreover, although India is a signatory of the Convention against Enforced Disappearances[30] India has yet not ratified to CED and has no domestic legislation to prohibit and punish such acts.

There should be a separate body in every state, particularly in states designated as disturbed areas, to handle cases of complaints of enforced disappearances, and must also have sufficient resources to investigate such cases, in pursuance of Article 12 of the Convention[31] and also take appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.[32]

Article 31 of the CED deals with acceptance of individual complaints procedure under the respective Convention. CED inquiry procedure under Article 33 does not require specific acceptance by States parties. It applies from the entry into force of the Convention in the country. But both these important provisions are taken to be not applicable on India because India has yet not ratified to CED. But signing a Convention is the reflection of a country's willingness to be respectful towards its provisions while carrying out its domestic affairs. This takes up a mandatory nature when a Convention is based on the protection of a *jus cogens* norm.

Relationship between International Law and Domestic Law

With respect to the relationship between international law and domestic law, there are two theories, namely, Dualism and Monism. According to the dualist theory, international law and municipal law are completely distinct from each other in terms of their substance, areas they govern and sources they arise from. Dualists see international law as inferior to domestic law and the former can become the part of latter, if the latter chooses to incorporate it by means of an enabling legislation. On the other hand, monists see both as aspects of one system of law and consider international law to be superior to municipal law and in case of conflict between the two the obligations of the State under international law will stand.

According to the dualists, for rules of international law to be applied in the municipal sphere, the Constitutional machinery of the State must go through the process of 'specific adoption' or 'specific incorporation'. This is known as the Specific Adoption or Specific Incorporation Theory. In respect of treaty rules, the treaty has to be 'transformed' into law of the State. This is known as the Transformation Theory. Such transformation is not merely a formality but a substantive requirement which will validate the extension of the rules laid down in those treaties to the individuals of the State. This is generally done by the enactment of an enabling legislation. These theories are based on the supposedly consensual character of international law as opposed to the non-consensual character of State laws.

Another theory under this head is the Delegation Theory. Proponents of this theory are of the view that there is no transformation or fresh creation of rules of municipal law and the procedure required to be adopted to embody provision of a convention in the municipal law, is simply a continuation of the process that starts with the conclusion of a treaty or convention. There is merely a *"delegation of Constitutional Rules of International Law to the Constitution of each State"*.[33]

Judicial interpretations are the key source for understanding the relationship between international law and domestic law in India. In the case of *Jolly George Verghese* v. *Bank of Cochin*[34], while deciding upon the effect that international law has and regarding its enforceability by an individual within the territory of a State, the Supreme Court of India asserted the law on this point that, *"The positive commitment of the State parties ignites legislative action at home but does not automatically make the covenant an enforceable part of the Corpus juris of India."* Thus, the Court affirmed the dualist approach followed in India. But, at the same time, where there is a legal vacuum in domestic law, higher courts have not shied away from applying international law principles directly into municipal law. In *Vishaka* v. *State of Rajasthan*[35] the Hon'ble Supreme Court noted that: *"Regard must be had to international conventions and norms for construing*

---

[29] *See* Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Official Records, Vol. II, p. 148, para. 47 (June 15-17, 1998), *available at* http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf(last visited on May 8, 2022) ("[India's] delegation was not in favour of including enforced disappearance of persons in the list of crimes against humanity."); Usha Ramanathan, *India and the ICC*, Vol. 3 J. INT'L CRIM. JUST. 627 (2005).

[30] India was one of the first signatories to the International Convention for the Protection of All Persons from Enforced Disappearance, 2006.

[31] Art. 24(2), The International Convention for the Protection of All Persons from Enforced Disappearance, 2006.

[32] *Ibid*., Art. 24(3).

[33] I. A. Shearer (ed.), STARKES' INTERNATIONAL LAW 66-67 (Butterworths, Kent, 1994).

[34] AIR 1980 SC 470.

[35] AIR 1997 SC 3011.

domestic law when there is no inconsistency between them and there is a void in the domestic law". This is a landmark judgment because it had given the guidelines against sexual harassment of women at workplace when there was no legislation in place in India at that time to deal with this issue.

Domestic Application of *Jus Cogens* in India for Protection of Persons from Enforced Disappearances

States that follow a monist approach consider international law laid down in treaties they ratify or which have become part of customary international law, including, peremptory norms of general international law or *jus cogens*, automatically as part of their domestic law. The courts can directly apply them and the citizens of these States can directly invoke them if their right under any treaty or convention ratified by the State they belong to has been violated. But States with a dualist approach, do not consider the two as one united system and international law does not form part of their domestic legal system unless it has been transformed and specifically adopted by means of an enabling legislation. Dualist nations rely heavily on the doctrine of State sovereignty. State sovereignty is often put forward as the defence to disqualify the application of *jus cogens* within national domain of States. Drawing on Immanuel Kant's conception of fiduciary relations, Cridle and Decent's article[36] developed a new theory of *jus cogens* based on the idea that states are fiduciaries of their people. According to the fiduciary theory, peremptory norms and state sovereignty do not oppose each other rather they complement each other as all States owe it to their subjects a fiduciary obligation to comply with these norms. The fiduciary theory points at discrete formal and substantive criteria for identifying these norms. It should be noted that the fiduciary theory of *jus cogens* that serves to prevent *"flagrant abuses of State power [that] deny a State's beneficiaries secure and equal freedom"* include as a norm of *jus cogens* "forced disappearances".[37]

Jus cogens norms have been used till now only in case of invalidating treaties.[38] The question arises why norms which are powerful enough even to nullify treaty norms should not also directly impact national law, i.e. the intra-state actions of states and their agents. The inconsistency of an approach that limits the impact of *jus cogens* to treaty law is also reflected by the fact that the main threat to the protection of a *jus cogens* norm, such as the prohibition against enforced disappearance, does not result from bilateral or multilateral treaties that facilitate its perpetration, but from acts of state organs or officials towards individuals or groups on their territory.[39] Some authors regard this approach as an over-extension of the role and purpose of the notion of *jus cogens*. It has, for example, been argued that during the preparatory discussion of the International Law Commission leading to the Vienna Convention, no attempts were made to extend this notion beyond the invalidation of incompatible treaties.[40] However, it is doubtful whether any conclusion could be drawn from this fact, since the mandate of the drafters of the Vienna Convention was limited to issues of treaty law. It could thus not have been expected of them to deliberate on the possible role of *jus cogens* outside the treaty context. Moreoever, it is important to note that a *jus cogens* rule creates an *erga omnes* obligation for states to comply with a rule. An *erga omnes* obligation is therefore the consequence of a rule being characterized as *jus cogens*. Therefore, even if a State is not party to a particular convention, it is still bound by the *jus cogens* rule.

India's commitment to international law has its source in the Constitution of India, 1950 under Article 51[41] which has its source and inspiration in the Havana Declaration of 30 November, 1939. Under paragraph (c) the Constitution directs the State to endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another. The approach of Indian judiciary towards application of international law within domestic legal system is a mix of monism and dualism with a bent in the favour of dualism.

The *jus cogens* character of the prohibition of enforced disappearance has been recognized in a number of domestic jurisdictions. The Supreme Court of Argentina stated that the prohibition contained in the Enforced Disappearance Convention enshrined the inderogable law of *jus cogens*.[42] Similarly, the Constitutional Court of Peru has described the prohibition of enforced disappearance as part of core inderogable rules of peremptory international law, in addition to being part of

---

[36] Evan J. Criddle and Evan Fox Decent, *A Fiduciary Theory of Jus Cogens*, Vol. 34 YALE JOURNAL OF INTERNATIONAL LAW (2009).
[37] *Ibid*.
[38] Art. 53, The Vienna Convention on the Law of Treaties, 1969.
[39] I.D..Seiderman, HIERARCHY IN INTERNATIONAL LAW: THE HUMAN RIGHTS DIMENSION 56 (2001).
[40] Zimmermann, *Sovereign Immunity and Violations of International Jus Cogens — Some Critical Remarks*, Vol. 16 MICHIGAN JOURNAL OF INTERNATIONAL LAW 438 (1995).
[41] Art. 51, The Constitution of India, 1950: "The State shall endeavour to- (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and (d) encourage settlement of international disputes by arbitration."
[42] Simón (Julio Héctor) v. Office of the Public Prosecutor, Judgment, Supreme Court of Argentina, June 14, 2005, para. 38.

the Peruvian constitutional framework.[43] Referring to the Third Restatement, the United States Court of Appeals has, in Siderman de Blake, also referred to the prohibition of "causing disappearance of individuals" as a norm of *jus cogens*.[44] Indian courts can take motivation from these judgments and affirm enforced disappearances to have the status of *jus cogens* and recommend to the government to ratify to CED and to the legislature to enact a law prohibiting and punishing acts of enforced disappearances. Till now the redress available in cases of enforced disappearances is the writ of *habeas corpus* filed under Art. 226 or Art. 32 of the Constitution and the monetary compensation to the victims or their dependents is entirely based upon the discretion of the Bench.

Moreover, the mandatory requirement of getting sanction from the government before initiating prosecution proceedings against erring policemen or member of the special forces alleged to have committed an act of enforced disappearance, is a huge impediment in bringing the victims of enforced disappearance to justice as in most cases, sanction is denied.

An enforced disappearance is not the human right violation of only the person who disappeared, but also causes endless misery to his or her family members who have to forever wait and search for answers as to the whereabouts of their closed one. After all, it's the responsibility of governments to curb and eventually eradicate every possibility of acts of enforced disappearances from occurring. As António Guterres, the Secretary-General of UN has said: *"Under international human rights law, families and societies have a right to know the truth about what happened. I call on Member States to fulfil this responsibility."*

Conclusion and Recommendations

The menace of enforced disappearances is currently possible due to the impunity that comes from the immunity from prosecution and excessive powers provided to law enforcement personnel, whether it's the police or the military and impunity compounds the suffering and pain of the dependents of those who disappeared and never returned home. Protection from enforced disappearance is a human right that has achieved the status of *jus cogens* in international law and hence obliges States world over to enact and implement appropriate legislation in their domestic jurisdiction to make any and all involvement in enforced disappearance of a person, whether accused of a crime or taken into custody for interrogation, to be a punishable offence. Accordingly, the author has made the following recommendations:

1. The government of India must ratify to the Convention for the Protection of All Persons from Enforced Disappearance and incorporate its provisions in the domestic law by enactment of appropriate enabling legislation.
2. The legislation prohibiting and punishing acts of enforced disappearance must include the provision to override the requirement of sanction from government to proceed for prosecution against a public servant if *prima facie* case exists.
3. The legislation must have a provision regarding compulsory monetary compensation for the victim of enforced disappearance or his dependents that may be collected from the offender as fine after his conviction.
4. The Constitutional courts must take note of the *jus cogens* status of human right of protection from enforced disappearances and invalidate laws such as the AFSPA that provide an umbrella protection to law enforcement personnel from prosecution.

[43] Guillén de Rivero v. Peruvian Supreme Court, Judgment, Constitutional Court of Peru, August 12, 2005.
[44] See, e.g., Hanoch Tel-Oren v. Libya, Judgment, United States Court of Appeals, District of Columbia, February 3, 1984, at 391.

Reviewing Consumer Protection Law in Mediating Medical Disputes in India

Dr. Faizanur Rahman*
Dr. Mohammad Haroon**

ABSTRACT

At present, the conflicts between medical practitioners and patients can be noticed frequently. It brought up plenty of medical lawsuits before the courts of law. The pendency of such lawsuits before the courts in India has proved the litigation process as slow, costly and complex. The landmark judgment of the Supreme Court of India in *V.P. Shantha*[1] opened new doors for the disposal of medical lawsuits through the consumer courts in India. The judgement considers the incidents of medical errors, negligence and malpractices as a deficiency in services on the part of medical professionals. So, most of the complaints were filed before the consumer courts because of the process followed by them was simpler, speedier and consumer-friendly. As the utility of Alternate Dispute Resolution System (ADR) in medical cases is growing and relied globally, the newly enacted *Consumer Protection Act,* 2019 has devised the mediation as a tool of resolution of disputes. This paper aims to investigate the new consumer protection law to evaluate the prospects and challenges in mediating medical disputes in India.

Introduction

In India, outside the court settlement of disputes is an age-old practice since the *Vedic* period. Before the formation of law courts, people were settling disputes through '*Panchayats*' headed by the elder or respectable among them and assisted by some other reputed people from the community or locality. They followed the methods like mediation and negotiation. The Panchayats were ruled by the Natural Law and the principles of natural justice were the guiding rules followed by them. Their decisions were remain accepted by the disputants.

Later on, with the legal developments, the law courts were established, these courts acted and resolved cases through the procedure established by law. At present, theses courts are overcrowded, plenty of cases are pending there which causes inordinate delay in providing justice to the parties. The procedural shackles and the adversarial system resulted in creating a judicial lag of sorts. This leads to the emergence of a new system of resolution of disputes. Consequently, an alternative system to the existing formal legal system came into existence, known as the Alternative Disputes Resolution System.

Laws favouring the ADR Process in India

Although the various forms of ADR like mediation, conciliation etc. were practiced in India for centuries back but the present model of Alternate Dispute Resolution used to resolution of disputes outside the Courts is a relatively new trend. The *Law Commission of India* in its 129th Report has advocated for the amicable settlement of disputes between parties. The 'Malimath Committee' has recommended to make it mandatory for courts to refer disputes, after their issues having been framed by the court, for resolution through alternate means of resolution rather than tigation. It brought up modifications in the *Code of Civil Procedure*.

The Code of Civil Procedure and the ADR

The Code provides for the out of court settlement of disputes, section 89 came into being in its current form on account of the enforcement of the *Code of Civil Procedure (Amendment) Act,* 1999 effective from the day one of July, 2002. At the commencement of the Code, a provision was provided for ADR. Section 89 (1) of the Code provides, where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of the settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for Arbitration, Conciliation, Judicial settlement including settlement through *Lok Adalat* or Mediation.

This provision of section 89 provides referring the dispute for the alternate means of resolution was challenged before the Supreme Court in the famous case of *Salem Advocate Bar Association, Tamil Nadu* v. *Union of India*. In Salem Bar Association Case II, the Supreme Court has made the following important observations about the mediation mechanism:

* Assistant Professor, Faculty of Law, Jamia Millia Islamia, New Delhi
** Assistant Professor, Hashmi College of Law, Amroha, Affiliated to M.J.P. Rohilkhand University, Bareilly
[1] (1995) 6 SCC 651.

> Under *section* 89 C.P.C., when it is provided that the Court will formulate a 'settlement' and refer it to one of the ADR mechanisms, it only means that what is referred to one of the ADR modes is the dispute which is summarised in the terms of the settlement.

The Court has stated the provision is drafted in such a manner that doubt arose whether the terms of the compromise are to be finalised by or before the mediator or by or before the court. The Supreme Court clarified that all the modes mentioned in this section are meant to be the action of the authorities outside the court and therefore not before or by the court.

If, mediation succeeds and parties agree to the terms of the settlement, the mediator will report to the court. The court will 'affect' the compromise after giving the notice and hearing the parties and pass a decree following the terms of settlement as mutually decided by the parties.

The Courts which refer the matter to mediation or conciliation are not debarred from hearing the matter where settlement is not arrived at. The Judge who refers only considers the limited question as to whether there are reasonable grounds to expect that there will be a settlement. On that ground, he cannot be treated to be disqualified to try the suit afterwards if no settlement has arrived between the parties.

The Court has acknowledged that *section* 89 maintains a fine line between conciliation and mediation, in conciliation, there is more latitude as the conciliator can suggest some terms of the settlement, while a mediator has no such power.

When the parties come to a settlement upon a reference made by the court for mediation, as suggested by the committee, there has to be some public record of how the suit is disposed of. Therefore, the courts have to first record the settlement and pass the decree in terms thereof and if necessary, execute it under the law. It cannot be accepted that such a procedure would be unnecessary. It is, however, a different matter if the parties do not want the court to record a settlement and pass a decree and feel that the settlement can be implemented even without decree. In such an eventuality, nothing prevents them from informing the court that the suit may be dismissed as the dispute has been settled between the parties outside the court.

Consumer Protection Law and the Mediation

Medical services are covered under the definition of "Service". Any dispute relating to deficiency in medical services can be dealt with as a subject matter of *the Consumer Protection Act,* 2019. In India, most of the cases relating to medical negligence or mal-practices can be filed before the consumer commissions. The Act provides for the reference of the disputes to mediation. *Section* 37 (1) provides, at the first hearing of the complaint after its admission, or any later stage, if it appears to the *District Commission* that there exist elements of a settlement which may be acceptable to the parties, except in such cases as may be prescribed, it may direct the parties to give in writing, within five days, consent to have their dispute settled by mediation.

The Consumer Protection Act, 2019 and the Process of Mediation

Recently, the Parliament of the Republic of India has enacted the *Consumer Protection Act*, 2019 and devised mediation as a tool to settle consumer disputes. Mediation as a mechanism of ADR system is intended to settle the consumer disputes outside the court by the mutual efforts of the disputing parties. Chapter-V of the Act provides for mediation as an ADR mechanism. It is an effort to make the process of adjudication simpler and quicker. It will help with the speedier resolution of disputes and reduce pressure on consumer commissions, which already have numerous cases pending before them.

Reference to Mediation

The Act provides for the reference of the disputes to mediation. Section 37 (1) provides that at the first hearing of the complaint after its admission, or any later stage, if it appears to the District Commission that there exist elements of a settlement which may be acceptable to the parties, except in such cases as may be prescribed, it may direct the parties to give in writing, within five days, consent to have their dispute settled by mediation under the provisions of Chapter-V of the Act.

Where the parties agree for settlement by mediation and give their consent in writing, the *District Commission* shall, within five days of receipt of such consent, refer the matter for mediation, and in such case, the provisions of Chapter-V, relating to mediation, shall apply.[2]

On the issue of the reference of complaints to mediation state commission and the national commission shall adopt the same procedure with such modifications as may be considered necessary. [3]

Establishment of Consumer Mediation Cells

The *Consumer Protection Act*, 2019 provides for the establishment of the Consumer Mediation Cells. The State Government shall establish a consumer mediation cell to

---

[2] The Consumer Protection Act, 2019, *s.* 37 (1)
[3] *Id*., *s.* 49(1) & 59(1).

be attached to each of the *District Commissions and the State Commissions of that State*.[4] The Act provides, the Central Government shall establish, by notification, a consumer mediation cell to be attached to the National Commission and each of the regional benches.[5] A consumer mediation cell shall consist of such persons as may be prescribed the rules.[6] Every consumer mediation cell shall maintain-

i. A list of empanelled mediators;

ii. A list of cases handled by the cell;

iii. Record of the proceeding; and

iv. Any other information as may be specified by regulations.[7]

It is provided that every consumer mediation cell shall submit a quarterly report to the District Commission, State Commission or the National Commission to which it is attached, in the manner specified by regulations.[8]

Empanelment of Mediators

For mediation, the *National Commission or the State Commission or the District Commission*, as the case may be, shall prepare a panel of the mediators to be maintained by the consumer mediation cell attached to it, on the recommendation of a selection committee consisting of the President and a member of that *Commission*.[9]

The qualifications and experience required for empanelment as a mediator, the procedure for empanelment, the manner of training empanelled mediators, the fee payable to an empanelled mediator, the terms and conditions for empanelment, the code of conduct for empanelled mediators, the grounds on which, and how, empanelled mediators shall be removed or empanelment shall be cancelled and other matters relating thereto, shall be such as may be specified by regulations.[10]

The panel of mediators prepared under section 75 (1) shall be valid for five years, and the empanelled mediators shall be eligible to be considered for re-empanelment for another term, subject to such conditions as may be specified by regulations.[11]

Nomination of Mediators from the Panel

The District Commission, the State Commission or the National Commission shall, while nominating any person from the panel of mediators referred to in section 75, consider his suitability for resolving the consumer dispute involved.[12]

Duties of a Mediator to Disclose Certain Facts

It shall be the duty of the mediator to disclose:

i. Any personal, professional or financial interest in the outcome of the consumer dispute;

ii. The circumstances which may give rise to justifiable doubt as to his independence or impartiality; and

iii. Such other facts as may be specified by regulations.[13]

Replacement of Mediator in Certain Cases

Where the *District Commission* or the *State Commission* or the *National Commission*, as the case may be, is satisfied, on the information furnished by the mediator or on the information received from any other person including parties to the complaint and after hearing the mediator; it shall replace such mediator by another mediator.[14]

Procedure for Mediation

The *Act* provides the procedure to be followed in mediation. Accordingly, the mediation shall be held in the consumer mediation cell attached to the *District Commission,* the *State Commission or the National Commission*, as the case may be.

Where a consumer dispute is referred for mediation by the *District Commission* or the *State Commission or the National Commission,* as the case may be, the mediator nominated by such Commission shall have regard to the rights and obligations of the parties, the usages of trade, if any, the circumstances giving rise to the consumer dispute and such other relevant factors, as he may deem necessary and shall be guided by the principles of natural justice while carrying out mediation. The mediator so nominated shall conduct mediation within such time and in such manner as may be specified by regulations.[15]

---

4 *Id.*, s. 74 (1).
5 *Id.*, s.74 (2).
6 *Id.*, s. 74 (3).
7 *Id.*, s. 74 (4).
8 *Id.*, s. 74 (5).
9 *Id.*, s. 75 (1).
10 *Id.*, s. 75 (2).
11 *Id.*, s. 75 (3).
12 *Id.*, s. 76.
13 *Id.*, s. 77.
14 *Id.*, s. 78.
15 *Id.*, s. 79.

Settlement of Disputes through Mediation

Under mediation, if an agreement is reached between the parties concerning all of the issues involved in the consumer dispute or concerning only some of the issues, the terms of such agreement shall be reduced to writing accordingly, and signed by the parties to such dispute or their authorised representatives.

The mediator shall prepare a settlement report of the settlement and forward the signed agreement along with such report to the concerned *Commission*. Where no agreement is reached between the parties within the specified time or the mediator thinks that settlement is not possible, he shall prepare his report accordingly and submit the same to the concerned *Commission*.[16]

Recording of Settlement and Passing of an Order

The *District Commission* or the *State Commission* or the *National Commission*, as the case may be, shall, within seven days of the receipt of the settlement report, pass a suitable order recording such settlement of consumer dispute and dispose of the matter accordingly.

Where the consumer dispute is settled only in part, the *District Commission* or the *State Commission or the National Commission*, as the case may be, shall record settlement of the issues which have been so settled and continue to hear other issues involved in such consumer dispute. Where the consumer dispute could not be settled by mediation, the *District Commission* or *the State Commission or the National Commission*, as the case may be, shall continue to hear all the issues involved in such consumer dispute.[17]

Judicial Approaches on ADR Mechanism

The judgement in *Salem Advocate Bar Association, Tamil Nadu v. Union of India*, has changed the course of civil litigation in India. In *Topline Shoes Ltd*. v. *Corporation Bank*,[18] the question for consideration was whether the State Consumer Disputes Redressal Commission could grant time to the respondent to file reply beyond a total period of 45 days given under *section* 13 (2) of the *Consumer Protection Act,* 1986. The Supreme Court held that the intention to provide a time frame to file reply is made to expedite the hearing of such matters and avoid unnecessary adjournments. It was noticed that no penal consequences had been prescribed if the reply is not filed in the prescribed time. The provision was held to be directive. It was observed that the provision is more by way of procedure to achieve the object of speedy disposal of the case.

The Indian Courts are more emphasis to use of the mediation process to settle cases. In 2011 the Supreme Court in *Moti Ram (D) Tr. LRs and Anr. v. Ashok Kumar and Anr*,[19] declared that the Supreme Court of India declared that mediation proceedings were confidential, and only an executed settlement agreement or a statement that the mediation proceedings were unsuccessful, should be provided to the court by the mediator. It is expected that because of this judgment, the popularity of mediation as a method of resolving disputes in India will increase.

Further, in *Afcons Infra Ltd*. v. *M/s. Cherian Varkey Constructions,*[20] the Supreme Court has held that normally all cases relating to trade, commerce and contracts, consumer disputes and even tortious liability could be mediated. Since the mediation centres in Delhi and Bangalore were setting up respectively in 2005 and 2007. An estimated 30,969 cases have been tried through the mediation process, and around 60 per cent of these cases have been settled ever since. It appears that the Supreme Court of India through its judgements is gradually developing a favourable environment towards mediation.

Resolution of Medical Lawsuits through Mediation

Although the Consumer Protection Act, 2019 has provided an adequate platform for the settlement of the consumer disputes including medical disputes. But the mediation or other modes of ADR are used very rarely to settle the disputes relating to medical services. David H. Sohney and B. Sonny Bal have revealed in their research article "Medical Malpractice Reform: The Role of Alternative Disputes Resolution" that mediation enhances 75 to 90 per cent success in avoiding litigation, it is cost savings of $ 50,000 per claim, and 90 per cent satisfaction rates among both plaintiffs and defendants.

Indian generic drug manufacturers are more frequently resorting to mediation as a method for their dispute settlements involving patents. Recently some famous disputes over patents between F. Hoffman La Roche Ltd. and Cipla Ltd., Merck and Glenmark have been settled through the mediation process.

---

16 *Id*., *s*. 80.
17 *Id*., *s*. 81.
18 (2002) 3 SCR1167.
19 (2011) 1 SCC 466.
20 (2010) 8 SCC 24.

Usually, it is expected that generic drug companies operate whilst keeping public health concerns at top priority. However, it is also of concern that even though settlements via mediation may be mutually beneficial for the parties involved. If not so it might end up making the drugs manufactured more expensive for consumers in countries like India. This would be disadvantageous for consumers in developing countries. So, at the time of mediation, the mediator may like to address not only the interest of the disputing parties but also the concern of the parties likely to be affected by the outcome of the mediation to avoid prolonged petitions in court.

The recent Covid-19 pandemic also has provided the favourable conditions to ADR mechanism globally. The current legal environment in India is favourable to mediation as well as other modes of ADR. The mediation can ease the process and provide the speedier solution to consumer disputes including medical lawsuits. It will reduce the burden on consumer courts during this era of an international health emergency.

Criticism of the Process in Medical Lawsuits

One of the most disturbing aspects of ADR from the consumer point of view is the issue of privacy that makes it so desirable to the service providers. For example, very less publicity of malpractice claim is received so the doctors are less investigated by the medical council,[21] which means the providers are less likely to lose their patients. So even if the doctor is not competent, he will be secured. Besides only when more payers are harmed, the state medical council will hear the provider's behaviour.

Another problem is that the ADR does not develop the law or the precedent on which payers can rely. The result of medical malpractice cases is based on current law and not on contraction, expansion and extension of principles of law. Precedent needs to be changed or set properly in some cases, where health care claims are rejected litigation is appropriate. Despite of all these drawbacks, the ADR has enough potential to deal with the medical lawsuits. Thus cannot be ignored.

Conclusion

In the present era of marketization and consumerism, the patients are treated as consumer and the doctors and hospitals as service providers. Any deficiency in medical services amounts to medical negligence or malpractice and gives rise to medical lawsuits. It is found that the disputes between doctor and patient are increasing rapidly and the litigation process has proved ineffective in disposing of the growing medical disputes. In countries like the USA, UK and the some other parts of the world the ADR processes like mediation and arbitration have proved an effective means of settling the medical lawsuits. The present socio-economic conditions of the country demand a substantial change in the litigation process to dispose of the medical lawsuits swiftly. Although, the legal and judicial developments in regards to the alternatives to the litigation process in India are sufficient but exercised insufficiently, particularly in medical lawsuits the ADR processes are exercised rarely. To provide speedy justice to the victims of the medical mal-practices as well as to lessen the burden of the traditional courts including consumer courts, the exercise of mediation which is now devised as a tool of resolution of disputes in the *Consumer Protection Act, 2019* has been proved effective. Thus can be relied in mediating medical lawsuits in India

[21] Alicia Roberts, "Alternative Resolution Takes Less Money, Time; So Arbitrate or Negotiate – Just Don't Litigate" 5 *Managed Care L. Outlook,* 1-4 (Jan.1993).

Sports For Disabled and Inclusive Sports: A Socio Legal Study

Mr. Sachin Yadav *
Mr. Saurabh Rana**
Dr. Rinu Saraswat***

ABSTRACT

For decades, the definition of 'Sport' and what it truly entails has been a point of contention, with numerous definitions and notions forming over time. The European Sports Charter of the Council of Europe defines sport as "all forms of physical activity aimed at expressing or improving physical fitness and mental well-being, forming social relationships, or obtaining results in competition at all levels" through casual or organised participation. "Targeting Sporting Change in Ireland—Sport in Ireland 1997 to 2006 and Beyond," by the Irish Department of Education, defined the concept under three primary categories.[1]

Recreational sport focuses on health benefits of sports, with enjoyment and companionship as "essential components. "Performance Sport is a term used to describe activities it's based on school or club systems, participation in local to national competitions. Participants are usually expected to achieve minimum performance levels and are bound by the competition's rules.

High-performance sport is a highly organised, elite-level sport in which performance is judged against national and international criteria. The ability to excel both on a personal and objective level, are required for this level of participation. The athlete demonstrates a desire to succeed, to prove themselves, to push oneself to new heights while maintaining high performance standards.[2]

People with disabilities have historically been excluded from athletics because of the perception that sports, as a sign of physical superiority, could not include those who were physically disabled. In today's world, sports participation opportunities are available in all of the broad categories of sport outlined above, as the trend toward inclusion and acceptance grows.[3]

Keywords: Sports, Disabled, Sports injuries, Inclusive participation

Introduction

Sport is a rehabilitation tool for people with disabilities. Many people consider Dr. Ludwig Guttmann to be the Pierre De Coubertin of the Paralympics, as he was instrumental in the birth of the International Paralympic Movement and the modern Paralympics.[4]

"You are the De Coubertin of the Paralyzed, Dr. Guttman." Pope John Paul XXIII

For decades, the definition of 'Sport' and what it truly entails has been a point of contention, with numerous definitions and notions forming over time. The European Sports Charter of the Council of Europe defines sport as "all forms of physical activity aimed at expressing or improving physical fitness and mental well-being, forming social relationships, or obtaining results in competition at all levels" through casual or organised participation. "Targeting Sporting Change in Ireland—Sport in Ireland 1997 to 2006 and Beyond," by the Irish Department of

* Research Scholar, NET- JRF, LLM- National Law University, Delhi, email:sachinadvocate05@gmail.com
** Assistant Professor, Law Centre II, Faculty of Law, University of Delhi, saurabh.lawfaculty.du@gmailcom,
***Associate Professor, school of Law, Apex University, Jaipur,reenusaraswat@gmail.com,

1 SENDI, Richard, and Boštjan KERBLER - KEFO. "Disabled People and Accessibility: How Successful Is Slovenia in the Elimination and Prevention of Built-Environment and Communication Barriers?" *Urbani Izziv*, vol. 20, no. 1, 2009, pp. 123–40, http://www.jstor.org/stable/24920466. Accessed 24 Apr. 2022.

2 Gleeson, B. J. "A Geography for Disabled People?" *Transactions of the Institute of British Geographers*, vol. 21, no. 2, 1996, pp. 387–96, https://doi.org/10.2307/622488. Accessed 24 Apr. 2022.

3 James A. R. Nafziger. "International Sports Law: A Replay of Characteristics and Trends." *The American Journal of International Law*, vol. 86, no. 3, 1992, pp. 489–518, https://doi.org/10.2307/2203964. Accessed 24 Apr. 2022.

4 Chaturvedi, Sameer. "Culture and Disability: Unheard Voices of Disabled People." *Indian Anthropologist*, vol. 49, no. 1, 2019, pp. 67–82, https://www.jstor.org/stable/26855092. Accessed 24 Apr. 2022.

Education, defined the concept under three primary categories.

It was established in 1944 by Guttmann so that it could deal with the swell of World War II-related spinal injuries. "Purposeful, dynamic physical management," or the role that sport may play in a person's physical and emotional recovery following a spinal cord injury, was a core belief of Guttman's. Patients at Stoke Mandeville Hospital soon began to see the benefits of sport as part of their treatment plan as a result. An international movement was formed 'by happenstance rather than design', continued to support and grow the Paralympic Movement. This year's Paralympic Games will be the first to be hosted in a different city and at a different site than previous Paralympic Games.[5]

A world-class sporting event for competitors with physical and sensory impairments, the Paralympics, has been established in recent years. Disabilities aren't as important to them as the participants' sporting prowess. The movement has grown rapidly since its inception. More than 4,300 athletes from 159 nations competed at Rio 2016's Summer Paralympic Games, which included 528 events spread across 22 sports. More and more sports participation options for people with disabilities are being made available in each of the broad sports categories listed above.

Sport as a Basic Human Right

Even when a society's reputation or national pride was at stake, sports and human rights have always been intertwined. Doris Corbett is the author of this article. People with disabilities have historically been excluded from athletics because of the perception that sports, as a sign of physical superiority, could not include those who were physically disabled. In today's world, sports participation opportunities are available in all of the broad categories of sport outlined above, as the trend toward inclusion and acceptance grows.

According to the World Health Organization, regular participation in sports and physical activity can benefit everyone's health and well-being, including people with disabilities. People with disabilities' rights were recognised and implemented around the world. Since its adoption by the General Assembly in 2006, it has been a record-setter for speedy treaties at the United Nations. Human rights and social development are at the heart of the convention. People with disabilities have the right to participate in cultural life. This treaty has legally binding obligations because it is a human rights treaty. For decades, the definition of 'Sport' and what it truly entails has been a point of contention, with numerous definitions and notions forming over time.[6]

The European Sports Charter of the Council of Europe defines sport as "all forms of physical activity aimed at expressing or improving physical fitness and mental well-being, forming social relationships, or obtaining results in competition at all levels" through casual or organised participation. "Targeting Sporting Change in Ireland—Sport in Ireland 1997 to 2006 and Beyond," by the Irish Department of Education, defined the concept under three primary categories. People with disabilities have historically been excluded from athletics because of the perception that sports, as a sign of physical superiority, could not include those who were physically disabled. In today's world, sports participation opportunities are available in all of the broad categories of sport outlined above, as the trend toward inclusion and acceptance grows

Convention on the Rights of Persons with Disabilities Article 30.5 states that disabled people have the same right to participate in leisure, recreation, and sports as everyone else. Sports and human rights have always been interwoven, even when the reputation or national pride of a society was at issue.

According to the World Health Organization, regular participation in sports and physical activity can benefit everyone's health and well-being, including people with disabilities. People with disabilities' rights were recognised and implemented around the world. Since its adoption by the General Assembly in 2006, it has been a record-setter for speedy treaties at the United Nations. Human rights and social development are at the heart of the convention. People with disabilities have the right to participate in cultural life. This treaty has legally binding obligations because it is a human rights treaty. A world-class sporting event for competitors with physical and sensory impairments, the Paralympics, has been established in recent years. Disabilities aren't as important to them as the participants' sporting prowess.[7]

The movement has grown rapidly since its inception. More than 4,300 athletes from 159 nations competed at Rio 2016's Summer Paralympic Games, which included 528

[5] Oliver, Mike, and Colin Barnes. "Disability Studies, Disabled People and the Struggle for Inclusion." *British Journal of Sociology of Education*, vol. 31, no. 5, 2010, pp. 547–60, http://www.jstor.org/stable/25758480. Accessed 24 Apr. 2022.

[6] Aldred H. Neufeldt. "Empirical Dimensions of Discrimination against Disabled People." *Health and Human Rights*, vol. 1, no. 2, 1995, pp. 174–89, https://doi.org/10.2307/4065213. Accessed 24 Apr. 2022.

[7] Gloag, Daphne. "Music And Disability: Music Will Benefit Disabled People." *BMJ: British Medical Journal*, vol. 298, no. 6671, 1989, pp. 402–03, http://www.jstor.org/stable/29702283. Accessed 24 Apr. 2022.

events spread across 22 sports. More and more sports participation options for people with disabilities are being made available in each of the broad sports categories listed above.

Even when a society's reputation or national pride was at stake, sports and human rights have always been intertwined. Doris Corbett is the author of this article.

According to the World Health Organization, regular participation in sports and physical activity can benefit everyone's health and well-being, including people with disabilities. People with disabilities' rights were recognised and implemented around the world when the Convention on the Rights of Persons with Disabilities was established. Since its adoption by the General Assembly in 2006, it has been a record-setter for speedy treaties at the United Nations. Human rights and social development are at the heart of the convention. People with disabilities have the right to participate in cultural life on an equal basis with everyone else. This treaty has legally binding obligations because it is a human rights treaty.

Article 30.5 states that disabled people have the same right to participate in leisure, recreation, and sports as everyone else.

i. Encourage and support the full involvement of people with disabilities in mainstream sports at all levels;

ii. To guarantee that people with disabilities have the opportunity to organise, develop, and engage in disability-specific sporting and recreational activities, and to encourage the provision of appropriate teaching, training, and resources on an equal footing with others;

The Convention promotes a rights-based approach to sport and physical exercise, which implies encouraging not just participation but also "QUALITY" participation (Walker 2007). The basic goal of this rights-based approach is to empower persons with disabilities to claim their legal rights and fully participate in society, thereby promoting equality and combating prejudice. People with disabilities have historically been excluded from athletics because of the perception that sports, as a sign of physical superiority, could not include those who were physically disabled. In today's world, sports participation opportunities are available in all of the broad categories of sport outlined above, as the trend toward inclusion and acceptance grows.[8]

Sport Participation for People with Disabilities

People with disabilities are scarce, but where it exists, it shows that they engage in less physical activity than their nondisabled counterparts. Global estimates show that more than 60% of people do not indulge in physical activity that are beneficial to their health, with women and people with disabilities particularly susceptible to inactivity.

According to the findings of a survey conducted by the National Disability Authority, persons with disabilities not exercising on a regular basis as their able-bodied colleagues. Encourage and support the full involvement of people in mainstream sports at all levels; To guarantee that people with disabilities have the opportunity to encourage the provision of appropriate teaching, training, and resources on an equal footing with others.

Sport England, the national sports development agency, found that sports participation rates and frequency are much lower among children and adults with disabilities than in able-bodied peers in two separate studies, and this is true for a wide spectrum of disabilities.[9]

Aiming for Inclusive Sport

People with disabilities are protected by the Convention on the Rights of Persons with Disabilities, despite the fact that the United Nations has already dealt with the problem of sport and disability. People with disabilities have their rights to sports, relaxation, and play covered particularly in Article 30.5 of the Universal Declaration of Human Rights (UDHR). All nations have ratified the Convention. It must allow people with disabilities to practise their human rights in sports. Prior to the Convention, relevant United Nations instruments were in effect, and the research analyses and contrasts these prior agreements with the current Convention. For example, Articles 30.5 and any others that may be relevant are examined. It is explored how the Article can be used to implement, develop, and preserve the rights of disabled people in sports.

Factors that Influence Sport Participation

Sport participation is impacted by a range of things. The perceived benefits of participating in sports are among these reasons, but restrictions that may prevent participation. People with disabilities have historically been excluded from athletics because of the perception that sports, as a sign of physical superiority, could not include those who were physically disabled. In today's world, sports participation opportunities are available in all of the broad categories of sport outlined above, as the trend toward

[8] Bogdan, Robert, and Steven J. Taylor. "Relationships with Severely Disabled People: The Social Construction of Humanness." *Social Problems*, vol. 36, no. 2, 1989, pp. 135–48, https://doi.org/10.2307/800804. Accessed 24 Apr. 2022.

[9] Harris, Jasmine E. "THE AESTHETICS OF DISABILITY." *Columbia Law Review*, vol. 119, no. 4, 2019, pp. 895–972, https://www.jstor.org/stable/26632274. Accessed 24 Apr. 2022.

inclusion and acceptance grows. Encourage and support the full involvement of people with disabilities in mainstream sports at all levels; to guarantee that people with disabilities have the opportunity to organise, develop, and engage in disability on an equal footing with others.[10]

These and other factors affecting sport participation have been extensively researched in the domains of able-bodied sport and, more recently, disability sport.

Getting Started in Sports

"Exploration is the key." Swimming, it turned out, offered me both freedom and a place in society. Beatrice Hess, a Frenchwoman. Several studies have examined the socialisation of people with disabilities into sports. As part of his investigation into disability sport socialisation, Williams uncovered three major components: significant others, socialising settings, and personal characteristics. Ruddell and Shinew argue that numerous agents are involved in an athlete's introduction to sport, and it is obvious that multiple individuals can have an affect on someone's socialisation, frequently operating simultaneously and oblivious of each other's influence, when it comes to significant others.[11]

These agents included the following:

i. Physiotherapist,

ii. Occupational therapist (ot)

iii. Therapist for therapeutic recreation,

iv. Work as a social worker

v. Family, especially parents,

vi. Trainers, and

vii. Peers that participate in sports

Scholars found similar introduction in both research identifying individuals with disabilities who participate in the activity. The one who discovered that family was the most important factor in the socialization of disabled women? People with disabilities have historically been excluded from athletics because of the perception that sports, as a sign of physical superiority, could not include those who were physically disabled. In today's world, sports participation opportunities are available in all of the broad categories of sport outlined above, as the trend toward inclusion and acceptance grows.[12]

When it comes to the situations in which people first participate in sports, there is a lot of variance based on the individual's unique characteristics. The rehab environment regarded to sport for those with a Spinal Cord Injury, an acquired disability.

Participation and Sustained Involvement Motives

There are currently a lot more research looking into the motivations for people with disabilities to participate in sports. When asked, people with disabilities participated in physical activity and sport for a variety of reasons according to Blinde and McCallister. Furthermore, Henderson and Bendini highlighted pleasure, fun, for persons with disabilities to engage in physical activity. Similar causes were discovered by Wu and Williams. This research was done with men and women who had had a continuing to participate in sports following their accident. Other individuals' participation was also influenced by therapeutic and social factors, it was noted. Continued participation in sport and physical exercise, She discovered that female athletes were more motivated to compete by the want to achieve and earn status, whereas male athletes were more motivated by the desire to accomplish and obtain status.[13]

Participation Restraints

Within the subject of leisure studies, research on leisure and sport participation restrictions is well established, with a wide range of significant theoretical breakthroughs, with primary categories in which to define limits to leisure suggested:

i. Facilities, time, money, and transportation are all structural factors.

ii. Intrapersonal, or, more precisely, the individual's psychological condition, and

iii. Interpersonal is a term that describes how people connect with one another.

There aren't many studies looking at the unique challenges faced by athletes with disabilities. While conducting a study of elite athletes with cerebral palsy, researchers Sherrill and Rainbolt found that lack of available training partners, insufficient equipment and facilities, and the absence of a dedicated coach. It is important to note that Ferrara et al.

---

[10] Høgelund, Jan. "The Integration of Disabled People: What Do We Know?" *In Search of Effective Disability Policy: Comparing the Developments and Outcomes of the Dutch and Danish Disability Policies*, Amsterdam University Press, 2003, pp. 31–52, http://www.jstor.org/stable/j.ctt45kdm9.5. Accessed 24 Apr. 2022.

[11] Barnes, Elizabeth. "Valuing Disability, Causing Disability." *Ethics*, vol. 125, no. 1, 2014, pp. 88–113, https://doi.org/10.1086/677021. Accessed 24 Apr. 2022.

[12] Barnes, Elizabeth. "Valuing Disability, Causing Disability." *Ethics*, vol. 125, no. 1, 2014, pp. 88–113, https://doi.org/10.1086/677021. Accessed 24 Apr. 2022.

[13] Wall, Roland. "DISCOVERING PREJUDICE AGAINST THE DISABLED." *ETC: A Review of General Semantics*, vol. 44, no. 3, 1987, pp. 236–39, http://www.jstor.org/stable/42579361. Accessed 24 Apr. 2022.

(Dattilo et al.) recognised that players faced different constraints based on the sport they were participating in, and that this was a significant barrier to participation. People with disabilities have historically been excluded from athletics because of the perception that sports, as a sign of physical superiority, could not include those who were physically disabled. In today's world, sports participation opportunities are available in all of the broad categories of sport outlined above, as the trend toward inclusion and acceptance.[14]

For blind athletes, transportation was the most common obstacle, whereas wheelchair athletes faced more equipment and/or financial constraints. According to Crawford & Stodolska, factors such as a lack of qualified coaches, a scarcity of equipment, shoddy facilities, and a lack of tolerance for people with disabilities all contribute to low levels of participation in sports in developing countries. Physical activity can be difficult for some people, but a new study has identified a number of factors that could make it easier. Findings from the study showed that there were 178 obstacles to overcome, which were broken down into a wide range of categories such as natural environment and economic concerns.[15]

Adults and children with disabilities face the same obstacles in sports, according to numerous studies. Sport England found that lack of friends, a lack of funds, and health concerns were the most common barriers to participation in physical activity for children with disabilities. Transportation issues, unwelcoming staff, discrimination, children's fears, and the inability to join clubs because of my disability were all problems I had to overcome. Disabled people's ability to participate in sports in Ireland appears to be hampered by transportation and accessibility issues. People with disabilities have historically been excluded from athletics because of the perception that sports, as a sign of physical superiority, could not include those who were physically disabled. In today's world, sports participation opportunities are available in all of the broad categories of sport outlined above, as the trend toward inclusion and acceptance grows. A survey conducted found that people with disabilities in Ireland are significantly less socially active than their able-bodied counterparts.

People with disabilities make up nearly a quarter of the population; only 5% of the general population is reported to have no means of transportation at all, including neither public transportation nor a personal vehicle. Additionally, a National Training and Coaching Centre Consultation Paper called 'Building Pathways' believes that there is far too little recognition of barriers. 'Building Pathways' Researchers also found that sports were not aggressive enough in creating opportunities for people and mainstream coaches were reluctant to work with disabled athletes due to a lack of education and awareness about disability.. Because of people's lack of knowledge, 'most obstacles are built.'

Opportunities in Sports

"Although the number of impaired athletes participating has remained significantly lower than the number of athletes participating in non-competitive sport. It is possible to modify almost any sport that is currently available to able-bodied athletes for participation by individuals with disabilities. For decades, the definition of 'Sport' and what it truly entails has been a point of contention, with numerous definitions and notions forming over time.[16] The European Sports Charter of the Council of Europe defines sport as "all forms of physical activity aimed at expressing or improving physical fitness and mental well-being, forming social relationships, or obtaining results in competition at all levels" through casual or organised participation. "Targeting Sporting Change in Ireland—Sport in Ireland 1997 to 2006 and Beyond," by the Irish Department of Education, defined the concept under three primary categories."[17]

Sport for Paralympians

Competitive athletic activities that are part of the worldwide Paralympic movement include all of the sports that are part of the Summer and Winter Paralympic Games. To many, the IPC represents the pinnacle of paralympic sport and serves as a model for other organisations throughout the world, including Special Olympics. IWAS, IBSA, and CPIRRA are only a few examples of other international organisations that control sports based on specific handicap groups, such as those for the visually impaired, the amputees, and those with cerebral palsy (CP-ISRA). In

[14] Gilderbloom, John I., and Mark S. Rosentraub. "Creating the Accessible City: Proposals for Providing Housing and Transportation for Low Income, Elderly and Disabled People." *The American Journal of Economics and Sociology*, vol. 49, no. 3, 1990, pp. 271–82, http://www.jstor.org/stable/3487004. Accessed 24 Apr. 2022.

[15] Beckett, Angharad E. "'Challenging Disabling Attitudes, Building an Inclusive Society': Considering the Role of Education in Encouraging Non-Disabled Children to Develop Positive Attitudes Towards Disabled People." *British Journal of Sociology of Education*, vol. 30, no. 3, 2009, pp. 317–29, http://www.jstor.org/stable/40375431. Accessed 24 Apr. 2022.

[16] Singh, Pooja. "Persons with Disabilities and Economic Inequalities in India." *Indian Anthropologist*, vol. 44, no. 2, 2014, pp. 65–80, http://www.jstor.org/stable/43899390. Accessed 24 Apr. 2022.

[17] Edwards, Claire. "Spacing Access to Justice: Geographical Perspectives on Disabled People's Interactions with the Criminal Justice System as Victims of Crime." *Area*, vol. 45, no. 3, 2013, pp. 307–13, http://www.jstor.org/stable/24029902. Accessed 24 Apr. 2022.

addition to the (IWBF) and (IWRU), there are federations that govern specific sports for disabled (FEI) or as a sports federation that governs sports specifically for disabled athletes.

There will be 540 events in 22 sports at the 2020 Paralympic Games in Tokyo, including the debut of two new sports, badminton and taekwondo. Six different sports will be represented in the 2022 Winter Paralympics in Beijing. In the Paralympic Games, the number and type of events may change.

Conclusion

For decades, the definition of 'Sport' and what it truly entails has been a point of contention, with numerous definitions and notions forming over time. The European Sports Charter of the Council of Europe defines sport as "all forms of physical activity aimed at expressing or improving physical fitness and mental well-being, forming social relationships, or obtaining results in competition at all levels"[18] through casual or organised participation. "Targeting Sporting Change in Ireland—Sport in Ireland 1997 to 2006 and Beyond," by the Irish Department of Education, defined the concept under three primary categories. People with disabilities have historically been excluded from athletics because of the perception that sports, as a sign of physical superiority, could not include those who were physically disabled. In today's world, sports participation opportunities are available in all of the broad categories of sport outlined above, as the trend toward inclusion and acceptance grows.

[18] Longhi, Simonetta, et al. "Interpreting Wage Gaps of Disabled Men: The Roles of Productivity and of Discrimination." *Southern Economic Journal*, vol. 78, no. 3, 2012, pp. 931–53, http://www.jstor.org/stable/23057336. Accessed 24 Apr. 2022.

Status of LGBT Marriage: A Myth or Reality after Navtej Singh Case

Shalini Saxena*
Vrinda Sharma**
Somya Gupta***

ABSTRACT

This research study analyzes homosexual marriages in the setting of India as an invisible struggle that is successfully kept under cover. Specifically, the paper focuses on the Indian subcontinent. In addition to this, it tries to define and explain many elements of homosexuality, such as its history, the reasons behind it, as well as the attitudes and reactions of society towards homosexual relationships. The article also draws information from nations in which homosexual weddings are legalized and underlines the outcomes that have come about as a result of legalizing homosexual interactions. In the conclusion, the author draws a conclusion regarding the potential of legalizing homosexual weddings in India by taking into consideration valid and persuasive arguments on both sides of the issue.

Keywords: LGBTQ, Same Sex Marriage, Homosexuality, Judicial Activism and Discrimination

Introduction

In the present day and throughout the course of human history, it has been an institution that every young person in the globe is expected to aspire to become a member of a family. Marriage has always been discriminatory toward some groups of people, despite the fact that it is a social institution that is so intertwined with society that everyone is expected to take part in it.[1]

Every time a certain population is allowed to marry or is denied the ability to do so, a conflict arises at the intersection of state policy, religious beliefs, and cultural expectations. The topic of marriage between people of the same gender is currently quite divisive. The purpose of this research is to investigate the social, political, and legal implications of same-sex marriage in India. In addition to this, it investigates the origins of marriage, as well as the reasons why people are hesitant to agree to a type of marriage that is more inclusive.

According to the Oxford English Dictionary, marriage is the situation of being a husband or wife; the relation between persons married to each other; matrimony. This is the dictionary's explanation of marriage in its most basic form. However, the dictionary now notes (in very small print) that the phrase is sometimes used in reference to long-term partnerships between partners of the same sex. This usage was not there when the dictionary was first published.[2]

A significant number of the various definitions of marriage that were considered define it as a union between a man and a woman. This suggests that the meaning of marriage outside of legal contexts has been changing at a glacially slow rate. This oversimplified conception of marriage presents a number of challenges. It is necessary to evaluate the concept of marriage in light of the social setting in which it exists. When societal variables such as religion and morality are involved in the definition of the nature and scope of marriage, this can also cause a shift in the meaning of marriage itself. The straightforward definition of marriage cannot hold up when these other considerations are taken into account.[3]

In contrast to what most people believe, marriage is not a personal relationship at all. Because marriage is a social institution that is always changing, opinions that go against the conventional wisdom on the institution are suppressed. Religious viewpoints on marriage carry more weight than those of any other component in determining how a society views marriage. There are many different aspects that go into determining how a society views marriage.

* Assistant Professor, School of Law, IMS Unison University, Dehradun, India
** Student LLM, IMS Unison University, Dehradun, India
***Student LLM, IMS Unison University, Dehradun, India

1 Rohit Beerapalli, SAME-SEX MARRIAGE IN INDIA: A SOCIO-LEGAL ANALYSIS, Vol. 1, International Journal for Legal Developments and Allied Issues (2015).

2 *Ibid.*

3 *Ibid.*

Research Methodology

Doctrinal Method: A doctrinal analytical method will examine legal precedents, statutes, and other official documents. In this procedure, the Statutes impact or applicability is not examined. According to doctrinal theory, law is a distinct and distinct entity that can be differentiated and interpreted by legal authorities.

Constitutional law is the subject of doctrinal inquiry, which asks, What is the rule? It all boils down to a thorough understanding of legal theory and how it is developed and used.

Qualitative Method: Analyzing and making sense of non-numerical data is an important part of qualitative research. Use it to obtain a better grasp on a subject or to come up with fresh ideas.

Doctrinal methods are employed in this study, with a qualitative data collection, evaluation, and inspection based on current data from books, articles, websites and reports.

Interpretation

The prescribing of the rites and standards of conduct that must be followed over the course of a marriage is one of the characteristics that are most typical of major religions. In India, the three major religions—Hinduism, Islam, and Christianity—each dictate their own definitions of marriage and the manner in which it should be performed. None of them even acknowledge same-sex marriage, much less have clauses that explicitly allow for it.[4]

Marriage in Hinduism is understood to be the permanent merging of two individuals for the purpose of pursuing Dharma, Artha, Kama, and Moksa (also known as liberation) together throughout their lives. Marriages in the Hindu religion are legally recognized and typically take place between individuals of different sexes. There have been a few occasions in which individuals of the same sex have gotten married, despite the fact that authorities have declined to give official legality to the marriage in those circumstances. Even while there are a number of dharmic writings that forbid homosexuality, there are also a number of legendary myths that portray homosexual experiences as something that is both natural and happy. The mythology does not make any direct reference to couples of the same sexual orientation being married. In a study that was conducted in 2004, the vast majority of swamis, albeit not all of them, expressed their opposition to the concept of a same-sex marriage that was blessed by the Hindu religion. Even though there is limited recognition of same-sex relationships in a few isolated communities within modern Hindu society, this has not stopped some priests from performing same-sex marriages; in fact, some of these marriages were done as early as the year 2001.[5]

Marriage is viewed as a binding legal agreement or a matrimonial contract between two parties from an Islamic point of view. It is customary for the bride to express her agreement to the marriage out of her own free will. A legal and legally binding contract is necessary for a marriage to be considered valid in Islam. Even when it comes to allowing people of the same sex in sexually active relationships, Islam has some difficulty with this concept. It is stated that Muhammad imposed the death penalty on both the active and passive partners in sexual acts between the same sexes. The ethical or theological justification for this position is that anyone who engages in homosexual behavior disrupts the balance that God intended for his creation and is, as a result, rebellious toward God. Therefore, it is reasonable to assume that people of the same sex could never consummate a partnership through marriage, and even if they did get married, they would never be able to have children together.

There is no such thing as a concrete definition of marriage according to the Christian worldview. There are a number of verses in the Bible that can be interpreted to suggest that marriage is the coming together of a man and a woman. One passage in the Bible, for instance, instructs husbands that they ought to love their spouses in the same way that Jesus loved the church. Even though there is no universally accepted definition of marriage, the majority of traditional Christian communities and churches do not acknowledge unions between people of the same sexual orientation. They are of the opinion that there should be no exceptions made to the traditional marriage model. Due to a passage in the Old Testament, some members of the far-right believe that homosexuals should be stoned to death as a kind of capital punishment.[6]

As can be seen from the aforementioned examples, the majority of religions have been hesitant when it comes to accepting weddings between people of the same gender, much alone non-heteronormative sexual relationships. From the perspective of conventional religion, a marriage between two people of the same sexual orientation is not an option.

There is reason to be optimistic about the possibility that this issue of social perception can be resolved by undergoing the process of altering readings of religious texts. Traditional Hindu law has, for most of its existence, disallowed marriages between members of different

[4] Nancy Bonvillain, Women and Men: Cultural Constructs of Gender, (Rowman & Littlefield Publishers, 5th edn, 2020).
[5] *Ibid*.
[6] *Ibid*.

castes, as well as the remarriage of widows and divorcees. In today's society, the majority of people do not agree with these kinds of confinements. This is true of a number of other world faiths as well. For instance, the Bible instructs individuals not to consume shellfish, not to use mixed textiles, and not to utilize the death penalty for those who do not observe the Sabbath. Additionally, those who do not observe the Sabbath are to be stoned to death. The majority of Christians today do not adhere to such regulations.

A shift of this kind is not just feasible inside religion, but also within the perceptions of society as a whole. Another illustration of this may be seen in the fact that in 1958, only 4% of people in the United States approved of interracial marriage, whereas in 2013, this number increased to 87%.[7]

In the context of India, it is perfectly feasible that over the course of time, the balance of public opinion may shift in favor of same-sex marriages. This would be a very positive development. This does really mean that, given the current state of affairs, same-sex couples have to contend with an unclear reality.

Analysis

Marriage and the associated wedding ceremony have a significant place in Indian society, in addition to being of religious and cultural significance. The institution of marriage is revered as a sacrament, and so the religious rites that accompany it are an indispensable component.

The conduct of religious ceremonies, the exchanging of garlands in temples, or the signing of quasi-legal friendship contracts (maitrikarar) in several reported cases may be one possible explanation for the large number of instances of lesbians being married. For example, in 1988, two female police officers wed one another in a ceremony that was of the Hindu faith. Their union was recognized and upheld throughout their families and the community, despite the fact that it could not be legally registered and both of them were fired from their jobs as a result. It is interesting to note that the majority of the numerous lesbian marriages that have been reported have taken place between women from rural areas, of lower middle class, who do not understand English, and who are not affiliated to the LGBT community.[8]

In this context, the acknowledgment of same-sex marriages under the rules governing personal marriages in India would be the most satisfying course of action to take.

In India, regulations governing marriage, succession, and other topics are interpreted differently according to Christian, Muslim, and Hindu beliefs. According to the Hindu Marriage Act, which is applicable to Buddhists, Sikhs, and Jains in addition to Hindus, a marriage can be performed between any two people who identify as Hindu. Additionally, it mandates that both the bride and groom must be at least 21 years old before the wedding can take place, while the bride must be at least 18 years old. According to the Christian Marriage Act, the minimum age requirement for a man is twenty-one years old, while the minimum age requirement for a woman is eighteen.[9]

Since Muslim marriages are not governed by a statute, there is no statutory meaning of the term marriage. However, Muslim marriages are typically thought of as a contract for the aim of procreation. Therefore, it would appear that all of India's personal laws consider marriage to be only a heterosexual partnership.

It is possible to secure, in accordance with Special Marriage Act, 1954, recognition of same-sex marriages by any one of the following methods:

i. Interpreting the law as it currently stands to make same-sex marriages legal,

ii. According to one interpretation, members of the LGBT community make up a distinct community, the traditions of which allow for marriages between individuals of the same sex,

iii. Modifying the acts so that same-sex relationships are legalized.

Previously, lesbian couples have experimented with this method, where one of them posed as a bride and the other as a groom. As a general, the laws of statutory interpretation don't allow you to sustain this claim because it's opposed to the common understanding of the terms bride and groom. As a result of this understanding, same-sex marriages are viewed as a kind of conventional marriage. Even in same-sex unions, this interpretation will perpetuate conventional repressive gender stereotypes that genders are intrinsically distinct, two people in a marriage are bound by pre-determined roles, and that even same-sex partners must embrace traditional roles in order to get married.[10]

Obtaining acknowledgment of the LGBT community as a community in its own right, one that is distinct from others and that adheres to its own set of norms and practices, is another strategy that might be utilized.

---

[7] Frank Newport, In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958, GALLUP (2013).
[8] Yatin Gaur, Evolution of LGBT Rights in India and taking the narrative forward: Living free and equal, Ipleaders (2020).
[9] *Ibid*.
[10] *Ibid*.

Both the anti-Brahmin Self-Respect movement in Tamil Nadu and the Arya Samaj, which is an anti-Brahmin organization, developed their own marriage ceremonies and practices. In the wedding ceremony that was performed by the Arya Samaj, references to the Hindu scriptures were made, but this was not done in the Self Respect marriages. However, both of these kinds of marriages were acknowledged after the Act that governs marriage in Tamil Nadu was changed to include Sec. 7-A[11], which made it possible to acknowledge self-respect marriages. The LGBT community might come to an agreement on a standard procedure for marriage and then apply for recognition under the Act. The problem, however, is that individuals who identify as part of the LGBT community are subject to a variety of personal laws and adhere to a variety of traditions and rituals. They are not united by a desire to bring about specific reforms in Hindu marriage customs, in contrast to the Arya Samaj, which is or the supporters of the anti-Brahmin movement.

The third strategy would be to mandate that the provisions in the legislation that governs Hindu and Christian marriage laws be read down by the judiciary so that same-sex marriages are recognized. This would be justified on the grounds that a reading of these laws as restricting such marriages would obtain the specific provisions unconstitutional because they discriminate on the basis of sexual orientation.[12]

Although the reasoning presented by the Delhi High Court in the case of Naz Foundation[13] appeared to provide support for this strategy, it now appears that the courts may not be open to arguments of this nature after the case of Koushal. There is also the long-standing judgement made by the Bombay High Court in the case of *State of Bombay* v. *Narasu Appa Mali*[14], which holds that personal laws cannot be challenged using the touchstone of fundamental rights. This is another obstacle that must be overcome. On a side note, one could make the argument that traditional Hindu rules did not prohibit weddings between people of the same gender, despite the fact that traditional Indian literature contains many references to partnerships between people of the same gender. The codified personal laws are a reflection of a more modern trend that evolved during the colonial era, which was to prohibit relationships between people of the same sexual orientation. This trend emerged under the influence of Victorian notions of heterosexuality and monogamy. Therefore, even if such reasoning is presented to the court, it may still be difficult to persuade the judges to meddle in personal laws on the basis of discrimination.[15]

The challenges that come with these three approaches are universally applicable to all personal laws. Since none of the aforementioned strategies appears to be workable, the last option would be to investigate the possibility of legislative amendments being made to the personal laws. This most satisfying answer would maybe also be the one that is the most challenging to implement in actual reality. A vocal segment of society is hostile toward the LGBT population, thus an amendment like this would be met with a great deal of opposition. In addition to this, it would be seen as an intrusion into the rituals and traditions that are observed by religious organizations. Even if the government were to be in favor of such a controversial legislative move, it would not be the priority of the government to move forward with such a move. As an illustration of this argument, when the Koushal case was being heard, the Attorney General assured the court that the Government of India was not seeking a reversal of the Naz Foundation decision; but, after Koushal, the Government of India did not initiate any effort to eliminate Sec. 377.

In addition, the Bharatiya Janata Party has expressed its unwavering support for Koushal. Because of these factors, it would appear that now is not the appropriate moment to lobby for a change in the law.

To allow marriages between people of the same gender would require a change to the Special Marriage Act of 1954, although this is a possibility that should not inflame religious sentiments. The SMA is a piece of secular legislation that makes it easier for individuals of different religions or individuals who do not wish to be bound by their own personal laws to wed one another. An official marriage registration takes the place of a religious ceremony when a couple decides to become married. Since the SMA, in its current form, stipulates that the male partner must be at least twenty-one years old and the female partner must be at least eighteen years old, it would appear that the SMA is intended to apply only to heterosexual couples. However, it is not difficult to allow marriages between people of the same gender within the context of SMA. It would only be essential to amend Sec. 4(c)[16] so that it reads that a party, if male, should have attained the age of twenty-one years and if female, should have attained the age of eighteen years, and to add a

[11] Sec. 7-A, The Hindu Marriage Act, 1955.
[12] *Supra* note 8.
[13] Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277.
[14] State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.
[15] *Supra* note 8.
[16] Sec. 4(c), Special Marriage Act, 1954.

specific provision that same-sex marriages are permitted. These changes would make it so that a party, if male, should have attained the age of twenty-one years. In any case, even if personal laws are changed to recognize marriages between people of the same gender, the SMA would still need to be changed in order to offer the same respect to relationships between people who practice different religions.

After the recent creation of a government led by the BJP, it might be challenging to pass an amendment, despite the fact that it is unquestionably the best legislative alternative. While both the Congress and the CPI(M) included decriminalization in their election manifestos for the Lok Sabha, the BJP was unequivocal in its support of the judgment, with a party leader stating that homosexuality is an unnatural act that cannot be supported. This was in contrast to the position of the Congress and the CPI(M), which both advocated for the issue. More recently, the Rashtriya Swayamsevak Sangh, the ideological parent of the BJP, has stated that while they are against glorifying homosexual behavior, it is debatable whether or not it should be criminalized. This statement was made despite the fact that they are against glorifying homosexual behavior.[17]

The revision to the SMA would be analogous to legislation that allowed marriages between people of the same sexual orientation that have been passed in other nations. Today, sixteen countries have passed legislation along these lines, beginning with the Netherlands in the year 2000 and ending with England and Wales in the year 2013. In the same vein, thirteen states in the United States have enacted laws that make same-sex weddings legal. On the other hand, there are a few laws that prohibit same-sex couples from getting married. The Defense of Marriage Act of 1996, also known as DOMA, was passed into law by the United States Congress in 1996 with the intention of denying federal benefits to same-sex couples who were married in accordance with state laws. The Defense of Marriage Act (DOMA) was invalidated by the Supreme Court of the United States; nonetheless, the challenge against DOMA in front of that court was actively defended by Republican groups, even though the Obama administration did not back the Act.[18]

Discussion And Findings

The institution of marriage is widely regarded as one of the most stable and significant aspects of human society. Marriage is still a global institution, despite the fact that it has developed new meanings and taken on new forms over the course of human history. This is especially important to keep in mind with regard to India, as the idea is so well ingrained in the culture there that participation on the part of every individual is anticipated.

Marriage and the ceremony of getting married are both revered as holy events in India. In addition to its role in the regulation of sexual activity, marriage is a partnership that is built on financial and emotional interdependence. All of the religious rites that are performed at the wedding are seen as vital components of the event. It is possible that this is the reason why the LGBT community in India is so eager to get the legal right to marry, or why there are so many instances of gay and lesbian marriages being performed in India by the exchange of garlands in temples or quasi-legal friendship contracts in several cases where they have been reported.[19]

When LGBTQ+ people are denied the right to marry, same-sex couples are deprived of social and legal recognition, in addition to the advantages from the state that are granted to married couples. Nevertheless, it is essential to point out that the institution of marriage has been exclusive toward specific communities of people ever since it was first established. Furthermore, whenever any group of people has been included or exempted from being able to marry, it has always been preceded by a battle between public policy, religion, and social norms.

Right to Marry is a Legal Right

The constitutional text does not make any direct reference to the right to marry. However, in the seminal case of *Lata Singh v. State of Uttar Pradesh*[20], the Indian Supreme Court construed it to be a part of Art. 21[21] of the Indian Constitution. This ruling is considered to be a constitutional precedent. In the matter of inter-caste marriage, the highest court in the land ruled that once a person reaches the age of majority, he or she is free to marry anyone of any caste they choose. According to the court's additional interpretation, the parent's only recourse is to completely sever all links with the children; nevertheless, they are not permitted to physically harm or threaten the children in any way.

The right to marry is also recognized on the international level in the human rights charter under the heading right to have a family and under various other covenants; however, the question of whether or not these laws are inclusive enough to include marriages between people of the same

[17] Nayantara Ravichandran, Legal Recognition of Same-sex Relationships in India, Manupatra (2020).
[18] *Ibid*.
[19] *Supra* note 8.
[20] Lata Singh v. State of Uttar Pradesh, AIR 2006.
[21] Art. 21, THE CONSTITUTION OF INDIA, 1950.

sexual orientation remains unanswered. People still do not prefer or allow their children to marry outside of their caste in Indian society, which is another very significant aspect that should be brought up here. This is the case even though other parts of the world are becoming more progressive. Since there are still instances of people being killed for marrying within a different caste or religion, it is natural to assume that the concept of same-sex marriage is even more challenging to comprehend.[22]

However, this explanation cannot be used as a legal justification to deny members of the LGBT+ community the right to marry simply due to the fact that they have a sexual orientation that is distinct from that of others. Aside from this, it also presents another extremely significant topic, which is whether or not the view of the majority bears more importance in the eyes of the law, to the point where it might deprive an individual of the personal autonomy and fundamental right to his or her own life.[23]

Same Sex Marriage Circumstances

Notwithstanding the fact that India does not have any laws that regulate marriages between people of the same sexual orientation, people who identify as LGBT continue to be married, and there have even been cases where the law has acknowledged this type of relationship.[24]

In 2009, when homosexuality was decriminalized in India, a court in Haryana effectively acknowledged the validity of a marriage between two lesbians. A more momentous decision, however, was handed out in 2019, when the Supreme Court unanimously decided to strike down Sec. 377[25]. In 2019, a bench of the Madras High court upheld the marriage of a biological male and a trans woman under the Hindu marriage act of 1956, and the court further directed to register their marriage. The marriage was between a biological man and a biological woman who was a trans woman.

At the community level, one can also find instances of acceptance of same-sex weddings, which are similar to those seen at the societal level. In 1988, two female officers from different departments got married in a Hindu ceremony. Despite the fact that they did not register their marriage, both of their families and the society welcomed and supported the union. In addition to this, similar kinds of same-sex marriages have been happening among the Kutchi in a small village in Gujarat called Angaar for the past 150 years. In these marriages, both the bride and the bridegroom are men.[26]

In addition, it is of the utmost significance to point out that the majority of marriages between people of the same gender, particularly lesbian marriages, have typically taken place between women who do not speak English and who are not even involved in the LGBT movement. This is especially true of lesbian marriages.

Navtej Singh Case and Same-Sex Marriage

As Justice Chandrachud pointed out in the Navtej Singh Johar case, the way an individual wishes to engage in intimacy is outside the scope of what the state has a right to protect. However, despite the fact that the judgment recognized everyone's right to intimacy, it did not direct the government to draft or revise laws to acknowledge other types of partnership. The word union was used in the context of companionship, not marriage, when Justice Misra recognized the right to the relationship under Art. 21.[27]

Furthermore, it should be noted that LGBT activists have submitted several reform proposals to the law commission in an attempt to make family laws more inclusive of same-sex couples, but none of these proposals have been given proper consideration.

It is possible, though, that some of these limits can be challenged under the broad framework of equality and non-discrimination recognized by the Supreme Court in the NALSA verdict and more recently in the Navtej Singh Johar judgement.[28]

Conclusion

It is necessary to create new laws to recognize same-sex weddings because the current laws do not apply to LGBT couples. To make marriage laws more accommodating to the LGBT community, there are three options.

i. Reinterpreting, changing, or modifying current laws to allow same-sex marriages is one option, according to one viewpoint.

ii. The second opinion recommends that same-sex marriages should be allowed only after developing a new law that recognizes the LGBT population as a distinct group.

---

[22] *Supra* note 8.
[23] *Ibid.*
[24] *Ibid.*
[25] Sec. 377, Indian Penal Code, 1860.
[26] *Supra* note 8.
[27] *Supra* note 21.
[28] *Supra* note 8.

iii. According to a third school of thought, given India's lack of progressivism and openness to LGBT marriages, lawmakers should instead grant same-sex couples a different status, such as a civil partnership, in which they would not have all the rights of marriage but would be able to take advantage of other important rights like sharing insurance and filing joint tax returns, for example.

Even if marriages between people of the same gender are not expressly outlawed in India, there is also no rule that makes it possible to get married without there being any room for interpretation. Even though the Indian government has not officially acknowledged same-sex marriages, there have been documented cases of same-sex couples getting married in the country of India. There is a school of thought among religious experts that contends the scriptures do not prohibit such relationships, and that such relationships were indeed rather widespread in ancient Indian society. Furthermore, changes brought about by post-colonial eras in society's perspective on culture have led to ignorance of this knowledge, which in turn has led to people declaring that such partnerships are foreign and against Indian culture.

Even if the ceremony is carried out and the union is acknowledged, there is no way for the couple to consummate their marriage without incurring legal repercussions as long as the laws that make homosexuality a crime continue to be upheld. They also deprive the people of the liberty to pursue their personal lives in accordance with their own interests, free from the imposition of the state's version of right and wrong on them.

Even options such as civil unions do not exist in India, so same-sex couples cannot live a life with the benefits and protections that are granted to other married people in India. This is in contrast to the situation in the United States, where same-sex couples can get married and embrace these rights.

Marriages between people of the same gender are not permitted expressly in India since such unions are not recognized as per any law or statute. But hon'ble Supreme Court has, in Navtej Singh Johar case recognized Art 19(1)(a) and Art21 of LGB community and legalized the sexual relationships between them. But court was silent on marriage and its registration. But with time, law scholars interpreted that SC has indirectly implied that same sex marriages may be possible under Special Marriage Act, 1954. But other options besides marriage are not on the table eg, registration of marriage, adoption etc. This leads to the conclusion that there is no social or legal recognition of same-sex marriage in India, which is presented as the conclusion of this research. Individuals who identify as gay are having their rights infringed. They are denied the right to participate in the institution of marriage, which is held in such high respect in Indian society, which prevents them from being incorporated into society. Marriage is held in such high respect in Indian society.

Redefining Legal Ambits of Torts Involving Artificial Intelligence

Dr. Shoaib Mohammad*
Dr. Arshad Hussain**

ABSTRACT

It is a time to evolve and explore intelligent machines, different from traditional machines which used to work on mechanical processes and human support. Now, the machines are becoming intelligent, they work on their own and may have self-acquired intelligence. There are no such limits to these machines; robot drones, automated vehicles, and bots are few examples; other things are constantly evolving. They have no human intervention or minimal human intervention. They decide themselves, may take action, and even they have self-learning ability. Such kind of technical advancement is always beneficial for society but it is often seen that they bring with themselves a lot of legal complications. The members of society are in search of these advancements to make their life comfortable. And invention becomes an inseparable part of their life as they increase efficiency and processing ability with the optimum utilization of the resources. The technocrats put a lot of effort into making technology error-free but it is not possible to create a full-proof invention. It is always an apprehension that the use of invention causes damage. Sometimes the damage is beyond expectation which the inventors never thought of. The damage may be not in terms of injury to the property but also to the life or health of persons. In all these situations the law comes into action to decide the liability. This research paper is focused to find and define the liability when the wrongdoer is an artificial intelligent person.

Keywords: Artificial intelligent person, robots, intelligent machines, liability of machines, self acquired intelligence, legal person, negligence of machines, Strict liability, negligence, automated vehicles.

Introduction

The law which makes the person liable even without negligence is a strict liability that says if a person brings or accumulates some dangerous thing on his land, he keeps that thing at his own risk. Does it mean that the person who uses or brings an artificial intelligence machine is the only one who is liable if anything wrong is done by that machine? However, the liability in cases of negligence accrued to the manufacturers as it was held in the case of Donoghue v. Stevenson[1], Wherein the neighbor principle was applied by Lord Atkin to make the manufacturer liable by observing that one can think about that someone is going to be injured by his act it will be considered as his neighbor. Everyone should take care of his neighbor. The liability based on neighbor principle depends upon anticipation the thing which could be reasonably foreseen must be taken care of. An analogy of this principle to the Machines with self-acquired intelligence emphasizes that there should be a liability of the manufacturer however in some situations it may be shifted to the user. In cases where artificial intelligence machines are involved, there are different persons behind it like a programmer is different from the manufacturer. so it is very difficult in such cases to determine who should be made responsible. Two different laws like strict liability and law of negligence walk in different directions. Fixing liability under strict liability reduces the hazards to life and health however it imposes a burden on the user where the law of negligence imposes a burden on the manufacturers as it presupposes human element i.e. negligence. This law presumes that there is anticipation on the part of the manufacturer of how other users are not pre-prepared. They are not well aware of the technicalities as the manufacturers are. A machine equipped with artificial intelligence may create a menace to society that needs to be discouraged anyhow. The idea which supports this contention is that the menace should be stopped before it reaches the market. The courts across the globe are of the same view as in the case of *Escola v. Coca-Cola bottling company*[2]. The court observed that there should be general and constant protection and manufacture is best situated to attend such protection.

Moreover, it is well-settled law related to liability in case the domestic animal causes injury to another person[3]. The High Court of Himachal Pradesh also held that[4], a boy was entitled to be compensated on account of the negligence of the Municipal Corporation to control stray

* Assistant Professor, School of Law, wIMS Unison University, Dehradun
** Associate Professor, Department of Law, SSJ University, Almora
1 1932 AC 562
2 24 Cal. 2d 456 (1944)
3 Nitin Walia v. Union of India, AIR 2001 Del 140
4 Court on its own motion v. State of Himachal Pradesh, AIR 2010 (NOC) 866 HP

dogs. Can we apply the analogy of liability which comes to the person's wrongful act of the domestic animal to intelligent machines? Not only domestic animals there is a liability for keeping ferocious animals under strict liability if it escapes. The principle of strict liability has extended to the cases of motor vehicle accidents[5]. The vehicles which need human assistance are considered a dangerous thing for applicability of strict liability. I don't think that there is a point in rejecting an opinion that automated vehicles should be kept within the term dangerous thing. And even it should be considered as an inherently dangerous activity for absolute liability.

There is a drastic difference between traditional machines and intelligent machines. Intelligent machines are the combination of different minds as they are designed by different persons. They are also a combination of hardware, software, and data assembly, etc. They are the perfect examples of Computer Architecture that involves machine learning. It is a process of training computers through programs and even those programs are designed by different companies. Sometimes the source of data for these intelligent devices besides the program or software is self enable through which intelligent machines may self acquire the knowledge from the internet. They perform like autonomous people without human interaction. Their decisions are vital in the decision-making process. It is an apprehension that there may be inaccurate processing caused by software or mechanical or technical defects. Faulty Signals and Communications may also cause faulty decisions of the machine.

Due to the imbibing character of Intelligence in the machine, the question comes to our mind that can it attribute legal personality to the machine? The legal personality could be attributed to different non-living persons like a deity, Guru-granth sahib, company, etc. Is it possible to attribute legal personality to the Machines having artificial intelligence? We know that the legal person can sue and can be sued. Then, what would be the advantage to sue the machine, ultimately we need to recover compensation from human beings. However, for the damages caused to the machine, it may be considered as a legal person but it could sue as a plaintiff. Attributing personality to intelligent machines is not so easy too because several components create the machine. Attributing personality to machines does it mean that we are attributing personality to its components? They may be replaced, will it attract a new personality? There are several questions whose answers are still not traced by legal jurisprudence.

Vicarious Liability on Behalf of Intelligent Machines

Talking about the concept of vicarious liability which depends upon the principle of respondeat superior for making master liable there should be a right to control over his servant. Can we apply this analogy to machines as a servant and humans as a master? The right to control may be well-established between human beings. It is considered as one of the essential factors for making a master liable on behalf of servants. The Supreme Court of India rightly observed in the case of *Sitaram Motilal Kalal v. Shantanu Prasad Jaishankar Bhatt*[6] that for the existence of a Master servant relationship there should be a right to control. It does exist between machine and the master it is good to attribute the user as master and the machine as a servant. There is a difference between general and specific masters in cases of artificial machines; the mastership should be attributed to the general master. The user may be a specific master; he may be exempted from liability as to the right to control lies in general-master. This thing is well settled by the court in the case of *Mersey Docks and Harbour Board Ltd v. Coggins and Griffith (Liverpool) Ltd*[7]

I thought that it's time to redefine agency also. The second factor on which master-servant liability is realized is that the act must be done in course of employment. Where the autonomous machines work without any intervention of the user can we consider it as a course of employment? The one who does the work on behalf of another is usually considered as an agent, the intelligent machines also working on behalf of its principle. Is it possible to consider the principal and agent relationship between humans and intelligent machines? This could form a good justification for establishing principal and agent relationships between them.

Various laws talk about joint and several liabilities of the persons. Particularly it is highly useful in cases where the question of monetary liability arises. Will this principle work for intelligent machines? Can we make the manufacturer and the user jointly and severally liable, in case the accident is caused by a machine having self-acquired intelligence? I think it will work and it will not impose an unnecessary burden only on the manufacturer. It would not also hamper the research process. Making the manufacturer liable for each and everything will cause demotivation to the innovations.

There are several standards for different types of the machine, but for intelligence, the policies and Standards are not in exhaustive form. There are several forms of

[5] S. Kaushnuma Begum v. New India Assurance Co.Ltd AIR 2001 SC 1086
[6] AIR 1966 SC 1697
[7] [1946] 2 All ER 345 HL

Machines having artificial intelligence common is standard policy may not be proper for all of them. They require separate policies and Standards. The inchoate policy is not providing proper norms for all forms of artificial intelligence machines. Even if the policies are well defined there are chances of accidents and there should be accountability under the strict liability principle. In the case of *O'Brien v. Initiative surgical, INC*[8] the artificial intelligence machine "da Vinci" robot performed the surgery without success. The view of the US Court was that the persons behind the development of the machine and mapping intelligence to the machines should be made liable.

When machines are fully autonomous, capable of deciding, what to do and what not to do, it is responsible for negligence as well as for an accurate decision. Even if there is no manufacturing defect the machine may make inappropriate decisions, as they can sense or think, they can decide based on their senses. So in such a situation still would it be proper to attribute liability to the manufacturer as O'brien's view is in full support of the manufacturer's liability.

Liability as Parent

In different parts of the world, there is a difference in law related to the liability of parents in case of intentional or negligent acts of children. Generally, the child is not considered negligent when he is below 8 years of age. Between 8 to 14 years a child could not be negligent but it is a rebuttable presumption. Between 14 to 21 years a child is considered capable of negligence but again it is a rebuttable presumption. However, Indian law does not make such demarcation in the civil liability of parents when any wrongful acts are committed by the child. But criminal law makes such demarcation as under 7 years of a child is exempted from liability. For a child between 7 to 12 years, the partial exemption is given to the child when he has not attained sufficient maturity. It was rightly observed by the Indian Court in the case of *MPSTRC* v. *Abdul Rahman*[9] that a child remains a child despite all training and directions and anything sparkle it is the glory of his innocence that makes him indifferent to the risks which an adult apprehends and pays attention to. This observation makes it very clear that contributory negligence of the child cannot be claimed as a defense. The question that comes to our mind is whether the knowledge of the law relating to children is also applicable to intelligent machines? Can we say that intelligent machines are also exempted from the defense of contributory negligence? The defense of contributory negligence could not be claimed when the injured person is a child, even when the negligence of the elder person accompanying the child contributed.[10] If we apply this analogy to intelligent machines can we exempt the user of the machine from contributory negligence defense, obviously the answer is no because in this case, the sufferer would be the user or the machine. But where the child would be the sufferer the difference of contributory negligence would not be available against him.

Is it possible to limit the liability where the mishap is caused by an intelligent machine, the liability is limited in several laws. Indian motor vehicle law limits the liability in case of death or grievous hurt.[11] Similarly California Civil Code[12] also limits the liability of parents in monetary terms as well as it is restricted to medical, dental, hospital expenses. Should the liability for the accidents caused by intelligent machines be limited?

Moreover, in cases of joint tortfeasors, there is a concept of joint and several liabilities. Can we make the manufacturer and user jointly and severally liable for the tort committed by the intelligent machine?

Open Ended Learning

The degree of human intervention in all the machines is different. The question of the lack of human intervention makes machines more intelligent or causes intelligence failure in machines is unanswered. Sometimes the lack of human intervention is more dangerous. The law should decide what should be the limit of human intervention to consider it as autonomous. It would be unjustifiable to make the manufacturer liable when the machine has the intervention of the user.

Intelligent machines are designed to have open-ended learning. And the machine is learning itself, from different sources including the internet, as an individual identity. Blaming humans the learnings of the machine seems to be proper after all the machine is the creation of human beings.

Liability in criminal cases from Civil cases is quite different. It revolves around mens-rea. Prosecution of human beings on behalf of machines! Can you find mens-rea in this situation? criminal law requires some deviation from the principle of mens-rea. The problem in criminal law is bigger than Civil law. Criminals will start creating machines to commit a crime on their behalf. In such a situation we

[8] No. 10 C 3005,2011 WL 304079,at 1 (N.D. Ill. Jul. 25,2011)
[9] AIR 1997 MP 248
[10] Mills v. Armstrong (1888) 13 App Cas 1
[11] Section164 Motor Vehicle Act, 1988 (As inserted by Motor Vehicle Amendment Act, 2019)
[12] California Civil Code S. 1714. California Office of Legislative Counsel. Retrieved March 24, 2021.

can easily trace mens-rea. However, it would be very difficult to trace it when the crime is committed by the decision of the machine. The matter of intelligent machines involves numerous concerns. The laws related to motor vehicle, insurance, vehicle technology, and aviation needs to be revamped.

Conclusion

The insurance law on accidents is based on fault and no-fault liability. To make the insurer liable for fault it would be very difficult to trace whose fault it is? The better idea is to make insurers liable for every accident caused by an automated vehicle even without anybody's fault. But it doesn't mean that the liability should exist when the automated vehicle drives itself. And another situation where the automatic vehicle is under human control the liability should be like a normal motor vehicle as it exists today. Where the user fails to obtain the insurance in such a situation the user himself should be liable. Existing motor vehicle laws prescribe some alterations to the vehicles. There is an apprehension of alteration to automated vehicles as well. It would not be justifiable to make the insurance company liable if an alteration is made by the user or he fails to install required software updates. Such requirements may be in some law or insurance policy itself. Domestic laws of different jurisdictions need to be modified considering all these aspects. several countries are trying to modify the laws. The attempts which they are doing are not exhaustive but definitely, it's a good beginning and appreciable.

Case Comment

Dilip Hariramani v. Bank of Baroda [Criminal Appeal 767 of 2022]

Poonam Kumari Bhagat*

On 9th May 2022, a two judge Bench of the Supreme Court comprising of Justice Sanjeev Khanna and Justice Ajay Rastogi has acquitted the partner of a partnership firm (M/s. Global Packaging) stating that no vicarious liability arises on him under section 141 of N. I Act, 1881 merely because he was partner at firm which took loan. The court said that a director or partner cannot be held liable vicariously merely because he was the director or partner of the company or firm at the time of the commission of the offence. In order to make a director or partner liable for criminal liability under section 138 and 141 of N. I. Act 1881, it is necessary that:

i. the company or firm is made an accused in the criminal proceeding,

ii. he has proven to have committed the offence of cheque bounce as the principal accused,

iii. the director or partner have been directly involved in the day-to-day affairs of the business the said offence was committed with his consent, connivance or is attributable to the neglect by the said director or partner of the company or firm.

Fact of the case: The issue was raised by the appellant Dilip Hariramani, challenging his conviction under Section 138 and 141 of the Negotiable Instruments Act, 1881 are covered by the decisions of this Court on the aspects of (i) vicarious criminal liability of a partner; and (ii) whether a partner can be convicted and held to be vicariously liable when the partnership firm is not an accused tried for the primary/substantive offence. The Bank of Baroda (Respondent) granted terms loans and cash credit facility to a partnership firm M/s. Global Packaging. In part payment of the loan, it was alleged that its authorized signatory (Simaiya Hariramani) issued three cheques, but they were dishonored on presentation due to insufficient funds. Consequently, the respondent- bank manager filed a complaint under Section 138 of N. I Act before the Court of Judicial Magistrate against the appellant and Simaiya Hariramani. The court convicted the appellant and Simaiya Hariramani under Section 138 of the NI Act thereafter the appellant and Simaiya Hariramani preferred an appeal and the same was dismissed by the Sessions Court. Later on, the High Court also dismissed the appeal of the applicant, and the appeal was filed before the supreme court of the country.

The two important sections which were interpreted in this case are sec 138 and 141 of the N.I Act, 1881. Section 138 talks about the legal provisions in case of dishonor of the cheque by a banker due to insufficiency of fund in account and section 141 talks about if the same offence is committed by a company who shall be vicariously liable. Section 141(1) specifically says that where such an offence is committed, every person who at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly while sec 141(2) provides that it is necessary to prove that that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer in order to be to be proceeded against and punished accordingly.

In case of *G.L.Gupta v. D.H.Mehta*[1], it was held that the expression 'a person in- charge and responsible for the conduct of the affair of a company' means that "the person should be in overall control of the day to day business of the company or firm". The criminal liability can be attached only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company. Vicarious liability on the part of a person must be pleaded and proved and not inferred. Therefore, the burden is on the prosecution to prove that the person complaint against was in the overall control of the affairs of the firm which the prosecution could not prove in this case.

*Assistant Professor, School of Law, IMS Unison University, Dehradun

[1] *(1971) 3 SCC 189*

Secondly, the respondent bank served the demand notice solely to Simaiya Hariramani, the authorised signatory of the Firm and the complaint before the Court of Judicial Magistrate, was made against Simaiya Hariramani and the appellant not against the firm. Section 141 impose vicarious liability by deeming fiction which presupposes and requires the commission of the offence by the company or Firm. Therefore, unless the company or Firm has committed the offence as a principal accused, the persons mentioned in sub-section (1) or (2) would not be liable and convicted as vicariously liable. Since in the present case, the Firm has not been made an accused or even summoned to be tried for the offence, the appellant cannot be held vicariously liable for that. The court referred the judgement of *Aneeta Hada v. Godfather Travels and Tours (P) Ltd*[2] in which it was held that in the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The Court also taken into consideration the judgements in the case of *Sharad Kumar Sanghi* v. *Sangita Rane*[3] , *Himanshu* v. *B. Shivamurthy* and *Another*[4], and *Hindustan Unilever Limited* v. *State of Madhya Pradesh*[5], where the same view has been followed.

The court of the judicial magistrate and Session court were erroneous to prove that applicant was in charge of and responsible for the conduct of the affairs of the firm. The apex court specifically held that the appellant cannot be convicted merely because he was a partner of the firm which had taken the loan or that he stood as a guarantor for such a loan. The Partnership Act, 1932, Indian Contract Act, 1872, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, etc. creates civil liability only. However, vicarious liability in the criminal law in terms of Section 141 of the NI Act cannot be attached because of the civil liability. Moreover, the court said that vicarious liability under sub-section (1) to Section 141 of the NI Act can be fixed when the person is in overall control of the day- to-day business of the company or firm. Consequently, the impugned judgment of the High Court confirming the conviction and order of sentence passed by the Sessions Court, and the order of conviction passed by the Judicial Magistrate First Class are set aside and the appellant was acquitted.

The supreme court of the country by giving such a judgement removed all the confusions in corporate sector where a person stands as a guarantor for others and for improving their earning enters into a partnership agreement only for the sake of profits without having overall control of the business of the firm. I firmly believe in the judgment of the court, and it will definitely improve the pace of economic development of the country. The verdict of the court is also capable for resolving the discrepancies about where civil and where criminal liability arises on the partners and the guarantor of the firm. The judgement of the apex court will also act as the torchbearer for the other lower courts of the countries in such a matter and will thus help in reducing the burden and time of the lower courts which is already overburdened with plenty of pending cases.

---

[2] *(2019) 3 SCC 797*
[3] *(2015) 12 SCC 781*
[4] *(2019) 3 SCC 797*
[5] *(2020) 10 SCC 751*

Case Comment

Canara Bank v. G.S Jayarama 2022 SCC OnLine SC 656

Dr Arti Sharma*
Dr Satish Mishra**

Facts: The application was moved in the syndicate bank on 31 December, 2012 before the Permanent Lok Adalat at Mangalore under section 22(c) of Legal Services Authorities Act, 1987 against the respondent and his guarantor pertaining to the value of Rs 240,583. The amount became due on 1.10.2012 but was not paid by the respondent despite the multiple notices. The appellant made a request for the principal amount along with the interest at the rate of 15% for the recovery of Rs 2,40,583 with interest at the rate of 15.75 per cent and costs. On 10 January 2013, notice was issued and in pursuance of no reply to such notice, service was deemed as complete on 12 March, 2013. The case was then adjourned to 6 June, 22 August and then to 6 February 2014. A final affidavit was filed by the appellant in pursuance of which the award was passed by Permanent Lok Adalat ordering the respondent to pay amount of 2,40,583 along with the interest @ 9 per cent till the date of realization. An execution application was filed in the court of civil judge and judicial magistrate 1st clas, Sullia Dakshin Kannada. The award passed by permanent Lok Adalat was challenged in the Karnataka high court before a single bench through a writ petition and writ was allowed.

Now, the bank challenged the said decision before a division bench which dismissed the appeal stating that the permanent Lok Adalat do not attain adjudicatory functions.it was noted and stated by the bench that the conciliation proceedings were not adhered by the PLA, and it directly moved to the adjudication process.

Decision of Court

Permanent Lok Adalat ordered the respondent to pay amount of 2,40,583 along with the interest @ 9 per cent till the date of realization. An execution application was filed in the court of civil judge and judicial magistrate 1st clas, Sullia Dakshin Kannada.

During the pendency of execution and upon getting the arrest notice, a writ petition was filed under Article 226 of the Constitution by the respondent on 1.7.2019 for challenging the award of 19.9. 2014.

Single Judge of High Court:

The writ petition was allowed on 3.7.2019 without the issuance of notice to the appellant.

Ground of decision:

That the permanent Lok Adalat do not attain an adjudicatory function as per the Legal Services Authority Act,1987. order dated 19.11.2014 is hereby quashed and set aside.

Thus, the execution of appellant was dismissed on 22.7. 2019 and they (respondent) filed a writ petition which was dismissed.

Division Bench of High Court

There occurred no conciliation proceedings between the parties under section 22(c) and award under section 22(c) (8) remains a nullity. The lok Adalat should not have acted like regular civil court in making the adjudication of dispute

The appeal was made in Supreme Court and despite the notice served upon the respondent; no one appeared on its behalf.

Supreme Court: It held that the decisions pronounced by the single bench and division bench were incorrect. The Apex Court stated that the high court was incorrect in stating that PLA do not attain adjudicatory functions and was correct to the extent that PLA did not follow conciliation functions.

*Assistant Professor, School of Law, IMS Unison University, Dehradun.

The legal Issues in the Case:

1. Whether the conciliation proceedings are mandatory under section 22c of the Legal Services Authority Act?
2. Whether the Permanent Lok Adalat attains adjudicatory functions under the Legal Services Authority Act,1987?

It is worth mention to discuss the provisions of Section 22(C) of the Act states that the party to dispute may move a direct application to the PLA subject to the condition that jurisdiction of any other court should not be invoked for similar matter. Each party should then present written statement, fact & substance of matter, points raised, documents and evidence and additional statement (if required). The conciliation proceedings may be started between the parties and assistance would be provided for ensuring settlement. If the settlement is not reached, then PLA may proceed to settle matters on the merit. Thus, theme is to ensure speedy, easy, and timely justice to the parties. It is worth mention that legislature aimed at providing an opportunity of being heard to the parties so that the terms of settlement could be framed and probably decision on merits could be reached by PLA on that very basis.

Now, coming up to decision of Supreme Court, the verdict was obtained in a partial manner or ratio that PLA was wrong in adjudication of dispute and correct in the conciliation of matter. Herein, the question comes what is the meaning, concept, and purview of conciliation? What is the scope and objective of conciliation? Is it (conciliation) valid or authentic in the absence of the party to dispute? Whether the theme of ensuring speedy or natural justice or legislative intent is completed after the verdict of Hon'ble Supreme Court. It is pertinent to mention over here that PLA should try to conciliate the dispute between parties by framing the terms and in case of no compromise, the matter may be decided on merits. In the present case, the decision was delivered ex-parte (in the absence of parties).

It is worth mention that Lok Adalat and Permanent Lok Adalat must follow the principles of natural justice, equity, and fair play. If the parties fail to reach an agreement, then the dispute may be resolved if it do not relate to an offence in pursuance of the provisions of section22(8). Thus, the pre-conciliation is necessary at the initial stage and if no agreement take place, then such matter needs to decide on merits.

The main objective of Lok Adalat is to settle the matters in an amicable manner and to reduce the huge pendency and backlog of cases with motto of ensuring cheap, easy, and efficient justice. In the pursuance of achieving the theme of lok adalat, legislation focus upon the natural justice by providing the opportunity of being heard to both of the parties. In this case, Supreme Court held that the decision delivered by division bench was not correct and stated that the permanent lok adalat can do conciliation. The decision was not delivered on merits by the court upon the subject matter of dispute. Since the permanent lok adalat failed to follow the conciliation process. The rights and contention of parties as kept open revealing that the parties can pursue in future. It is not perhaps the end to litigation or access to justice embodying the speedy or cheap justice.

The main objective of establishment of PLA with the insertion of amendment in 2002, has been to provide a forum for the settlement of matters pertaining to the public utility matters that is water, electricity, transport, telegraph, or postal services. Since these matters relate to the daily routine services and are necessary for the basic survival of the people; it paved as need to settle the matters at early pace to reduce the anxiety and hurdle in the life of people.

The Permanent Lok Adalat consist of the chairman who may be district judge or additional district judge along with two persons having expertise over the subject matter. but, in the present case PLA did not follow the procedure and its decision was reversed by the single bench & division bench of high A proper or technical procedure like regular courts is not to be followed because the main theme is to ensure speedy and accessible justice. The power to decide cases on merits is allocated to the PLA with a requirement of pre-conciliation.

Apex Court stated that the High Court was incorrect in stating that PLA do not attain adjudicatory functions and was correct to the extent that PLA did not follow conciliation functions. Such decision has not decided the matters in final and conclusive manner. If such would be the fate of litigants and litigation, then the utility and establishment of PLA may remain a question the race of providing easy or cheap justice. If the PLA are not following the proper power & procedures while working under the legal services authority act,1987; then is a mandate to follow the legislative intent which as not followed in the present case. If parties must run behind each other and seek the remedy through the hierarchy of courts, then where lies the concept of speedy justice?

The main theme and objective of Lok Adalat is to settle the disputes in a cheap, efficient and easy method so that the litigants should be able to access the justice The theme and intent of Lok Adalat should be efficiently met and not frustrated.

Our Contributors

Kshitij Kumar Rai
Assistant Professor of Law, IMS Unison University, Mussoorie Diversion Road, Dehradun

Aanya Aggarwal
Teaching Associate, Himgiri Zee University, Dehradun. aanya5319@gmail.com

Richa Sharma
Assistant Professor, Himgiri Zee University, Dehradun. richa.dharmani@gmail.com

Farah Hayat
Research Scholar, Faculty of Law, Jamia Millia Islamia, New Delhi

Dr. Faizanur Rahman
Assistant Professor, Faculty of Law, Jamia Millia Islamia, New Delhi

Dr. Mohammad Haroon
Assistant Professor, Hashmi College of Law, Amroha, Affiliated to M.J.P. Rohilkhand University, Bareilly

Mr. Sachin Yadav
Research Scholar, NET- JRF, LLM- National Law University, Delhi, email: sachinadvocate05@gmail.com

Mr. Saurabh Rana
Assistant Professor, Law Centre II, Faculty of Law, University of Delhi, saurabh.lawfaculty.du@gmailcom,

Dr. Rinu Saraswat
Associate Professor, school of Law, Apex University, Jaipur, reenusaraswat@gmail.com,

Shalini Saxena
Assistant Professor, School of Law, IMS Unison University, Dehradun, India

Vrinda Sharma
Student LLM, IMS Unison University, Dehradun, India

Somya Gupta
Student LLM, IMS Unison University, Dehradun, India

Dr. Shoaib Mohammad
Assistant Professor, School of Law, wIMS Unison University, Dehradun

Dr. Arshad Hussain
Associate Professor, Department of Law, SSJ University, Almora

Poonam Kumari Bhagat
Assistant Professor, School of Law, IMS Unison University, Dehradun

Dr Arti Sharma
Assistant Professor, School of Law, IMS Unison University, Dehradun.

Dr Satish Mishra
Assistant Professor, School of Law, IMS Unison University, Dehradun.

PRAGYAAN: JOURNAL OF LAW

EDITORIAL POLICY

PRELUDE

Pragyaan: Journal of Law is a flagship law journal of School of Law, IMS Unison University and is a bi- annual peer-reviewed journal, first published in 2011. It seeks to promote original and diverse legal scholarship in a global context. It is a multi-disciplinary journal aiming to communicate high quality original research work, reviews, short communications and case report that contribute significantly to further the knowledge related to the field of Law. The Editorial Board of the Pragyaan: Journal of Law (ISSN: 2278-8093) solicits submissions for its Volume 12 Issue 1 (June 2022). While there are no rigid thematic constraints, the contributions are expected to be largely within the rubric of legal studies and allied interdisciplinary scholarship.

CONTRIBUTION

We seek contributions in the form of:

1. Articles (Maximum 8,000 words inclusive of footnotes and Abstract)
2. Essays (Maximum 4,000 words inclusive of footnotes)
3. Case Comment/Legislative Critique & Notes (Maximum 3,000 words inclusive of footnotes)
4. Book Review (Maximum 2,000 words inclusive of footnotes) besides other forms of scholarly writing

   Place tables/figures/images in text as close to the reference as possible. Table caption should be above the table. Figure caption should be below the figure. These captions should follow Times New Roman 11point.

SUBMISSION GUIDELINES

1. Submissions must be in Microsoft Word (MS Word):

The whole document should be in Times New Roman, single column, 1.5 line spacing. A soft copy of the document formatted in MS Word 97 or higher versions should be sent as submission for acceptance.

2. Main Text:

Title of the paper should be bold 16 point, and all paragraph headings should be Bold, 12point.

3. Cover Letter:

First page: It should include (i) Title of the Paper; (ii) Name of the Author/s ;Co-authored papers should give full details about all the authors; Maximum two author permitted (iii) Designation; (iv) Institutional affiliation; (v) Correspondence address. In case of co-authored papers First author will be considered for all communication purposes.

Second page: Abstract with Key words (not exceeding 300 words).

4. The following pages should contain the text of the paper including:

Introduction, Subject Matter, Conclusion, Suggestions & References. Name (s) of author(s) should not appear on this page to facilitate blind review.

5. Plagiarism Disclaimer:

Article should contain a disclaimer to the effect that the submitted paper is original and is not been published or under consideration for publication elsewhere. (Annexure I) The signed document must be e- mailed/ posted to The Editor along with manuscript.

6. Citations:

All citations shall be placed in footnotes and shall be in accordance with format specified (Annexure II). The potential contributors are encouraged to adhere to the Appendix for citation style.

7. Peer Review:

All submissions will go through an initial round of review by the editorial board and the selected papers will subsequently be sent for peer-review before finalization for publication.

All Correspondence/manuscripts should be addressed to:

The Editor – Pragyaan: Journal of Law
School of Law, IMS Unison University,
Makkawala Greens, Mussoorie Diversion Road,
Dehradun, Uttarakhand– 248009, (India).
Phone: +91-135-7155000
E-mail: pragyaan.law@iuu.ac
Website: http://pragyaanlaw.iuu.ac

Annexure I

PLAGIARISM DISCLAIMER

To,

The Editor – Pragyaan: Journal of Law
School of Law, IMS Unison University,
Makkawala Greens, Mussoorie Diversion Road,
Dehradun, Uttarakhand– 248009, (India).
Phone: +91-135-7155000
E-mail: pragyaan.law@iuu.ac
Website: http://pragyaanlaw.iuu.ac

Sir / Madam,

Sub: Assignment of Copyright

I / We(Ms./Mr./Dr./Prof/) _____,author(s) of the article titled _____do hereby authorize to publish the above said article in PRAGYAAN: JOURNAL OF LAW.

I/We further state that:

1) The Article is my/our original contribution. It does not infringe on the rights of others and does not contain any libelous or un law ful statements.

2) Wherever required I/We have taken permission and acknowledged the source.

3) The work has been submitted only to this journal PRAGYAAN: JOURNAL OF LAW and that it has not been previously published or submitted elsewhere for publication neither assigned any kind of rights of the above said Article to any other person/Publications.

I/We hereby authorize, you to edit, alter, modify and make changes in the Article in the process of preparing the manuscript to make it suitable for publication.

I/We hereby assign all the copyrights relating to the said Article to the IMS Unison University, Dehradun.

I/We agree to indemnify the IMS Unison University, Dehradun, against any claim or action alleging facts which, if true, constitute a breach of the foregoing warranties.

First author: **Name** **Signature**

Second author: **Name** **Signature**

Annexure II

PRAGYAAN-JOL - CITATION STYLE

CASES

IN MAIN TEXT:

Jassa Singh v. State of Haryana

IN FOOTNOTE:

Jassa Singh v. State of Haryana, (2002) 2 SCC 481

The full citation should be provided in the footnote even if the case name has been mentioned in full in the main body.

Government to be written in full.

Example: Kesavananda Bharati v. State of Kerala ; M.C. Mehta v. Union of India.

SHORTENED FORM

If the same case is going to be cited subsequently, the full citation used the first time should be followed by the shortened form by which the case will be referred to subsequently, in inverted commas, and in square brackets.

Example: M.C. Mehta v. Union of India, [1997] 2 SCC 353 [Taj Trapezium case] Subsequent references

Taj Trapezium case, [1997] 2 SCC 353

The shortened form should be used every time after the first time a case is cited.

QUOTES FROM CASES

Per Subba Rao J., "a construction which will introduce uncertainty into the law must be avoided. It is conceded by the petitioner that the power to amend the Constitution is a necessary attribute of every Constitution". (Footnote original citation of case or shortened form as per rules stated above)

Single Judge:

S.H. Kapadia J.

Chief Justice of India

Thakkur C.J.I.

More than one Judges

K.G. Balakrishnan C.J.I., S.H. Kapadia, R.V. Raveendran, B.S. Reddy and P. Sathasivam (JJ.)

UNPUBLISHED DECISIONS

Name of the parties, Filing No of Year, Decided on date (Name of Judges) (Name of Court) **Example:**

> BP Singhal v. Union of India, W.P. (Civil) No.296 of 2004, Decided on May7, 2010(K.G. Balakrishnan C.J.I., S.H. Kapadia, R.V. Raveendran, B.S. Reddy and P. Sathasivam (JJ.) (Supreme Court of India).

INTERNATIONAL DECISIONS

Case name, (Party names) Judgement, Year, Publisher, Page No (Court Name) Example:

Case Concerning Right of Passage over Indian Territory (India v. Portugal) Judgment, 1957, ICJ reports, 12 (International Court of Justice)

LEGISLATIVE MATERIALS

When citing Constitution, it should be in Capital letters while other Statutes it should be First letter of the word in Uppercase followed by lower cases.

CONSTITUTION

Art. 21, THE CONSTITUTION OF INDIA, 1950.

OTHER STATUTES

Sec. 124, Indian Contract Act, 1872.

BILLS

Cl. 2, The Companies (Amendment) Bill (introduced in Lok Sabha on March 16, 2016).

PARLIAMENTARY DEBATES

Question/Statement by Name, DEBATE NAME, page no (Date) Example:

Question by N.G. Iyengar, CONSTITUENT ASSEMBLY DEBATES 116 (August 22, 1947).

Statement of V. Narayanaswamy, LOK SABHA DEBATES 5 (March 10,2010).

BOOKS

TEXTBOOKS

Name of the Author, NAME OF THE BOOK, Volume (Issue), Page (Publisher, Edition, Year)

Example:

H.M. Seervai, CONSTITUTIONAL LAW OF INDIA, Vol. 3, 121 (Universal Law Publishing Co. Pvt. Ltd.,4thEdn., 2015)

In the case of a single author,
M.P.Jain, INDIAN CONSTITUTIONAL LAW, 98 (Kamal Law House, 5th Edn., 1998)

If there is more than one author and up to two authors,
M.P.Jain and S.N. Jain, PRINCIPLES OF ADMINISTRATIVE LAW, 38 (Wadhawa, 2001)

If there are more than two authors,
D.J. Harris et al, LAW OF THE EUROPEAN COMMUNITY ON HUMAN RIGHTS, 69 (2nd Edn., 1999).

If there is no author then the citation would begin from the Title of the Book.

If the title of the book includes the author's name then the book should be cited as an author less book.

Example:

Chitty on Contracts, Vol. 2, 209 (H.G. Beale ed., 28th edn., 1999).

EDITED BOOKS

Name of Editor/s (Ed.) NAME OF BOOK, page no./s (Publisher Name, Year of Publication)

In the case of a single editor,
Nilendra Kumar (ed.), NANA PALKHIVALA: A TRIBUTE, 24 (Universal Publishers, 2004).

If there is more than one author and up to two editors,
S.K. Verma and Raman Mittal (eds.), INTELLECTUAL PROPERTY RIGHTS: A GLOBAL VISION, 38(2004).

If there are more than two editors,
Chhatrapati Singh et.al. (eds.), TOWARDS ENERGY CONSERVATION LAW 78 (1989).

COLLECTION OF ESSAYS

Name of Author, Name of Article in Name of Collected Book Page No (Editor Name, Year of Publication)

M.S. Ramakumar, India's Nuclear Deterrence in NUCLEAR WEAPONS AND INDIA'S NATIONAL SECURITY 35 (M.L. Sondhi Edn., 2000).

REGILIGIOUS AND MYTHOLOGICAL TEXTS

TITLE, Chapter/ Surar Verse (if applicable)

Example:

THE BHAGAVAD GITA, Chapter 1 Verse46

ARTICLES

Name of Author, Name of Article, Volume (Issue) NAME WHERE ARTICLE IS PUBLISHED page no (Year of Publication)

LAW REVIEW ARTICLES

A.M. Danner, Constructing a Hierarchy of Crimes in International Criminal Law Sentencing, Vol. 87(3) VIRGINIA LAW REVIEW 415 (2001).

MAGAZINE ARTICLES

Articles in print versions of magazines
Uttam Sengupta, Jack of Clubs and the Cardsharps, OUTLOOK 22 (June 11, 2016).

Articles published in a magazine arranged by volume
A. Bagchi, Sri Lanka's Experiment in Controlled Decentralization: Learning from India, 23(1) ECONOMIC AND POLITICAL WEEKLY 25 (January 2, 1988).

Articles in print versions of newspapers
Robert I. Freidman, India's Shame: Sexual Slavery and Political Corruption are Leading to an AIDS Catastrophe, THE NATION 61(New York Edn., April 8, 1996).

MAGAZINE ARTICLES ONLINE VERSIONS

Name of Author, Name of Article, NAME WHERE ARTICLE IS PUBLISHED (Date of issue)

available at link where it is published (date of last visit)

It is mandatory to use exact link where the article of published removing the hyperlink

Articles in online versions of newspapers

Mehboob Jeelani, Politics stretches list of Smart Cities from 100 to 109, The Hindu (2 July 2016), available at http://www.thehindu.com/todays-paper/politics-stretches-list-of-smart-cities- from-100-to-109/article8799010.ece(Last visited on July 2,2016).

Articles in online versions on magazines

Uttam Sengupta, Jack of Clubs and the Cardsharps, OUTLOOK (11 June 2016), available at

http://www.outlookindia.com/magazine/story/jack-of-clubs-and-the-cardsharps/297427(Last visited on July 2, 2016).

REPORTS

LAW COMMISSION REPORTS

243rdReport of the Law Commission of India (2012)

ONLINE REPORTS

World Trade Organization, Lamy outlines "cocktail approach" in moving Doha forward, (2010), available at http://www.wto.org/english/news_e/news10_e/tnc_chair_report_04may10_e.htm (Last visited on May 10, 2016).

INTERNATIONAL TREATIES

Art. 5, UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), July12, 1998, ISBN No. 92-9227-227-6, available at: http://www.refworld.org/docid/3ae6b3a84.html (accessed July 2, 2016)

GENERAL RULES

FORMATTING

Single numbers do not begin with a0

Remove hyperlinks in all citations of URLs

The format of dates should be – June 25,2016

Capitalisation – The start of every sentence should be in capitals. In titles, do not capitalise articles, conjunctions or prepositions if they comprise of less than fourletters.

Italics – Italics are to be used in the following instances:

Case names when used in the main text

Non-Englishwords

Emphasis in the main text, but not forming part of aquote

Short forms – The short forms of words which are not mentioned in this guide are not acceptable. Short forms which are acceptable are:

Art. for Article

Cl. for clause

No. for number

Reg. for regulation

Sec. for section

Vol. for volume

Edn. For edition

Ed. For editor

Ltd. for Limited

Co. for Company

Inc. for Incorporated

Add "s" to the short form for the plural form.

FOOTNOTES

Multiple citations in the same footnote should be separated by asemicolon.

Connectors–

Id. and supra are the only connectors which may be used for cross referencing

These connectors can only be used to refer to the original footnote and may not be used to refer to an earlier reference.

The format for referring to the immediately prior footnote shall be one of the following:

When the page number(s) being referred to are the same as in the previous footnote

Id.

When the page number(s) being referred to are different from the previous footnote

Id., at 77-78.

The last name of the author, when available, should be used before the supra. The format for referring to footnote earlier than the immediately prior footnote shall be: Seervai, supra note 6, at 10.

Introductory Signals

No introductory signal to be used when the footnote directly provides the proposition.

The signal 'See' shall be used when the cited authority clearly supports the proposition.

All footnotes must not end in a period (fullstop).

QUOTES

For quotations below fifty words in length, the quote should be in double inverted commas and should beitalicized.

For quotations above fifty words in length, separate the text from the main paragraph, indent it by an inch from either side, and provide only single line spacing. If the main text has only single line spacing, the font size of the quote shall be reduced by1.

Ethics Policy for Journal

1. Reporting Standards

Authors of research paper should present an accurate account of the work performed as well as an objective discussion of its significance. Underlying data should be represented accurately in the paper. A paper should contain sufficient detail and references to permit others to replicate the work. Fraudulent or knowingly inaccurate statements constitute unethical behaviour and are unacceptable. Review and professional publication articles should also be accurate and objective, and editorial 'opinion' works should be clearly identified as such.

2. Data Access and Retention

Authors may be asked to provide the research data supporting their paper for editorial review and/or to comply with the open data requirements of the journal. Authors should be prepared to provide public access to such data, if practicable, and should be prepared to retain such data for a reasonable number of years after publication. Authors may refer to their journal's Guide for Authors for further details.

3. Originality and Acknowledgement of Sources

The authors should ensure that they have written entirely original work, and if the authors have used the work and/or words of others, that it has been appropriately acknowledged, cited, quoted and permission has been obtained where necessary. Authors should cite publications that have influenced the reported work and that give the work appropriate context within the larger scholarly record. Information obtained privately, as in conversation, correspondence, or discussion with third parties, must not be used or reported without explicit, written permission from the source.

Plagiarism takes many forms, from 'passing off' another's paper as the author's own paper, to copying or paraphrasing substantial parts of another's paper (without attribution), to claiming results from research conducted by others. Plagiarism in all its forms constitutes unethical behaviour and is unacceptable. Plagiarism test of the content should not be more than 10% (Turnitin).

4. Similarity checks for plagiarism shall exclude the following:

i. All quoted work reproduced with all necessary permission and/or attribution with correct citation.

ii. All references, footnotes, endnotes, bibliography, table of contents, preface, methods and acknowledgements.

iii. All generic terms, phrases, laws, standard symbols, mathematical formula and standard equations.

iv. Name of institutions, departments, etc.

5. Multiple, Redundant or Concurrent Publication

An author should not in general publish manuscripts describing essentially the same research in more than one journal of primary publication. Submitting the same manuscript to more than one journal concurrently constitutes unethical behaviour and is unacceptable.

In general, an author should not submit for consideration in another journal a paper that has been published previously, except in the form of an abstract or as part of a published lecture or academic thesis or as an electronic preprint.

Publication of some kinds of articles (e.g. clinical guidelines, translations) in more than one journal is sometimes justifiable, provided certain conditions are met. The authors and editors of the journals concerned must agree to the secondary publication, which must reflect the same data and interpretation of the primary document. The primary reference must be cited in the secondary publication. Further detail on acceptable forms of secondary publication can be found from the ICMJE

6. Confidentiality

Information obtained in the course of confidential services, such as refereeing manuscripts or grant applications, must not be used without the explicit written permission of the author of the work involved in these services.

7. Authorship of the Paper

Authorship should be limited to those who have made a significant contribution to the conception, design, execution, or interpretation of the reported study. All those who have made substantial contributions should be listed as co-authors.

Where there are others who have participated in certain substantive aspects of the paper (e.g. language editing or medical writing), they should be recognised in the acknowledgements section.

The corresponding author should ensure that all appropriate co-authors and no inappropriate co-authors are included on the paper, and that all co-authors have seen and approved the final version of the paper and have agreed to its submission for publication.

Authors are expected to consider carefully the list and order of authors before submitting their manuscript and provide the definitive list of authors at the time of the original submission. Only in exceptional circumstances will the Editor consider (at their discretion) the addition, deletion or rearrangement of authors after the manuscript has been submitted and the author must clearly flag any such request to the Editor. All authors must agree with any such addition, removal or rearrangement.

Authors take collective responsibility for the work. Each individual author is accountable for ensuring that questions related to the accuracy or integrity of any part of the work are appropriately investigated and resolved.

8. Declaration of Competing Interests

All authors should disclose in their manuscript any financial and personal relationships with other people or organisations that could be viewed as inappropriately influencing (bias) their work.

All sources of financial support for the conduct of the research and/or preparation of the article should be disclosed, as should the role of the sponsor(s), if any, in study design; in the collection, analysis and interpretation of data; in the writing of the report; and in the decision to submit the article for publication. If the funding source(s) had no such involvement then this should be stated.

9. Notification of Fundamental Errors

When an author discovers a significant error or inaccuracy in their own published work, it is the author's obligation to promptly notify the journal editor or publisher and cooperate with the editor to retract or correct the paper if deemed necessary by the editor. If the editor or the publisher learn from a third party that a published work contains an error, it is the obligation of the author to cooperate with the editor, including providing evidence to the editor where requested.

10. Image Integrity

It is not acceptable to enhance, obscure, move, remove, or introduce a specific feature within an image. Adjustments of brightness, contrast, or color balance are acceptable if and as long as they do not obscure or eliminate any information present in the original. Manipulating images for improved clarity is accepted, but manipulation for other purposes could be seen as scientific ethical abuse and will be dealt with accordingly.

PRAGYAAN: JOURNAL OF LAW

Peer Review Policy

Peer review is an integral part of our research journal. All the research papers will be sent to Reviewer after concealing the name of the author and any other identification mark in this regard. We ensure that Peer review will be fair, honest and maintain confidentiality.

The practice of peer review is to ensure that only good research papers are published. It is an objective process at the heart of good scholarly publishing and is carried out by all reputable scientific journals. Our referees play a vital role in maintaining the high standards and all manuscripts are peer reviewed following the procedure outlined below.

Initial manuscript evaluation The Editor first evaluates all manuscripts. It is rare, but it is possible for an exceptional manuscript to be accepted at this stage. Manuscripts rejected at this stage are insufficiently original, have serious scientific flaws, have poor grammar or English language, or are outside the aims and scope of the journal. Those that meet the minimum criteria are normally passed on to at least 2 experts for review.

Type of Peer Review: *Our Policy* employs blind reviewing, where both the referee and author remain anonymous throughout the process.

How the referee is selected Whenever possible, referees are matched to the paper according to their expertise and our database is constantly being updated.

Referee reports: Referees are asked to evaluate whether the manuscript. Follows appropriate ethical guidelines - Has results which are clearly presented and support the conclusions - Correctly references previous relevant work.

Language correction is not part of the peer review process, but referees may, if so wish, suggest corrections to the manuscript.

How long does the review process take? The time required for the review process is dependent on the response of the referees. In rare cases for which it is extremely difficult to find a second referee to review the manuscript, or when the one referee's report has thoroughly convinced the Editor. Decisions at this stage to accept, reject or ask the author for a revision are made on the basis of only one referee's report. The Editor's decision will be sent to the author with recommendations made by the referees, which usually includes verbatim comments by the referees. This process takes one month. Revised manuscripts may be returned to the initial referees who may then request another revision of a manuscript or in case second referee the entire process takes 2-3 months.

Final report: A final decision to accept or reject the manuscript will be sent to the author along with any recommendations made by the referees, and may include verbatim comments by the referees.

Editor's Decision will be final. Referees are to advise the editor, who is responsible for the final decision to accept or reject the research paper for publication.

IMS Unison University
SUBSCRIPTION / ADVERTISEMENT RATES

The Subscription rates for each of our three journals, viz., Pragyaan:Journal of Law, Pragyaan:Journal of Management, and Pragyaan:Journal of Mass Communication are as follows:

Category	1 Year		3 Years		5 Years	
	Domestic Rates (`)	Foreign Rates (US $)	Domestic Rates (`)	Foreign Rates (US $)	Domestic Rates (`)	Foreign Rates (US $)
Academic Institutions	500	30	1200	75	2000	120
Corporate	1000	60	2500	150	4000	240
Individual Members	400	25	1000	60	1600	100
Students	300	20	700	40	1200	75

Rates For Single Issue of Pragyaan:Journal of Law, June-2021 & December-2020

Academic Institutions	INR 300 (15 US $)
Corporate	INR 600 (30 US $)
Individual Members	INR 250 (15 US $)
Students	INR 200 (10 US $)

Note: Back Volumes of Pragyaan:Journal of Law up to December 2020 are available at the Rate Rs.100/-perissue, subject to the availability of the stock.

Advertisement Rates (Rs.)

Location/Period	1 Year	2 Years	3 Years
B/W (Inside Page)	10,000/- (2 Issues)	18,000/- (4 Issues)	25,000/- (6 Issues)
Colour (Inside Back Cover)	17,000/- (2 Issues)	30,000/- (4 Issues)	45,000/- (6 Issues)
Single Insertion (1 Issue)(Inside B/W Page)- Rs. 5000/-			

SUBSCRIPTION FORM

I wish to subscribe to the following journal(s) of IMS Unison University, Dehradun:

Name of Journal	No. of Years	Amount
Pragyaan: Journal of Law		
Pragyaan: Journal of Management		
Pragyaan: Journal of Mass Communication		
	Total	

A bank draft/cheque bearing no. _____ dated _____ for Rs._____ Drawn in favour of IMS Unison University, Dehradun towards the subscription is enclosed. Please register me/us for the subscription with the following particulars:

Name:_____ (Indiviual /Organisation)

Address_____

_____

Phone _____ Fax _____E- mail: _____

Date: Signature(individual/authorizedsignatory)

Please send the amount by DD/Local Cheque favouring IMS Unison University, Dehradun, for timely receipt of the journal. Please cut out the above and mail along with your cheque/DD to: The Registrar, IMS Unison University, Makkawala Greens, Mussoorie Diversion Road, Dehradun-248009. Uttarakhand, India,Phone No.: +91-135-7155375

IMS Unison University at a glance

IMS Unison University, a constituent of Unison Group is a premier educational and research University nestled amidst beautiful and serene surroundings offering an environment that fosters learning and stimulates creativity.

It was established as IMS Dehradun in 1996, as a non- profit organization by a group of visionaries dedicated to the cause of changing the face of professional education in Northern India.

The University today provides a platform for excellence in teaching, learning, and administration. Its State-of-the-art Infrastructure facilitates in developing well trained graduate, post- graduate and doctorate professionals to meet the ever changing needs of the corporate world.

IMS Unison University aspires to become a world-renowned center for creation & dissemination of knowledge. It aims to provide a holistic career-oriented education that develops intellectual, moral and physical capabilities of the students.

University presently offers under-graduate, post-graduate and doctorate programs in several streams of Management, Computer Applications, Law and Mass Communication under the following five schools:

1. School of Management
2. School of Computer Applications
3. School of Law
4. School of Mass Communication
5. School of Hotel Management

The University is committed towards delivering quality education, developing strong industry interface and providing placement opportunities to its students.

The University brings out four Journals, one each in the four disciplines of Management, Computer Applications, Law, and Mass Communication, in an effort to fulfill our objective of facilitating and promoting quality research work:

∀

- Pragyaan: Journal of Management
- Pragyaan: Journal of Information Technology
- Pragyaan: Journal of Law
- Pragyaan: Journal of Mass Communication

Makkawala Greens, Mussoorie Diversion Road, Dehradun- 248009,
Uttarakhand, INDIA, T: 0135- 7155000, 09927000210
E: info@iuu.ac, W: www.iuu.ac
Established under Uttarakhand Act No. 13 of 2013,
Recognized by UGC under section 2(f) of UGC Act, 1956

IMS UNISON
UNIVERSITY
Nurturing Knowledge. Empowering Minds.