GD Goenka | **School of Law**

EXCELLENCE IN EDUCATION · 29 YEARS · GD GOENKA

GD GOENKA LAW REVIEW

A Peer Reviewed Journal by School of Law, GD Goenka University

Inaugural Issue (June- December 2022)

Vol.01-Issue 1

Debasis Poddar	Lilliputians and the law: rural commons in globalized India
Amit Raj Agrawal	Power of police during the course of criminal investigation under the code of criminal procedure, 1973 - A study with reference to constitutional safeguards
Priti Ramani Nayyar	Codification of Law of Mediation in India: Key Developments Issues and Resolutions
Md. Ataur Rahman	A Comparative Study of Retrospective Justice between International Crimes Tribunal of Bangladesh and the Extraordinary Chamber in the Courts of Cambodia
Priya Vijay and Afkar Ahmad	Law of Contract Labor and Issues in Deployment
Ksenija Cipek	Digital evolution-possibilities of using new technologies in the field of taxes
Sumit Agarwala & Shweta Rathore	Gender Inequality and Domestic Violence Perpetrated by Women against Men
Book Review	

Research Journal of School of Law
GD Goenka University

GD Goenka University, Gurugram Sohna Road, Delhi NCR Haryana

GDGU LAW REVIEW

A Peer –Reviewed Journal by School of Law GD Goenka University

Volume 1 Number 1

SCHOOL OF LAW, GD GOENKA UNIVERSITY, GURUGRAM

Copyrights: The copyrights associated with the published contributions shall become the intellectual property of GD Goenka University. For permission to reprint a submission or any portion thereof, a prior permission shall be obtained from the Review.

Subscription: Yearly subscription for the GDGU Law Review shall be priced at Rs. 600/- payable in advance by means of Demand Draft, made in favour of 'GD Goenka University', addressed to The Managing Editor, GDGU Law Review, GD Goenka University, GD Goenka Education City, Sohna Gurugram Road, Delhi-NCR, Haryana-(India) 122103.

Disclaimer: The views expressed in the Review are those of the authors and do not represent the opinion or expression of any member of GDGU Law Review Editorial Board.

For any enquiries, kindly mail us at journalsol@gdgu.org

Layout Design by : Ms. Paramjeet Kaur

GDGU Law Review, GD Goenka University, GD Goenka Education City, Sohna Gurugram Road, Delhi-NCR, Haryana- (India)122103.

GDGU LAW REVIEW

A Peer Reviewed Journal by School of Law GD Goenka University
INAUGURAL ISSUE

Volume 1 Number 1

2022

CHIEF PATRON

Mr. Nipun Goenka

MD GD Goenka Group

PATRON

Prof.(Dr.) Tabrez Ahmad , Vice-Chancellor and
Dean School of Law, GD Goenka University

EDITOR IN CHIEF

Prof.(Dr.) Azimkhan B. Pathan

EDITOR

Prof.(Dr.) Ajit Kaushal

MANAGING EDITOR

Dr. Mohd Tariq Intezar

GDGU LAW REVIEW

A Peer Reviewed Journal by School of Law GD Goenka University

ADVISORY BOARD

Justice **(Dr.) Saleem Marsoof, PC**
Judge of the Supreme Court of Fiji,
Former Judge of the Supreme Court of Sri Lanka
& former President of the Court of Appeal.

Prof. (Dr). M.Afzal Wani,
Former Member, Law Commission of India &
Ex-Dean, University School of Law and Legal Studies,
Guru Gobind Singh Indraprastha University

Dr. Andrii Paziuk
Associate Professor in International Law,
Taras Shevchenko National University of Kyiv
Head, Information Law Section
Ukrainian Association of International Law
CEO, Ukrainian Academy of Cyber security, Ukraine

Dr Sarah Jane Fox
University of Leicester (School of Law)
Visiting Professor DePaul University, Chicago- USA.

Prof. (Dr). Upendra Choudhury
Professor, Aligarh Muslim University (AMU), Former Member Secretary and Director
Indian Council of Social Science Research (ICSSR), New Delhi.

Prof. (Dr). Debasis Poddar
National Law University and Judiciary Academy-Assam

Prof. (Dr.) Sreejith
Professor and Executive Dean
Jindal Global Law School, O.P. Jindal Global University, Haryana

EDITORIAL
Greetings from the Chief Editor's Desk!

It is our great pleasure to present the first issue of SOL Law Review, GD Goenka University. We would like to congratulate all the contributors for their scholarly contributions in this issue of the Journal. Simultaneously, we would like to express our deep appreciation to the contributors who devoted their time and energy to provide quality work pertaining to diverse fields of Law. School of Law, GD Goenka University has taken this initiative for dissemination of the quality, original and innovative research-based contributions in the domain of legal and interdisciplinary research. Hence, the Journal Committee invited research articles, papers, case studies, commentaries, policy briefs, and book reviews on law and allied areas for publication in the GDGU Law Journal 2022 Issue 1, Volume No. 1. The Journal is a bi-annual, peer-reviewed publication from School of Law, GD Goenka University. It is an endeavor of the Institute to become the beacon of legal education by encouraging the synthesis of knowledge and best practices cutting across the academia and research fraternity. The present issue of the Journal deals with the various contemporary topics in the area of Law like; Law & Globalization (Lilliputians and The Law: Rural Commons in Globalized India; by Dr. Debasis Poddar, Professor of Law, National Law University and Judicial Academy Assam), Digital Evolution-Possibilities Of Using New Technologies in the Field Of Taxes (Ksenija Cipek, International Tax Expert , Lawmaker, Project Leader, Head of Tax Risk Analysis At Ministry Of Finance , Tax Adm., Croatia, Europe), Law of Contract Labour (Dr. Priya Vijay Assistant Professor of Law , National University of Study and Research in Law, Ranchi & Dr Afkar Ahmad, Associate professor of Law, School of Law, GD Goenka University) among other topics of Law. The collection of these articles provides not only a finished work on the relevant matter but also ignites a meaningful debate and discussion on the relevant issue of Law. We have tried to maintain a fine balance between the diverse field of Law while selecting the research articles to explore unique interdisciplinary and imaginative innovations to capture the breadth in the relevant fields of Law. For the purpose of providing quality work, we have stressed upon a logical outcome in every paper. The Journal provides a great support in recording the recent developments in the area of Law while bringing the area of Law beyond its traditional scope. We take the opportunity to recognize the invaluable encouragement and support of the entire team which made this project realized.

Prof.(Dr.) Azimkhan B. Pathan
(EDITOR IN CHIEF)

CONTENTS

Title of the Article	Name of Contributors	Page No.
Lilliputians and the law: rural commons in globalized India	**Debasis Poddar**	1
Power of police during the course of criminal investigation under the code of criminal procedure, 1973 - A study with reference to constitutional safeguards	**Amit Raj Agrawal**	13
Codification of Law of Mediation in India: Key Developments Issues and Resolutions	**Priti Ramani Nayyar**	39
A Comparative Study of Retrospective Justice between International Crimes Tribunal of Bangladesh and the Extraordinary Chamber in the Courts of Cambodia	**Md. Ataur Rahman**	55
Law of Contract Labor and Issues in Deployment	**Priya Vijay and Afkar Ahmad**	66
Digital evolution-possibilities of using new technologies in the field of taxes	**Ksenija Cipek**	73
Gender Inequality and Domestic Violence Perpetrated by Women against Men	**Sumit Agarwala and Shweta Rathore**	79
Book Review : Religious Freedom in Secular Democracy of India : A Constitutional Perspectives : Author Amit Raj Agrawal	**Azimkhan B. Pathan** .	86
Guidelines for Submission of Research Articles to GDGU Law Review		
Copyright Transfer Form		

Lilliputians and the Law: Rural Commons in Globalized India

Debasis Poddar

Professor of Law, National Law University and Judicial Academy Assam

Abstract:

In the wake of new economic policy in India since 1991, rural development appears on its rise as a contentious matter for the State to deal with in three decades (1991-2021). While the Statecraft in India is increasingly getting inclined to liberalization-privatization-globalization as an official trajectory of development, and the discourse demonstrates its omnipresence in the law and public policymaking process alike, *gramin Bharat* deserves poles apart development paradigm to assert its *sui generis* life-world at loss nowadays. Development is meant for the society and its stakeholders and not vice versa. Here lies acute ideological tension between urban India and *gramin Bharat* to put hitherto development debate at critical crossroads. Besides urban-rural divide, there are others as well, e.g., privileged-underprivileged, centripetal-centrifugal, industrial-agrarian, modern-traditional, material-spiritual, etc., to add to their distance. So called liberalization-privatization-globalization is meant for the Occidental urban civilization by default while the Oriental rural civilization of South Asia is run by a *sui generis* genre; something poles apart from all others in the West. Rather than material production, priority is more on spiritual count, individual identity stands supplemented- if not supplanted- by collective conscience of the community to constitute the rural commons. Likewise, urban consumerism is countered by communitarian lifeworld. Thus, liberalization-privatization-globalization finds tough time to get penetrated to remote rural hamlets in the hinterland of the subcontinent while witnesses smooth sailing in the urban metropolis. Spatial disparity is something that deserves attention of state apparatus in law and policymaking process. In the absence of due care and caution over the same, the given vacuum- if not void- ought to put hitherto liberalization-privatization-globalization roadmap- as set by the New Economic Policy- to real peril and thereby pose hurdles to drives toward structural reform of the Statecraft in time ahead. This effort is meant to get default ideologue setting of liberalization-privatization-globalization drawn upon the regional context of the *gramin Bharat*; too nearby yet too far away from the metropolis India.

Keywords: *liberalization-privatization-globalization (LPG), New Economic Policy (NEP), local self-governance (LSG), urban-rural distance, spatial disparity, fraternity deficit*

'It was not that we did not know how to invent machinery, but our forefathers knew that if we set our hearts after such things, we would become slaves and lose our moral fibre. They,

therefore, after due deliberation decided that we should only do what we could with our hands and feet. They saw that our real happiness and health consisted in a proper use of our hands and feet. They further reasoned that large cities were a snare and a useless encumbrance and that people would not be happy in them, that there would be gangs of thieves and robbers, prostitution and vice flourishing in them and that poor men would be robbed by rich men. They were, therefore, satisfied with small villages'.

\- *M. K. Gandhi*.[1]

I. Introduction

The given rhetoric- reflected in its title- finds reference in *Gulliver's Travels* (1726),[2] a literary classic and the magnum opus of Jonathan Swift. In recent times, Lilliputians appear to have resurfaced themselves as countryside commons in the peri-urban India. Since NEP, with reasoning of their own, global capitalists- replication of Gulliver- initiated voyage to urban India; followed by footprints into the public policy regime. Unlike naïve public perception, penetration of the global capital in domestic economy is pregnant with far-reaching impact on domestic polity of the Republic in time ahead. Consequently, the state policy vis-à-vis indigenous rural self-governance,[3] peri-urban tribal self-governance in particular,[4] ought to suffer from systemic setback; something similar to every sundry foreign invasion, albeit, without visible bloodshed. Chronicles of civilization, however, witnessed instances of invisible bloodshed by invisible hand; something missed by Adam Smith yet mentioned by the following Marxist literature:[5]

Marx was not working within the tradition of the great classical political economists—honing and refining the positions of Smith, Ricardo, etc. ... Marx instead sought to expose what he saw as the inherent contradictions of capitalism, and demonstrate that the classical economists confused ideological presuppositions for universal economic principles. His effort was not only an attack on free market capitalism, but also a radical critique of the emerging discipline of economic theory, a discipline that he rejected as being faulty at its core. The invisible hand is a mere charade, Marx tells us. What is really at work is something more like an elusive but deadly claw, currently choking the working class but, ultimately, the capitalists themselves. The classical economists are blind to this reality.

---

1 M. K. Gandhi, *Hind Swaraj or Indian Home Rule* (1910); see chapter 13: *What is true civilization?* Available at: https://www.mkgandhi.org/ebks/hind_swaraj.pdf

2 Jonathan Swift, *Gulliver's Travels* (1726); Part I: *A Voyage to Lilliput*. Available at: http://www.tmv.edu.in/pdf/Distance_education/MA(English)/EnglishFiction.pdf

3 Article 40, read with Eleventh Schedule to the Constitution of India.

4 Article 40, read with Fifth Schedule and Sixth Schedule to the Constitution of India.

5 David L. Prychitko, *The Nature and Significance of Marx's Capital: A Critique of Political Economy*, ECONLIB, 2004. Available at: https://www.econlib.org/library/Columns/y2004/PrychitkoMarx.html

Since time immemorial, foreign invaders expressed their wonder over South Asia and the same still continues the legacy. What got initiated by the emperor Alexander later followed by the rest till date. Thus, Basham discovered '*the Wonder that was India*'[6] as a perfect nomenclature for his book on Indian antiquity. Even Nehru realized that his work was, at bottom, 'Discovery of India'[7] despite his Indian identity by ethnicity. With both of his schooling and collegiate life spent in England, by default, Nehru resembles the Indo-Anglican diaspora with strong inertia to national roots. Likewise, Said got stuck to mysticism of non- westernized lifeworld, of South Asia in particular, under the disguise of 'Orientalism';[8] a buzzword played out by postcolonial polemics. Apart from geophysical jingoism, what went far and wide to leave rest of the world spell bound was the naive village lifestyle- a *sui generis* communitarian civilization- across the subcontinent; content with its own limited resource since time immemorial. The regional history witnessed no instance of South Asian invasion elsewhere while reverse was the trend to this end. The so-called LPG model of global market economy constitutes the latest addition to such inventory on the count of outside intervention (read invasion) in South-Asia. Even before the sub-Saharan Africa, the South Asian subcontinent thereby got reduced to laboratory of the Occidental colonial experiments with bizarre findings to gross detriment of local and indigenous folk as their subjects. For convenience of the focus, this effort stands limited to the South Asian community; the way the same underwent transition from colonization to globalization of the West and the vacuum- if not void- to this end.

The way Adam Smith and Marx fell short of reading the non-westernized hemisphere in regional context of its heterogeneity,[9-10] Dunkel continues to grapple with the same *sui generis* legacy South Asia beholds in its public sphere. The way Kipling depicted- "*East is East, and West is West, and never the twain shall meet*"-[11] fell on deaf ears. So, classical (read occidental) development studies scholarship reads *gramin Bharat* as poor victim out of underdevelopment syndrome and thereby suggests urbanization as the medicine while the same is bound to take away very life from the given mode of lifeworld there. with insertion of few letters, e-l-e-p-h, an ant may well get elevated to elephant; but, at the cost of its own identity. Such a transformed entity no longer stands what it was; nor does it

---

6 A. L. Basham, The Wonder That was India (1954), Grove Press, New York, 1959. Available at: <http://www.prepjunkie.com/web/IASnotes/TheWonderthat%20wasIndia(AL%20Basham)Part1.pdf>

7 Jawaharlal Nehru, The Discovery of India (1946), Oxford University Press, New Delhi, 1985. Available at: <http://varunkamboj.typepad.com/files/the-discovery-of-india-1.pdf>

8 Edward W. Said, Orientalism (1977), Vintage Books, New York, 1979. Available at: <http://pages.pomona.edu/~vis04747/h124/readings/Said_Orientalism.pdf>

9 *Vide* Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (1776), digital ed., 2007. Available at: <https://www.ibiblio.org/ml/libri/s/SmithA_WealthNations_p.pdf>

10 *Vide* Karl Marx, The British Rule in India (1853). Available at: <https://www.marxists.org/archive/marx/works/1853/06/25.htm>

11 *Vide* Rudyard Kipling, The Ballad of East and West (1889).

retain erstwhile identity of its own. So also is the case in case of urbanization of a village. Thus, the corpus of rural and the cloak of urban together constitute oxymoron and the same earns the legacy of neither. Quite contrary to popular perception, an axiomatic truth ought to surface that village is not village due to want of civilization. Village is the icon of another, if not better, civilization beyond the Western world.

The failure of hitherto initiatives toward rural development lies here that the same were driven by erroneous hypothesis. After independence, with its seat in metropolis, the then urban middle class strived to urbanize *gramin Bharat* with a hypothesis that the same deserves urban lifeworld but cannot carry forward out of resource shortage. One among the core areas of failure lies in a dialogue with urbanized India in general and New Delhi as the capital of metropolis India in particular leading to its accession to General Agreement on Tariff and Trade (hereafter the GATT) regime. Regrettably, state apparatus run by New Delhi operates in urban metropolitan with its limited reach to the peri-urban India at its best. At bottom, with its top-down approach, New Delhi is yet to reflect upon rural commons; i.e., realpolitik in *gramin Bharat* that constitutes the South Asian narrative where there lies a vacuum, if not void, in hitherto available means of communication between naive commons and their leadership in ivory tower of the metropolis India to represent them. With sporadic diversity, so also is the case elsewhere, e.g. Afghanistan, Burma, Pakistan, Bangladesh, Nepal, Bhutan, Sri Lanka, Maldives, etc. Popular will of rural commons in the *gramin Bharat*- may also get read in the regional context- thereby turns subaltern in its voice that cannot penetrate inside powerhouse of the given state apparatus. Consequently, deafening silence reigns to gross detriment of *pro bono* governance in India. As stated by foremost provision of the Constitution of India, albeit unwittingly, there are two public spheres juxtaposed to one another: India and *Bharat*:[12] the former represents urbanized India and the latter does *gramin Bharat* respectively. One reflects the Occident; along with the colonization. Another reflects ancient Indian antiquity in contemporary version; by courtesy want of access for *Bharat* to colonized culture.

Within the same geographical space, urban India and *gramin Bharat* thereby coexist through respective spatial politics of their own, along with mutual export and import *inter se* to supplement one another. In the wake of new international economic order, followed by the NEP since 1991, the way urbanized India undertook onus to supplant *gramin Bharat* by worldwide metropolis cult culminates into a contemporary version of the 'crisis of civilization', by courtesy Tagore, toward formulation of homogenous civilization worldwide with little heed to the regional wisdom of 'unity in diversity' as perennial character of the subcontinent. The forthcoming paragraphs grapple with epistemic struggle

[12] Article 1, the Constitution of India, 1950.

between poles apart cults: one engaged in aggressive expansionism while another in its struggle for existence. This effort is meant to characterize the law and policymaking for the state apparatus to strategize its jurisprudent positioning for better governance. The given urban-rural rift thereby represents ideological icons for their epic rivalry vis-à-vis industrial economy and agrarian economy beforehand. Thus, urban domination did havoc to defeat rural development from within the system. With little sense of the soil, *sarkaari babus*- with anglicized background- experiment development discourse of foreign origin to put their change agency to double jeopardy. On one side, the rural transcends its threshold and thereby turns the peri-urban; indeed an unintended effect of postcolonial governance in India. Consequently, rural and indigenous commoners get exposed to drudgery- if not vagary- of urban civilization unprepared and thereby put to peril. Whether and how far the same may get construed as collective right to self-determination raises a moot point to this end. On the other, the metamorphosis offends constitutional aspiration of India to minimize inequalities amongst groups of people residing in different areas or engaged in different vocations.[13] Rural-urban divider poses a conundrum of governance in India.

II. While the LPG Governs the LSG

Accused of its discursive bias against equality by default, the LPG jurisprudence but does not necessarily culminate into concentration of wealth and there are illustrations to the contrary.[14] What globalization reflects are assumptions in favour of freedom.[15] Given the freedom for market players to get operated

---

13 Article 38(2), the Constitution of India, 1950.

14 This article theoretically and empirically evaluates the impact of globalization and government ideology on income inequality in LDCs and yields the following conclusions. First of all, the findings are in accord with "technology-centred globalization-inequality thesis", i.e. that increased trade flows and FDI have expanded income inequality in LDCs. On the other hand, governments with leftist parties and chief executives have significantly mitigated income gaps and have in fact moderated the expansionary pressure of the integrated world market on income inequality, compared to their rightist counterparts. These findings lend support to the notion that redistribution from rich to poor is a more explicit concern of the left than of the right, since left-leaning governments are more successful in mitigating income inequality.
Eunyoung Ha, Globalization, Government Ideology, and Income Inequality in Developing Countries, The Journal of Politics, Vol. 74, No. 2 (March 28, 2012), p. 552. Available at: <http://sites.cgu.edu/hae/files/2014/01/Journal-of-Politics.pdf>

15 The underlying assumption is that the economic operators, like manufacturers, traders, service providers, banks, etc. work with great efficiency and their unhindered operations will bring benefit to the society along with them getting profits from their operations.
It is further assumed that any interference by government reduces their efficiency, thereby reducing the benefit to society. The firms, in course of open competition, among themselves, are supposed to improve their performance continuously. Any slackness on the part of a firm is punished by open competition, in the sense that the weak ones get weeded out by the strong ones. This line of argument and thinking presumes that free operation of the market is beneficial to society and its people.

by invisible hand of capitalism, they ought to get driven by the market force to receive market justice involved therein. Accordingly, state is ought to withdraw from the market along with its intervention and mind all mundane issues of governance; defence, law and order being few of them. In its anxiety for market justice, those pleading for globalization put a classical axiom of capitalism to oblivion that man as a social animal is driven by self-interest;[16] what modern individualism has put in more candid expression to assert necessity of the law for mutual self-restraint among fellow citizens.[17] Here lies fallacy in market economy that the same is prompted by naïve presupposition that all sundry players in the market are virtuous enough not to play with rules of the game. Regrettably, hitherto chronicles of the market economy get ridden with illustrations to the contrary. Moral fallibility plays critical role for consecutive economic meltdown since early twentieth century and the trend is on its rise. Consequently, all naive assumptions in favour of fair play- with little heed to foul play- may and does reduce otherwise sacrosanct game theory of the market to otiose from within the system at regular intervals to discredit market; something ought to fall on deaf ears of statesmen irrespective of apparent variation in political affiliation. Magnitude apart, neoliberalism resembles the New Testament for LPG jurisprudence. Departure from its default course, therefore, appears unlikely; the way left-leaning leadership reaps harvest for commons. Even the left lacks sense to decipher rural-urban divide as one of lifeworld diversity.

A further assumption is that an intervention by the government reduces free competition and thereby reduces the efficiency of the economic operation. It is argued that governments act with political motives, and their intervention will harm the economic process.

Bhagirath Lal Das, An Introduction to Globalization and Its Impacts, Third World Network, Penang (Malaysia), 2001, p. 4. Available at: <http://www.twn.my/title2/ge/ge03.pdf>

[16] It is not from the benevolence of the butcher, the brewer, or the baker, that we expect out dinner, but from their regard to their own interest. we address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages. Nobody but a beggar chooses to depend chiefly upon the benevolence of his fellow-citizens. Even a beggar does depend upon it entirely.

Supra. n. 4, p. 16.

[17] Man in society proceeds to make laws, the object of which is to restrain himself and his fellow citizens from anti-social conduct designed to satisfy the self irrespective of the convenience of others. As a member of society, the citizen conforms to its conventions and obeys its laws; but he does these things not from choice, but from fear; not, that is to say, because he naturally prefers to do what is right, but, lest a worse thing befall him, if he transgresses the ordinances of society. Morality, then, which we may identify with law-abiding conduct, is not natural to human nature; it is the offspring of convention, an offspring born not of a natural preference for doing right as compared with doing wrong, but of the consequence with which society has taken care to visit socially injurious conduct. Thus, society is based upon a contract, express or implied, by which every man gives up his natural right to "aggress against" his fellows on condition that they give up their natural rights to "aggress against" him.

C. E. M. Joad, Guide to the Philosophy of Morals and Politics, Lund Humphries, London, 1938, p. 21. Available at: <https://ia802605.us.archive.org/26/items/guidetothephilos035212mbp/guidetothephilos035212mbp.pdf>

With these pitfalls in the market, whether and how far imposition of erratic economy upon *gramin Bharat* is imperative deserves academic articulation on following counts: (i) *gramin Bharat* appears hardly aware of rules of the game meant for urban civilization; (ii) even in otherwise full-fledged urban civilization, rules of the game get compromised to gross detriment of market justice; (iii) instead of competition among market players driven by mercantile relations, *gramin Bharat* deserves cooperation among stakeholders driven by fiduciary relations to put alternative array of development to fruition. Thus, local self-governance clauses got enacted toward functional autonomy of *gramin Bharat* in course of daily lifeworld; by courtesy, the Constitution (Seventy-third Amendment) Act, 1992; the very next year after India acceded to the GATT regime.[18] The LSG genre, however, suffers from two constraints: first, out of centripetal inertia in governance, the local autonomy in its policymaking may and does get often than not compromised with discursive defence, implementation of treaty appears one among them;[19] second, even otherwise, these institutions have no functional autonomy under the Constitution beyond minor issues of daily lifeworld and thereby falls severely short of proceeding for policy decisions on its own;[20] imposition of new economic policy on *gramin Bharat* to give effect to legal obligations of India to international community out of the GATT may get illustrated to this end. Rather than percolation of the federalist jurisprudence to grassroots for common good, the LSG jurisprudence is meant to showcase reach-out of the State to rural commons; and reach-out of the State may at times stand vitiated with economic agenda of its own to common detriment. Thus, no stretch of imagination may get the same extended to bottom-up governance for *gramin Bharat* and its people in their 'tryst with destiny' while the same constitutes the default locale for the majority, if not most, of those in periphery of the so-called public sphere. Whether India appears incredible with travesty for the majority of its people in course of their tryst with destiny and, if so, how far the same may get drawn spectacular raise moot points to this end. In the given genre of development, *Gramin Bharat* remains colonized by urban India to gross detriment of regional autonomy for the majority of its territory and population; contrary to wisdom under Article 38 of the Constitution.

III. Rhetoric of Orientalism in Disguise

[18] Part IX of the Constitution, read with Schedule XI to the Constitution of India.

[19] Notwithstanding anything in the foregoing provisions of this Chapter (Part XI, Chapter I: Legislative Relations between the Union and the States), Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.
Article 253, the Constitution of India, 1950.

[20] *Vide* Schedule XI to the Constitution of India, 1950.

Governance of rural commons has had cultural underpinnings and the discourse may get drawn from the fictionalized divides between the Occident and the Orient as well. After the so called hemispheric polemics spearheaded by Edward Said and thereafter, contemporary India appears to have been driven by governmentality of the urban India to govern its rural counterparts to urbanize the latter after given trajectory of the former; as if the latter somehow lagging behind in its development and the former is engaged as Good Samaritan extending support to save the soul from getting lost. Looking back, the same replicates "white man's burden" to save barbaric people beyond the West and thereby bring them to light of civilization. Likewise, irrespective of political colour, those in the seat of power get driven by *sarkaari babus* as a constituent of bureaucracy to hold rural commons deprived of civic infrastructure available in the metropolis India and thereby engage means and methods to convert village to city with little knowledge of village as an alternative civilization. Consequently, such interventionist sycophancy leaves the locale at its *sui generis* state of affairs. Neither the same remains a village nor becomes a city; but something like a peri-urban locale, in between village and city to put more to predicament of the same. It resembles the Nehruvian fantasy in making a new India after the West after unmaking of it was.[21] The partial success of his project lies in the metropolis India as dominant discourse while LPG pandits has set agenda to push the Nehruvian project ahead and thereby urbanize the rest. Few binary opposites thereby surface regional disconnect; and the same between city and village illustrate one among them.

Before Nehru, however, a contrary discourse got initiated to put "internal Orientalism" to place through back-to-past movement;[22] old-as-gold movement to freeze hitherto village lifeworld to antiquity including pervasive parochialism to its peril constitutes part of the Gandhian project to proscribe the urban lifeworld like a forbidden fruit and, therefore, not to get followed by the rural lifeworld. A flip side for the rural commons but lies in getting deprived of progress on their own; indeed, an unintended consequence out of such otherwise prudent version of Orientalism.[23] Fallacy lies in blind

---

[21] It is interesting to examine Said's assertion that Orientalism had the 'eminence', 'power' and 'authority over the Orient that it had'. David Kopf says British Orientalists impressed Jawaharlal Nehru (1889-1964) who used Orientalists knowledge to build up a new India. Kopf's statement alludes to the question of indigenous Orientalism, which claims to recycle the 'Orient' to its source.
William Al-Sharif, Orientalism, kindle edition.

[22] Indian thinkers, such as Vivekananda (1863-1902) and Gandhi (1869-1949), used Orientalist literature to form 'modern Hinduism' and serve Indian nationalism. They invented a 'pristine genesis' of 'Hinduism' and considered the Bhagvad Gita the uniting sacred text of India. This implies India's identities have to succumb to a 'Hindu identity'. Thus, 'Internal Orientalism' makes it difficult 'to think about India outside of Orientalist habits and categories'.
Ibid.

[23] Rajnarayan Chandravarkar says Orientalism 'encourages historians to deem Indian society as exception to every rule of social (and historical) explanation'. Writers perceive unique 'Indian culture' and timeless 'essence', which became part of 'a political discourse' that views 'all group differences' as 'dangerous separatisms'.

adherence- either for or against the Occident- rather than in the Occident and its lifeworld as such. Neither development for the rural is meant to convert the same to peri-urban locale nor the same is meant to maintain sacrosanctity of the rural along with the parochial praxis involved therein. For survival in the age of LPG, *gramin Bharat* ought to live with time- not without- and thereby strategize the rural governance accordingly. There are traps of Orientalism in both sides; as mentioned above. While external Orientalism is meant to get the rural converted to peri-urban, internal Orientalism- often than not in disguise- is meant to get the rural reduced to rustic and thereby subvert development discourse of *gramin Bharat* from within to get stuck to archaic antiquity.

With given whirlpool of the LPG worldwide, the Orient transcends its hitherto meaning to turn political rather than spatial in regional geographical context of South Asia and thereby usurp newer rhetoric; more so for the ideological context of right-wing politics in India. Similar is the case of *gramin Bharat* in the wake of urban India; the former turning globalized while the latter turning localized to get far away from one another. With all these spatial political traits in tune, any sundry locale may get characterized as the Orient or the rural, as the case may be; irrespective of its status getting otherwise determined by hyper-technical mapping of the development index. Political economy rather than default fiscal status thereby appears litmus test for a locale to get identified as the rural or the Orient. Thus, after Orientalist reading, the rural or the Orient often than not reflects rhetoric of the other; something not in the Occidental metropolis ought to belong to the rural and, therefore, to the Orient. Such exclusive reading of the locale creates urban-rural divides *inter se* while fallacy in the inclusive reading lies in attempt for urbanizing the rural in the name of mainstreaming the same and thereby defeating the very purpose of inclusion. A need of the hour lies in striking synergy between them; thereby getting mutually cemented to one other.

IV. "India, that is *Bharat*": The Constitutional Appositives

Here lies the underlying constitutional jurisprudence to bring in *gramin Bharat* and urban India together and thereby get them assembled at level playing field for fair play irrespective of spatial disparity and not to let the disparity create divides between them; as indicated by relevant constitutional provisions.[24] A heartening pointer lies here that, appearance apart, characteristics of metropolis India is poles apart from the Occident. With urban middle class conscience, progressive civil society movement, omnipresence of rural commons as locomotive of the metropolis, lesser face-off between the wealthy and the needy, interdependency syndrome, to name few of them, urban India cannot afford

Ibid.

[24] Article 1, read with 38, of the Constitution of India, 1950.

expropriation of *gramin Bharat* in its own interest since synergy between them is imperative for both to maintain the synergy between production and consumption, growth and development, the urban and the rural, and the like.[25] Thus, rural commons being resourceful enough, in the absence of economic juxtaposition, classical rupture between the enriched and the impoverished- the way Marx-Engels documented the same in the Occidental setting in mid-nineteenth century- appears otiose in the regional setting of South Asia in general and of India in particular in early twenty-first century. Thus, in India, urbanization did not hit either too harsh. Instead, rural-urban relations put mutual exchange to place and thereby harvest benefit for both sides in a way or other.[26] Exceptions apart, negotiations between urban India and *gramin Bharat* bridge the gap to put regional justice to place and engage mutual exchange with *sui generis* modality not available for the Occident. By and large, so far as regional synergy is concerned, India appears on joyride in its tryst with globalization.

A bizarre side of its tryst but lies in peri-urbanization of the urban and the rural alike. Urban India appears no megalopolis the way its Occidental counterparts look like. Nor *gramin Bharat* appears hinterland the way remote hamlets in *Adivasi Bharat* look like. Indeed irony of fate, both urban India and *gramin Bharat* demonstrate similar status as peri-urban locales with wide variations in urbanization of their own; no wonder that there is little rift between them. With its given new economic policy, agrarian economy finds safe haven beyond the net of direct taxation in India; despite the same appears anathema to the underlying LPG jurisprudence. Likewise, judgments against landgrab- of cultivable land for other purpose in particular- speak for the engagement of dialogue between them. Also, there are judgments against landgrab on the count of sacrosanctity to the tribal population concerned. From *Singur* in West Bengal to *Niyamgiri* in Odisha- the Apex Court upheld legitimate interests of the rural commons to cut vested interests of corporate giants to size and thereby optimize the balance

[25] A neutral expansion of consumption and production, with unchanged proportions of goods in both cases, would be growth without development, at least on the output side. Protrade and antitrade biases would involve both development and growth. Ultra antitrade and ultra protrude biases would normally also involve both growth and development, with the possibility that shrinkage in production of one item may offset expansion in another to such an extent that development without growth would be a possibility.
Robert A. Flammang, Economic Growth and Economic Development: Counterparts or Competitors? Economic Development and Cultural Change, Vol. 28, No. 1 (October 1979), p. 60-61. Available at: < >

[26] The programmes for the industrial production on large scale were launched. The technologization of industrial production increased and the programmes for introducing technology and science in agricultural production also forged ahead. the industrial programmes increased the size of the existing urban areas and also added to their number. The flow of educated people and also of illiterate and literate manual, unskilled and skilled workers towards the cities from the rural areas increased. The facilities for education and also the demand for them in rural and urban areas increased. This process of urbanization grew at a more rapid pace than before. There has also been a change in favour of the urban in the rural-urban relations.
I. P. Desai and Banwarilal Choudhry, History of Rural Development in Modern India, Vol. II, Impex India, New Delhi, pp. 84-85.

between competing claims of the globalized urban India with the localized *gramin Bharat* toward regional equity (read spatial parity), a fundamental duty, set for every citizen under the Constitution of India;[27] though, after Frost, "*there are miles to go … … …*". Such a spatial parity, however, constitutes the core of social solidarity. The Constitution of India has brought social solidarity- an oft-quoted buzzword of Durkheim[28]- into context with the phrase: FRATERNITY, assuring the unity and integrity of the Nation;[29] as reminder of another iconic buzzword, by courtesy, the French Revolution of 1789. Besides religious unity, regional unity tributes to integrity, *sine qua non* for good governance.

V. Conclusion

In its given spirit, here lies relevance of the LSG jurisprudence to safeguard the rural from clutch of the urban. For local policymaking, the LSG appears democratic enough to offset the LPG aftermath in course of rural governance; perhaps the legal reasoning played out behind enactment of the Constitution (Seventy-third Amendment) Act, 1992 immediately after accession of India to the GATT regime in 1991 with no other option left out; albeit arguably. Even thereafter, India follows the same trend to enact statutes; e.g., the Panchayat (Extension to Scheduled Areas) Act, 1996 and the Gram Nayalayas Act, 2008; to name few among them. Also, as part of statutes meant for other concerns, emphasis is put to place to formulate an otherwise fragmented public sphere by revival of the *Gram Sabhas* (House of rural commons) in local governance of the rural commons by themselves. Local self-governance by those concerned may get construed a derivative of collective right to self-determination for rural commons. In the wake of globalization, local and tribal populations are left with no other option but to assert their respective collective rights and get the same recognized and survive with respective cultural traits until the same offends human rights non-negotiable to conscience for rest of the world. Witch-hunt ought not to get pampered by these LSG protagonists.

For any sundry system of governance, key to success lies in diplomacy and discipline; more so while getting contested. In the wake of globalization, onus lies on the localized institutions of self-governance to prove its worth by its work and thereby put relevance for themselves to place. Pitfalls in the form of evil practices ought to defeat relevance of the same to real peril. Instead, these institutions need to

---

[27] Article 51A(e) of the Constitution of India.

[28] Durkheim derived an idea, which he maintained all his life, an idea which is, as it were, at the centre of his whole sociology, namely, that individual is born of society, and not society of individuals.
Richard Howard & Helen Weaver (tr.), Raymond Aron, Main Currents in Sociological Thought (1967), Volume II, Transaction Publishers, New Brunswick, reprint 2009, p. 16. Available at: https://books.google.com.ag/books?id=V2m2hQgFdA4C&printsec=frontcover#v=onepage&q&f=false

[29] *Vide* Preamble to the Constitution of India.

spearhead default potential of their own and thereby convert themselves to goodwill embassy for better credibility of their given localized lifeworld to global public sphere. In the wake of globalization, the local ought to reach out to the global with prudence rather than aggressive outreach with products; e.g., goods, services, intellectual property, etc. There lies cutting edge of their age-old cult. Also, the local ought to get weatherproof and inclusive enough to localize the global and reset hitherto epistemology with time.

Last but not least, righteousness appears a critical pointer to put the system to place and the same lies in adherence to newer truth of the newer time. In the globalized world, *gramin Bharat* cannot afford to get stuck to antiquity since the then truth passed away and got replaced by the LPG to rule the world in time ahead. The LSG jurisprudence alone cannot stop hands of the clock; nor the same needs to. Righteous rural commons, if run with their given tide and time, are set to win the race against corporate giants; the way, despite uneven status, even the Lilliputians survived; after the literary classic. Again: "*To be, or not be, that is the question*", thus spoke Hamlet, Prince of Denmark; After the oft-quoted tragedy of Shakespeare. Subject to prudent public policy regime, rural commons ought to regain relevance in time ahead.

Conceptualizing the Power of Police during Criminal Investigation and its Constitutional implications - A study under the Code of criminal Procedure, 1973

Amit Raj Agrawal

Assistant Professor, School of Law, G D Goenka University, Gurugram, Haryana.

Abstract:

Crime is as old as our social system. The Great social thinker, Thomas Hobbes once said in his great work "*Leviathan*" that men are by nature nasty, brutish and cruel; men are selfish and egoist; men are engaged in fighting all the times. With the evolution of political society it becomes imperative on the part of governing agency to control this character of men so that peace and harmony can very much prevail in the society. Therefore a system of criminal law was evolved to protect human beings from violence etc. this led to substantive and procedural penal laws which jointly became the backbone for ***Criminal Justice Administration***. In India, the police constitute an integral part of ***Criminal Justice Administration*** and serve from the front in maintenance of the law and order in the society. The ***police*** have been endowed with many powers and functions for the smooth conduct of states' affairs. The police are expected to work within the limits of their powers and in tune with constitutional philosophy. However the possibilities of police irregularities and atrocities cannot be overruled particularly in the matter of ***investigation of crimes***. The present paper attempts to capture the powers and functions of police while investigating crimes under the ***Code of Criminal Procedure, 1973*** and the mannerism in which such powers are exercised so as to ensure the compliance of ***constitutional mandate***. The paper comprehensively presents the analysis of legal provisions contained the Code of 1973 in the light ***of judicial delineations*** of the constitutional courts including scholarly observations and recommendations of the Law Commission of India.

Key Words- *Criminal Justice Administration, Constitutional Mandate, Code of Criminal Procedures, 1973, Investigation of Crimes, Judicial delineations, Police.*

I. Prologue

The purity of the ***Criminal Justice System*** in any a common law adversarial adjudicatory mechanism largely depends upon the evidence collected by the enforcement machinery during the course of investigation, therefore investigation carries an important role in not only determining the liability of the offender but also in ensuring and maintaining and orderly regulation based on the principles of law in the society.

The purpose behind timely and orderly investigation into an alleged offence from the point of view of criminal law also facilitates the prevention of crimes. The occurrence of crimes in the society requires pro-active approach from the law enforcement machinery and it is expected that the people who are accountable to the community they serves should perform their duties by ensuring fair and timely investigation into the matter.

Generally, the investigation process requires the accused persons to appear before the legal system and provide detailed accounts for their conducts. Indubitably, the legal objective is that the investigation resulting into collection of evidences, detection and apprehension of the accused persons, convincingly aims to suppress recidivism thereby controlling the occurrences of crimes in the society.

The evidences collected during the course of investigation by the law enforcement agencies are ultimately analyzed and weighted at the trial, which determines the innocence or guilt of any suspects of a crime, therefore it is obvious to suggest that investigation which put the foundation for the criminal trial requires to be fair, effective and in all cases within the reasonable time frame.

The commencement of investigation begins with the receiving of information, when law enforcement machinery receives any information regarding the commission of a crime, it starts functioning.

The information primarily originates from "*People*" and "*Things*". These two sources are so distinct that the legal process of collection and ascertainment of authentic version from each these categories demands special legal skills and conviction of a high degree. In the context, it is important to submit the law enforcement machinery engaged in the activities of *field investigation necessarily* require skills to deal with the human element this invariably includes

the cautious considerations of factors such as psychological, emotional, sociological and environmental aspects of human behaviour. In this context, it is observed:

[1]

"…….The crime scene technician/investigator or the laboratory based scientist deals with inanimate objects that are unable to mislead, lie or fight. The tasks of the criminal field investigator and the technician are closely related and somewhat dependent upon one another insofar as that each participant must have a fundamental appreciation of one another's duties and responsibilities. Although these tasks are functionally related, they are in fact different in and of themselves and thereby necessitate the capability of distinct skills, disciplines and techniques. This is not to say that one task is more important or more difficult than the other……".

The aforementioned observations convincingly suggest the onerous and interrelated duties performed by different people involved in the process of collection, analysis and determination of true facts, be that law enforcement agency performing the field investigation or technicians involved in expert analysis

Therefore, it becomes utmost important for the law enforcement machinery to be cautious and circumspect about the constraints and inherent capabilities of the crime lab including the technicians and accepted protocols, so as to ensure proper and efficient processing of evidences obtained from the field. It is the solemn duty of the law enforcement agency to be very cautious at each and every stage in the process of collection recognition and preservation of physical objects at the criminal lab and the same does not get over just by submitting the evidentiary objects for physical examination at the criminal lab. It is the skills and ability of the filed investigator at a particular scene to identify the evidentiary matter from the information obtained from physical items examined. In the context, the courts have consistently observed that information obtained from inanimate objects usually reflects a higher evidentiary value *vis-à-vis* the information derived from the people. This is obvious to observe that inanimate objects in the form of physical evidence cannot lie, it is not affected by emotional considerations and it cannot be challenged.

[1] *Ibid.*

Investigation is the first stage in every criminal case which actually puts the law enforcement machinery into action. Precisely, the term investigation is a systematic attempt to collect and analyze the material facts of an alleged offence so as to root out the involvements of true offenders. It is a legal attempt to move from the unknown facts to the known facts, by systematic procedure of collection and preservation and presentation of material proofs, with a view to assist the judge in an adversarial system to reach at fair determination for further course of action.[2]

Under Indian Criminal Justice System, every investigation is supervised and monitored, though not interfered by the judicial magistrate which certainly provides a kind of judicial eyes in the form of safety valve, wherein cases which are fake, fictions and devoid of merits are removed and filter out at the beginning only , and only real and substantial cases where there are real and reasonable grounds to believe the occurrence of the offence proceed to the next stage i.e. *Trial*.[3]

Investigation plays an important role as far as criminal trial is concerned, in fact it is the basic foundation through which the guilt or innocence of the suspect is determined, and therefore it shall be the duty of the authority to facilitate the investigation in such a manner which provides for better administration of criminal justice.

In the context, it is to be emphasized that the there is a direct and real connection between investigation and trial as it is evident from the observation of the Court in *State of Gujarat* v. *Kishanbhai* [4] as the court puts, "it is on the strength of findings of the field investigators during the course of investigation , the courts assess the innocence or guilt of the accused at the criminal trial."

The decision in *Maneka Gandhi* v. *Union of India*[5] makes it abundantly clear that as per the mandate of article 21 of the Constitution of India procedure contemplated in criminal trials should necessarily be right, just and fair and must not be , fanciful, arbitrary or oppressive.

---

[2] Bharat Chugh, Role of a Magistrate in a Criminal Investigation, available at: https://delhicourts.nic.in/ejournals/ROLEOFAMAGISTRATE-FINAL-BHARATCHUGH.pdf (Last visited on June 01, 2022).

[3] *Ibid.*

[4] (2014) 5 SCC 108.

[5] (1978) 1 SCC 248.

Further in *Commissioner of Police, Delhi* v. *Registrar, Delhi High Court, New Delhi*[6], the Court got an occasion to outlines the sacrosanct mandate of article 21 of the Constitution of India that guarantees the exquisite right of life and personal liberty to every individual that demands a fair and just trial for the deprivation, if any. It is therefore imperative to suggest the requirement of a fair trial is the first inevitable requisite of the dispensation of justice.

Indubitably, the investigation into an alleged offence plays a pivotal role in a criminal trial. It is on the strength of the evidences collected during the course of investigation; the court eventually determines the innocence or guilt of the accused involved in the case. Therefore, it is of prime importance to empathize upon the constitutional and statutory rights available to the accused as well as to the victims which certainly require legal protection at the initial stage only because of the reason the evidences collected during the course of investigation has direct and causal connection at the trial of the accused before the court.[7]

The present paper attempts to present a comprehensive discussion concerning the concept of investigation in a criminal case in India particularly from the statutory powers of the police officer and the interconnected issues such as , examination of witness by the police officer at time of investigation under the circumstances where there is every apprehension of use of force, threat or promise, arrest , power of search and seizure and impact of improper investigation on trial process including the constitutional implications of the same.

II. Investigation: Concept Meaning and Purpose

According to Black's law dictionary[8] the term Investigate means:- "to inquire into the matter systematically; to make (a suspect) the subject of a criminal inquiry, to make an official inquiry"

According to Oxford shorter English Dictionary[9], the term Investigation means, the action of investigating; search inquiry; systematic examination; minute and careful research.

[6] (1996) 6 SCC 323.

[7] Dr. M. Rama Krishna, I-Addl. District Judge, Machilipatnam, Fair Trial-from investigating to the trial stage, available at: https://districts.ecourts.gov.in/sites/default/files/3rd%20Topic.pdf (Last visited on June 1, 2022).

[8] Bryan A. Garner, Editor In chief ,Black's Law Dictionary, seventh edition at page 830.

[9] William little, H.W Flower, J.Coulson, The Oxford Shortest English Dictionary on Historical principles volume I, At page 1040.

On perusal of the above definitions, it is abundantly clear that the term investigation means a systematic inquiry into the matter by the authority in power which includes minute and careful examination of the alleged matter. However, it is not clear about the designation of the authority by which the investigation is to be carried out.

In this context, the term investigation has been defined elaborately under section 2(h) of the Code of Criminal Procedure, 1973[10] (Hereinafter the Code) which reads as:-

> "Investigation includes all the proceedings under this code for the collection of evidence conducted by a police officer or by any person (other than a magistrate) who is authorized by a magistrate in this behalf;

On analysis of the statutory definition following important points are submitted.

- Investigation is a systematic procedure meant for collection of evidences.
- Investigation is carried out by a police officer or any other person authorized by magistrate, but not a magistrate.

Under the scheme of the Code, investigation can only be carried out either by the Police officer or by any person who is authorized by a magistrate but not the magistrate himself. Therefore, it is obvious to submit that the statutory definition of "investigation" in its scope is not confined to only to police investigation. It is the word of wide amplitude and flexible enough to include investigation carried on by any agency whether he be a police officer or empowered authorized officer or a person not being a police officer under the direction of a magistrate to make an investigation vested with the power of investigation.[11]

Therefore, the custom officers or officers of enforcement are equally competent to conduct investigation though not with the power of a filling a chargesheet or police report as the same can only be effected a police officer.[12]

---

[10] Under the Code of Criminal Procedure , 1898, the term "Investigation" has the same meaning as it is defined under Section 2(h) of the Code of Criminal Procedure, 1973. The old Code provides the definition of " Investigation under Section 2(l) which reads as " investigation " includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by ally person (other than a Magistrate) who is authorized by a Magistrate in this behalf.

[11] S C Sarkar, P.C Sarkar , et al., Sarkar the Code of Criminal Procedure 26 (Lexis Nexis, Gurgaon 11th edn., 2015).

[12] *Directorate of Enforcement* v. *Deepak Mahajan*, AIR 1994 SC 1775.

Purposively as per the object of the statutory definition of investigation, the Gujarat High Court in the matter of *N.H Dave, Inspector of Customs* v. *Mohmed Akhtar Hussain Ibrahim Iqbal Kadar Amad Wagher*[13] has observed that investigation is meant for the purpose of searching materials and facts in order to ascertain about the commission of the offence , therefore , it does not matter whether it is made by the police officer or custom officer who intends to lodge a complaint.

Under the scheme of the Code the power of the police officer to investigate into the offence depends upon the nature of the offence. If it pertains to Cognizable Offence[14], the police officer can investigate without the prior order of the magistrate, however if it pertains to a Non-cognizable offence[15] , a police officer is not permitted to investigate the same without obtaining a prior permission of the magistrate.[16]

III. First Information Report and Commencement of Investigation

In Indian Criminal Justice System, there is always a debate, particularly with reference to the point of commencement of investigation. The debate takes its strength from the fact of requirement of the registration of ***First Information Report*** contemplated under Section 154 of the Code as a condition precedent for the commencement of investigation.

The phrase 'first information report' is neither defined in the Code of 1973 nor in any other criminal enactment nor in General Clauses Act ,1897. This is probably because the term First Information Report is a term of wide magnitude, it is very comprehensive and it covers many aspects of information, therefore it's very difficult to give any precise statutory definition. The other reason may be of the commonality of the understanding of the people. The term 'first information report' means information which is first in point of time recorded by the police

[13] (1982) 2 GLR 792.

[14] Section 2(c) of the Code of Criminal Procedure , 1973 defines "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;

[15] Section 2 (l) of the Code of Criminal Procedure , 1973 defines "non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant;

[16] *Illies Ali* v. *State of West Bengal*, 1997 CrLJ 803 (Cal). As per the statutory provisions contained under Section 155 of the Code of Criminal Procedure, 1973 Investigation in a non-cognizable offence commences with the order of a Magistrate.

officer pertaining to the commission of a crime.[17] However the term First information report is neither used under section 154 nor under section 155 of the Code. But under section 207 of the Code the term ***First Information Report*** means information recorded under section 154 of the Code.

The principal object of the first information report from the point of view of the informant is to set the criminal law into motion and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps to trace and bring to book the guilty.[18]

In the context an important question needs an elaboration about the authority of the police officer to conduct an investigation without registering the First Information Report (FIR) as contemplated under Section 154 of the Code. To make the discussion more comprehensive some important questions are framed as follows-

1. Is registration of FIR is mandatory for the purpose of conducting the investigation?
2. If police officer does not register the FIR, and starts conducting the investigation, does it render the investigation void?
3. If police officer fails to register the FIR, can magistrate order for investigation without ordering the registration of FIR under section 156(3) of the Code?

As far as registration of FIR is concerned it is basically meant to set the criminal law into motion that is to enable the police machinery to investigate into the matter. But there are occasions where police officers register the FIR after commencing the investigation in that case it becomes very important to understand the concept.

The mandate of Section 157 of Cr.P.C provides for procedure for investigation in the case. The procedure for investigation of a cognizable offence begins when a police officer in charge of a police station has reason to suspect the commission of a cognizable offence. The basis for

---

[17] Generally under the scheme of the Code of Criminal Procedure, 1973, the term First Information Report is employed in reference to cognizable offence. However etymologically, it means information recorded in first in point of time and may also suggest the commission of non-cognizble offence, but in such cases instead of First Information Report, Non –cognizable report is made under Section 155 of the Code of Criminal Procedure.

[18] Rattan Lal and Dhiraj Lal, *The Code of Criminal Procedure* 476 (Lexis Nexis Butterworth wadhawa, Nagpur, 19th enlarged edn, 2011).

the suspicion may be the first information report received under section 154, or the suspicion may be based on any other information of the police.

Convincingly it is suggested that [19] generally in cases involving commission of cognizable offences, the investigation is initiated by recording of information under Section 154 of the Code to a police officer in charge of a police station. However, such First information report is not an indispensible requisite for the investigation of crime. Even without any FIR, if a police officer in charge of a police station has reason to suspect the commission of a cognizable offence, he can proceed to investigate the offence under section 157(1). However, it is to be submitted that the police has no unfettered discretion to commence investigation under section 157 of the Code.

On the issue under consideration in one of the earliest reported decisions titled *Emperor* v. *Khawaja Nazir Ahmed*[20] the Privy Council has observed that registration of FIR is not a condition precedent for the commencement of investigation into the matter.

Subsequently, the apex court in *The State of Uttar Pradesh* v. *Bhagawant kishor Joshi*[21] has reiterated the point that though ordinarily investigation is undertaken on a receipt of information by the police but the receipt of information is not a condition precedent for the commencement of investigation. The court further observed that "***In the absence of any prohibition in the Code, express or implied, it is open to a Police Officer to make preliminary enquiries before registering an offence and making a full scale investigation into it***"[22]

Interestingly the division bench of the Delhi High Court in *Shanti Devi* v. *State*[23] has observed that investigation would not be taken up before registration of the case. However, it is to be submitted, the case should not be taken as a judicial precedent laying the general principle of law.

---

[19] R.V Kelkar's, *Code of Criminal Procedure* 132 (Eastern Book Company, Lucknow, 5th Edn,. 2012).
[20] AIR 1945 PC 18.
[21] AIR 1964 SC 221.
[22] *Ibid.*
[23] 2003 Cri LJ 69 (NOC).

Further, the apex court in *State of West Bengal* v. *Swapan Kumar Guha*[24] , has observed that the power of investigation can be exercised by the police officer only if the FIR or other relevant material prima facie discloses the commission of a cognizable offence.

The observation of the Court in *Swapan Kumar Guha* (Supra) does not expressly put the requirement of FIR as a condition precedent for the commencement of investigation but it certainly lays down the requirements of existence of some material basis for the commencement of investigation.

On the subject of requirement of registration of FIR in cases involving the magisterial order of investigation under Section 156(3) of the Code ,the apex court in *Sakiri Vasu* v. *State of U.P*[25], observed that, although Section 156(3) is very briefly worded, there is an implied power in the magistrate under Section 156(3) to order registration of a criminal offence and/ or to direct the officer-in-charge of the concerned police station to hold a proper investigation and take all such necessary steps that may be necessary for ensuring a proper investigation including monitoring of the same. Even though these powers have not been expressly mentioned in section 156(3) they are certainly implied in the above provisions.

On perusal of the aforementioned observation it is submitted that generally registration of FIR is required for the purpose of commencement of the investigation. However if the investigation is commenced and FIR is lodged later on, such investigation cannot be considered as null and void but shall be in continuance of the investigation which has been taken after the registration of FIR. Further, a Magistrate is empowered to order for registration of FIR, such power of magistrate is implied under the mandate of Section 156(3) of the Code of Criminal Procedure. In cases, where magistrate orders for investigation it shall be the duty of the police officer to register the FIR and then to proceed with the investigation.

[24] 1982 SCC (Cri) 283.
[25] AIR 2008 SC 907.

IV. Process of Investigation

Consistent with the object of investigation envisaged under Section 2(h) of the Code and the detailed process contemplated under Section 157 of the Code[26], The apex court in the matter of *State of U.P* v. *Bhagwant Kishore Joshi*[27], reiterated its earlier observation stated in *H.N Rishbud* v. *State of Delhi*[28] investigation of an offence generally consists of the following steps.

a) Movement of the police officer at the crime scene ;
b) Findings and analysis of the facts and circumstances of the case;
c) Detection and arrest of the suspects;
d) Gathering of material proofs relating to the occurrence of the offence which may include
   - d.1) Examination of various persons including the accused and the reduction of their statements into writing, if the officers think fit.
   - d.2) The search of places or seizure of things considered necessary for the investigation or to be produced at the trial; and

e) Formation of the opinion as to whether on the material collected there is a case to place the accused before a magistrate for trial, and if so, taking the necessary steps for the same by filing of a charge-sheet under section 173.

The investigation of a cognizable offence begins when a police officer in charge of a police station has reason to suspect the commission of a cognizable offence. The basis for suspicion may be the first information report received under section 154, or the suspicion may be based on any other information of the police. Further the offence must be such as the police officer

[26] Section 157 of the Code of Criminal Procedure elaborates upon the procedure to be followed in the case of Investigation. It provides , if the officer in charge of a police state has reason to believe the commission of an offence either on the basis of information received or otherwise subject to the mandate of Section 156 of the Code, the officer in charge is required to send a report to the magistrate and thereafter he shall proceed in person at the spot or deputy any subordinate officer as per the regulation framed by the State Government for the ascertainment of the facts and circumstances of the case and discovery and arrest of the suspected persons. It further provides that if there is not a sufficient grounds for entering into investigation, he shall not investigate the case. However, in such as situation the concerned officer is required to state the reasons in the report.

[27] AIR 1964 SC 221.

[28] AIR 1955 SC 196.

has power to investigate under section 156. After wars the detailed procedure has been laid down under section 157 of the code, which has already been mentioned above.[29]

V. Police officer's powers during investigation

Under the scheme of the Code of Criminal Procedure in India, the investigation is carried out by the police and the police are considered as the principal instrument to effect the same. Therefore, to make the process of investigation fair, transparent and based on the constitutional values, the police as an agency of criminal investigation have been endowed with wide powers.

1. Requiring attendance of witnesses - As per the mandate of Section 160, a police officer making an investigation under the scheme of the Code is empowered to issue a written order requiring the attendance of witnesses (within certain limits). Here the term witness is taken to mean persons who are acquainted with the facts and circumstances of the case.

Here certain persons are given privilege from appearance at police station or any place except the place in which such male person or women resides.[30]

Further to submit, the witnesses who are summoned under this provision are required to obey the instructions but in no case the police can use the force to compel the appearance. Furthermore, the police officer cannot detain a person even for a moment whose evidence is required. In addition to it, the police cannot take any security bond from the person for the appearances.

During the course of investigation, police officer seeking attendance of witnesses required to adhere to the jurisdictional norms either within the limits of his own police station or adjoining station.[31] Further, the order to attend must be in writing, therefore failure or refusal to obey oral order is not subject to the prosecution under Section 174 of the Indian Penal Code, 1860.

---

[29]Supra note 7,Dr.K.N Chandrasekharan Pillai, *R.V.Kelkar's Criminal Procedure* (Eastern book Company,Lucknow, 5th Edition 2008.,)

[30] Any male person under the age of fifteen years or above the age of sixty five years or a woman or a mentally or physically disabled person are not required to attend at any place other than the place in which such male person or woman resides.

[31] *Prisma Investment Pvt Ltd.* v. *State of Meghalaya*, 2010 Cr LJ 56 (59)(Gau).

Interestingly in one of the matters a question is raised, whether the expression "***Any person***" under Section 160 of the Code includes "***Accused***" as well? And if it is so, does it not violate the mandate of Art 20(3) of the Constitution of India?

The Madras High Court in the matter of *Pulavar B.M Senguttuvas* v. *State* [32] observed that the expression "Any person" means and includes "any accused person" and they can be summoned to appear as witnesses since such summon issued to an accused in a case under investigation by the I.O ., is not at all violative of Art 20(3).

In the context it is important to submit that the police officer is required to make payment of reasonable expenses to every person required to attend under Section 160(1) of the Code according to the rules framed by the State Government.[33]

2. Examination of witnesses by the Police – As per the mandate of Section 161 of the Code, the police officer can examine witnesses and record their statements. The mandate of Section 161 and Section 162 provides for oral examination of witnesses by the police, the statements so obtained shall be reduced in writing and the object behind such examination is to obtained relevant materials connected with the alleged offence which is the subject matter of investigation and the same can be used subsequently during the course of trial as per the provisions of the Code and the Indian Evidence Act, 1872.

The provisions contained under Sub-section (1) of Section 161 though authorize the police officer to examine orally even an accused person including suspects, however there is always a question of fundamental protection given to the accused person under article 20(3) of the Indian Constitution which protects the person from answering any incriminating questions. In the context, as per the mandate of sub-section 2 of section 161, it is suggested that the person who are examined by the police officer is required to answer truly all questions relating to such case put to him by such officer, other than the questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

[32] (2004) CrLJ 558.
[33] Section 160(2).

Consistent with the aforementioned observations the mandate of Section 163 of the Code casts a statutory duty upon the police officer not to offer or make or cause to be offered or made any inducement, threat or promise to any person during the recording of statement at the time of investigation. However, if a person who is being examined by the police officer himself makes any statement out of his free will then in that case, such officer shall not prevent him/her from making of the statements.[34]

In *Nandini Satpathy* v. *P. L. Dani*[35], the apex court has an occasion to consider the scope of Section 161(2) of the Code of Criminal Procedure, 1973 *vis-a –vis* the protection provided under Article 20(3) of the Constitution of India concerning rule against Self-incrimination.

The Court convincingly laid down following principles. However, it is to be submitted that the principles laid down by the Court in the *Case* is mere suggestive not mandatory but over a period of time it acquires a character of good law.[36]

a. The mandate of Sub-section (2) of Section 161 of the Code extends to the witnesses and accused both, therefore both the accused persons and witnesses are equally entitled to claim the protection.

b. The examination of persons by a police officer under Section 161 of the Code during the course of investigation does not be compulsive as the person has every right to refuse incriminating questions which would have tendency to expose him/her to any criminal charge.

c. During the course of examination of witnesses by the police officer under the provisions of Section 161 of the Code, the witness may take the assistance of a lawyer. It suggests the right to have legal counsel during the course of examination at the stage of investigation. This observation has a close relationship with the first principle as discussed above as the assistance of a legal counsel would help to the witness to exercise his/her fundamental rights guaranteed under article 20(3) of the Indian Constitution.

d. The mandate of Section 179 of the Indian Penal Code, 1860 which punishes a person who refuses to answers public servant who is authorized to question is not contradictory to the

[34] Section 163- No inducement to be offered.

[35] (1978) 2 SCC 424.

[36] Abha Nandkarni, *A critical analysis of Nandini Satpathy* v. *P.L. Dani*, available at: https://www.readcube.com/articles/10.2139/ssrn.2604514 (Visited on June 05, 2022).

principle contained under Section 161(2) of the Code. The operation of Section 179 of the Indian Penal Code, 1860 should be read subject to the exception contained under Section 161(2) of the Code.

In order to arrive at the decision, the Court has extensively relied on the decisions of the Supreme Court of the United States of America in *Hoffman* v. *United States*[37]where the US Supreme Court identified the right to silence in reference to an incriminating question put by the investigating agencies. The Court also has an occasion to make reference to the US court's decision in *Miranda* v. *Arizona*[38] where the rule pertaining to self incrimination and right to silence has been discussed at length. In addition to it, the Court speaking through Justice V.R Krishna Iyer has also made reference to its earlier decision on the scope of article 20(3) referred in *State of Bombay* v. *Kathi Kalu Oghad.*[39]

3. Arrest of the suspects - In addition to it, the police officer has also been endowed with the power to make arrest and detain persons. The exercise of the aforementioned powers have always been questions on the touchstone of constitutional provisions concerning right to privacy[40] human dignity[41] and the doctrine containing rule against self –incrimination under the scheme of the Constitution of India.[42] However, with the passage of time consistent with the constitutional mandate and the requirements of fair and transparent investigation, the courts in India have laid down a strong jurisprudence to exercise the check and restrictions on the exercise of such powers by the police personnel.

For proper and effective investigation, particularly in reference to serious offences timely arrest of the suspects is sine qua non. It is also necessary for creating a fear in the minds of criminals and deterring them from committing offences in future.[43]

---

[37] 341 US 479.
[38] 384 US 436.
[39] AIR 1961 SC 1808.
[40] *Justice K.S Puttuswamy* v. *Union of India*, (2017) 10 SCC 1. Right to privacy is a guaranteed fundamental right under article 21 of the Constitution of India.
[41] Right to life and personal liberty includes right to live with human dignity.
[42] Article 20(3) of the Constitution of India provides that person accused of an offence shall not be compelled to give evidence against himself.
[43] IGNOU-Peoples' University, Unit –2, Arrest, Detention, Search and Seizure, *available at*: https://egyankosh.ac.in/bitstream/123456789/38902/1/Unit-2.pdf (Visited on June 05, 2022). The term arrest is derived from French word "arreter" means "to stop or stay" which means a restraint of the person. In other words, it refers to apprehension of a person by legal authority resulting in deprivation of his liberty

Under the scheme of the Code, the police officer is competent to make arrest both in cognizable and non-cognizable offences. However, the power of police officer to make arrest in cognizable offence is wide as it can be effected without a warrant[44], whereas the power to arrest by police officer in non-cognizable offence can only be exercised through a warrant by the magistrate.[45]

It is expected from the police officer that at the time of arrest there should not be use of disproportionate force except in the circumstances where the person whose arrest is sought forcibly resist or attempts to evade the arrest. Further while exercising force , the police officer should keep in mind that in no circumstances death should be caused of a person who is not accused of an offence punishable with death or with imprisonment for life.[46]

Under the scheme of the Code of Criminal Procedure, the arrested persons are provided with certain safeguard both from the Constitution[47] and the Statute[48]. In addition to it, the judiciary has also laid down detailed guidelines from time to time to safeguards the rights of the arrested persons as the same has the fundamental protection of articles 21, 22,and 32 of the Indian Constitution.

The statutory regulations concerning the procedure for arrest are very explicit and prohibit the unnecessary use of force. The judiciary as well in the matter of *D.K Basu* v. *State of West Bengal*[49] has laid down detailed guidelines concerning the procedure to be followed by the

---

[44] Section 41 of the Code of Criminal Procedure, 1973 contemplates the circumstances where a police officer can arrest a person without warrant.

[45] Section 155(3) of the Code of Criminal Procedure, 1973.

[46] Section 46 of the Code of Criminal Procedure, 1973 – Procedure for Arrest.

[47] Article 21 – protection of right to life and personal liberty. Article 22(1)- Right to know the grounds of arrest, right to produced before the magistrate within twenty four hours of arrest , right to consult and defended by a legal practitioner one choice.

[48] Under the Code of Criminal Procedure, 1973- Section 41D –Right of arrested person to meet an advocate of his choice during interrogation. Section 49- No unnecessary restrain. Section 50- Right to know the grounds of arrest, Section 50(2)- Right to claim bail in cases of bailable offences. Section 50A- Obligation of person making arrest to inform the arrest etc., to a nominated person. Section 54- Right of medical examination. Section 55A- Health and Safety of the arrested persons. Section 56- Right to appear before magistrate. Section 57- Right not to be detained beyond twenty four hours without the approval of a competent magistrate. Section 60A- Arrest to be made strictly according to the mandate provided under the Code of Criminal Procedure, 1973.

[49] AIR 1997 SC 610. a. Clear and Visible identification of police personnel. b. Preparation of arrest memo at the time of arrest containing details of time and place of arrest and it should be countersigned by the arrestee. c. Right

police officer at the time of arrest and the rights available to the arrested persons, which are later on given to the statutory shape through the Criminal Law Amendment Act, 2009 and 2010.[50]

Further the apex court in a case concerning Section 498A of the Indian Penal Code, 1860 in Arnesh *Kumar* v. *State of Bihar*[51] has observed that just because an offence appears to be a non-bailable and cognizable, the police officer should not make the arrest in routine, casual and cavalier manner. The police officer should exercise the power of arrest only after due investigation as to the genuineness of the allegation and reasonable satisfaction. The Court instructed the police officer to make effective use of the mandate of Section 41A of the Code before effecting arrest.[52]

Therefore, when arrest is made not in accordance with the principles laid down under the Code **or without complying with the mandatory statutory procedures or provisions as provided under the Code , it amounts to an unlawful restraint** of an individual's fundamental rights protected under article 21 of the Indian Constitution and it is a clear case of illegal or unlawful arrest.

The apex court in ***Joginder Kumar* v. *State of U.P*[53] has identified the abuse of power by the police officer while making arrest and awarded compensation to the victim. Similarly the division bench of the Andhra Pradesh High Court in *Boya Nallabothula*** *Venkateswarlu* **v. *The Circle Inspector of Police, Nandikotkur PS*.[54] awarded compensation to the appellant who were deliberately implicated in false charge of murder and detained in custody. The Court in the matter has identified the misuse of power by**

---

to inform a friend or relative about the fact of arrest. d.Right to medical examination of major and minor injuries of the arrested persons in every 48 hours. e. Right to meet the lawyer during interrogation, f. Requirement to send documents to the jurisdictional magistrate. g. Establishment of police control room and display of information about the fact of arrest.

[50] The Criminal Law Amendment Act, 2009 (w.e.f 01.11.2010) and the Criminal Law Amendment Act, 2010 (w.e.f 02.11.2010).

[51] (2014) 8 SCC 273.

[52] Section 41A of the Code of Criminal Procedure, 1973 contemplates the notice of appearance before the police officer.

[53] AIR 1994 SC 1349.

[54] 2010 (3) U.P.L.J 19 (HC).

the police officer at the time of arrest and subsequently as well and made them responsible for the illegality committed by them along with the State.

In the case of *People's Union for Civil Liberties* v. *Union of India*[55] the Court consistent with the mandate of article 21 of the Constitution of India observed that a state or its officers cannot claim the benefits of sovereign immunity and deprive a person of his life and liberty without following a due procedure contemplated under the Constitution. The Court convincingly ruled that "*The claim for compensation is based on the principle of strict liability to which the defence of sovereign immunity is not available*."

Further in *Citizens for Democracy* v. *State of Assam*[56], the Apex Court ruled that:
"……In all the cases where *a person arrested by the police is produced before the Magistrate and judicial or non-judicial remand is given by the Magistrate, the person concerned shall not be handcuffed unless special orders in this respect are obtained from the Magistrate at the time of the grant of the remand.* When the police arrest a person in execution of a warrant of arrest obtained from a Magistrate the person so arrested shall not be handcuffed unless the police have also obtained orders from the Magistrate for the handcuffing of the person to be so arrested. Where a person is arrested by the police without warrant the police officer concerned may, if he is satisfied, on the basis of the guidelines given by us that it is necessary to handcuff such a person, he may do so till the time he is taken to the police station and thereafter his production before the Magistrate. Further use of fetters thereafter can only be under the orders of the Magistrate as already indicated by us." (Emphasis Supplied)

On perusal of the aforementioned observations, it can convincingly be submitted that though arrest is an important aspect of criminal investigation, but it should be exercised strictly as per the statutory procedure contemplated under the Code and in accordance with the values of the Constitution. If there is a dereliction in the exercise of powers there is a remedy which may sometimes results in criminal prosecution as well.

---

[55] AIR 1997 SC 1203; see also: *Nasiruddin* v. *State*, 2001 CriLJ 4925; *Tasleema* v. *State (NCT of Delhi),* 161 (2009) DLT 660.
[56] (1995)3 SCC 743: 1995 SCC (Cri.) 600.

4. Power of Search and Seizure - Though the term "Search" is not defined under the Code, nonetheless it constitutes an important aspect of investigation. The Code in its schemes contains elaborate provisions relating to power and procedures to be exercised and followed by the Police Officers during the course of search and seizure.[57] In this context the mandate of Section 165[58] read with Section 100[59] of the Code contained elaborate provisions.

However a general practice is that the search is conducted during day time. However, in exceptional and extraordinary circumstances, where there is possibilities of destruction or concealment of evidences the search is conducted during night after ensuring proper compliance of the legal provisions. Furthermore, it is the duty of the police officer to ensure that there should not be any damage of the property during the search and to avoid

---

[57] Criminology, E-Pathsala, (Ministry of Human Resources Development Project under its national mission on Education through ICT, (NME-ICT) *available* at: https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S001608/P001746/M022181/ET/1504500854Module-17-Q1.pdf (Visited on June 6, 2022). Basically there are two types of search, 'Personal' and 'House'. Personal searches are conducted immediately after the arrest and custody of the person, whereas House search as per the requirements of investigation can either be conducted prior to the arrest or after the arrest

[58] The power of search by the officer-in charge of a police station or the police officer making an investigation is regulated by the mandate of Section 165 of the Code. It requires bonafide belief on the part of police officer in the form of reasonable grounds and the same is required to be reduced in writing stating the place and article to be searched subject to the jurisdictional limits. It also suggests that police officer is required to conduct search in person, except in certain circumstances where the power can be delegated to subordinate officer. At the stage of search, the police is required to keep the jurisdictional magistrate informed about the process. In addition to it, the occupier of the premises is also entitled to receive the copies of record free of costs through an application from the magistrate. Section 166 of the Code contemplates a procedure when search is to be conducted at a place outside the local limits whether in the same or another district. Under such circumstances, the assistance of the officer in charge of another district or place may be obtained, however , if it appears to the investigating authority that there is possibilities of delay which might result in destruction or concealment of important piece of evidences then the concerned officer can proceed in person for the search and while keeping the local officer informed about the process.

[59] Section 100 of the Code contemplates the procedure to be followed whenever there is a requirement of search of close places. There is a requirement of presence of respectable witnesses of the locality at the time of search. It is important for the officer conducting search to make the list of things obtained from the search and to get the same signed by the witnesses. In addition to it, occupant or his representative has also the right to present during the process and get the signed copy of the search list. Further in order to overrule the possibilities or suspicion of deliberate plantation of things by the officer, it is important to ensure that before the commencement of search the police personnel and the independent witnesses should also be searched. On the completion of search, four copies of search list is required to be prepared necessarily. All the four copies are required the signature of the Police Officer making the search and the witnesses present during the search. One copy is required to be sent to the magistrate, another copy is required to be sent to the superior officer along with the case diary, one copy should form the part of station record and one copy will be handed over to the occupier or owner of the place where search is conducted.

indiscriminate search by all means.[60] After search the property is to be seized and for it the procedure is laid down under Section 102 of the Code.[61]

In the matter of *Hamida Habib Jeelani* v. *Secretary to Government Home Department*[62]the issue before the court was the authority of the police officer to seize the passport of the person under the mandate of Section 165 of the Code of Criminal Procedure. The Court held that the police officer is statutorily authorized to do the same, if in the opinion of the police officer it is necessary to control the movement of the person alleged to have committed the offence and to secure his presence during the investigation.

Interestingly in one of the matter a question is raised about the admissibility of evidence obtained from illegal search. The Apex Court in *Bharati Tamang v. Union of India*[63] has considered the matter and made a following pertinent observation:-

> "The test of admissibility of evidence lies in relevancy and unless there is an express or necessary implied prohibition in the Constitution or other law, evidences obtained as a result of illegal search or seizure is not liable to be shut out. Apparently and justifiably the said legal position as pronounced always have a universal application, as in order to dispense justice and ensure that the real culprits are brought to book, the investigating agency should make every endeavors to unearth the truth by scrutinizing and gathering every minute details and materials and place it before the concerned adjudicative machinery in order to enable the Court examining the guilt or otherwise of an accused to reach a just conclusion."

---

[60] *Ibid.*

[61] As per the mandate of Section 102, the police officer is statutorily empowered to seize any property if it appears to the officer concerned; the property is a stolen property or gives suspicion about the commission of crime in respect to such property. Further, it is the duty of the officer to report the fact of seizure to the jurisdictional magistrate immediately without delay. The law also permits the police officer to put the property in the hand of any person subject of his executing a bond where the person concerned undertakes to produce the property before the court as per the requirement particularly under situations where the property obtained from seizure cannot be easily conveyed to the court.

[62] 1996 CrLJ 1086.

[63] 2014 CrLJ 156 (SC).

The aforementioned observation is to be understood in the context of object and purpose of criminal investigation and the solemn objective behind the entire process of criminal justice administration. The Court categorically stated that the evidence procured from illegal search or seizure is not inadmissible except under the circumstances, where there admissibility is prohibited either expressly or by necessary implications under the Constitution or any other law.

Further on the question of violation of fundamental rights under article 14 and 19 on account of search, the apex court in *Subbayya* v. *State of Karnataka* [64] the apex court has made the following pertinent observation: "[T]he Executive power of search and seizure is a necessary concomitant of a welfare state Such power is in any system of jurisprudence an overriding power of the State for the protection of social security but that power must be regulated by law. A search by itself is not a restriction on the right to hold and dispose of property. The Court further elaborated that it is only a temporary interference with the right to hold premises searched. Therefore the statutory regulation in this behalf is a necessary and reasonable restriction and cannot per se be considered to be unconstitutional or ultra vires Article 14 or Article 19(1)(f) or Article 19(1)(g) of the Constitution."

In another case a question concerning the violation of fundamental right under article 20(3) is raised as it was argued that the search amounts to testimonial compulsion within the meaning of article 20(3) of the Constitution of India. The Court in *State of Gujarat v. Shyamlal*[65]negatives the above argument and held that the provisions relating to search is not hot by article 20(3) , however the court at the same time held that it does not apply to the accused.

VI. Delay in Investigation

On the subject of delay in investigation the Law Commission of India in its 239th report considered the matter and made the following pertinent observations.[66]

> "Inordinate delays in the investigation and prosecution of criminal cases involving serious offences and in the trial of such cases in the Courts is a

[64] AIR 1979 SC 711.
[65] AIR 1965 SC 1251.
[66] Law Commission of India, 239th Report on Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities, (March 2012).

> blot on justice system. The objective of penal law and the societal interest in setting the criminal law in motion against the offenders with reasonable expedition is thereby frustrated. The adverse effect of delay on the society at large is immeasurable. The fear of law and the faith in the criminal justice system is eroded irretrievably."

It is true that delay in timely and efficient investigation *ipso facto* does not affect the case of the prosecution but it does certainly affects the quality of evidences as with the passage of time memory fades and in one way or the other affects the credibility of the material evidences so obtained from the investigation.

There are many factors which contribute to the delays some are, inaction on the part of the police officer to register the FIR and taking up the investigation in the right perspective, lack of periodical training to upgrade the skills of investigation, shortage of forensic experts, engagement of investigating officers in other duties, including corruption and lack of motivation on the part of police personnel.

The Law Commission of India earlier in its 154th report[67] in order to avoid undue delay and to expedite the process of investigation recommended that police personnel engaged in investigation of offences should be separated from the personnel engaged in enforcement of law and order, though absolute separation is not required but there should be a separation. Further it suggested that once the task of investigation is undertaken by a police officer, he should not be assigned with any other duties as long as investigation continues. The object behind such separation is to ensure compete devotion on the part of police officer in the matter of detection of crimes and collection of material evidences during the course of investigation

VII. Epilogue

Convincingly the fair and transparent investigation is the backbone of the criminal justice system. It is on the strength of investigation the criminal trial proceeds. In the context, it becomes important to ensure that the investigation should take place strictly in accordance with the mandate

[67] Law Commission of India , 154th Report on the Code of Criminal Procedure , 1973 (Act No 02 of 1974) (1996).

of law and it should be within the time limit. Every effort should be made to avoid undue delay in investigation.

However the possibilities of illegality or irregularity in investigation cannot be overruled. Therefore, an important question arises about the credibility of evidence of witnesses obtained from such investigation. Though the Court ruled that the "inept or deficient investigation could not be taken as a sufficient ground to reject the evidence of witnesses. Provided their credibility has to be tested on other circumstances like, the chance of their presence at the place of occurrence, the credibility of their claim of having seen the occurrence and the intrinsic value of their evidence when they claim to be the eye witness to the occurrence." In this context, it is the duty of the court to see, whether the evidence of the witness is inspiring confidence and is free from material infirmities making the same creditworthy including the test of cros-examination whether the witness is able to stand on the same or not. However, if the credibility is not established, then the whole of the case of prosecution is discredited.[68]

In *Neyaz Ahmed* v. *State of Bihar*[69]the court categorically stated that if the officer does not perform his legal duty of investigation properly and as per the mandate of law then such officer is liable for departmental action.

Interestingly an argument is raised in the matter whether an irregular or faulty investigation can be made as a ground to acquit the accused? The Court in *State of U.P* v. *Jagdeo*[70] held that faulty investigation cannot alone be taken as a ground to acquit the accused. Consistent with the aforementioned observation in *Union of India* v. *Prakash P Hinduja*[71]the Court reiterated its observations and held that *"en error or illegality in investigation can have no impact on trial unless miscarriage of justice has been brought out."*

Occurrence of crime in a society is not a new phenomenon what is important is the approach of the state in suppressing the crimes and punishing the offenders within the limits and principles of law as to ensure proper law and order in the society and to sustain the faith of

[68] *Mritunjay Mani Mishra* v. *State of Bihar*, 2011 CrLJ 1966 (1975) (Pat). Also see, *Sheo Shankar Singh* v. *State of Jharkhand* , 2011 Cr LJ 2139 (SC).
[69] 1999 CrLJ 2550 (Pat).
[70] AIR 2003 SC 660.
[71] AIR 2003 SC 2612.

common people in the system of justice administration. In the context, the roles of investigating authorities become very vocal and important.

Under the scheme of the Indian Criminal Justice Administration, the police as an agency of investigation have been endowed with all powers to conduct investigation but on account of factors as discussed; on many occasion inefficient and prolonged investigation results in unjustified and unwarranted prosecution which is certainly not a good practice for the administration of justice in the society as a whole particularly when the Constitution of the country promises *inter alia*, Justice Liberty, Equality and Fraternity as the underlying values of governance.

Conclusively it is submitted that investigation constitutes an essential and first stage to determine the effectiveness and purity of the Criminal Justice System of the country which predominantly operates on the principles of ***Rule of Law***, therefore every effort should be made to ensure due compliance of constitutional and statutory mandate and to ensure that no person should suffer on account of faulty and irregular investigation.

Recommendations

On perusal of the above discussion, the researchers wishes to make following recommendations–

1. Every effort should be made to expedite the process of investigation. The process and outcomes of investigation has a direct nexus with the trial of the offences, therefore if the investigation is delayed or conducted improperly, it is bound to affect the criminal proceedings at a later stage and eventually delayed the trial of the offences, which in a way disturb the constitutional commitment of fair and speedy trial guaranteed under article 21 of the Constitution of India.
2. There is a need to bring suitable amendment in the existing criminal law to fix the time frame for the completion of investigation for every offences depending upon the severity and nature of the offences.

3. Proper monitoring about the progress of investigation is required to be made by the senior police officer. If there is any irregularity or impropriety noticed by the senior police officer, then immediate action in the form of instructions, warnings is required to be taken to avoid the occurrence of any further error.

4. In addition to it, the judiciary should also monitor the progress of investigation by the police officer and should issue directions in cases involving political or other influential interference at the time of investigation. However at the same time, judiciary should also not make any interference in the process of investigation.

5. Police personnel should be provided with periodical training to upgrade the skills of investigation. Government should provide adequate resources to the police personnel in order to make the police personnel committed and connected with their duties.

6. Government both at the Centre and State must work in unison to fully modernize and equip their police forces up to the desired level. They should not take the excuse of financial constraint.[72]

7. Police personnel engaged in the process of investigation should necessarily follow the principles of law laid down in the Code of Criminal Procedure, 1973, and the decisions of the Hon'ble Supreme Court of India including the decisions laid down in *D.K Basu* v. *State of West Bengal*[73], *Arnesh Kumar v. State of Bihar*[74] *and Lalita Kumari* v. *State of U.P*[75].
8. The Government should take into account the recommendations of the Law Commission of India, particularly the observation of the Commission in its 154th report.
9. In addition to it, the Government should promote at a large scale the police learning experiences in collaboration with other countries and international organizations by sending the police personnel to learn the best practices from other countries thereby facilitating the exchange of knowledge and experiences.

---

[72] It is submitted that the Police and law and order comes under the legislative domain of the State Government as per the distribution of legislative powers between Centre and State under the mandate of article 246 read with Entry II, VII Schedule of the Constitution of India. However, it is noticed that most of the State governments on account of financial constraints are not able to modernize their police forces. This calls for the action on the part of the Centre.
[73] AIR 1997 SC 610.
[74] (2014) 8 SCC 273.
[75] Writ Petition (Criminal) No. 68 of 2008, delivered by five judges Constitution bench of the Supreme Court of India on November 12, 2013.

10. Police personnel should work in the direction of developing good rapport with common men. Presence of police should be welcomed and appreciated with an element of trust; it should not create fear and distrust in the minds of common men. The image of police can only be corrected by the police themselves through their cooperative and humanly behavior. There are good examples set by a good number of hard working, sincere and honest police officers, but still the task is not yet achieved.

Codification of Law of Mediation in India: Key Developments Issues and Resolutions

Priti Ramani Nayyar

Assistant Professor ,School of Law, GD Goenka University, Gurugram, Haryana

Abstract:

This article explores the concept of mediation, its kinds and its benefits over other forms of Alternate Dispute Resolution mechanisms like arbitration. The current legal framework governing mediation in India is dispersed in laws like The Code of Civil Procedure 1908, The Commercial Courts Act 2015, The Consumer Protection Act 2019, or is a matter a private mediation agreement between the parties. Hence, there is a need for codification of a single, unified and comprehensive law of mediation in India. The key developments leading to the proposal inter alia for mandatory pre-litigation mediation in India comprised in The Mediation Bill 2021 have been discussed in detail. The other key features of the Mediation Bill 2021 including definition of mediation, concept of community based mediation, virtual mediation etc., and some limitations of the Mediation Bill as well as solutions to the same are also proposed. The article emphasizes the necessity for mandatory mediation and makes an endeavour to dispel some of the issues and concerns with mandatory mediation in India and concludes with suggestions which would pave the way for enactment and implementation of the Mediation Bill 2021 in an efficacious manner.

Keywords: Codification, Mediation, Mandatory Mediation, Pendency, Alternate Dispute Resolution.

1. Introduction

Amongst the many Alternative Dispute Resolution (ADR) techniques for the harmonious settlement of conflicts is mediation- a process wherein a third person helps two or more parties, with their consent, to resolve a dispute by assisting them to arrive at an amicable conclusion.[1] In other words, mediation may be defined as a flexible dispute resolution method used in private and confidential surroundings where a mediator serves as a neutral facilitator to assist the parties in trying to reach a negotiated

[1] United Nations 'Guidance for Effective Mediation, The United Nations (UN) Guidance for Effective Mediation' (2012) 4.

resolution of their conflict.[2] Some legal scholars describe mediation as an aid to two or more disputing parties by a third party who have no power to impose a result.[3] The mediator helps the parties identify concerns, minimise misconceptions, clarify priorities, explore areas of compromise, and generate ideas in order to encourage communication between the parties. Mediation is favoured over arbitration for conflicts that do not involve complicated issues of law or evidence and have the ability to be settled amicably without the formal and restrictive processes of the conventional legal system.[4] Not only is mediation one of the oldest methods of resolving disputes, but there are instances of its application in countries like China, Korea, Malaysia Norway, and Japan and India. This age-old, globally recognised conflict resolution method is still prevalent in the contemporary era to handle conflicts in a variety of contexts. Particularly, mediation is used in labor-management negotiations, community problems, legal disputes, and international interactions.

1.1 Kinds of Mediation

There are various perspectives in both theory and practise with respect to the position and responsibility of a mediator. Amongst them the most important are Facilitative Mediation, Power Based Mediation and Formulative Mediation[5]. Facilitative mediation is focused on setting up and facilitating non-directive conversation between the parties in order to elicit the underlying needs and interests that lie beneath the surface demands and stances. The mediator refrains from offering significant comments or proposals. A more directed role is played by the mediator in Formulative Mediation. The mediator offers many possibilities, for example by creating option papers or drafting agreements, in addition to structuring the process and gathering suggested solutions. Similar to Facilitative Mediation, the parties' agreement in Formulative Mediation is regarded as crucial. The main goal of Power-Based mediation is to use the mediator's influence to secure a resolution. Different mediators may utilise these techniques alone or in combinations at various points of the mediation process, thus there isn't always a clear-cut distinction between them in practise. Although the consent of the parties to the conflict, the objectivity of the mediator, and the all-encompassing nature of the process are essential elements of mediation, not all mediation techniques always adhere to these standards.

1.2 Benefits of Mediation

---

[2] International Chamber of Commerce Mediation Rules, Sec. 1(3).

[3] Kenneth Kressel & D. G. Pruitt, *Mediation research: The Process and Effectiveness of Third-Party Intervention* (Josey: Bass 1989) 395.

[4] The Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003, Rule 4.

[5] Jonathan Wilkenfeld, Kathlee Young, Victor Asal & David Quinn, 'Mediating International Crises: Cross-National and Experimental Perspectives' (2003) 47 (3) The Journal of Conflict Resolution (2003) 279, 301.

Compared to arbitration or litigation, mediation is much faster and less expensive dispute resolution process. Through the mediation process, the parties can come to an understanding on issues that cannot be resolved through an adjudicative procedure like arbitration or litigation. For instance, in the event of a dispute, the parties may decide to renegotiate the terms of the contract. Mediation permits contract amendment, unlike arbitration or litigation where there would not be a legal basis for such a request. Mediation enables parties to consider additional interests, such as business interests, while adjudicative procedures focus on the parties' legal rights.[6] There is a significant distinction between mediation and arbitration or litigation in this regard. The mediation process can aid parties in developing a better understanding of one another's wants and interests so that they can search for a solution that as nearly as possible, satisfies these needs and interests. When the parties to the dispute are still in contact with one another, mediation can be a very helpful tool in a joint ventures or in long-term supply contract. The Supreme Court acknowledging the importance of mediation has made following observations in *M.R. Krishna Murthi* v. *New India Assurance Co. Ltd.*,[7]

> "29..Advantages of mediation are manifold. This stand recognised by the legislature as well as policymakers and needs no elaboration. Mediation is here to stay. It is here to evolve. It is because of the advantages of mediation as a method here to find new grounds. It is here to prosper, as its time has come."

1.3 Mediation is the Need of the Hour To Reduce Pendency of Cases in Courts

Eminent jurists are of the opinion that mandating mediation is the initial step in conflict resolution. The Indian judiciary supports the goals of justice and maintains social order whilst serving as the foundation of Indian democracy. Studies show that the efficiency of the economy in general and the civil justice system in particular have a significant impact on each other, sustaining economic stability.[8] Contracting parties must be able to assert their legal and contractual rights through authoritative judicial determination, which uses the State's coercive power to force litigants to sit down and negotiate.[9] So, for any democracy to continue existing, there must be a civil judicial system that operates effectively and renders decisions quickly. However, the Indian judicial system is infamous for its incapacity to resolve cases quickly. In India's District Courts as of August 2022, there were more than 4,18,38,523

---

[6] International Chamber of Commerce Mediation Guidance Notes, (2014) 5.
[7] (2020) 15 SCC 493.
[8] RM Sherwood, 'Judicial Systems and Economic Performance' (1994) 34 Quarterly Law Review of Economics & Finance 101, 116.
[9] Hazel Genn, 'What is Civil Justice For? Reform, ADR and Access to Justice' (2012) 24 Yale Journal of Law & the Humanities 397.

cases pending, compared to 59,50, 252 cases pending in the High Courts.[10] These figures are alarming, particularly as far as 'Ease of Doing Business' is concerned.[11] Whilst many financially stable corporates may have the litigation time and expense planned as part of their corporate strategies, the delay and the time taken by the courts to resolve the disputes are seldom factored in by the common man. In fact that this the reason that perhaps it is difficult to quantify the sum of losses or missed opportunities that parties have as a result of a legal battle. In India, it is fairly typical for litigants to decide to challenge rulings as many times as they can. Despite the fact that the number of appeals accepted varies, it is exceedingly uncommon for one to go unfiled after a judgement is pronounced. There are currently about 10,46,519 appeals pending in India's High Courts[12]. The common does not seem to be satisfied with the court's decisions in spite of the fact that both disputing parties consult their attorneys for guidance on whether or how to proceed with litigation and are frequently guaranteed a victory. Time and again, the Supreme Court has acknowledged the need for a less formal, alternative forum numerous times, citing the lengthy, complex, and expensive nature of India's court system as justification.[13] Long-running legal disputes are not in either party's best interests because of the time commitment, high financial costs, and emotional toll that comes with being in the public eye. The adversarial nature of today's litigation prevents open discussion or debate; instead, the parties engage in constant combat while the core issue remains unresolved. The generally accessible legal services are now unable to satisfy the demand for quick and affordable dispute resolution. Additionally, there are several structural obstacles including wealth, caste, gender, age, and religion that prevent vast portions of the general public from accessing the Indian courts. In contrast, both parties actively participate in mediation to resolve the conflict and come to a settlement. Indirect costs of litigation include time, damage to relationships, and loss of trust between parties, among others. In some countries, mediation has improved access to justice by facilitating adjudication. According to studies, parties are more likely to abide by a mediation agreement than a court order.[14] According to empirical statistics, mediation is a more effective dispute resolution

[10] 'National Judicial Data Grid' <https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard> accessed 02 September 2022.

[11] The World Bank, 'Ease of Doing Business in India' (2021) http://www.doingbusiness.org/data/exploreeconomies/india/#enforcing-contracts accessed 02 September 2021.

[12] 'National Judicial Data Grid' <https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard> accessed 02 September 2022.

[13] Guru Nanak Foundation v. Rattan Singh & Sons, AIR 1981 SC 2073; Shyamalika Das v. Gen. Manager, Gridco, Civil Appeal No. 8181 of 2010.

[14] Tony Biller, 'Good Faith Mediation: Improving Efficiency, Costs, and Satisfaction in North Carolina's PreTrial Process' (1996) 18 Campbell Law Review 281, 284.

method than traditional litigation in terms of cost, speed, and satisfaction.[15] Since the time when the eminent jurist Frank Sander suggested the notion of a 'Multi-door Courthouse' as a pioneering organization which offered the citizens alternate channels for amicably and informally resolving their conflicts.[16] However, it is yet to realise its full potential in India.

2. Existing Legal Framework Governing Mediation in India and the Legal Issues Therein

Currently, there are three ways to commence with the process of mediation in India:

- Firstly, by including a provision for it in contracts and taking the recourse to ad-hoc or institutional mediation.
- Secondly, to encourage use of ADR procedure to resolve disputes, Section 89 and Order X, rules 1A to 1C of the Code of Civil Procedure 1908 (CPC) were enacted so that the parties to dispute benefited from ADR procedures including mediation before the trial in a suit commenced. According to Section 89, the court may send the subject matter to arbitration, conciliation, or judicial settlement through Lok Adalats or mediation if it determines that the conflict can be resolved peacefully or through alternative means. This stage of mediation is referred to as court-referred mediation. If court-recommended mediation is unsuccessful, this case will be adjudicated by the court. However, if efforts at mediation are successful, the mediator submits a report to the court, and the case is disposed of accordingly. The said provisions of law were also upheld by the Hon'ble Supreme Court in *Salem Advocate Bar Association v. Union of India.*[17]
- Thirdly mediation may also be resorted to under a specific legislation, like the Section 37 of the Consumer Protection Act, 2019 pursuant to the filing of the case in the District Consumer Dispute Redressal Forum and mandatory pre-litigation mediation which is directed by Section 12A of the Commercial Courts Act, 2015. The said Section 12A, mandates the plaintiff in a suit, to make use of the remedy of pre-institution mediation in case such suit does not warrant any which does not contemplate any compelling relief.

Nevertheless, certain issues arise while resorting to mediation by invoking the aforesaid legal provisions. Although mediation is a swift and a comparatively affordable mechanism for amicable resolution of disputes and provides superior chance of maintaining those amiable relations between the

[15] James Alfini & Catherine McCabe, 'Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law', (2001) 54 Arkansas Law Review 171,172.

[16] Frank Sander, 'Another View of Mandatory Mediation' 2007 13(2) Dispute Resolution Magazine 16.

[17] 2003 (1) SCC 49.

disputing parties, the present legal framework has not been a potent force in encouraging the number of disputes which should be resolved through mediation. In the case of *Afcons Infrastructure vs. Cherian Varkey Constructions,*[18] although the Hon'ble Supreme Court applauded the objective of the legislature behind drafting the said section, yet the court drew attention to some conspicuous drafting mistakes in the language of Section 89 of the CPC. According to the court, the definitions of 'mediation' and 'judicial settlement' under Section 89(2) clauses (c) and (d) seemed to have been mixed up by the legislature. According to clause (c), the judicial settlement shall be referred by the Court to an appropriate institution or person who will be regarded as a Lok Adalat. Similarly, as regards clause (d) a legal mandate has been cast by the legislature on the courts to mediate a settlement between the parties by adhering to the approved procedure. The Court further held that it is inappropriate to refer to court effected mediation as a compromise, which is suggested by the language of clause (d). Additionally, it makes no sense to refer to a court's referral of an appropriate institution or party to reach a settlement as a "judicial settlement," as is done in clause (c). This is because, the term 'judicial settlement' which is popular in the USA, refers to the resolution of a civil matter with the assistance of a judge who is not designated to adjudge the case. The court reiterated that the confusion in the definition of terms 'judicial settlement' and 'mediation' is seemingly because of a clerical erratum as a result of which the said phrases seem to have been used interchangeably in Section 89 clauses (c) and (d). Pursuant to the aforesaid judgement, the Law Commission of India, in its two hundred and thirty eighth report (238th) analysed Section 89 of the CPC and advised replacing it with a modified legal provision that would align it with the judgement of the Supreme Court in *Afcons Infrastructure vs. Cherian Varkey Constructions.*[19] Some of the recommendations were to change the definitions of mediation and judicial settlement and to indicate the juncture at which the court should submit the case to the various ADR procedures described in Section 89 of the CPC. However, this Report has not yet been put into practise.

Furthermore, despite having great promise, Section 12 A of The Commercial Courts Act, 2015 has not lived up to its full potential. The appointment of mediators through legal aid cells, the lack of experience among mediators to handle commercial cases, and concerns raised regarding the report that the mediator needs to submit in the event of failure to reach a settlement are some of the difficulties this Act's limited implementation has faced. The Commercial Courts (Pre-Institution Mediation and Settlement) Rules,

---

[18] 2010 (8) SCC 24.

[19] 2010 (8) SCC 24.

2018 entrusts the legal mandate of appointing mediators under The Commercial Courts Act, 2015 to the Establishments founded under the Legal Services Authorities Act, 1987, a procedure which is plagued with many issues, like the number of mediators appointed are inadequate to fulfil the requirements of the Commercial Courts Act, 2015. Further, mediators may not have the requisite knowledge to be able to resolve the commercial disputes efficaciously.

2.1 Need for Codification of Law on Mediation

From the aforesaid discussion it is clear that even though mediation is undertaken on a voluntary basis by the parties and some of the statues also recognize mediation, yet there is no comprehensive law which regulates mediation in India, leaving little incentive for the parties to the dispute to resolve their differences through the same. Further, as discussed above legal provisions with respect to mediation are scattered in various laws, regulations and rules, making it the need of the hour to provide a clear legal framework for the subject.

In addition, India is also a signatory to the United Nations Convention on International Settlement Agreements resulting from Mediation, 2019 (Singapore Convention on Mediation).[20] The Singapore Convention on Mediation creates a uniform legal framework for the right to evoke settlement agreements and for their implementation. However, there is currently no standalone legal framework in place in India to enforce this Convention's requirements. The general public is woefully ignorant of mediation despite efforts to raise awareness of it and its inclusion in the legal education curriculum. The absence of incentives for parties to try mediation, even when they are aware of it, is a significant obstacle. There are some misconceptions about mediation in India that make it challenging for attorneys and their clients to view it as a practical dispute resolution method. The said factors have hindered mediation's development as an efficient method of dispute settlement, and the proposed Mediation Bill, 2021 is an effort to remedy these issues.

3. Main Attributes of The Mediation Bill, 2021

The salient features of The Mediation Bill, 2021 (‘The Bill’) are discussed as under:

a. Agreement to Mediate:

[20] Press Information Bureau, Government of India, ‘Cabinet approves signing of the UN Convention on International Settlement Agreements resulting from mediation by India’ (20< https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1580824> accessed 04 September 2022.

The Bill stipulates that each relationship, whether contractual or not, must include a written agreement by or between parties to subject to all or specific disputes to mediation.[21] This legal provision is similar to the already recognised practise of entering into an 'arbitration agreement'. in accordance with Section 7 of the Arbitration and Conciliation Act, 1996.

b. Mandatory Pre-litigation Mediation:

The Bill specifies resolution of disputes in the first instance by means of mandatory Pre-Litigation Mediation conducted by a mediator who is registered with the Mediation Council of India[22] or by a mediation centre attached with a court or a service provider of mediation who is authorized to conduct mediation, notwithstanding absence of a mediation agreement between the parties.

According to the Bill, the court or tribunal may grant or deny urgent interim relief and thereafter order the parties to try mediation before appearing in court.[23] Section 12 A of the Commercial Courts Act, 2015 required all parties to first make and efforts towards mediation before going to court. But there was a condition. Parties would not have to try mediation first if they 'needed' urgent relief, which they 'inevitably do'. The Bill has plugged this loophole making it impossible for parties to exploit this clause any longer.

c. Institutionalization of mediation services

The Bill emphasizes on institutional mediation as a pivotal foundation for commercial mediation in India,[24] clarifying that when parties cannot agree on a process for choosing the mediator or mediators, the party seeking to initiate mediation must apply to a mediation service provider (instead of the courts) for the appointment of a mediator, further highlighting party autonomy, which is a novel provision and departure from provisions of the Arbitration and Conciliation Act, 1996. This novel clause establishes the importance of confidentiality and party sovereignty even before the commencement of the case.

d. Provisional relief(s):

---

[21] The Mediation Bill, 2021, Sec. 4.
[22] The Mediation Bill, 2021, Sec. 6.
[23] The Mediation Bill, 2021, Sec. 8(2).
[24] The Mediation Bill, 2021, Sec. 12(3).

The Mediation Bill also includes another stand-alone provision[25] under Section 8 that is strikingly similar to Section 9 of the Arbitration and Conciliation Act of 1996. This provision gives parties the ability to approach a court with appropriate jurisdiction in exceptional circumstances, before the commencement or during the mediation for an immediate relief.

e. Deadline **based process of mediation**

The Mediation Bill makes provides for imposing a deadline for finishing the mediation process within 90 (ninety) days from the date of its commencement, with a further extension of ninety (90) days with the approval of the parties.

f. Acknowledgement, Validation and Registration of 'Settlement Agreement':

The Bill legally recognizes a 'Settlement Agreement' which has been executed between the parties pursuant to mediation.[26] It also recognizes virtual mediation settlement agreements that were authenticated and electronically signed.[27] Such Settlement Agreements be registered with authorities established under the Legal Services Authorities Act of 1987 and that such settlements be given a special registration number within ninety (90) days of the date on which you received a copy of the mediation agreement.[28]

g. Virtual Mediation:

In an endeavour to keep pace with the technological advancements, The Bill recognises virtual mediation done through the use of applications and computer networks.[29] Additionally, it requires that virtual mediation be carried out in accordance with the Regulations that will be established by the Mediation Council in accordance with the legal mandate of Information Technology Act, 2000. The Bill also stipulates that, with the parties' written approval, virtual mediation may also be used at any point during the mediation process in addition to the aforementioned with the consent of the parties.[30]

[25]The Mediation Bill, 2021, Sec. 8.
[26] The Mediation Bill, 2021, Sec. 21.
[27] The Mediation Bill, 2021, Sec. 21 (6).
[28] The Mediation Bill, 2021, Sec. 21 (7) & (8).
[29] The Mediation Bill, 2021, Sec.32.
[30] The Mediation Bill, 2021, Sec. 33.

h. Formation of Mediation Council of India:

The Bill stipulates the establishment of the Mediation Council of India as a body corporate with multifarious duties, functionalities, powers [31] and to fulfil the responsibilities envisioned by of the Bill. It should be noted that the 2019 Amendment Act introduced an amendment to the Arbitration and Conciliation Act, 1996 on similar lines to create an independent Arbitration Council of India and promote ADR in India.

i. Recognition and Enforcement of International Mediation Settlement Agreement:

With India recently ratifying the Singapore Convention on Mediation, the International Mediation Settlement Agreement has been legally recognized by the Bill. International Mediation Settlement Agreements shall be regarded as legally binding for all purposes and shall be enforced under Part-III of the Bill in any judicial actions in India.[32]

4. Legal Issues in The Mediation Bill 2021 and their Proposed Resolutions

There is a sense of exhilaration amongst Indian mediators as a result of the promulgation of the Mediation Bill by the Ministry of Law and Justice, Government of India. This is understandable considering that India will join a select group of nations with independent laws on business mediation, including Singapore, Hong Kong, Brazil, and the United States of America, if the Bill is enacted into a law. Although the Bill's intention is commendable and innovative, it is still a work in progress and needs to address the following issues:

a. Definition of Mediation

The Bill defines mediation as a procedure whether termed mediation, virtual mediation, pre-litigation mediation, community based mediation or any other allied expression in which parties request a third party to aid them to resolve their dispute amicably.[33] However, the definition of mediation under the Bill does not state that the mediator is not empowered to compel the parties to reach an agreement.

[31] The Mediation Bill 2021, Sec.35.
[32] The Mediation Bill, Sec. 50.
[33] The Mediation Bill, Sec. 4.

The aforesaid definition of mediation does not conform to the definition under the Singapore Convention. According to the Singapore Convention's definition of mediation, the mediator is not permitted to compel a resolution on the disputing parties.[34] To emphasise the idea of party autonomy, this should be expressed in the definition of mediation in the Bill, since India is a signatory to the Singapore Convention and its definition of mediation is one that is globally recognized.

b. Alleged Coercive Nature of Mandatory Pre- Litigative Mediation

The primary objection against the Bill has been its requirement of pre-litigation mediation. Making pre-litigation mediation mandatory might result in cases being postponed and provide delinquent litigants another tool in their armory for delaying the conclusion of the case[35] as it prevents parties from accessing courts and tribunals for all types of cases, with the exception of those categories of disputes excluded in the first schedule, until they first turn to mediation.[36] Further, parties to the dispute are required to participate in mediation for at least two mediation sessions and forewarn the party who misses the first two mediation meetings 'without reasonable cause' with costs, in case litigation pertaining to the said dispute is initiated. Therefore, a party who refuses to mediate would have to wait two mediation sessions before being allowed to approach courts or tribunals. There is also a concern that mandatory pre-litigation mediation would only add another layer of litigation and would force the litigant to hire a mediator, spend costs, and then, in the event that mediation was unsuccessful, return to court, incurring further costs for bringing a case. Hence, there is a concern that the Bill's proposed compelled mediation may go against mediation's voluntary nature. Mandating compulsory mediation may also not result in its adoption as an ADR technique. Parties that do not want to mediate may nevertheless attend two mediation sessions, but only as a formality and not with the intention of resolving the conflict. Making pre-litigation mediation essential will force parties who are not interested in settling to pay for two mediation sessions as well as court costs, should they decide to initiate court action. Further imposing expenses on parties or failing to mediate is 'coercive' and that it denies parties right, to take part in a procedure of their choosing (mediation or court process).

However, as is frequently misunderstood, 'mandatory mediation' does not imply that parties must resolve their differences. It merely means, ordaining the parties to make an effort towards mediation.

---

[34] United Nations Convention on International Settlement Agreements Resulting from Mediation, 2018 Art. 2(3).

[35] Rajya Sabha, Parliament of India, *Parliamentary Standing Committee on Personnel, Public Grievances, Law & Justice, 117th Report on The Mediation Bill, 2021* (2022).

[36] The Mediation Bill, Sections 24 and 25.

Requiring litigants to make a sincere initial effort at mediation is the one of the most effective ways, if not the only way, to significantly increase the number of mediated disputes. Mandatory mediation can therefore encourage parties to engage in mediation by assisting them in overcoming the initial resistance that comes with voluntary mediation. There is no denying that one of mediation's key characteristics is voluntariness. However, it is exaggerated to claim that mediation would cease to be voluntary if parties were required to merely undertake mediation. Pursuant to attending the sessions required by law, the parties have a choice whether to continue the mediation process, to reach a settlement or to terminate the mediation. This is known as the 'Opt-Out Model' of Mediation, currently also in vogue in countries like Turkey, Italy and Azerbaijan to name a few.[37] As a result, it is crucial to consider mediation as a whole rather than merely concentrating on one element that is made mandatory.

c. Failure to clearly define the term 'public policy'

The Bill prohibits settlement of disputes with are contrary to 'public policy.[38] However, like The Arbitration and Conciliation Act 1996, the Bill also does not define the term 'public policy' even though there are several judgements of the Supreme Court of India[39] attempting to define the phrase 'public policy' to help it clearly outline the justifications for contesting the enforcement of the Settlement Agreement. The Arbitration and the Conciliation Act, 1996 made a similar mistake by leaving open-ended the question of whether it violated Indian public policy. This could result in numerous conflicts and legal battles at the time of execution of such Settlement Agreement and leaving room for potential abuse by parties attempting to scuttle the mediated settlement. Hence, the Bill needs to clearly specify the term public policy so as to avoid the confusion which was faced whilst challenging the arbitral awards on ground of public policy under The Arbitration and the Conciliation Act,1996.

d. Inconsistency in the provisions relating to confidentiality of mediation proceedings

The Bill provides that the mediator, mediation service provider, parties, and participants in the mediation shall maintain the confidentiality of all information and communication pertaining to the

---

[37] Ruslan Mirzayev, 'After Italy And Turkey, Azerbaijan Also Follows The Opt-Out Mediation Model' http://mediationblog.kluwerarbitration.com/2019/05/01/after-italy-and-turkey-azerbaijan-also-follows-the-opt-out-mediation-model/ accessed 04 September 2022.

[38] The Mediation Bill, Sec.7 and The First Schedule.

[39] *Renusagar Power Co. Ltd* v. *General Electric Co. 1994 Supp. (1) SCC 644; ONGC v. Saw Pipes Ltd. (2003) 5 SCC 705; Government of India v. Vedanta Ltd. (2020) 10 SCC 1.*

mediation proceedings, and no party to the mediation shall rely on or introduce any such information or communication as evidence in any proceedings before a court or tribunal, including an arbitral tribunal.[40] However, where disclosure of the mediated settlement agreement is required for purposes of registration, implementation, enforcement under the Authority constituted under the Legal Services Authorities Act 1987, the legal provision regarding confidentiality shall not apply.

There is no requirement of registration of an arbitral award even under The Arbitration and Conciliation Act 1996. The requirement for registration of all mediated settlement agreements introduces an additional element of formality and complexity, and confidentiality of the mediation proceedings is compromised. Given that the Bill states that it has no effect on the enforceability, the Bill should clarify if such registration would incur additional costs for the parties (such as registration fees) and what would the repercussions of non-registration.

e. Execution of a Settlement Agreement

A mediated settlement agreement may be challenged on the grounds of impersonation, corruption, fraud or when mediation is used to resolve a dispute or matter that is not appropriate for mediation. Such a challenge must be filed within 90 days of the date the parties received a copy of the mediated settlement agreement.[41] The said clause is an extremely broad provision raising questions the significance of mediation because it lacks a binding effect. The goal of mediation proceedings should be to reduce needless courtroom litigation; as a result, parties should approach the courts with greater difficulty pursuant to mediation, to encourage them to take mediation as a serious exercise.

It is suggested that the Government considers to include a provision in the Bill that permits the Court to take action if it determines that an application assailing the mediated settlement agreement is frivolous or without merit or if the allegations in the application are deemed to be unproven.

f. Virtual mediation

The Bill provides that, with the written consent of the parties, virtual mediation, including pre-litigation mediation, may be conducted at any stage of mediation. This includes using computer network or electronic forms, not limited to an encrypted electronic mail service, or audio or video conferencing. The Bill does not provide any detailed rules for the conduct of mediation. Further, the absence of human interaction, illiteracy, inadequate confidentiality and secrecy of proceedings, a lack of confidence and

---

[40] The Mediation Bill, Sec. 22 and Sec. 23.

[41] The Mediation Bill, Sec. 29.

trust, constraints with respect to culture, education, linguistics, and the unfavourable attitude of lawyers are just a few of the challenges facing virtual mediation as it develops. One of the most significant and pressing issues, however, is the admissibility of virtual mediation. As stated above, virtual mediation is permissible only with the written consent of the parties which is usually expressed in form of a written agreement. Such agreement shall be in writing in accordance with UNCITRAL Model Law[42] and New York Convention.[43] However, the New York Convention says nothing about agreements executed through electronic communications. While India has adopted its 2015 Amendment to The Arbitration and Conciliation Act 1996 Act, the UNCITRAL Model Law accepts arbitration agreements made through electronic communications. Further the Bill also does not specify place of virtual mediation which is a key element giving rise to several legal implications.

During the COVID 19 pandemic, the idea of virtual dispute resolution has gained popularity. The Bill only includes a provision for virtual mediation. It is suggested that specific provisions and mechanism for virtual mediation viz., place of mediation, law applicable to virtual mediation, enforcement of settlement agreement in virtual mediation, confidentiality issues in virtual mediation should be appropriately incorporated into the Bill.

g. **Community Based Mediation**

The Bill provides that the resolution of disputes that are likely to affect the peaceful co-existence, unity, and tranquilly among residents or families of any area or locality may be resolved through community-based mediation, with the prior mutual consent of parties.[44] The concerned Authority, District Magistrate, or Sub-Divisional Magistrate is given the authority to form a panel of three mediators for the community mediation.[45] Further, a panel of three community mediators will conduct community mediation in accordance with the dispute-resolution process that they will develop. Considering how class, culture and caste work at the level of community, the Bill does not give the flexibility to the people in the community to choose their own mediators in addition to those named in the Bill.

It is suggested that the mediation process may become rigid if there are only three mediators. Depending on the needs of the case, the panel's number of mediators may be increased. It is suggested that there must be a legal provision for a trained mediator or a person with legal background, in the panel, to assist the disputing parties to a valid resolution.

---

[42] Art. 7(2).
[43] Art. 2.
[44] The Mediation Bill, Sect 44.
[45] The Mediation Bill, Section 44.

h. International Mediation and Mediation where Government is a Party should not be Restricted to Commercial Disputes

According to the Bill disputes of a non-commercial nature that involve at least one party who resides outside of India are ineligible for mediation.[46] Further, only commercial issues involving the government are eligible for mediation. Since the Bill's preamble mentions mediation, which is commercial or otherwise, Insofar as international mediations or mediations involving government conflicts are concerned, the scope of the Bill of Mediation cannot be limited to commercial disputes.

In *Dilbagh Rai v. Union of India*[47] Justice Krishna Iyer acknowledged that the State is the main litigant which entails huge expenses on public exchequer. Hence, given that the Central and State governments are primary litigants in the country,[48] both the governments should be required to conduct mandatory mediation for all kinds of civil and commercial disputes. In *State of Punjab v. Geeta Iron & Brass Works*[49], the Supreme court has stated that government-related litigation increases the backlog of cases in the courts which makes them susceptible to criticism from the public.

5. Conclusion

In the 'Ease of Doing Business Rankings' for 2022, India is ranked as number 63.[50] India, which is one of the fastest-growing economies of the twenty-first century, is a democracy with one of the largest populations. Litigation is an adversary for business because it adds costs, hampers relationships, leads to missed opportunities and most importantly is unpredictable. People only realise this with experience, since something as rudimentary as executing a legally binding contract in India can be a difficult task. This leaves a lot of disputes which remain unresolved but which could have been efficaciously solved by mediation. The absence of a strong legal framework for mediation has always hindered ADR in India. It is true to say that the Bill, with a focus on mediation, positively addresses and seeks to close specific gaps in the Indian legislations between the various forms of ADR. Additionally, it makes an

[46] The Mediation Bill, Section 3(4).
[47] AIR 1974 SC 130.
[48] Government of India, Ministry of Law and justice, Rajya Sabha Unstarred Question No. 3318, 31 March 2022 <https://pqars.nic.in/annex/256/AU3318.pdf>
[49] (1978) 1 SCC 68.
[50] World Bank, "Ease of Doing Business Rank' < https://data.worldbank.org/indicator/IC.BUS.EASE.XQ?most_recent_year_desc=false> accessed 05 September 2022.

effort to ensure that any disputes between the parties will be resolved in a prompt and efficient manner. In the contemporary era, where the world continues to struggle as a result of the COVID-19 outbreak, the Bill's consideration of the virtual mediation process is highly commendable. The same ought to be economical and will unquestionably lead to the avoidance of health risks related to the outward appearances of parties in cases and disputes.

Having said that, the implementation of the Bill's provisions may face the biggest challenge due to the operational problems with the entire mediation process that have been highlighted above, along with the establishment of virtual mediation facilities across courts, forums, and appropriate authorities, etc. Further as regards as mandatory mediation is concerned, though it is the need of the hour there has been no formal impact analysis of this law’s effects on the legal system, which has been conducted or researched. Self-determination is frequently cited by advocates of mediation as the foundation for the widespread acceptance and applicability of mandatory mediation. Therefore, it is suggested that the Bill may be implemented in a phased manner to determine its effectiveness and utility and to create a win-win situation for all the stake holders.

A Comparative Study of Retrospective Justice Between the International Crimes Tribunal of Bangladesh and the Extraordinary Chamber in the Courts of Cambodia

Md. Ataur Rahman

Lawyer, Supreme Court of Bangladesh & Research Scholar, School of Law GD Goenka University, Haryana.

Abstract:

The independence of Bangladesh on 16th December 1971 was achieved after nine-month bloodshed and fighting. Pakistani military forces with local collaborators brutally killed Bengali armless civilians and a large-scale atrocity materialized. On the other hand, Cambodian society was brutalized under Pol Pot of the Khmer Rouge regime and the duration between 1975 and 1979. These two-difference key international crimes tribunals set up geographically different landscapes of the South East Asian regions between 25 March 2010 in Dhaka, Bangladesh, and 2004 in Phnom Penh, Cambodia to ensure retrospective prosecution of perpetrators. Approximately three million civilians were brutally killed during the west Pakistan regime from 25 March 1971 to 16 December 1971. An estimated 1.7 million Cambodians died Khmer Rouge regime in Cambodia between 17 April 1975 and 6 January 1979. This research paper explores the similarities and dissimilarities with distinctive features between the International Crimes Tribunal of Bangladesh (ICTB) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) with executive, legislative, and judicial formation. These comparative studies will also briefly examine the trial of Crime Against Humanity in Bangladesh and Cambodia with the further contribution of domestic trials under the International Crimes Tribunal of Bangladesh and hybrid-domestic trials under the International Crimes Tribunal of Cambodia. It further explores the domestic and hybrid tribunal's experiences and lessons arising from these tribunals' trial processes. The recent judgment of both tribunals is examined which is a significant impact on the international Criminal Justice System. This study also enhances to contribute the existing accused rights and defense protection and its fairness as well as the outcome of the fair trial processes of Bangladesh and Cambodia concerning the International Crimes Tribunal. Furthermore, this article considers that the trial of ICTB and ECCC permitted retrospective prosecution although the international norms are not allowed retrospective prosecution.

Keywords: International Crimes Tribunal of Bangladesh; The Extraordinary Chambers in the Courts of Cambodia; The Principle of Non- Retrospective Justice; Hybrid Tribunal; Domestic Tribunal; Crime against humanity.

1. Introduction

After four decades, the legacy of the International Crimes Tribunals of Bangladesh (ICTB) steps into a historical attachment by establishing International Crimes Tribunals to end impunity and ensure justice for 1971's atrocities of the International Crimes that occurred by the Pakistani Military and its local perpetrators. The act 1973 was amended in 2009 and commenced tribunals in 2010 which is the holistic nature of the domestic tribunal under International Crimes. On the contrary, in the regime of the Khmer Rouge from 1975 to 1979, large-scale atrocities happened and brutally killed Cambodian Civilians. The Extraordinary Chambers in the Courts of Cambodia (ECCC), which falls under the category of international crimes, was founded in 2004 by the Cambodian government and the UN. The purpose of the prosecution was to end the justice of the perpetrators who were involved in Cambodia's mass atrocities. This paper will briefly focus on a comparative analysis of the two contemporary International Crimes Tribunals located in different geographical locations in Bangladesh and Cambodia its trial procedure and retrospective justice practice. To compare the tribunals' legal provisions explained in this paper to a clear concept about the topic. Trials of crimes against humanity of the tribunals are briefly discussed in the case study. This paper also highlights the tribunals' features and also analyzes the rights of the accused and defense protection. Finally, the end of the paper and its comparative study identifies the limitations of tribunals with recommendations about the legal aspect.

2. The Objective of Research

The principal aim of this paper is a comparative analysis of the tribunals' similarities and differences in the trial process of crimes against humanity with retrospective justice application. The International Criminal Tribunals of Bangladesh and the Extraordinary Chambers in the Courts of Cambodia as international criminal tools and their further contribution to the International Criminal Justice System will be discussed briefly and limitations with suggestions will be made.

3. Background of Study

The trials of Crimes against humanity and their retrospective prosecution in the International Crimes Tribunals of Bangladesh and the Extraordinary Chambers in the Courts of Cambodia are the central points of this discussion. The domestic nature of

the International Crimes Tribunal of Bangladesh was established by the government of Bangladesh under B.P. Bill No.20 of 1973[1] prosecution under International Crimes. The historical tribunals, after four decays long time delayed journey, was established in 2010 with the aims of detention, Prosecution, and punishment of persons for genocide, crimes against humanity, war crimes, and other crimes under international law and for matters those who are involved in the International Crimes of 1971's mass atrocities. Nine month-long civil war from 25th March to 16th December 1971 Pakistani Military crackdown which they code-named Operation Searchlight.[2]

On the contrary, the hybrid nature of the Extraordinary Chambers in the courts of Cambodia established a jointly made out agreement with the collaboration of the United Nations and the Cambodian Government on May 22, 2003, to prosecute senior leaders of the Khmer Rouge and those most responsible for the serious crimes that were happened. The purpose of the law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that was committed during the period from 17 April 1975 to 6 January 1979.[3]

4. Bangladesh International Crimes Tribunals and Khmer Rouge Tribunal

4.1 Executive, Legislative and Judicial formation

The Act 1973 of the International Crimes Tribunal of Bangladesh was enforced in 2010 following four decades of the tribunal's establishment. In 1971, the Pakistan Military crackdown started named Operation Searchlight in collaboration with Rajakars-Biharis-Other local squads. The international community and other international crime-affected communities recognize the operation ordered by Pakistani armies and their local perpetrators in 1971. On December 16, 1971, Bangladesh declared independence, and the Act of 1973

[1] https://www.ict-bd.org/ict1/
[2] Menon, Parvathi, International Crimes Tribunal Bangladesh, Oxford University Press, 2015.
[3] Article- 1, https://www.eccc.gov.kh/en/node/39457.

was formed by the parliament of Bangladesh in 2010 through the judicial formation enforcement of the establishment of Tribunal-1. In Cambodia, Pol Pot atrocities from 17 April to 6 January 1979 occurred, and Cambodian citizen was brutally killed by the Khmer Rouge regime. The first Prime Minister Ranariddh and Second Prime Minister Hun Sen apple to the United Nations Secretary-General to establish Cambodian International Crimes Tribunal. After several years, United Nations and Cambodia signed an agreement on May 22, 2003.[4] In May 2006, the United Nations nominated seven judges, and King Norodom Sihamoni of Cambodia and thirteen international officials announced the Extraordinary Chamber in the Courts of Cambodia (ECCC). All the Judges were sworn in to serve on the tribunal in July 2006.[5]

4.2 Tribunals' Structure

The International Crimes Tribunals Bangladesh inserted section 6 (1) to appoint judges. Section-6(1) stated that "for section 3, the Government may by notification in the official Gazette set up one or more Tribunals, each consisting of a Chairman and not less than two and not more than four other members''.[6] The Government of Bangladesh has the sole and exclusive authority in the election of adjudicators. One major change made to the Act of 1973 via the Amendment Act of 2009 added civilian judges instead of military judges.[7] Similarly, the Extraordinary Chambers in the Courts of Cambodia (ECCC) also stipulated four Cambodian judges and three foreign judges (Article 9 Law of Establishment of ECCC). [8]

---

[4] Thiring, Robert, `` The Policy of Truth: A comparative Study of Transitional Justice between the Rwandan GACACA Court and the Extraordinary Chambers in the Courts of Cambodia'', California Western International Law Journal, Vol.48, P(170-171) , 2017 .

[5] Ibid

[6] International Crimes (Tribunal) Act, 1973

[7] Menon , Parvathi , `` International Crimes Tribunal in Bangladesh'' Oxford University Press, 2015 , http://opil.ouplaw.com

[8] Ibid

4.3 Application of Laws

The International Crimes Tribunals Act of 1973 does not contain any rules or procedures of its own, but Section 22 of the ICT Act grants the tribunal the authority to create them. The Act of 1973's Section 22 made reference to the empowerment of the tribunal to freshly produce regulation: ``subject to the provisions of this Act, a Tribunal may regulate its procedure. ``[9] The Extraordinary Chambers in the Cambodian Courts, on the other hand, have their own policies and processes.

5. Trials of crimes against humanity

The jurisdiction of ratione materiae stipulates in section 3(2) of the ICTB Act 1973: a) Crimes against Humanity, b) Crimes against peace, c) Genocide, d) War Crimes, e) Violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva conventions of 1949, f) any other crimes under international law, g) attempt, abetment or conspiracy to commit any such crimes and h) complicity in or failure to prevent the commission of any such crimes.

The ICT 1973 defines crimes against humanity as "murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape, or other inhumane acts committed against any civilian population or persecution on political, racial, ethnic, or religious grounds, whether or not in violation of the domestic law of the country where perpetrated" in section 3(2)(a).

Above the considering definition of crimes against humanity of the ICTB Act, 1973, it has closely rewritten the definition of the International Military Tribunal at Nuremberg. Article 6(c) of the IMT-Nuremberg Convention defines crimes against humanity as "*murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in the execution of or in connection with any crime within the jurisdiction of*

[9] International Crimes (Tribunal) Act, 1973 Section – 22

the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." [10]

Between both tribunals' definitions of crime against humanity, there is a lack of a connection to "international armed conflict," yet the ICTB Act of 1973 purposefully omits this connection as a precondition for crimes against humanity. The international crimes tribunals of Bangladesh, the defense side in many cases i.e. Chief Prosecutor v. Professor Golam Azam case, Chief Prosecutor v. Motiur Rahman Nizami case, and Chief Prosecutor v. Salauddin Quader Chowdhury case argued that under customary international law, crimes against humanity needed to be committed in an armed conflict.[11]

Conversely, the material jurisdiction of Crimes against humanity of the Extraordinary Chamber in the Courts of Cambodia mentioned in article 5 which has no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as *murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, other inhumane acts.* [12]

The material elements of crimes against humanity as stated by the Extraordinary Chamber in the Courts of Cambodia and the international crimes tribunals of Bangladesh are almost similar notions incorporated, excluding "Widespread or systematic" attacks. The defense side of the ICTB argues that "Widespread and systematic" attacks against any civilian population are not linked with crimes against humanity and are not self-evident as forwarded by the tribunal. The definition of crimes against humanity in the ICTB is not similar to other international and internationalized criminal justice mechanisms such as those in East Timor, Sierra Leone, and Cambodia.[13]

[10] International Military Tribunal- Nuremberg Charter 1945, Article 6 (c)

[11] Billah, Maruf, `` Prosecuting Crimes against Humanity and Genocide at the International Crimes Tribunal Bangladesh: An Approach to International Criminal Law Standards, MDPI, Laws 2021,10,82. P (7).

[12] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, Article- 5

[13] Billah, Maruf, `` Prosecuting Crimes against Humanity and Genocide at the International Crimes Tribunal Bangladesh: An Approach to International Criminal Law Standards, MDPI, Laws 2021,10,82. P(7)

6. Accused's rights and defense protection

Accused rights are universally mandated protection as a critical component of a fair trial.[14] Article 14 of the International Covenant on Civil and Political Rights (ICCPR) stated that –

``Everyone shall be entitled to the following minimum guarantees, in full equality: to defend himself in person or through legal assistance of his choosing; to be informed, if he does not have legal assistance, of this right; to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him any such case if he does not have sufficient means to pay for it.''

The above humanitarian protection incorporated various international instruments in their legislation. The ICTA does not contain in any of its provisions the right to counsel.[15] Section 11(2) of the ICT Act of 1973 specifies that `` For the purpose of enabling any accused person to explain any circumstances appearing in the evidence against him, a Tribunal may at any stage of the trial without previously warning the accused person put such questions to him as the Tribunal considers necessary: provided that the accused person shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them but the Tribunal may draw such inference from such refusal or answers as it thinks just;``[16]

The ICTA should be adequately modified to add the principles of protecting the rights of the accused as laid down in the ICCPR.[17]

On the contrary, the accused rights of article 13 incorporate all the fundamental rights enshrined in Articles 14 and 15 of 1966, International Covenant on Civil and Political Rights (ICCPR).[18] It mandates that the accused rights shall be respected throughout the trial process incorporated in Article 35 new of the Extraordinary Chambers in the

---

[14] Sen, Jhuma. `` The Trial of Errors in Bangladesh: The international Crimes (Tribunal) Act and the 1971 war Crimes Trial.'' Harvard Asia Quaterly, 2013: p(42)

[15] Ibid

[16] International Crimes (Tribunal) Act, 1973, Section – 11(2)

[17] Sen, Jhuma. `` The Trial of Errors in Bangladesh: The international Crimes (Tribunal) Act and the 1971 war Crimes Trial.'' Harvard Asia Quaterly, 2013: p (42)

[18] End eley N. Isaac, EVOLUTION OF DEFENCE SYSTEMS IN INTERNATIONAL TRIBUNALS: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (ECCC), P(9) https://unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/i-evolution-defence-systems-international-tribunals-eccc-endeley

Courts of Cambodia incorporated in article 14 of ICCPR. In accordance with Article 35 new of ECCC, it states that `` in determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights- a) to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them; b) to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing; c) to be tried without delay; d) to be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing, to be informed of this right and to have legal assistance assigned to them free of charge if they do not have sufficient means to pay for it; e) to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them; f) to have the free assistance of an interpreter if the accused cannot understand or does not speak the language used in the court; g) not to be compelled to testify against themselves or to confess guilt.``[19]

Article 14 of the ICCPR, the previously mentioned globally acknowledged accused rights protection, is not integrated into the International Crimes Tribunals of Bangladesh as a signatory and member of ICCPR.

7. Retrospective Prosecution

The ICT Act of 1973 applies retrospectively. Section 3(1) of the ICT Act 1973 has sanctioned the prosecution of crimes perpetrated before or after the commencement of the legislation.[20] The constitution of Bangladesh has prohibited the retrospective application of criminal law and is also an issue of debate in international criminal law. [21] Section 3(1) of the ICT act 1973 stated that ``A tribunal shall have the power to try and punish any person irrespective of his nationality who, being a member of any armed, defense or auxiliary forces commits or has

[19] Law on the Extraordinary Chambers in the Courts of Cambodia, with the inclusion of amendments as promulgated on 27 October 2004, Article 35 new

[20] Billah, Maruf. `` Non- retroactivity in Prosecuting Crimes against Humanity and International Crimes Tribunal Bangladesh.'' Journal of Politics and Law; Vol.13; No.3; 2020, P (181)

[21] Hoque, Ridwanul. `` War Crimes Trial in Bangladesh: A Legal Analysis of Fair Trial Debates.'' Australian Journal of Asian Law, Vol. 17 No.1. 2016: P (12)

committed, in the territory of Bangladesh, whether before or after the commencement of this Act.[22] The term "before" in the ICT Act of 1973's section 3(1) refers to the authority to prosecute crimes that were committed before the legislation's beginning, or prior to 1973. The heinous acts were perpetrated on 25 March and 16 December 1971. The tribunals have the power to prosecute the perpetrators on commission from 25 March to 16 December 1971's Acts. The tribunals also have the power to prosecute the perpetrators after committing international crimes after the commencement of the legislation.[23] In the Rome statute, the retrospective prosecution by incorporating art 22 was limited to exercising the ICC's jurisdiction. Article 22(1), states that ``A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. ``[24] As the supreme law of the constitution of Bangladesh, the prohibition of retrospective criminalization does not apply to war crimes trials incorporating art 47A (1) and art 35(1) of the constitution of Bangladesh. Article 47A(1) of the constitution of Bangladesh states that ``the rights guaranteed under article 31, clauses (1) and (3) of article 35, and article 44 shall not apply to any person to whom a law specified in clause (3) of article 47 applies.``[25] The international Crimes tribunal of Bangladesh refers (Prosecutor v. Abul Kalam Azad) that most of the international tribunals i.e. the International Crimes Tribunal for Yugoslavia(ICTY), International Crimes Tribunal of Rwanda(ICTR) and the Extraordinary Courts of Cambodia (ECCC), backed by United Nations have been constituted under their retrospective justice.[26]

Retrospective justice rules on its decision in the case of Chief Prosecutor v. Abdul Quader Mollah, International Crimes Tribunals of Bangladesh states that: `` There should be no ambiguity that even under retrospective legislation (Act XIX enacted in 1973), initiation to prosecute crimes against humanity, genocide, and systemic crimes committed in violation of

[22] The ICT Act 1973 section 3(1)

[23] Billah, Maruf. `` Non- retroactivity in Prosecuting Crimes against Humanity and International Crimes Tribunal Bangladesh.'' Journal of Politics and Law; Vol.13; No.3; 2020, P (181)

[24] Article 22(1) of the Rome Statute

[25] Bangladesh constitution, Article 47A (1)

[26] Prosecutor v. Abul Kalam Azad case, Para 14 ``There should be no ambiguity that even under retrospective legislation (Act XIX enacted in 1973) initiation to prosecute crimes against humanity, genocide and system crimes committed in violation of customary international law is quite permitted. It is to be noted that the ICTY, ICTR, and SCSL the judicial bodies backed by the UN have been constituted under their respective retrospective Statutes. Only the ICC is founded on prospective Statute."

customary international law is fairly permitted. It is to be noted that the ICTY, ICTR, and SCSL, the judicial bodies backed by the United Nations (UN), have been constituted under their respective retrospective statutes. Only the International Criminal Court (ICC) is founded on the prospective statute.``[27] In 2013, the ICT Act 1973 was amended to the retrospective provision to empower the government to appeal against any sentence passed by the ICT, whether the sentence convicted or acquitted the accused.[28] After the retrospective amendment, the government appealed to the Appellate Division against the sentence of Abdul Quader Mollah passed by the ICT and demanded that the sentence be increased the defense objected that the retrospective application of the 2013 amendment was unlawful and should not apply to the Molla case.[29] The International Court of Justice mentioned that the retrospective punishment in the Mollah case is incompatible with Bangladesh's obligations under the ICCPR. It is also a violation of article 15 of ICCPR which clearly prohibits the imposition of a heavier penalty than provided for the criminal offense committed.[30] Brad Adam, Asia director of the Human Rights Watch also criticized the retrospective application of law in the case of Mollah:`` the prohibition against retroactive application of laws is universal protection for everyone against the abuse of laws, without this protection, governments would simply keep mending laws whenever faced with a verdict they didn't like.``[31]

The Extraordinary Chambers in the Court of Cambodia (ECCC) also permitted retrospective prosecution which is backed by United Nations. The crimes were committed in Cambodia during the period from 17 April 1975 to 6 January 1979. The Extraordinary Chambers Court of Cambodia (ECCC), which has a similar retrospective prosecution process as the International Crimes Tribunal of Bangladesh, was formed in 2004. The retrospective prosecution of the ECCC is incorporated in article 15 of the ICCPR. Bangladesh should adopt the ICCPR's Article 15's provision for retroactive prosecution.

---

[27] Chief Prosecutor vs Abdul Quader Molla, Part III, Para III. pp (3) https://www.ict-bd.org/ict2/.

[28] Hoque, Ridwanul. `` War Crimes Trial in Bangladesh: A Legal Analysis of Fair Trial Debates.'' Australian Journal of Asian Law, Vol. 17 No.1. 2016: P (12)

[29] Abdul Quader Molla case, Appellate Division pp (163-175)

[30] http//www.icj.org/bangladesh-Abdul-Quader-mollah-death-sentence-violates-international-law/

[31] http://www.hrw.org/news/2013/09/18/bangladesh-death-sentence-violates-fair-trail-standerds

8. Conclusion

In accordance with the Act of 1973, the International Crimes Tribunal of Bangladesh (ICTB) was created in 2010 and the Extraordinary Chambers in the Court of Cambodia commenced in 2004 both are contemporary International Crimes Tribunals and similar aims for trial to prosecute those who are involved in mass atrocities that occurred respectively from March 25 to December 16, 1971, in East Pakistan (Now Bangladesh) and the period from 17 April 1975 to 6 January 1979 in Cambodia. Both tribunals have distinct Characteristics and the other international crimes tribunals can collaborate and exchange their development of the further International Criminal Justice System. The ICTB does not incorporate the accused rights followed by the International Covenant on Civil and Political Rights (ICCPR), article 13, article 14, and article 15. On the contrary, article 35 new of accused protection incorporates and strictly follows the guidelines of the ECCC was enshrined in the ICCPR of 1966. By implementing Article 14 of the ICCPR, the ICTB may be addressed, its gray areas can be determined, and the accused rights in the prosecution of international crimes can be properly followed. In addition, Retrospective prosecution is the challenge of the International Crimes Tribunals of Bangladesh. Even though most of the International Crimes, i.e., ad hoc and hybrid tribunals including the Extraordinary Chambers in the Courts of Cambodia (ECCC) allowed retrospective application, excluding International Criminal Court. Bangladesh should renounce the use of retrospective applications or adopt article 15 of the ICCPR instead.

Law of Contract Labour and Issues in Deployment

Priya Vijay

Assistant Professor of Law, National University of Study and Research in Law, Ranchi

Afkar Ahmad

Associate professor of Law, G D Goenka University, Haryana

Abstract:

Labourer has been subjected to vulnerable working conditions, and when it comes to contract labourer the issues become all the more complex. The necessity for the contact workers cannot be ruled out for the enterprises where the work is of temporary nature, therefore it was the regulation of the terms of employment of contract labourers and not its abolition which was thought necessary. The law in this regard has been made clear by the judicial pronouncements wherein it has been established that unless the work is perennial in nature contract workers can be employed and there is no right of absorption as per existing law.

Keywords: Contract labour, Vulnerable, Deployment, Dispute, Right of absorption,

The employment of contract workers has become indispensable with the diversification of industries and has also presented numerous employment opportunities for the those in search of work. In the light of the grave exploitation of the contract workers in India, government thought in necessary to enact Contract Labour (Regulation & Abolition) Act, 1970. The Contract Labour (Regulation and Abolition) Act, 1970 is one of thirteen enactments being subsumed under the Occupational Safety, Health and Working Conditions Code, 2020.

The “Occupational Safety, Health and Working Conditions Code, 2020” (OSH Code) was signed by the President of India on 20th September 2020 but it has not yet seen the light of the day. The codification of the labor laws in India has been achieved through the Code by making it one of the most comprehensive legislations. Along with many other legislations the “Contract Labour (Regulation and Abolition) Act, 1970” also got merged into the Code. This codification has done a restructuring of the long-awaited labor laws in India.

As the contract labor has become an order of the day to carry out the additional and work of temporary nature therefore its necessity and indispensable nature cannot be ruled out even by

the government. The most significant issue that has been faced by the employer while employing the contract labour has been, the claims of the contract laborer to be absorbed and be treated as regular employee. Contract labor occupies a huge part of labor force and they are mainly working in seasonal employment. The sectors where the major part of contract workers is engaged are canteen services, painting, construction works, housekeeping etc.

The very idea of the Legislature to provide for The Contract Labour (Regulation and Abolition) Act, 1970 was not to completely abolish the system of contract labour rather it was left for the government to apply its wisdom and determine in which sector the system needs to be abolished and thus to issue a notification to that effect[1]. Though that decision to abolish the contract labour in an Industry cannot be taken without consideration of the due factors under the Contract Labour Act.

The OSH Code which seeks to codify the law relating occupational health and Safety has defined the term Contract Labour as "a worker who shall be deemed to be employed in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer and includes inter-State migrant worker but does not include a worker (other than part time employee) who is regularly employed by the contractor for any activity of his establishment and his employment is governed by mutually accepted standards of the conditions of employment (including engagement on permanent basis), and gets periodical increment in the pay, social security coverage and other welfare benefits in accordance with the law for the time being in force in such employment[2]." The intention of the legislature in defining the term contract labour has been very precise and clear that the contract labour may be employed through contractor but the knowledge on the part of principal employer is immaterial.

Protection of Contract workers

The truth remains that many of our legislative protection for the laborers including constitutional guarantee is hardly enforced. The so-called trade unions meant to serve the interest of labours actually serve the interest of their own leaders. The small and unorganised sectors see the issue more worsen as their labours are left remediless.

---

[1] The Contract Labour (Regulation and Abolition) Act, 1970, Sec.10.

[2] THE OCCUPATIONAL SAFETY, HEALTH AND WORKING CONDITIONS CODE, 2020, Sec 2 (m).

The applicability of the OSH Code has been made conditional upon 50 or more contractual worker in order to avail the protection under the Code[3]. The Code has made a departure from the Contract Labour Act by providing that the contract workers are entitled for welfare facilities and the liability for the same has been imposed upon Principal employer itself[4]. The responsibility for the payment of wages due to the contract workers still primarily belongs to the contractor but in case fails to pay then the principal employer is obligated to pay the same which will be recovered from the contractors as due from him[5].

As defined under the OSH Code 2020, contract labour[6] "means a worker who shall be deemed to be employed in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer and includes inter-State migrant worker but does not include a worker (other than part time employee) who is regularly employed by the contractor for any activity of his establishment and his employment is governed by mutually accepted standards of the conditions of employment (including engagement on permanent basis), and gets periodical increment in the pay, social security coverage and other welfare benefits in accordance with the law for the time being in force in such employment". So, it is visible that even the knowledge of the principal employer has been dispensed with and it would not stand in the way of fixing the liability under the Code.

In order to provide better condition of working and realising their plight and exploitation SC in Standard *Vacuum Refinery Company Vs. Their Workmen*[7] observed " *a) Contract labour should not be employed where The work is perennial and must go on from day to day, b) The work is incidental to and necessary for the work of the Factory ,c) The work is sufficient to employ considerable number of whole time workman, d) The work is being done in most concerns through regular workmen*" reflecting that if the work is continuous in nature and is being done by regular employees in similar other concerns it should not be done by contractual workers.

---

[3] THE OCCUPATIONAL SAFETY, HEALTH AND WORKING CONDITIONS CODE, 2020 Sec. 45 (1).
[4] THE OCCUPATIONAL SAFETY, HEALTH AND WORKING CONDITIONS CODE, 2020 Sec. 53.
[5] THE OCCUPATIONAL SAFETY, HEALTH AND WORKING CONDITIONS CODE, 2020 Sec 55 (3).
[6] THE OCCUPATIONAL SAFETY, HEALTH AND WORKING CONDITIONS CODE, 2020 Section 2 (l).
[7] *1960, (3) SCR, 466.*

The prime objective of the Contract Labour (Regulation and Abolition) Act is to prevent the exploitation of contract workers and to abolish the system of contract labor in cases where the work is perennial in nature. The work is incidental or is necessary for the functioning of the establishment. The work is of such a nature that it can employ a considerable number of workmen full time. The work need not be done by contract workers and can be done by regular workmen. The Constitutional validity of the Act was challenged in *Gammon India Ltd. v. Union of India*[8] declared application of the Act to construction workers as reasonable restriction on the right to carry on trade and profession under article 19(1) (g) of the constitution of India. The validity of statute was also upheld.

Furthermore, the aspects that can be dealt under the Contract Labor abolition Act need to directly correspond to its object as in Indian *Explosives Ltd. v. State of UP*[9] *"*the dispute was about workmen in the company's factory canteen, court said there was no question of question of abolition of contract labour, the dispute can be referred to the industrial Tribunal for adjudication".

Issues relating to contract Labour

Recently a trend amongst the contract labourers is apparent once they have been in employment for few years that held themselves entitled to be treated as employees of principal employer. This becomes more obvious when the principal employer is any govt instrumentality. This has acted as a burden on the enterprises specially PSU who are more akin to govt pressure and thereby reluctant to employ them. Though the catena of cases by SC has settled the issue still time and again a new service condition becomes the bone of contention between the employer and contractual workers. In *R.K. Panda and Ors. vs. Steel Authority of India and Ors*[10]The court was wise enough to held that *"a trend amongst the contract laborer is discernible that after having worked for some years, they make a claim that they should be absorbed by the principal employer and be treated as the employees of the principal employer especially when the principal employer is the Central Government or the State Government or an authority which can be held to be State within the meaning of Article 12 of the Constitution,* ***although***

[8] 1974 SCC (L & S) 252.).
[9] 1981) 1 LLJ 423 (All H.C.).
[10] MANU/SC/0793/1994.

no right flows from the provisions of the Act or the contract laborer to be absorbed or to become the employees of the principal employer"

B.H.E.L. Workers' Association v. Union of India[11] it was pointed out that Parliament has not abolished the contract labour as such but has provided for its abolition by the Central Government in appropriate cases under Section 10 of the Act. It is not for the Court to enquire into the question and to decide whether the employment of contract labour in any process, operation or other work in any establishment should be abolished or not. That has to be decided by the Government after considering the relevant aspects as required by Section 10 of the Act.

In order to provide wider interpretation to the law protecting contract worker the judiciary has relaxed the technical requirements. *"A ship or vessel in which repair work is carried on is a place and an "establishment" within the meaning of S. 2 (I) (e) (ii). The work site or place may or may not belong to the principal employer, but that will not stand in the way of application of the Act or in holding that a particular place or work site where industry, trade, business, manufacture or occupation is carried on is not an establishment"*[12].

The OSH Code has expanded the definition of Principal employer[13] by linking the supervision and control of the establishment with the liability under the Code and the applicability has also been declared by providing that "(i) every establishment in which fifty or more contract labour are employed or were employed on any day of the preceding twelve months through contract; (ii) every manpower supply contractor who has employed, on any day of the preceding twelve months, fifty or more contract labour"[14].

This Part of the Code shall not apply to the establishment in which work only of an intermittent or casual nature is performed and the determination of intermittent or casual nature will be done by appropriate government after consulting the National Board and State Advisory board

---

[11] (1985)ILLJ428SC.
[12] Lionel Edwards Ltd. v, Labour Enforcement Officer, (1978) 53 FJR 116 (Cal DB.
[13] Sec 2 ZZ OSH Code principal employer", where the contract labour is employed or engaged, means—
"(i) in relation to any office or Department of the Government or a local authority, the head of that office or Department or such other officer as the Government or the local authority, may specify in this behalf;
(ii) in a factory, the owner or occupier of the factory and where a person has been named as the manager of the factory, the person so named; (iii) in a mine, the owner or agent of the mine;
(iv) in relation to any other establishment, any person responsible for the supervision and control of the establishment;"
[14] OSH Code 45 (1).

which is final[15]. The Code has also defined the criteria of intermittent nature by linking it with a minimum time frame.[16].

The OSH Code prohibits employment of contract worker but permits them only in core activities of the enterprises and that to only in limited case such as where there is sudden rise in work that needs to be fulfilled in limited time, or the work being of such nature that does not requires full time workers etc.[17].

In Dena Nath and others vs. National Fertilisers Ltd. and others [18] the issue before the court was **"**Whether persons employed by principal employer who has not obtained registration as per provisions of Act shall be deemed to be direct employees". Supreme Court observed that "High Court should not be deciding as to whether any kind of employment of contract labour in any establishment be abolished only on ground of noncompliance of provisions, Court cannot issue any mandamus for deeming contract labor as having become employees of principal employer." The court did not allow the technical compliance to be taken as an advantage by the employees.

Again, the Issue of absorption came into question in *R K Panda v. Steel Authority of India*[19] The workers claimed to get the same wages as regular employees as they were performing work of perennial nature. SC was of the opinion that decision to absorb them in the workforce or to terminate the services, belong to the discretion of employer alone. Though sometimes the principal employer may find it suitable that old workers are retained while renewing the contract but "such a clause in the contract which is benevolently inserted in the contract to protect the continuance of the source of livelihood of the contract labor cannot by itself give rise to a right to regularization in the employment of the principal employer[20]."

The issue of absorption of contract labor as permanent employees of the principal employers have raised issues time and again in India, especially in the light of the fact that contract workers have become order of the day. Though we do not deny the fact that in the

---

[15] OSH Code sec 45 (2)

[16] Sec 45 Explanation- work performed in an establishment shall not be deemed to be of an intermittent nature— (i) if it was performed for more than one hundred and twenty days in the preceding twelve months; or (ii) if it is of seasonal character and is performed for more than sixty days in a year

[17] OSH Code Sec 57 (1)

[18] 1992 AIR 457,

[19] R.K. Panda and ors. vs. Steel Authority of India and ors

[20] Ibid.

commercialized competitive world forcing enterprises to absorb even contractual workers would compromise their freedom as well as efficiency therefore the law needs to be modified to clearly indicate the liability of the employer to consider for permanent employment and also the circumstances which may give rise to right created in favor of the contract workers. Even the OSH Code has not addressed the issue which is likely to again face the challenges in the days to come.

It is submitted by the authors that the necessity of the contract laborers in most of the industries cannot be undermined and therefore its complete abolition cannot serve the purpose. The judiciary has brought an end to the controversy that lied around their right to absorption. The legislature has taken the initiative by providing the new system of protection for the contract workers through the new labour code.

The labour code is yet to see the light of the day therefore it would be too early to comment upon its working. The willingness shown in the legislative provision by the government would go a long way in improving the plight of the contract workers and allow them constructive place in the industry concerned.

Digital Evolution-possibilities of Using New Techonlogies in the Field of Taxes

Ksenija Cipek

International Tax Expert , Lawmaker, Project Leader, Head of Tax Risk Analysis at Ministry of Finance , Tax Adm., Croatia

Introduction

The world continues with its development in the new, Fourth Industrial Revolution. The Fourth Industrial Revolution represents a fundamental change in the way we live, work and relate to one another. It is a new chapter in human development, enabled by extraordinary technology advances commensurate with those of the first, second and third industrial revolutions. These advances are merging the physical, digital and biological worlds in ways that create both huge promise and potential peril. The speed, breadth and depth of this revolution is forcing us to rethink how countries develop, how organisations create value and even what it means to be human. The Fourth Industrial Revolution is about more than just technology-driven change; it is an opportunity to help everyone, including leaders, policy-makers and people from all income groups and nations, to harness converging technologies in order to create an inclusive, human-centred future. The real opportunity is to look beyond technology, and find ways to give the greatest number of people the ability to positively impact their families, organisations and communities.[1]
From the broad definition of the influence of The Fourth Industrial Revolution to the world as it has been known so far, this text attempts to sum up the most important new technological challenges that tax administrations face and the impact on the overall tax law system.

The Fourth Industrial R evolution can be called digital evolution in terms of technological achievements. The new digital era creates new challenges, but also new, absolutely amazing, great opportunities that we must know how to use it. Especially in the area of tax policy which is always of vital importance for the whole society.

The emergence of Artificial Intelligence, Machine Learning, Blockchain and Distributed Ledger Technology, opens up tax administrations of the way of analysis, testing the application of the best solutions. Time is already here!

The World Economic Forum (WEF) has identified blockchain technology as one of its six mega-trends in a new report broadly aimed at outlining the expected transition to a more digital and connected world. Compiled by the WEF‘s Global Agenda Council on the Future of Software and Society, the report included the results of a survey of more than 800 information and communications executives and experts. Perhaps most notable among the poll’s findings

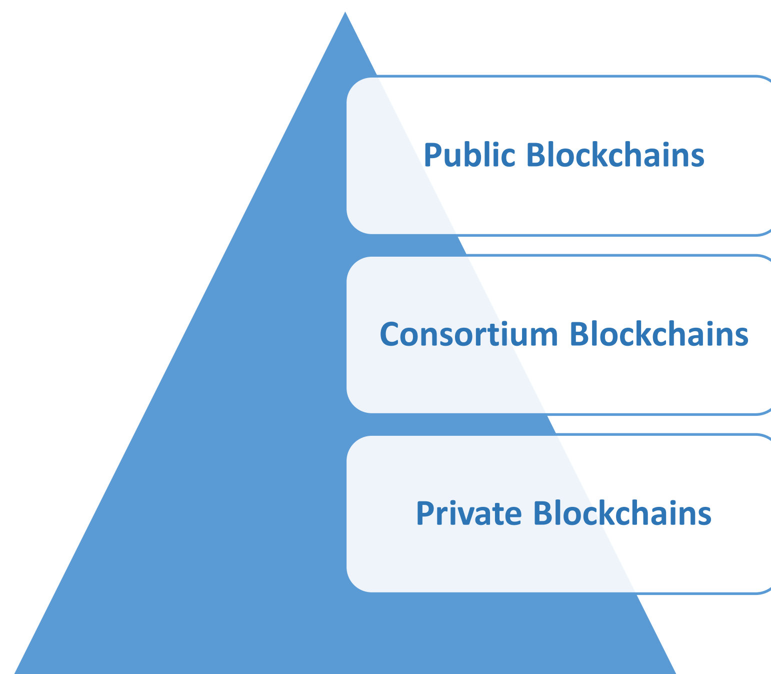
[1] https://www.weforum.org/focus/fourth-industrial-revolution

is that those surveyed believe the "tipping point" for government use of the blockchain will occur by 2023. For purposes of the survey, blockchain technology was broadly defined as "an emerging technology [that] replaces the need for third-party institutions to provide trust for financial, contract and voting activities".[2]

Blockchain is a ledger that can be added to but not modified, making it very secure. Each entry is secured into blocks of entries, and each new block is linked to the previous one. Blockchain is historically known as a core part of the digital currency bitcoin but can be used for any transaction of value.[3]

A 'blockchain' is a particular type of data structure used in some distributed ledgers which stores and transmits data in packages called "blocks" that are connected to each other in a digital 'chain'. Blockchains employ cryptographic and algorithmic methods to record and synchronize data across a network in an immutable manner.[4]

Types of blockchain



[2] https://www.coindesk.com/world-economic-forum-governments-blockchain
[3] https://cloudblogs.microsoft.com/industry-blog/government/2019/04/16/could-blockchain-become-governments-best-ally-in-driving-tax-compliance/
[4] http://documents.worldbank.org/curated/en/177911513714062215/pdf/122140-WP-PUBLIC-Distributed-Ledger-Technology-and-Blockchain-Fintech-Notes.pdf

Public Blockchains[5] **-** Public blockchains are just that, public. Anyone that wants to read, write, or join a public blockchain can do so. Public chains are decentralized meaning no one body has control over the network, ensuring the data can't be changed once validated on the blockchain. Simply meaning, anyone, anywhere, can use a public blockchain to input transactions and data as long as they are connected to the network. Some well-known examples of Public Blockchains would be Bitcoin and Ethereum, with Bitcoin being among the first Blockchain application to prove that value could be moved across the globe without third-parties like banks or remittance companies.

Consortium Blockchains - Consortium blockchains differ to their public counterpart in that they are permissioned, thus, not just anyone with an internet connection could gain access to a consortium blockchain. These types of blockchains could also be described as being semi-decentralized. Control over a consortium blockchain is not granted to a single entity, but rather a group of approved individuals. With a consortium blockchain, the consensus process is likely to differ to that of a public blockchain. Instead of anyone being able to partake in the procedure, consensus participants of a consortium blockchain are likely to be a group of pre-approved nodes on the network. Thus, consortium blockchains possess the security features that are inherent in public blockchains, whilst also allowing for a greater degree of control over the network. Examples of consortium blockchains would be: Quorum, Hyperledger and Corda.[6]

Private Blockchains - In private blockchains, the owner of the blockchain is a single entity or an enterprise which can override/delete commands on a blockchain if needed. That's why in its true sense it is not decentralized and hence can just be called a distributed ledger or database with cryptography to secure it. In comparison to public blockchain it is much faster and cheaper because one doesn't have to spend an enormous amount of energy, time and money to reach a consensus here. But in other sense, it is much less secure and closed as compared to public blockchain because it can be edited/written or read as when wished and deemed fit by the benefiting parties. To make any changes in such types of blockchains, one needs special privileges and accesses. Example: Bankchain.[7]

Fulfilling blockchain's potential, however, depends on a policy environment that allows innovation and experimentation, while balancing the risks of misuse. Governments will play a significant role in shaping policy and regulatory frameworks that help address challenges presented by the technology, and foster transparent, fair and stable markets as blockchain develops.

Tax administrations were already interested in applications of blockchain technology and some actions and studies have taken place, initially associated with the Academy, to identify areas for application in the tax administration. Typically, VAT management and payment were the

[5] https://hackernoon.com/public-vs-private-blockchain-4b4aa9326168
[6] See https://www.mycryptopedia.com/consortium-blockchain-explained/ on 27 may 2019
[7] https://coinsutra.com/private-blockchain-public-blockchain/

first designed applications, although at the academic level, as we shall see in the next chapter. Also, we can think of applications that require the coordination of actions between tax administrations; between administrations and taxpayers; between internal departments of a tax administration. Typically, tax applications will be developed in blockchains of the type consortium or private. Specialists warn that the blockchain is a potential facilitator, but not the complete solution. The expansion of the digital world and the shared economy will probably force the TAs to seek new legislation, methods and technologies to ensure the collection of taxes. Blockchain would be a potential partner in these efforts. It is admitted that this technology can change the way taxes are collected: the responsibility for collecting the tax on income or sales may possibly shift completely from tax authorities towards the participants of the shared economy.[8]

While blockchain is not the cure all for the tax system, it could be applied in a number of areas to reduce the administrative burden and collect tax at a lower cost, helping to narrow the tax gap Blockchain's core attributes mean that it has significant potential for use in tax:

- Transparency: blockchain provides provenance, traceability and transparency of transactions
- Control: access to permissioned networks is restricted to identified users
- Security: the digital ledger cannot be altered or tampered with once the data is entered. Fraud is less likely and easier to spot
- Real-time information: when information is updated, it's updated for everyone in the network at the same time[9]

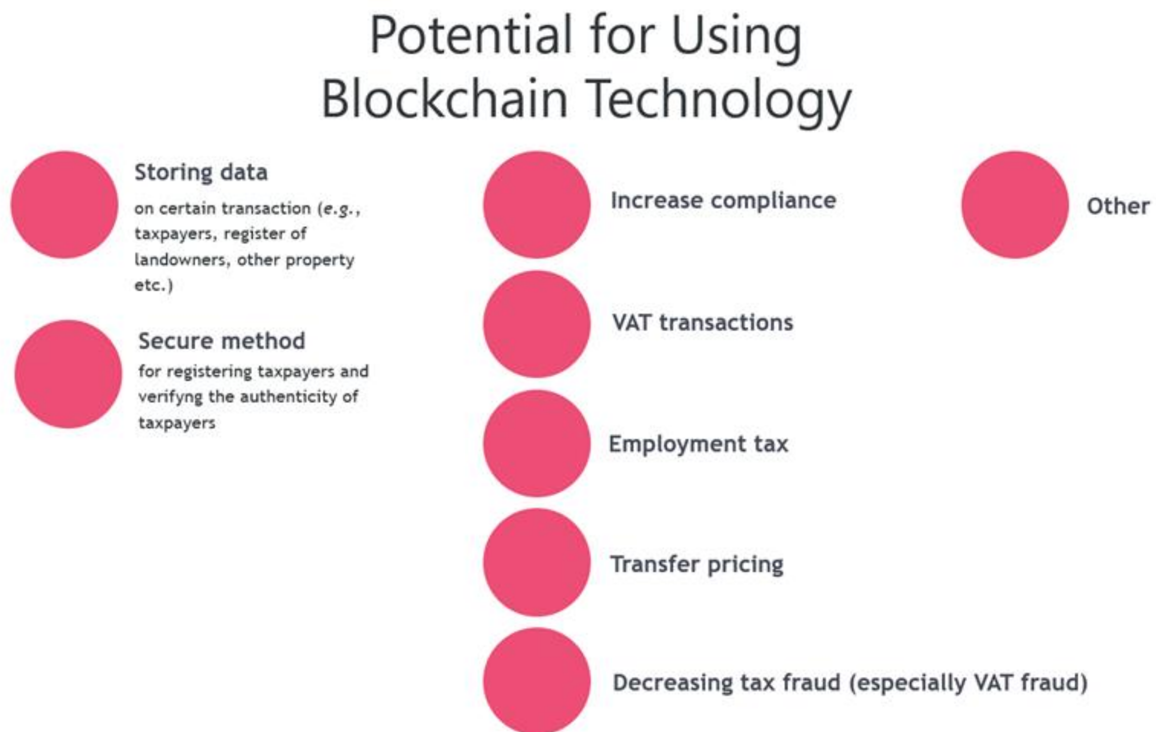
Tax administrations are part of the influence of new technologies that are developing within The Fourth Industrial Revolution. Their reactions and actions must be timely. The primary purposes of tax administration are to collect tax revenues in accordance with the laws, but also to service taxpayers. Taxpayers must, amongst other things, have a simple, fast, secure and cost-effective way of exchanging information with tax administrations and vice versa, tax administrations with taxpayers. In addition, in the same efficient way, tax administrations must ensure the exchange of data, in accordance with laws and international agreements, and with other institutions at national and international level, as well as internally.
Security, trust, and transparency are some of the main benefits of using blockchain, making it well suited to tax compliance. Because blockchain is an objective, mutually agreed-upon record of transactions, multiple parties can verify every step of a process.[10]

Governments and tax authorities have blockchain firmly in their sights as part of a wider move towards digitising the tax system and assessing tax in real-time. The initial focus is likely to be indirect taxation, though other areas of tax management such as transfer pricing could be

---

[8] https://www.ciat.org/blockchain-concepts-and-potential-applications-in-the-tax-area-13/?lang=en
[9] https://www.pwc.co.uk/issues/futuretax/how-blockchain-technology-could-improve-tax-system.html
[10] https://cloudblogs.microsoft.com/industry-blog/government/2019/04/16/could-blockchain-become-governments-best-ally-in-driving-tax-compliance/

brought into play as blockchain networks develop. Eventually, blockchain could become the primary means of tax collection.[11]



In communications, tax administrations must in particular ensure:

- Quality data warehouse: minimize error data, real-time data and data usage (data should not be for the own purpose only, without using them)
- Security and data protection
- Controlling data, especially their immutability
- Exchange quality data in a way:

- Timely and in the shortest possible time (effectiveness in the prevention of tax fraud, but also exchange of data with the taxpayer, which affects the increase compliance)
- Lower cost for both sides.

[11] https://www.grantthornton.global/en/insights/articles/taxation-in-realtime-blockchain/

- Timely detection and prevention of taxpayers' risk behavior, as well as internal risks

- Predictive analyitics for future preventive communication.

Tax administrations must monitor, analyze and test new technologies in order to make quality solutions solely for priority.

Anonymity of data is not acceptable. The data must be accurate in a visible way so that all relevant information for tax administration can be read from them.

However, it is clear that new technologies such as Blockchain and DLT can provide in certain segments, better communication with tax administrations.

Immutability data, use of smart contracts, real-time data, are just some of the benefits.

Considering that tax administrations communicate with a huge amount of data, attention to the selection and implementation of new technologies is of particular importance.

In addition, new technologies also contain certain disadvatages, but this should not be a reason for a priori withdrawal. High quality analyzes and studies can provide the best solution for the digital era.

Tax administrations should be ready at this time to accept all the challenges posed by digital evolution. Movement is possible only forward.

Gender Inequality and Domestic Violence Perpetrated by Women against Men

Sumit Agarwala and Shweta Rathore
Assistant Professor,
School of Law, G D Goenka University, Gurugram, Haryana.

Abstract:
Domestic Violence is an epidemic of society. Though Domestic violence laws were framed for the protection of genuine female victims, but now these laws have become the weapon of some greedy and disgruntled females who misuse these protective shields against their male spouse and in-laws for obtaining financial benefits or for taking revenge due to incompatibility on account of trivial issues and file false cases by taking advantage of these laws to teach them lessons. Gone the days when females were downtrodden, now they are putting steps ahead with males in external world. Now-a-days, gender inequality is also being demonstrated in the patterns of abuse used by females towards males. Indian domestic violence Laws are gender biased, that's why the cry of males remain unheard and helpless to file any complaint against the injustice doing by their female spouse and in-laws under the garb of gender biased domestic violence laws. Due to the changing gender roles in Indian society, it is assumed that this problem of domestic violence against males will spread gradually and it will destruct the social structure by affecting the families and institution of marriage of Indian society. Through the present paper, the author is making an endeavor to highlight how gender inequality and domestic violence is perpetrated by women against men by misusing the provisions of gender biased domestic violence laws in India. The research paper has been deliberated on the strength of doctrinal methodology based on secondary source of data.

Key Words: *Domestic violence laws, gender inequality, men, women*.

I. Introduction

Whenever most of the people hear about the term domestic violence, they prima facie consider male as a perpetrator and female as a meek cow. Whereas it has been observed now a days that domestic violence against males is very common but patriarchal Indian society make fun of

such males by raising question mark on their manhood if they ever notice such instance, in-spite of considering it a gross violation of their human rights and fundamental rights under Article 14 and 21 of the Indian Constitution. Males also face domestic violence by their female spouse and sometimes females misuse the protective domestic violence laws against males. On account of the same, males are also facing emotional trauma and due to the same, they don't want to come out. Domestic violence has been recognized as a violence that adversely affects the both females and males mentally, physically, psychologically across the globe, that's why many countries have made their domestic violence laws gender neutral but in India, legislators have still not addressed it. Though Indian males are facing violence from their wives and it's a reality, but presently all three domestic violence laws are female -centric. That's why males are unable to file any complaint against their spouse and in-laws for domestic violence. Basically, it's a common thinking that male cannot be a victim of domestic violence –this helps the females get away unpunished.

The National Family Health Survey has observed during the year 2004 that about one percent or around sixty lakhs' females have perpetrated physical violence against their male spouse without any provocation. Surprising fact about this survey is that males are even not asked whether they are dealing with domestic violence or not? Because people have this taboo that "Male feels no pain."

As per the NCRB data of 2005 regarding the suicide by married males in India- "Fifty thousand married males are committing suicide which is quite higher around seventy eight percent, as compared to the married females' suicide rate which is merely twenty-eight thousand. Still why there is no existence of any Law for the protection of males?"[1]

False cases against males have been observed a significant rise. As according to NCRB data of 2019, over one lakh twenty-five thousand, six hundred and fifty-seven males acquitted from domestic violence laws.

II. Nature of the violence against males by females in India

[1](2005) NCRB

Most of the males reported that their female spouse refuses for sex and always use this refusal as a weapon against them as Indian males mostly restraint from doing sex outside their marital relation. Mostly males also reported that they are scared for implicating in false cases by their in-laws and likewise forced by them to bow down on knees in front of the unfair demands of female spouse. It's like a demonstration of the fact that females are mostly verbally harsh and insulting towards their male spouse and their parents.[2]

III. Criticism of Domestic Violence Act and section 498 A

The said Act only includes females as an aggrieved person and keeps male out of its ambit. Hence, according to the said law only females can be considered as victims of domestic violence, therefore, no cases from males are seen to be reported for enduring violence from their female spouse. Feminists justifies it by stating that protecting females is more significant just because males are physically stronger. Mostly cases of domestic violence are reported in urban areas where aware females are smart enough to misuse the provisions for subserving their ulterior motives in order to extort money by the way of torturing male spouse and in-laws. Domestic violence laws are too much biased to be misused by the greedy and disgruntled female spouse even on trivial issues, which is quite lucid from the too much expansive definition of domestic violence under Domestic Violence Act and that's why the same is grossly misused.

Likewise, "harassment" it has been defined under the said Act from female point of view. The term "Economic Abuse" denotes – "hardship of all or any financial or budgetary asset to which the abused individual is entitled under any law or custom". In the case if male spouse wins cash and doesn't pay female spouse, then the same will be considered as abusive attitude at dwelling. But on the contrary, if wife gains and does not pay the male spouse, then the same will not be treated on similar grounds. Because females are supposed to have no duty regarding fiscal contribution to family at all, and the same should be fallen in the category of abusive attitude at dwelling against males.

---

[2]"Domestic Violence" (*National Centre for Victims of Crime* July 29, 2022) <https://www.justice.gov/ovw/domestic-violence> accessed September 15, 2022

“Verbal” and “emotional abuse” is also abstruse because it is assumed by the Act that females cannot affront, mortify or criticize anyone. Further the definition of “abuse” is too broad to accuse any male by his female spouse.

The former President of India, Smt. Pratibha Patil also acknowledged the gross misuse of domestic violence laws by admitting, “there has been the existence of the instances where the shield of legal provisions for females have been subjected to misuse for maliciously wreaking petty vengeance for settling scores against the fair invocation of favorable provisions and their objectives as well as honest enforcement. She further condemned by stating that its’s quite objectionable if protective laws get misused as a weapon for harassment.”

Further section 498A of I.P.C., the potential weapon of females, is also often misused by them as well as by police to harass husband and his innocent family for extortion of money by blackmailing them. The Centre for Social Research in India has stated in a study regarding implications of the said section that “it is grossly misused by independent and educated females” Even the movie by the name “498A: The Wedding Gift has been made to show the pathetic reality how innocent husbands commit suicide on account of torture by their female spouse by misusing the said section as an assassin’s weapon. Due to the structure and nature of the said section, any complaint lack of evidence, is quite sufficient not only to arrest male spouse but also roping his entire innocent family members for taking recourse by the female spouse and her family members if they are caught by the male spouse and his family for concealing facts regarding mental health or educational status at the time of wedding in order to adopt fraudulent means for forging alliance.

Here the mention of the letter by Syed Ahmed Makhdoom is quite relevant, who ended his life due to the unbearable torture by his female spouse under the garb of the said section- “My wife and in-laws demanded the amount of Rs ten lakhs from me and in case of failure to fulfill the said demand due to financial crisis, I was prevented to meet my beloved son and also got implicated falsely under section 498 A, for which I have been caught without even considering the truth by the police. I literally died on that day for two reasons- firstly, for keeping away from my son and secondly, for harassment by my better half.”

On 9th of May, a gathering comprised of males outbroke a battle to scratch section 498A and spoke too much regarding the abuse of unproportionate gender specific domestic violence laws in Telangana.[3]

IV. Judicial Pronouncements:

The following judgements not only acknowledged but also condemned the gross misuse of sec-498A:

The Supreme Court observed in **Preeti Gupta v. State of Jharkhand**,[4] due to the reflection of the tendency of over implication in most of the cases, serious relook of the entire provision is warranted by the legislature.

In **Sushil Kumar v. Union of India Jharkhand** [5], Supreme Court again held that "mostly complaints under section 498 A have been filed due to oblique motives for personal vengeance, that's why legislature is supposed to curb misuse of the said section which is unleashing legal terrorism by the way of falsely accusing the persons.

While noticing the reverse trend, The Supreme Court asked the Parliament and Law Commission to frame the offence as bailable and non-cognizable in the case of **Saritha vs. R. Ramchandra** [6]**.** Further in the case of **Arnesh Kumar vs. State of Bihar** [7], the Hon'ble Supreme Court also accepted that "the provisions under Section 498A of the Indian Penal Code are being utilized to harass the male spouses and his relatives by disgruntled wives. The rate of charge sheet under the said section was 93.3 percent whereas conviction rate was staggering

[3] "Almost Every Men Indian Husband Is Subjected to Domestic Violence" <https:// themalefactor.com/2014/02/18/almost-every-indian-husband-is-subjected-to-domestic-violence> accessed September 13, 2022
[4] (2010)7 SCC 667
[5] (2005) 6 SCC 281
[6] 2002 SCC Online AP 631
[7] (2014) 8 SCC 273

low and was merely fifteen percent. Out of 3,72,706 pending cases,3,17,000 were about to result in acquittal, which is quite surprising ."[8]

It was extracted by 243rd Report of Law Commission, pointing out the gross misuse of Domestic Violence Laws – "By virtue of NCRB data 2011, conviction rate under section 498A is 21.2 percent only out of 3,39,902 (Three Lakh Thirty-Nine Thousand Nine Hundred Two) cases. "In fact, in the year 2013, ten percent of the cases, which were filed under section 498A of the Indian Penal Code, i.e., the dowry harassment law, turned out to be fake. Male cannot even protect himself due to the availability of minimal legal remedies to him. Hence males suffer in silence as their manhood is questioned if they try to speak up."

V. *Conclusion and Suggestions*

Unfortunately, females are taking unnecessary advantage of considering as "weaker sex" by way of fraudulent claims of domestic violence which are unpunished in many States and provocation of spousal abuse by females is encouraged by such laws. Mostly a female spouse might deliberately provoke male spouse to slap her subject to the ulterior motive of obtaining settlement of divorce in her favor. It is submitted that merely misuse shouldn't be considered as a ground to repeal the favorable provisions of Domestic Violence Laws, but some significant amendments are suggested in said laws to curb misuse which are as under:

a. It is suggested that Section 498-A IPC should be converted as non-cognizable and bailable looking at the ever-increasing fake complaints in future.

b. Numerous definitions of PWDV Act are extremely expansive, hence the same should be precise and unbiased in order to check its frequent misuse.

c. The counselling mechanism under PWDV Act should be enforced by State Govts. As well as counselling of the concerned parties should be conducted by professionally qualified counsellors, instead of police men.

d. In order to arrest under section 498A, written orders of DCP or equivalent level subject to the acceptable reasons should be made mandatory.

e. The amendment under section 41 of Code of Criminal Procedure is suggested to make the offence compoundable bailable under section 498A.

f. The Domestic Violence Act and section 498A should be amended for providing specific penalty if the complaint is found to be false on account of subserving ulterior motives and misuser should be made liable to compensate the financial losses endured by the falsely accused persons.

g. Though it has been stated by Delhi High Court that the provisions of PWDV Act are applicable against women, but the legislators should include the same in the said Act by amending it. Hence, PWDV Act should be made gender neutral to check its gross misuse.

h. Time bound trial should be made mandatory in all domestic violence laws to mitigate the unnecessary litigation and inconvenience to accused party.

i. The trial under PWDV Act should be made in the pursuance of Evidence Act instead of Code of Criminal Procedure. in order to the sole testimony of a female is not considered true but is backed by the proper evidences.

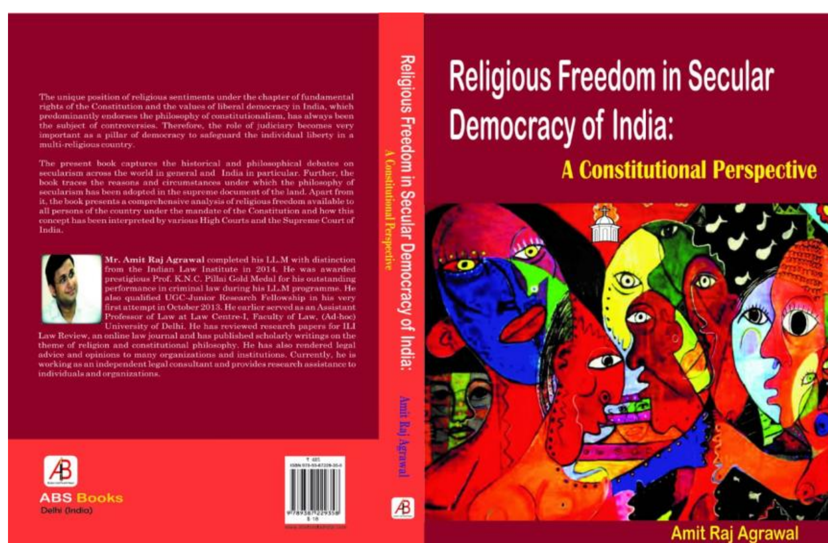
j. India must guide the globe on how inclusion is an example, as our nation gave woman Prime Minister to the world when gender equality was just a utopian concept. The legislators must protect the vulnerable females but continue to shield innocent males who are the silent bearers for no cause. Both are equally precious to the mankind. As a society moving towards equality, we need every side to be equal. By talking about equality, we can't only fight for women's rights, we have to fight for rights of males also.

Book Review

Religious Freedom in Secular Democracy of India: A Constitutional Perspective

Author: Amit Raj Agrawal**,** Assistant Professor, School of Law, G D Goenka University, Gurugram , Haryana.

Book Review by: Azimkhan B. Pathan ,Professor & Head of the Department, School of Law, GD Goenka University, Sohna Gurugram, Haryana.



The book, *Religious Freedom in Secular Democracy of India: A Constitutional Perspective*,[9] identifies very contemporary area of discussion on religious freedom vis-à-vis secular democracy. The book uncovers the constitutional perspective of the religious freedom. Book also exposes the scope and ambit of secularism along with the idea of secular state. It also explores the discussion on constitutional mandate provided for freedom of religion in India. Book also unearths the judicial creativity over religious freedom in India. This book also elaborately provide discussion on the issues like communalism, religion and politics, forced conversion, taxation to promote religion and state sponsored religious activities in India. This book came at right time when the country is grappling with many constitutional issues with reference to freedom of religion and secular character of Indian democracy.

[9] Amit Raj Agrawal, *Religious Freedom in Secular Democracy of India: A Constitutional Perspective,* (edn., 2020).

Manoj Kumar Sinha[10], M. Mahalingam[11] and Deepak Jain[12] have provided impressive and eruditely the introduction and forewords to the book. Shivendra Kumar Mishra[13] has also very aptly stated in the 'foreword' to the book that "the scholarly work on the subject is lucid and convincing. It captures the constitutional perspectives of different countries over the theme of religion and its relationship with the State and its people". Indeed, the scholarly work of the author is a value addition to the existing knowledge base. However, the author could extend his further edition with the current grappling issues on the freedom of religion and essential and integral practices of religions. Recently Karnataka High Court in Resham vs. State of Karnataka and others (2022) has dealt the issue with reference to freedom of religion and essential and integral practice of religion and Supreme Court of India has also flooded with petitions on the final interpretation on the subject matter. To keep the country and its democracy based on the secular characteristics, attempt which has been made by way of Places of Worship (Special Provisions) Act, 1991. This Act declared religious character of places of worships existing on the 15th day of August, 1947 shall continue to be the same as it existed on that day; this is towards maintenance of unity and integrity of India and for preserving secular characteristics of *democracy* in furtherance of not to use historical wrongs *as instruments to oppress the present and the future generations.*

Anurag Deep,[14] very aptly provided the introduction saying how USA has recognised in its Constitution as Secular country with negative approach and how Indian Democracy is based on positive approach and on the concept of '*Sarv Dharma Samabhav'*. Moreover, in India State is empowered to make laws to restrict religious freedom for reform.

For readers' better understanding, contents of the book are divided into six chapters *viz.,* Chapter-one, Prologue; Chapter-two, Secularism and Secular State- Definition, Nature and Scope; Chapter-three, Constitutional Mandate on Freedom of Religion in India; Chapter-four, Judicial Mindset over Religious Freedom in India; Chapter-five, Secularism in India-Issues and Challenges and Chapter-Six, Epilogue. In addition, author has provided Bibliography and Index for further research and references.

[10] Director and Professor of Law, The Indian Law Institute, New Delhi.
[11] Associate Professor, Faculty of Law, SGT University, Gurugram, Haryana
[12] CS and Life Coach and Spiritual Motivational Speaker and Founder, Vijayash Foundation.
[13] Shivendra Kumar Mishra, Civil Judge, District and Session Court, Deoria, Uttar Pradesh, India.
[14] Associate Professor, The Indian Law Institute, New Delhi.

In the introductory Chapter *Prologue*, the author very pin pointedly introduced the concept of Secularism in Constitution of India as it is not similar to USA Constitution, where there is complete separation of religion and State action with negative approach. Author has very aptly provided the discourse on how Indian concept of secularism conceptualized based on Yajur Veda, Rig Veda, Atharva Veda and Akbar Din-e-Ilahi and how the concept imbibed in itself the idea of *Sarva Dharma Sambhav i.e.* tolerance for all regions. United Nations had also started its work on the principles of tolerance as a human rights. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (the "1981 Declaration"), has also brought the idea and concept for all country parties of UNO for freedom of religion and freedom of conscience. Author may further substantiate his work in coming edition to the above effect. Author in introductory chapter has very eruditely emphasised upon the judicial trend towards the concept of secularism in the constitutional jurisprudence citing the Keshavanand Bharati vs. State of Karala (1973), S.R. Bommai vs. Union of India (1994), Shayara Baono vs. Union of India (2017) providing the account of the essential religious practices protection under Article 25 of Indian Constitution. Author has also provided the practical experiences where state is involving itself in the religious affairs by way of providing subsidy for Haz and expenses for organization of Kumbh Mela, when the constitutional mandate has prohibited the same.

The *second* Chapter expounds on Secularism and Secular State providing definitions, nature and its scope. Author has established categorically relationship between Secular State and Secularism. He further emphasised upon the observations of some of the prominent scholars including Garry Jeffry Jacobson, R.L. Chaudhary and Donald E. Smith. Author has succeeded in pointing out divergent views upon the concept of secularism. He elaborately brought European, American and Asian perspective of secularism including Indian context.

The *third* Chapter uncovers constitutional mandate on freedom of religion in India. Before discussing Secularism in Indian Constitution author has discussed different operative models of secularism in respect of western countries. Author further elaborately discussed upon the Indian Constitution and its different parts explaining different parts' which is based on secularism. He described about preamble, union and its territory, citizenship, directive principles of state policy, fundamental duties and election process.

In the *fourth* Chapter of this book about judicial mind-set over religious freedom in India author explained scholarly observations upon religious freedom and also judicial observations. Author while discussing judicial observation upon essential and non-essential religious practices cited 14 judicial pronouncement till 2009. However author could also substantiate in next edition the new perspectives and powerful dissent which has come out in the case of Indian Young Lawyers Association vs. State of Kerala and Ors. (2018). In this case Justice Indu Malhotra has given powerful dissent saying that the matter of what is essential practice of any religion should be left to the religion only. Court should not enter for judicial review of faith and religion of the people. Author has further elaborately discussed judicial observation upon the issues of freedom of religion with basic structure doctrine, election and minorities rights.

In the *fifth* Chapter of this book author has very categorically discussed on the issues and challenges with reference to secularism in India. He has discussed about the issues of communalism, religion and politics, forced conversion taxation to promote religion and state sponsored religious activities in India. He very painstakingly discussed the different approaches of the judiciary towards the above issues.

In *epilogue* of the book author has elaborately provided brief about what has been discussed in different chapters. He also very categorically provided the observations on every chapter. In its entirety, book deals with very contemporary issue relating to secularism and freedom of religions in India. The book also covers conceptual and contextual background about the secularism and secular state. It has also elaborately discussed about the constitutional perspective of freedom of religion, judicial role over freedom of religion in India and issues and challenges relating to secularism in India. Book is systematically arranged from concept to different continents' perspectives over secularism and after that Indian perspective is discussed. Author maintained very accurately the flow of every chapter. The book would help research scholars, students, academicians and practitioners in understanding basic concepts and different nuances about the secularism and freedom of religion in India.

Azimkhan B. Pathan[15]

---

[15] Professor and Head of the Department, School of Law, GD Goenka University, Sohna Gurugram, Haryana.

GDGU LAW REVIEW

A Peer –Reviewed Journal by School of Law GD Goenka University

Guidelines for Submission

ABOUT THE JOURNAL

In the continuation and dissemination of the quality, original, and innovative research-based contributions in the domain of legal and interdisciplinary research, the Journal Committee of the School of Law, GD Goenka University hereby invites research articles/papers, case studies/commentaries, policy brief, and book reviews on law and allied areas for publication inthe GDGU Law Journal 2022 Issue 1, Volume No. 1.

The journal is a bi-annual, peer-reviewed publication from School of Law, GD Goenka University. It is an endeavor of the Institute to become the beacon of legal education by encouraging the synthesis of knowledge and best practices cutting across the academia and research fraternity.

THEME

The journal invites submission on "any broad topic of Law and Interdisciplinary research" butis not limited to any particular theme.

The authors are free to write on any topic that they wish to contextualize. However, preference by the editorial team shall be given to scholarly research papers, articles, policy papers, case comments, original manuscripts highlighting contemporary legal issues with national and international significance.

ELIGIBILITY

Entries from the student community, preferably studying Law and allied discipline of Social Sciences & Humanities; Professionals/Practitioners of Law; Legal Academia and Academia from Social Sciences & Humanities who could link legal regime in the contribution would beaccepted.

SUBMISSION GUIDELINES

The manuscript should be accompanied by an abstract in about 300 words along with adeclaration that the paper has not been published or sent for publication elsewhere.

- **Word Limit**: Submissions should not exceed: Research papers (4,000-6,000 words),Policy briefs (2,000-3,000 words), Case studies/commentaries (2,000-3,000 words), and Book reviews (not longer than 1,000 words)

- **Authorship**: Maximum of two authors per entry is permissible.
- **Citation Style**: The **OSCOLA** System of Citation shall be strictly adhered to. The main text should be in Times New Roman, size 12 with a1.5 line spacing and the footnotes shall be in size 10 with 1.0 line spacing. This shall be strict compliance for papers to be accepted for the review process.

The journal is guided by a well-defined 'Ethical policy' which gives no scope for plagiarized submission. Thus, authors are strictly requested to follow the plagiarism policy for academic submissions published by UGC.

PUBLICATION POLICY

The submissions must be original and should not be under consideration in any other journal. Articles with plagiarism and copyright issues are liable to be rejected immediately. GDGU Law Journal is not to be subject to any liability which may arise in this regard.

Submission of work must be made to GDGU Law Journal, which is indicative of the fact that the authors grant exclusive permission to GDGU to publish and reproduce their work in all streams of media. Such right is subject to the doctrine of fair use as followed under the law relating to Intellectual Property Rights and subject to the entitlements of the author.

The editors reserve the right to delete or edit any article or part thereof whose content is found to be offensive, defamatory, out rightly unethical, or if it is suggestive of discrimination in anyform racism, sexual, gender, religious, illegal or terror activities, and/or another. The article issubjected to rejection if its content is likely to offend or provocate the religious or political sentiments of the reader.

There is no publication fee. A process of peer-review shall be used to scrutinize all the submissions. Following this, the authors of selected papers will be notified of the results.

GDGU LAW REVIEW

A Peer Reviewed Journal by School of Law GD Goenka University

COPYRIGHT TRANSFER FORM

(Please complete and sign this form and send it back to us via email or post)

Full Name	
Organisation	
Correspondence Address	
Postal code	
City	
Country	
Mobile Number (s)	
E-mail	
Paper Title	
Author(s)	

Copyright Transfer Statement

The copyright to this article/paper is transferred to SOL Law Review, GD Goenka University. I /WE hereby transfer any and all copyrights to SOL Law Review. I/We hereby declare /am completely abide to the copyright act. This paper has not been submitted or published elsewhere.

Corresponding Author‘s Full Name and Signature/Date

(On behalf of all co-authors (if any))

CONTACT US

All editorial correspondence must be addressed to:

Dr. Mohd. Tariq Intezar
MANAGING EDITOR
Area Chair :Law- Commerce & Management School of Law, GD Goenka University, Sohna Gurugram, Haryana (India) 122103
Email: m.tariq@gdgu.org ; journalsol@gdgu.org
Mobile: +918979695601; +91 7895568299

GDGU LAW REVIEW

A Peer Reviewed Journal by School of Law GD Goenka University

Subscription: Yearly subscription for the GDGU Law Review shall be priced at Rs. 600/- payable in advance by means of Demand Draft, made in favour of 'GD Goenka University', addressed to The Managing Editor, GDGU Law Review, GD Goenka University, GD Goenka Education City, Sohna Gurugram Road, Delhi-NCR, Haryana- 122103,India

SUBSCRIPTION FORM

Enclosed DD Number ______________________________ **Dated**___________________________

For Rs.___________________________ **drawn on**_______________ **Bank**____________________

Towards the subscription of GDGU Law Review.

SUBSCRIBER DETAILS

Name and Designation ____

Name of the Institute/College/University____

Mailing Address____

____ Pin/Zip__________

Phone____

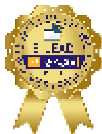
E-mail ____

Date: **Signature and Seal**

/gdgoenkauniversity

AWARDS & RANKINGS

Certified for E-Learning Excellence & Advanced E-LEAD certificate



QS I-GAUGE certified university for Advanced E-Learning Excellence on Academic Digitisation (Adv E-LEAD) by seamlessly integrating educational endeavors with digital practices.

GD Goenka University is a **QS IGAUGE Gold Rated** University

GD Goenka University is a **QS IGAUGE Diamond** rated University in **Teaching and Learning**

ASSOCHAM INDIA
NATIONAL EDUCATION SUMMIT 2019
GD GOENKA UNIVERSITY
MOST PREFERRED
PRIVATE UNIVERSITY

Forbes
FORBES INDIA MAGAZINE
GD GOENKA UNIVERSITY
GREAT INDIAN INSTITUTES 2019

Times B School
TIMES BBA EDUCATION
RANKING SURVEY 2021
TOP EMERGING BBA INSTITUTES
GD GOENKA UNIVERSITY
RANKED 1st IN INDIA

Ranked 10th in Delhi-NCR 2023
GD Goenka University
Top Private MBA Institution
Outlook
Outlook - ICARE Rankings 2022

THE TIMES OF INDIA
TIMES ENGINEERING INSTITUTE
RANKING SURVEY 2019
TOP EMERGING
ENGINEERING INSTITUTES
GD GOENKA UNIVERSITY
RANKED 1st IN INDIA

Nov.2022

GD GOENKA UNIVERSITY
GD Goenka Education City | Gurugram, Delhi-NCR,
Haryana-122103, India.