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“We live in the age of technology and the internet where social movements around the world have swiftly integrated digital connectivity into their toolkit: be it for organising, publicity or effective communication. The ability to scale up quickly using digital infrastructure has empowered movements to embrace their often leaderless aspirations and evade usual restrictions of censorship; however, the flip side to this is that social media channels are often fraught with danger and can lead to the creation of highly polarised environments, which often see parallel conversations running with no constructive outcome evident.”

- Sanjay Kishan Kaul, J. in
Amit Sahni (Shaheen Bagh, In re) v. State,
(2020) 10 SCC 439, para 18

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WHISTLE BLOWER PROTECTION IN INDIA: A MYTH OR REALITY

Dr. Jasdeep Kaur*

Abstract

Whistle blowing is an act of disclosure of information by people within or outside an organization which is not open to public and generally involves activities of an organization that are in opposition to public interest. It is a channel of unveiling information about illegal or unethical tasks which help the employee to take a positive step towards reduction of corruption. Whistleblower is one who blows the whistle on the acts like corruption, crime and unethical conduct. There have been number of commissions which were appointed in India to suggest about the formulation of the legislation for the protection of the whistle blowers, however, there are number of instances of the victimization of the whistleblowers. This victimization has increased to such an extent that in many of the cases it has resulted in causing death of the whistle blowers under suspicious circumstances. The government of India has made efforts to formulate the legislation in the form of Whistle Blower Act, 2011; however, it is not successful in giving protection to the whistle blowers especially after the amendment Bill 2015 which has resulted in making the issue of protection of the whistle blowers a myth rather than a reality.

Keywords: Whistle Blower, Whistle Blower Protection, Whistle Blower Act, Corruption, Victimization of Whistleblowers

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INTRODUCTION

Whistle blowing is an act of disclosure of information by an employee or contractor of an organisation regarding the corrupt means and wilful misconduct of an individual or group of individuals within an organization.¹ It can be defined as an act of disclosure of information by people within or outside an organization which is not open to public and generally involves activities of an organization that are in opposition to public interest. It is a channel of unveiling information about illegal or unethical tasks which help the employee to take a positive step towards reduction of corruption.² It is basically an act of alerting the higher ups and the society about the danger. Whistleblower is one who blows the whistle on the acts like corruption, crime and unethical conduct.³ The alleged misconduct can involve fraud, violation of law, threat to the interest of the organisation, violation of rule or regulation and gross mismanagement or waste of funds etc. The word whistle blowing is thought to have its roots in the practice of policemen and referees who used to blow their whistle while attempting to stop an activity that is illegal or foul.⁴ Whistle blowing can be of two types i.e. internal and external whistle blowing. Individuals who expose information regarding wrongdoing, fraud, corruption or mismanagement and report such acts inside an organisation i.e. to the Chief executive officer or any member of the senior management are called as internal whistleblowers. Whereas individuals who report of such wrongdoings outside of the organisation i.e. to the media, law enforcement agencies, etc. are called as external whistleblowers.⁵

Whistle blowing policy is a policy with which anyone can account for any alleged, dishonest or illegal actions or misconduct in the company or any organisation directly to any person

¹ Ayushi Kalyan and Aseem Diddee, *Whistle Blowing Policy in India: Needs and Challenges*, Law Mantra Online Monthly Journal, Available at: <http://journal.lawmantra.co.in/?p=153>

² Kanubha Jain, *Whistle Blower Policy: A Revised Vigil Mechanism*, Abhinav National Monthly Refereed Journal of Research in Commerce and Management, Vol. 4, Issue 4, 23-28 at 23 (April 2015).

³ *India Needs a Whistleblowers Protection Act*, The Hindu, 25th March 2003 (Tuesday), Available at: www.hindu.com

⁴ Dasguptas and A. Kesharwani, *Whistle Blowing: A Survey of Literature*, The IUP Journal of Corporate Governance, Vol. 9, Issue 4, 1-15 at 2 (2010).

⁵ Peter Bowden, *A Comparative Analysis of Whistle Blower Protection*, Australian Association for Professional and Applied Ethics, 12th Annual Conference, Adelaide (28-30th September 2015), Available at: <https://w3.unis.edu.au/hawkeinstitute/gig/adpae05/documents/bowden-whistleblower.pdf>

having authority or to the director or head of the company or organisation.⁶ The first law on the protection of whistleblower was passed in the United States.⁷ This Act protects the whistleblowers from unlawful release and encourages them to disclose the illegal activity and misconduct by giving the damages which are acquired by the government.⁸ There are multiple Acts in India which provide for the eradication of corruption from public sector. But all these Acts are not sufficient enough to eradicate the corruption until the protection is provided to those who disclose corruption.⁹ Whistle Blowers Protection Act is the first law of the country which protects the whistleblowers.¹⁰ Even before the passing of the Act, the Supreme Court acknowledged the need to afford some sort of protection to persons who would give information about the malpractices of public authorities. In the case of *A.K. Roy v. Union of India*,¹¹ the Supreme Court held that-

"The disclosure of the identity of the informant may abort the very process of preventive detention because, no one will be willing to come forward to give information of any prejudicial activity if his identity is going to be disclosed, which may have to be done under the stress of cross-examination."

Again, In April 2004, the Supreme Court pressed the government to protect the whistleblowers by issuing an office order, the Public Interest Disclosures and Protection of Informers Resolutions, 2004, designating the Central Vigilance Commission (CVC) as the nodal agency to handle complaints on corruption.¹² Later on the Indian Government

⁶ Catherine C. Koh, *The Impact of Whistle Blowing Legislation on Developed and Emerging Markets*, Honours Thesis Paper 2204 (2012), Available at: http://scholarworks.wrnich.edu/honours_thesis

⁷ For Further Details See False Claims Act which was passed in 1863 and revised in 1986. It tries to encounter fraud by suppliers of the U.S. government during the Civil War.

⁸ V. K. Chaurasiya et. al., *Whistleblower's Protection Act 2011, India: A Critical Analysis*, International Journal of Advanced Research in Computer Science, Vol. 4, No. 8, 136-141 at 136 (May- June 2013).

⁹ C. Raj Kumar, *Corruption in India: A Violation of Human Rights Promoting Transparency and Right to Good Governance*, Journal of University of California, Vol. 49, 743-790 at 747 (2015).

¹⁰ Sonal Nagpal, *Whistle Blowing Mechanism: A Move Towards Better Corporate Governance*, Global Journal of Management and Business Studies, Vol. 3, No. 8 855-860 at 856 (2013).

¹¹ 1982 SCR (2) 272

¹² Office Order No. 33/5/2004, Central Vigilance Commission, Government of India, New Delhi (17th May, 2004), Available at: http://cvc.nic.in/004vgl26_1.PDF

introduced the Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010.¹³

VICTIMIZATION OF WHISTLEBLOWERS IN INDIA: SOME INSTANCES

Whistle blowing in India is only a matter of writing anonymous complaints due to fear of facing dire consequences like bad reputation, losing job, boycott from peer group, suicides due to excessive harassment at the workplace or even murder or killing by the wrongdoers.¹⁴ Further the problem is that due to anonymity in complaints, it lacks credibility and no strong action could be taken against the wrongdoers. Rather they become more alert and ultimately the whistleblower becomes the victim. This victimization of the whistleblowers is day by day increasing in aggravated form especially from the period right to information is legalized by the government. This extent can be measured by analyzing different cases of victimization of Whistle blowers.

Satyendra Dubey: He was a project engineer of the National Highways Authority of India (NHAI). He had exposed the financial irregularities in handling of golden quadrilateral project in 2002.¹⁵ On 11th November, 2002 he had sent anonymous letter to the prime minister wherein he disclosed the corrupt practices of the contractors who submit forged documents to justify their technical and financial capabilities to win bids for the contract. He also requested to prime minister that his identity should not be revealed. The prime minister forwarded the letter to the Central Vigilance Commission along with the Ministry of Road, Transport and Highways. On November 27, Dubey was shot dead in Gaya.¹⁶ The matter was raised in Parliament, and the Prime Minister shifted the onus of investigation from the Bihar Police to the CBI. The CBI registered a case against unknown persons under 120-B (criminal

¹³ Also See Office Memorandum, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, Government of India, New Delhi, (16th June, 2014), Available at: http://ccis.nic.in/WriteReadData/CircularPortal/D2/D02ser/371_4_2013-AVD-III-16062014.pdf

¹⁴ Nimisha Bhargava, Mani K. Madala, *An Overview of Whistle Blowing: Indian Perspective*, International Journal of Innovative Research in Science, Engineering and Technology, Vol. 4, Issue 2, 334-339 at 337 (February 2015).

¹⁵ Arjumand Barro and Sanjay Barjal, *Whistle Blowing in India: Introspection*, International Journal of Engineering, Technology, Management and Applied Sciences, Vol. 3, 243-252 at 248 (March 2015).

¹⁶ *Three Gets Life in Satyendra Dubey Murder Case*, The Hindu, 15th December, 2016 (Thursday), Available at: <http://www.thehindu.com/news/national/Three-get-life-in-Satyendra-Dubey-murder-case/article16625349.ece>

conspiracy) and 302 (murder) of Indian Penal Code and various provision under the Arms Act on 14 December 2003 and they were finally convicted by the court.¹⁷

Shanmugam Manjunath: He was IIM graduate & marketing manager in Indian Oil Corporation. He detected petrol adulteration racket at Indian Oil Corporation (IOC) outlet in Lakhimpur, Kheri. He ordered shutting down of two pumps in the area.¹⁸ However, the pumps got reopened in a month. Shanmugan conducted a surprise raid on 19th November, 2005 and was shot. His bullet-ridden body was found in backseat of his car. Pawan Kumar mittal, the main accused and owner of the pumps, was arrested along with other eight accused.¹⁹ The trial court convicted all the eight accused in 2007. While Mittal, was sentenced to death, the other seven who were charged with criminal conspiracy, were sentenced to life imprisonment. However, the Lucknow Bench of the Allahabad High Court upheld the convictions of six of the eight accused including Mittal in December, 2009. It commuted the death sentence of Mittal into a life imprisonment and also acquitted two accused named as Rajiv Awasthi and Harish Misra on the basis that nothing incriminating was found against them. A bench of Supreme Court judges comprising Hon'ble Justices Ranjan Gogoi and N. V. Ramana also upheld the decision of the Allahabad High Court in an appeal before them.²⁰

Lalit Mehta: He was an RTI activist and civil engineer by qualification. He was secretary of Vikas Sahyog Kendra, an NGO that was actively working on the right to food and NREGA schemes. He blew the whistle on widespread corruption in the scheme in Palamu. He had become a threat to the contractor lobby and corrupt government officials. He under took social audit of NREGA under the supervision of economist Jean Dreze's supervision. However, he was killed just a day before the submission of report of the audit.²¹ After facing

¹⁷ Prachi Sharma and Satyendra Dubey, *The Brave Whistle Blower who was Betrayed by Government*, 30th October, 2015 (Friday), Available at: <https://www.quora.com>

¹⁸ Santanu Kumar Das, *Whistle Blowing: A Step to Strengthen the Corporate Governance*, International Journal of Management and Social Sciences Research Review, Vol. 1, Issue 1, 41-48 at 44 (January 2016).

¹⁹ Percy Fernandez, *EX- IIM man Shot Dead for Doing his Job*, The Times of India, 23rd November, 2005 (Wednesday), Available at: <https://timesofindia.indiatimes.com/india/Ex-IIM-man-shot-dead-for-doing-his-job/articleshow/1305300.cms>

²⁰ Hari Narayan, *The Extraordinary Tale of an Ordinary Man*, The Hindu, 18th October, 2016, Available at: <http://www.thehindu.com/features/magazine/The-extraordinary-tale-of-an-ordinary-man/article12291362.ece>

²¹ Available at: <http://www.hardnewsmedia.com/2008/07/2264>

pressure from various quarters, the state government ordered a CBI investigation after more than a month of the murder. The special CBI Court convicted two persons while two others were acquitted in the case.²²

Shehla Masood: She was the secretary of NGO Udai that was created in 2004. She was an activist working primarily on wildlife conservation, and also supported other causes like good governance, RTI Act, police reforms, environment, women's rights and issues and transparency.²³ She co-founded RTI Anonymous, a service for whistle blowers for filing anonymous complaints. She was found dead inside her car just outside her residence in Bhopal on August 16, 2011 when she was on her way to attend the demonstration which was called to support Anna Hazare's 'India against Corruption' campaign. Initially, the police termed it as suicide, but after furore, the case was handed over to CBI on 19th August.²⁴ According to police, the motive of the killing remains unknown. However, the media was of the opinion that the possible cause could be her RTI activities, protest relating to illegal diamond mining done by Rio Tinto in connivance with government officers and fight to save tigers, leopards and forests, which were killed for their skins in connivance with forest officers. The special CBI court convicted interior designer Zahida Pervez and three other accused for the murder, and sentenced them to life imprisonment.²⁵

LEGISLATIVE PROVISIONS FOR THE PROTECTION OF WHISTLEBLOWERS IN INDIA

A bench comprising of Hon'ble Chief Justice T. S. Thakur, Hon'ble Justices A. K. Sikri and R. Banumathi of Supreme Court of India directed the centre for setting up an administrative mechanism for the protection of the whistle blowers. According to the Bench they face

²² Jaideep Deogharia, *Two Convicted in Whistle Blower Murder Case*, The Times of India, 19th March, 2013 (Tuesday), Available at: <https://timesofindia.indiatimes.com/city/ranchi/two-convicted-in-whistleblower-murder-case/articleshow/19049435.cms>

²³ Sujay Mehdudia, "Provide Security to Whistleblowers", The Hindu, 19th August 2011 (Friday), Available at: <http://www.thehindu.com/news/national/provide-security-to-whistleblowers/article2369802.ece>

²⁴ Available at: <https://www.ndtv.com/india-news/4-sentenced-for-life-in-rti-activist-shehla-masoods-murder-case-1653641>

²⁵ Punya Priya Mitra, *RTI Activists Shehla Masood Murder: Bhopal Designer, 3 Others get Life Term*, The Hindustan Times, 29th January 2007 (Monday), Available at: <https://www.hindustantimes.com/india-news/rti-activist-shehla-masood-murder-bhopal-designer-3-others-get-life-term/story-I970XgfOJY4EYwlBggJaMP.html>

threats and harassment for bringing to light irregularities in government departments.²⁶ The Supreme Court further directed that machinery should be put in place for acting on complaints from whistle blowers till a law is enacted by the legislature.²⁷ On the basis of the directions of the Supreme Court, the government established central vigilance commission to formally look into the complaints of people of any wrongdoing.²⁸ However, it lacked the authority to take any punitive action against the wrongdoer.²⁹ The Law Commission of India also drafted a Bill in this regard as Shri N. Vittal, the then Central Vigilance Commissioner requested the Law Commission to draft a Bill for encouraging and protecting honest persons to expose corrupt practices on part of public functionaries.³⁰ The Law Commission of India suggested Public Interest Disclosure (Protection of Informers) Bill, 2002 for the protection of whistle blowers in India.³¹

The Whistleblower Protection Act, 2011- The Public Interest Disclosures and Protection to Persons making the Disclosures Bill, 2011 was introduced in the Lok Sabha on 26th August, 2010 in order to give statutory protection to whistle blowers in the country. The Bill was passed on 11th December, 2011 by Lok Sabha and on 21st February, 2014 by Rajya Sabha. It has received the assent of President of India on 9th May 2014, but it has not come into force till now.³²

The Act establishes a mechanism by which the complaints relating to disclosure on any allegation of corruption, or wilful misuse of power or wilful misuse of discretion can be received or inquired in to. It also aims to provide adequate protection against victimisation of

²⁶ Notify Law for Those Who Blow Whistle: SC, The Telegraph, 7th January, 2016 (Thursday), Available at: https://www.telegraphindia.com/1160107/jsp/nation/story_62594.jsp

²⁷ Amit Anand Chaudhary, Set up System to Protect Whistleblowers: SC to Government, The Times of India, 6th January, 2016 (Wednesday), Available at: <http://timesofindia.indiatimes.com>

²⁸ Shika Sachdeva, Whistle Blower Protection Mechanism: A Mandate in the Current Indian Scenario, International Journal of Commerce, Business and Management, Vol. 3, No. 1, 216-219 at 218 (February 2014).

²⁹ 4th Report of Second Administrative Commission on Ethics in Governance, Government of India, para 3.6 at 78 and 79 (January 2017)

³⁰ One Hundred Seventy Nine Report on Public Interest Disclosure and Protection of Informers, Law Commission of India, at 4, (December 2001).

³¹ Ibid. at 80

³² Ajay Sharma and Shashi Bhushan, Scope of Protection Available to Whistle Blowers: A Critical Analysis of Whistle Blowers Protection Act, 2011, International Journal of Research and Analysis, Vol. 5, Issue 1, 1-11 at 1 (2007).

the person who has made the complaint.³³ The Act aims to protect whistle blowers, i.e. persons making a disclosure in the public interest, related to an act of injustice, corruption, criminal offence by a public servant, or misuse of power.³⁴ The Act lays down the procedure for making disclosure.³⁵ It also set up the mechanism for making disclosures and inquiries.³⁶ It further provides for the powers of the competent authority,³⁷ protection of the persons making disclosure.³⁸ It also provides for offences and penalties against the wrong disclosures against public servants.³⁹ The Act provides that any public servant or any other person including a non-government organization can make a disclosure to the Central or State Vigilance Commission. The Act makes it mandatory for the complainant to include his/her identity with the complaint. The Central Vigilance Commission has been directed not to disclose the identity of the complainant except to a higher official if he deems it necessary. The Act penalizes any public official who reveals the identity of the complainant, without any proper approval with up to 3 years imprisonment and a fine up to 50,000 Rupees.⁴⁰ The Act has also prescribed penalties for deliberately filing any false or frivolous complaints with up to 2 years imprisonment and a fine of up to Rs. 30,000.⁴¹

The Whistleblower Protection (Amendment) Bill, 2015- The Whistleblower Protection (Amendment) Bill, 2015 was introduced in Lok Sabha on 11th May, 2015 by the Minister of Personnel, Public Grievances and Pensions, Mr. Jitendra Singh. The Bill was passed in Lok Sabha on 13th May, 2015. The Bill amends the Whistleblowers Protection Act, 2011. It seeks to incorporate different amendments:

³³For Further details See Objective of the *Whistle Blowers Protection Act, 2011*.

³⁴ *Whistle Blower Protection Act, 2011*, section 4 (1)

³⁵ *Ibid.*, section 4.

³⁶ *Ibid.*, chapter III, section 5 and 6.

³⁷ *Ibid.*, chapter IV, section 7-10.

³⁸ *Ibid.*, chapter IV, section 11-14.

³⁹ Anshul Agnihotri, Sankul Kabra, *Whistle Blower Legislation in India: Comparison with International Standards*, Indian Journal of Law and Policy Review, Vol. 1, 31-45 at 32 (August 2016).

⁴⁰ Supra note 34, chapter IV, sections 15-22.

⁴¹ Venkatesh Nayak, *Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2012: A Comparison with International Best Practice Standards*, Commonwealth Human Rights Initiative, New Delhi, 1-115 at 15 (2010), Available at: <http://www.humanrightsintiative.org>

Exemptions from Public Interest Disclosures: The Act provides a mechanism for receiving and inquiring into public interest disclosures against acts of corruption or wilful misuse of power and discretion by public servants. The Bill amends the Act to prohibit any person from making a disclosure if it relates to information under any of the following 10 categories: (i) the sovereignty, strategic, scientific or economic interests of India, or the incitement of an offence; (ii) records of deliberations of the Council of Ministers; (iii) that which is forbidden to be published by a court or if it may result in contempt of court; (iv) a breach of privilege of legislatures; (v) commercial confidence, trade secrets, intellectual property (if it harms a third party); (vi) that relayed in a fiduciary capacity; (vii) that received from a foreign government; (viii) that which could endanger a person's safety etc.; (ix) that which would impede an investigation etc.; (x) personal matters or invasion of privacy.⁴²

However, if information related to (ii), (v), (vi), and (x) is available under the Right to Information Act, 2005, then such disclosure would be permitted under this Act. A certificate by an authority of the state or central government with regard to the above will be binding.⁴³

Procedure to determine complaints that are prohibited from disclosure: The Bill states that if a disclosure related to any of the above 10 categories is made, the competent authority will refer it to a government authorised authority. This authority will decide if the disclosure is prohibited. This decision will be binding on the competent authority. However, if such information has been made available under the Right to Information Act, 2005, then it may be disclosed. The Bill also provides about the circumstances under which no person is required to answer any question, produce any document or render any assistance in any inquiry under the Act. It includes the above ten conditions under which public disclosures cannot be made.⁴⁴

Issues exempt from being addressed during an inquiry into a whistle blowing complaint: Under the Act, no person is required to provide any information or render assistance, during

⁴² Venkatesh Nayak, *Whittling the Whistle*, Available at: <https://www.nationalheraldindia.com/news/whittlin-g-the-whistle-2>

⁴³ Priyanka Rao, *The Whistle blowers Protection Act, 2014: Comparison of 2015 Bill with 2013 Amendments*, May 11, 2015, Available at: www.prssindia.org.

⁴⁴ Carmen Apaza and Yongjin Chang, *The Impact of External Whistle Blowers on Uncovering Corruption: A Comparative Study*, 1-33 at 2, Available at: <http://www.law.kuleriven.be/mtisc/integriteit/egpa/previous-egpa.../apazachang.pdf>

an inquiry into a whistle blowing complaint if it relates to one of five categories of information. These include: (i) security of India, (ii) foreign relations; (iii) public order and morality; (iv) contempt of court; defamation or incitement to an offence; and (v) Cabinet proceedings. The Bill amends this provision to replace these five categories with the above 10 categories of information. The proposed amendments allow whistleblowers to disclose some kinds of information only if it has been obtained through a Right to Information query. This includes intellectual property, trade secrets and even information that can be considered as the unwanted invasion of privacy of an individual.⁴⁵

Limitations on Disclosure under the Act: Under the Whistleblowers Protection Act, 2011, any person may make a public interest disclosure against a public servant. Such disclosures are made before a Competent Authority.⁴⁶ The Act specifies the Competent Authority for each category of public servant. For example, it would be the Prime Minister for a Union Minister; Speaker/ Chairman for Members of Parliament; the Chief Justice of the High Court for district court judges, the Central or State Vigilance Commission for government servants.⁴⁷ The Bill amends the Act to prohibit the disclosure of 10 categories of information to a Competent Authority. Further, while the Act excludes 22 security and intelligence organisations from its purview, any information related to allegations of corruption must be provided.

DRAWBACK OF THE LEGISLATION FOR PROTECTION OF WHISTLEBLOWER IN INDIA:

1. The Act empowers the public servant, private person or any NGO to disclose any wrong doings by a public servant only.⁴⁸
2. The Act does not cover any wrong doings in non-governmental sector. The private and social sectors have been left out.⁴⁹

⁴⁵ Nitika Pasan and Surbhi Jain, *Critical Analysis of the Whistle Blowers Protection Mechanism in Indian Law*, Kaav International Journal of Economics, Commerce and Business Management, Vol. 4, 66-69 at 67 (July-September 2017).

⁴⁶ S. Srividhya and C. Stalin Shelly, *Whistle Blowing Protection: A Watchdog for the Organisation*, International Journal of Social Sciences and Interdisciplinary Research, Vol. 1, Issue 10, 204-11 at 207 (October 2012).

⁴⁷ Supra note 34, section 3 (b).

⁴⁸ *Ibid.*, section 4.

3. Members of armed forces, employees of intelligence agencies are prohibited from reporting any wrongful action directly or indirectly to the organisation.⁵⁰ Further with the Amendment Act, 2015, the members of armed forces are excluded from the purview of the Act.
4. The Competent Authority can ask the Head of Department for making comments and opinions. It is not clear that inquiry will be conducted openly or secretly.⁵¹
5. The Act does not place any obligation on the Competent Authority to inform any whistleblower about the progress of investigation.
6. The Act does not provide any witness protection program which is present in other countries like U.S.A., Canada and South Africa.⁵²
7. Though the Amendment Act, 2015 provides for the definition of the term disclosure however, definition of victimisation is still not clear.
8. The time period after which action will be reviewed is not provided. There is no time limit for inquiry.
9. The anonymous complaints are not entertained by central vigilance commission.⁵³
10. The Bill states that if the Competent Authority receives a public interest disclosure that falls under any of the 10 prohibited categories of information, he will refer it to a government authorised authority.⁵⁴ This authority will decide whether the disclosure contains any information that is prohibited under the Bill. This decision will be binding on the Competent Authority. However, the Bill is silent on the minimum qualifications or designation of the government authority. The independence of this

⁴⁹ Supra note 34, section 3 (b).

⁵⁰ Apurba Kundu, *Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010*, Journal of Indian Law and Society, Vol. 2, 113-124 at 119, Available at: www.manupatra.com

⁵¹ Gaurav Vivek Bhatnagar, *Activists Urge Rajya Sabha MPs not to Pass Amended Whistle Blower Bill as is*, Available at: <http://thewire.in/158568/rajya-sabha-whistle-blowers-act-amendments/17/07/2017>

⁵² For Further Details See, *The UK Public Interest Disclosure Act, 1998*, and *The Whistle blowers Protection Act, 1984*, USA.

⁵³ Supra note 39, section 4 (6).

⁵⁴ Rupesh Aggarwal, *Critically Analysing The Whistle Blowers Protection (Amendment) Bill, 2015: Is the Change a Step Towards Regression*, NLUA Law Review, Vol. 1, No. 1, 86-100 at 88 (2015).

authority may be at risk if the authority is junior in rank to the public servant against whom the disclosure is made.⁵⁵

11. The Amendment Act, 2015 prohibits the disclosure of information if information is related to the categories mentioned in 10 sub clauses. It unduly restricts the disclosure of information. Further the disclosure is now prohibited if it falls under any provisions of Official Secrets Act which again restricts the disclosure of information by whistleblower.

SUGGESTIONS FOR IMPROVEMENTS IN WHISTLE BLOWERS PROTECTION LEGISLATION

Whistleblowers would be entitled to official protection only if all of the conditions mentioned under the Act are complied with. They could face action if these conditions are not complied with. Further the central and state governments are the final authorities who are given the power to judge each case. The activists are of the view that the concern of Amendment Bill for protecting national security and exempting information under the Official Secrets Act is only meant to dilute the Whistleblowers Protection Act and it will eventually turn the law into a dead-letter.⁵⁶ The following suggestions can be incorporated to overcome the drawbacks in the present legislation along with the amendment Bill.

1. The Act should also cover the wrong doings done by non-government sector.
2. The members of armed forces, employees of intelligence agencies should not be prohibited from reporting any wrongful action directly or indirectly to the organisation as it will help in recognizing and tackling corrupt practices in these institutions also.
3. The legislation provides for creation of internal whistle blowing mechanism. However, it should be created without any bias.
4. The Competent Authority should be required to inform whistleblower about the progress of investigation not only the result of the investigation.
5. The provision for strict penalties should be incorporated in case of victimising of the whistleblower by the accused persons.
6. There should be proper safeguards for the protection of the whistleblowers.

⁵⁵ Aareja Johari, *If Amendments to Whistle Blowers Act are Passed, There may be no One Left to Protect*, 14th May 2015, Available at: <http://scroll.in/article/727173>

⁵⁶ *Ibid.*

7. There should be provisions for rewarding the whistleblower rather than penalizing the action if he blew the whistle against the organisation.
8. The Act should also provide for witness protection program.
9. Definition of the term victimisation should be made clear.
10. The time period after which action will be reviewed should be provided and there should also be a time limit for inquiry.
11. The anonymous complaints should be entertained by central vigilance commission in order to ascertain the protection of the whistle blower.
12. The legislation should fix the minimum qualifications or designation of the government authority inquiring about the complaint of the whistle blower.
13. There should not be too much categories which is to be excluded from the purview of the Act as it would undermine the importance of the concept of whistle blowing.

AAROGYA SETU WITHIN THE CONTOURS OF PRIVACY LAW IN INDIA

Snigdha Gupta* & Mayuri Gupta**

INTRODUCTION

The COVID-19¹ pandemic has somewhat locked us inside our own houses, but would it not be strange to realise that every time we step out of our own house, someone has an eye on us and knows about our every movement?

When the coronavirus disease started spreading all over the world at a rate of knots , India, being a very populous country², found it very difficult to come up with any measure that immediately could address the situation at that point of time. On 24th March, 2020 a nationwide lockdown was imposed in India under the National Disaster Management Act, 2005³ which put the country to a standstill.

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¹ International Committee on Taxonomy of Viruses (ICTV) on 11th February 2020 announced ‘Severe Acute Respiratory Syndrome Coronavirus 2’ (SARS-CoV-2) as the name of the novel coronavirus. The World Health Organization on 11th February 2020 announced ‘COVID-19’ as the name of the new disease caused by the SARS-CoV-2. Available at: [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it#:~:text=The%20International%20Committee%20on%20Taxonomy,two%20viruses%20are%20different](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it#:~:text=The%20International%20Committee%20on%20Taxonomy,two%20viruses%20are%20different) (Accessed on: 09.01.2021).

² India has a population of 1,380,004,385 in 2020, according to UN data, which is equivalent to 17.7% of the total world population, that is almost 138 crores, Available at: <http://data.un.org/en/iso/in.html> (Accessed on: 09.01.2021)

³ Under Section 2(d) of the National Disaster Management Act, 2005 ‘Covid-19’ was declared as a notified disaster by the Ministry of Home Affairs vide Letter No.33-4/2020/NDM-1 dated 14.03.2020 to chief secretaries of all States <https://www.mohfw.gov.in/pdf/RevisedItem&NormsforutilisationofSDRFdt14032020.pdf>, (Accessed on: 09.01.2021)

The Ministry of Home Affairs, acting through the Home Secretary in his capacity as Chairperson of the National Executive Committee, issued the order of lockdown under the Section 10(2)(l) of the National Disaster Management Act, 2005 vide Letter DO No. 40-3/2020-DM-I(A) dated 24.03.2020 w.e.f. 25.03.2020 till 14.04.2020,

Available at:

With the rising number of cases, arose the need for the use of technology to develop tools for contact tracing to break the chain of human-to-human transmission of the disease. In line with the contact tracing tools developed by various countries across the world, on 2nd April 2020, the Government of India released a mobile application called “Aarogya Setu” for the very purpose of contact tracing of infected individuals, exposure notification and allow health departments to take effective actions in order to manage the COVID-19 pandemic and enhance their preparedness. Aarogya Setu could inform persons at risk of the precautions to be taken by them, identify individuals exposed to the infection, and help manage quarantining, follow up and effective treatment, resultantly.

This means, Aarogya Setu although could not stop the spread of COVID-19 completely but could somewhat control it. This app, on installing, would ask you to take a self-assessment test, i.e., it will ask for your name, your mobile number and then you have to give your Bluetooth and location information as well so that firstly, the government authority controlling this app would know about your movement and details regarding that and secondly, if you are infected with the virus, people coming in contact with you could be made aware of it. However, this brings us to a question *“Is Aarogya Setu app contrary to the Right of Privacy in India?”*

Right to Privacy is a fundamental right given to every individual in India under Article 21⁴ as a part of the freedoms guaranteed by Part III of the Constitution. This basically includes that every individual in India has a legal right to enjoy their private life without any involvement of the rest of the world and the government of the country as far as any illegal activity is not seen.

Both the decisions of the Hon’ble Supreme Court of India and the Government of India, i.e., giving the Right to Privacy a fundamental value by the Supreme Court in 2017, and launching the Aarogya Setu app by the Government of India in 2020 were in a good faith and in favour of the citizens. But soon after its launch, the Aarogya Setu app was surrounded by controversies claiming the infringement of the right to privacy and personal freedom guaranteed under the Constitution of India. Several points were put forward, on the one hand

https://www.mha.gov.in/sites/default/files/PR_MHAOrderDt14042020forextendingtheLockdownPeriodtill03052020_14042020.pdf (Accessed on: 09.01.2021). This lockdown was further extended.

⁴ Article 21- *Protection of life and personal liberty*- No person shall be deprived of his life or personal liberty except according to procedure established by law.

advocating the need and urgency of launching the Aarogya Setu app whereas the other, defending the need to secure the right of privacy protected by the Constitution. In this article, the authors will try to incorporate such debates and examine the legality of the Aarogya Setu app on the litmus paper of right to privacy in India.

THE IDEA OF RIGHT TO PRIVACY IN INDIAN CONSTITUTION:

On 24th August 2017, after a series of debates, discussions and decisions over past 60 years, the idea of giving right to privacy a fundamental value guaranteed by the Constitution was developed in the case of (*Retd.*) Justice K.S.Puttaswamy v. Union of India⁵.

In 2011, the central government introduced the Aadhaar card as a new identity document and established the Unique Identification Authority of India (UIDAI) to issue Aadhaar with 12 digit unique identity number. In 2012, Justice K.S. Puttaswamy, a retired judge of the Karnataka High Court, filed a writ petition in the Supreme Court against the functioning of the Aadhaar Card introduced by the UPA government, stating that this scheme has no constitutional validity. He opposed the move of the government in making the Aadhaar Card mandatory for the welfare schemes like, Public Distribution System, Mid-Day Meal, MGNREGA⁶, asserting that welfare schemes are meant for every citizen of the country and it is their constitutional right to get it. He further mentioned that through this Aadhaar Card scheme the government is gathering the biometric data of the citizens of the country like fingerprint scan, iris scan, facial scan. The details collected would be stored in a central server by the government and if by any chance the data got leaked, then there would be a high chance that these data could be misused and hence petitioning that the right to privacy of the citizens was on stake.

On 11th August 2015, a Bench of three judges⁷ passed an order that a bench of adequate strength must examine the judgement passed in *M. P. Sharma v. Satish Chandra, District Magistrate, Delhi*⁸ and *Kharak Singh v. State of Uttar Pradesh*⁹. Primarily, the 3 Judges

⁵ (2017) 10 SCC 1

⁶ Mahatma Gandhi National Rural Employment Guarantee Act, 2005

⁷ Hon'ble Justices Chelameswar, Bobde and C. Nagappan

⁸ 1954 AIR 300 (8 Judges Bench) Hon'ble CJ. Mehar Chand Mahajan, Hon'ble Justices B. Jagannadhadas, Ghulam Hasan, Natwarlal H. Bhagwati, T.L. Venkatarama Aiyyar, B.K. Mukherjea, Sudhi Ranjan Das, Vivian Bose.

bench wanted a clear picture that whether the judgements given in these two cases denying any fundamental right of privacy was on the mark or not.

While the above mentioned cases stated that Indian Constitution does not guarantee right to privacy to its citizen, but in later cases like *Maneka Gandhi v. Union of India*¹⁰, *Govind v. State of Madhya Pradesh*¹¹ and *R. Rajgopal v. State of Tamil Nadu*¹², the Supreme Court benches started giving right to privacy a constitutional protection. These conflicting decisions created confusions that whether right to privacy has constitutional efficacy or not.

After this, the *Puttaswamy case* got divided into two parts.

- Validity of Aadhaar Card
- If right to privacy is fundamental or not

A Constitution bench of 5 judges¹³ was set up which modified the order dated 11th August 2015 passed by a 3 Judges bench¹⁴. The 5 Judges Bench after considering the matter as to the recognition of right to privacy as fundamental right referred the same to a 9 Judges Bench for an authoritative resolution of the dispute.¹⁵ The bench came up with the decision that the judgements given under the *M.P Sharma case* and *Kharak Singh case* were inaccurate and the foundation of right to privacy could be seen under *Article 14*, *Article 19*, *Article 20*, *Article 21* and *Article 25* of the Constitution of India. Opposing this decision the Attorney

⁹ AIR 1963 SC 1295 (6 Judges Bench) Hon'ble CJ. Bhuvneshwar P. Sinha, Hon'ble Justices N. Rajagopala Ayyangar, Syed Jaffer Imam, K. Subbarao, J.C. Shah, J.R. Mudholkar.

¹⁰ 1978 AIR 597 (7 Judges Bench) Hon'ble CJ M.H. Beg, Y.V. Chandrachud, V.R. Krishna Iyer, P.N. Bhagwati, N.L. Untwalia, S. Murtaza Fazal Ali and P.S Kailasam.

¹¹ 1975 AIR 1378 (3 Judges Bench) Hon'ble Justices Kuttyil Kurien Mathew, V.R. Krishnaiyer, P.K. Goswami

¹² 1995 AIR 264 (2 Judges Bench), B.P. JEEVAN REDDY, S.C. SEN

¹³ Hon'ble Chief Justice H.L. Dattu and Hon'ble Justices M.Y. Eqbal, C. Nagappan, Arun Mishra and Amitava Roy

¹⁴ The order permitted the use of Aadhaar only for the PDS scheme and the LPG distribution scheme. Further, The Court said that if the Schemes like The Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS), National Social Assistance Programme (Old Age Pensions, Widow Pensions, Disability Pensions) Prime Minister's Jan Dhan Yojana (PMJDY) and Employees' Providend Fund Organisation (EPFO) are added to the P.D.S. Scheme and the L.P.G. Distribution Scheme as mentioned in the order dated 11.08.2015, it will not dilute the earlier order passed by this Court.

¹⁵ WP (C) 494/2012, (2017) 10 SCC 1 (Bench) Hon'ble CJ. Khehar and Hon'ble Justices, Jasti Chelameswar, S.A. Bobde, DY Chandrachud, Abdul Nazeer, R. Nariman, R.K. Agarwal, Abhay Manohar Sapre, And Sanjay Kishan Kaul

General of India said that there is no such concept of right to privacy in India and the Constitution makers deliberately didn't include such rights.

After hearing all the arguments, on 24th August 2017, the 9 Judges bench of Supreme Court unanimously came up with a landmark judgement overruling its own judgements in *M.P Sharma and Kharak Singh*, and declared the right to privacy a fundamental right under Article 21 of Part III of the Constitution. After this, on 26th September 2018 it was held that Aadhaar Act is also constitutionally valid and providing biometric data to the government is not the violation of any fundamental rights of the citizen.¹⁶

AAROGYA SETU AND ITS CONFLICT WITH PRIVACY

When you install any contact tracing App in your mobile, it asks you for some details regarding you and connects to your Bluetooth system of your device to work in accordance with it. This is exactly what the Aarogya Setu app does. Although the benefits of the app are clear, it is equally essential to protect the right to privacy of the users.

However, the working of the app is slightly unlike. On installing this app, the user needs to provide his name, gender, age, profession, travel history and telephone number. After this, the app will try to access the user's Bluetooth and location data. On acquiring all the details, the data gets saved in a centre based server. The users are required to keep their Bluetooth and location data switched on all the time because this app is designed to keep track of the app users who came in contact with each other or in Bluetooth proximity of each other's device. When any person starts registering their covid-19 symptoms then it gets uploaded in these central server and not only this, the other users of this app will also get to know about the number of registered users who are being infected nearby in their Bluetooth proximity and provide an approximate location of the user through their location data as well.

Conflicts:

¹⁶ (2019) 1 SCC 1 (5 Judges Bench) Hon'ble CJ. D. Misra, Hon'ble Justices D.Y. Chandrachud, A Bhushan, AM Khanwilkar, A Sikri. Declared that the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 was valid and not violative of the fundamental right to privacy. The Court also held that Section 7 was the core provision of the Aadhaar Act and since it satisfied the condition of Article 110 of the Constitution, the Aadhaar Act was validly passed as Money Bill.

- 1) The critics who opposed this step of the government regarding the quick releasing of the Aarogya Setu app pointing over its illegal and unlawful nature towards the fundamental right of right to privacy in the country came up with several arguments. The foremost of them are the working of the app and its policies. It has been argued that on installing, the app acquires admin access through the Bluetooth setting of the user. This is a risk for the users as the app could get access to more than the required data through the setting which is against the rights of the individuals because nobody is entitled to access anybody's personal data without their consent according to Article 21 of the constitution. It is against the right of privacy given to every individual through the Constitution of the country.
- 2) On May 1 2020, the Ministry of Home Affairs under the National Disaster Management Act, 2005 passed an order stating that it is mandatory for all the people of the containment zones and private and public employees to install the Aarogya Setu app and gave the responsibility, in case of employees, to the head of the organization and, in case of containment zones, to the local authorities of the area, to make sure that everybody has registered themselves in this app and ensure a 100% coverage of the Aarogya Setu app.¹⁷ This order aroused several conflicts. Firstly, the National Disaster Management Act, 2005 comes under the concurrent list¹⁸ which the government had used to take the measure of launching an app and thus the central government could take decisions and request the states to follow it. But when it comes to the personal or sensitive information of the individuals, any decision taken by the government could not force them to share it unless they have not consented according to the right of privacy given to the individuals under Article 21 of the Indian Constitution. The National Disaster Management Act, 2005 specifies no such circumstance or situation under which the fundamental rights given to the individuals could be infringed. Secondly, the employers of the private organizations assert that it is not possible for them to keep a check on all of their employees all the time that

¹⁷ Ministry of Home Affairs, Government of India Order No. 40-3/2020-DM-I(A) dated 01 May 2020, Available at:

<https://www.mha.gov.in/sites/default/files/MHA%20Order%20Dt.%201.5.2020%20to%20extend%20Lockdown%20period%20for%202%20weeks%20w.e.f.%204.5.2020%20with%20new%20guidelines.pdf> (Accessed on 31.01.2021)

¹⁸ Seventh Schedule Entry 23 List III Social security and social insurance; employment and unemployment.

whether they are using the Aarogya Setu app or not and even if they don't then they cannot force them to do so. According to the Personal Data Protection Bill, 2019 both the public and private employees need to give their consent before getting their personal data being shared to their employers other than those required for processing salaries.¹⁹ Moreover, the installation of the app was made advisory rather than mandatory by a subsequent government notification.²⁰

- 3) According to the Economic Survey of 2018-19, the government is considering the citizens' data as something to be used for public good and tends to use some parts of them for revenue making by providing them to private companies to ease the pressure on government finances.²¹ This idea of the government has created a concern among the people assuming that the data being acquired by the government through the Aarogya Setu app could be used by the government for further purposes of their benefit.
- 4) The Aarogya Setu app lacked transparency to its users. At first the app was not open source which meant that any third party could not review its methods and policies which leads to a lot of criticism regarding it and it was said that the app which was launched by the government is not transparent in its working to the citizens of the country and thus restricting the researchers to detect its vulnerabilities. But later the government came up with a decision declaring the Aarogya Setu app will now be an open source.²²
- 5) Another concern was raised with the fact that the guidelines and directives provided by the government regarding the application lacked the sunset clause. That means no

¹⁹ Personal Data Protection Bill, 2019, Available at:
https://www.prsindia.org/sites/default/files/bill_files/Personal%20Data%20Protection%20Bill%2C%202019.pdf
 (Accessed on: 30.01.2021)

²⁰ The Ministry of Home Affairs, Government of India Order No. 40-3/2020-DM-I(A) dated 17.05.2020, Available at: <https://www.medianama.com/wp-content/uploads/MHA-Order-Dt.-17.5.2020-on-extension-of-lockdown-till-31.5.2020-with-guidelines-on-lockdown-measures.pdf> (Accessed on: 28.01.2021)

²¹ Chapter 4, *Data Of the People, By the People, For the People*, Economic Survey 2018-19 Volume 1 Pg 78-97, Available at: <https://www.indiabudget.gov.in/budget2019-20/economicsurvey/doc/echapter.pdf> (Accessed on: 28.01.2021)

²² Aarogya Setu is now open source, Ministry of Electronics and Information Technology (MeitY), Government of India posted on 26 May 2020 PIB Delhi, Available at: <https://pib.gov.in/PressReleasePage.aspx?PRID=1626979> (Accessed on: 28.01.2021)

definite time interval was mentioned about the working of Aarogya Setu app and how long it would keep collecting the data and store them. This further created distress among the citizens regarding their fundamental right of right to privacy.

- 6) A petition was filed in Karnataka High Court by Anivar Aravind claiming that the citizens cannot be restrained from any service for not installing the Aarogya Setu app.²³, advocating the petition, Senior Advocate Colin Gonsalves says that this application is not backed by any law. In any such circumstance where the privacy of the citizens are being infringed by any directive of the government, needs a proper legislation and mere executive orders are not enough. Further, it was claimed that Aarogya Setu app fails the test of proportionality and purpose limitation test. There is no need for Bluetooth and location data to be collected and stored in the central server. A data controller cannot collect the data without a clear and informed consent of the user and give its access to third parties.²⁴
- 7) Another petition was filed in Kerala High Court by John Daniel, General Secretary, Thrissur District Congress Committee in which he appealed to the court that the step taken by the government by launching the Aarogya Setu application is violating the fundamental rights of the citizens by collecting their information through the app and storing it in the cloud and there is a possibility of the data being misused.²⁵ The directives issued by the government has taken away the rights of the people to control their own personal information by releasing the guidelines that the private sector employers were compelled to ensure a 100% coverage of the app among their employees as per Section 58 of Disaster Management Act, 2005 leaving the employees in a situation where they were forced to share their data. Beside this the

²³ *Anivar A. Aravind v. Ministry of Home Affairs*, GM PIL WP (C) 7483 of 2020

²⁴ The High Court, on 25 January 2020, in its interim order declined to stay the Aarogya Setu app or use of data of the users already collected through the app while *prima facie* holding that there is “informed consent of the users” through the privacy policy” of the app regarding collection and manner of collection of information, use of information and retention while there is no informed consent of users for sharing of response data as provided in the protocol. However, the Court restrained the Central government and the National Informatics Centre (NOC) from sharing the data collected through the app with other government authorities and agencies as per the Aarogya Setu Data Access and Knowledge Sharing Protocol, 2020 till further orders. See also, The Hindu dated 25 January 2021, Available at: <https://www.thehindu.com/news/national/karnataka/karnataka-hc-declines-to-stay-use-of-aarogya-setu-app/article33657589.ece> (Accessed on: 28.01.2021)

²⁵ *John Daniel v. Union of India & Anr* Writ Petition presented on 05 May 2020 Kerala HC

petitioner mentioned that, it was not specified in the guidelines released by the government that which department or ministry would be the one controlling the authority of accessing the data, questioning the transparency of the application and hence concluding that the guidelines and directives of the government regarding the Aarogya Setu app are completely unconstitutional.²⁶

THE AAROGYA SETU DATA ACCESS AND KNOWLEDGE SHARING PROTOCOL, 2020

After many such conflicts and questions regarding the sudden releasing of the Aarogya Setu app, on 11th May, 2020 a notification was issued by Empowered Group on Technology and Data Managements²⁷ under the Disaster Management Act, 2005²⁸ giving a clarity regarding the working of the app, its policies, its data accessibility and many such information for which there has been a lot of confusion and conflict in the country since the launch of the app which led to a lot of criticism against the policies, directives and guidelines of the central government regarding it. This notification was a protocol²⁹ regarding the policies of the Aarogya Setu app and the directives of the government, acting as a legal defence to the App.

Rationale- The protocol begins with explaining the reason behind the launching of the app and its need to do so. With the increasing number of COVID-19 cases in the country, the central government issued some guidelines that are required to be followed by both the central as well as the state governments to take precautionary measures for those who are not

²⁶ Ibid., Available at: <https://www.medianama.com/wp-content/uploads/John-Daniel-v.-UOI-Represented-Arogya-Setu-Writ.pdf> (Accessed on: 29.01.2021)

²⁷ Ministry of Home Affairs, Government of India Order No. 40-3/2020-DM-I(A) dated 29 March 2020 ‘Constitution of Empowered Group under the Disaster Management Act, 2005’, Available at: <https://ndmindia.mha.gov.in/images/gallery/MHA%20Order%20on%20Constitution%20of%20Empowered%20Groups%20under%20the%20Disaster%20Management%20Act%202005-compressed.pdf> (Accessed on: 26.01.2021)

²⁸ Notification of Aarogya Setu Data Access and Knowledge Sharing Protocol, 2020 in the light of Covid-19 pandemic, Ministry of Electronics and Information Technology (MeitY), Government of India Order No. 2(10)/2020-CLeS dated 11 May 2020 https://www.meity.gov.in/writereaddata/files/Aarogya_Setu_data_access_knowledge_Protocol.pdf (Accessed on: 26.01.2021)

²⁹ Aarogya Setu Data Access and Knowledge Sharing Protocol, 2020, Available at: <https://aarogyasetu.gov.in/wp-content/uploads/2020/06/mygov-100000000981057882.pdf> (Accessed on: 26.01.2021)

infected yet and for the treatment of the individuals who are affected. In order to ensure the implementation of such measures there is a need of sharing the required data and information among the central and the state governments. The main focus should lie with protecting the health of the people in the country and in this concern a '*syndromic mapping and contact tracing*' of those who are being infected are urgently required to find those infected individuals and provide them with a proper treatment and make those individuals aware who are at risk. For this purpose Aarogya Setu app is being launched in the country to collect the required data of the individuals in this regard.

Process & Principle - specified that the purpose and the reason of collecting the data of the individuals through the Aarogya Setu app should be mentioned in the privacy policy of the app and only required data pertaining to the purposes mentioned should be collected and should be formulated and implemented for such purposes only. Contact and location data that are being collected should remain on the device on which the Aarogya Setu app has been installed and could only get uploaded on the central server for the formulation and implementation of the required purposes relating to the health of the individuals. The protocol has come up with a 'sunset clause' stating that it is in operation for 6 months from the date of its issuance and after that it will cease to exist, '*unless specifically extended by the Empowered Group on account of the continuation of the COVID-19 pandemic in India*'.³⁰ This aligns with the retention of the individual's data i.e., contact, location, self-assessment, not beyond 180 days from the date on which it is collected and to be deleted permanently. The demographic data of an individual could be retained in case of the protocol to be in force, but in the case of the user requests the deletion of the data it should get deleted after 30 days of such request being made. The data should be stored securely and should only be used in accordance with the protocol.

³⁰ Sunset Clause: The Empowered Group shall review this Protocol after a period of 6 months from the date of this notification or may do so, at such earlier time as it deems fit. Unless specifically extended by the Empowered Group on account of the continuation of the COVID-19 pandemic in India, this Protocol shall be in force for 6 months from the date on which it is issued. Aarogya Setu Data Access and Knowledge Sharing Protocol, 2020, Available at: <https://aarogyasetu.gov.in/wp-content/uploads/2020/06/mygov-100000000981057882.pdf> (Accessed on: 26.01.2021). Notification of Aarogya Setu Data Access and Knowledge Sharing Protocol, 2020 in the light of Covid-19 pandemic, Ministry of Electronics and Information Technology (MeitY), Government of India Order No. 2(10)/2020-CLeS dated 10 November 2020 https://www.meity.gov.in/writereaddata/files/Order_Aarogya_Setu10112020.pdf (Accessed on: 26.01.2021)

The data of the individuals could be shared with the Ministry of Health and Family Welfare, Government of India, Departments of Health of the State/Union Territory Governments/ local governments or other such institutions of the government in a '*de-identified form*' where these data are strictly needed for the implementation of the mentioned purposes. Here, a randomly generated id is being placed, in place of the personal information of the individual. Apart from this, a list is to be maintained of the agencies and the institutions with whom such data are being shared, the timing at which the data sharing was initiated, the category of data that is being shared and the purpose for which the data is being shared.

Further, these data could be made available to Indian universities and research institutions registered in India for research purposes as well. But there is a condition to it, mentioned under this protocol. The data would go under a series of '*hard anonymisation*' through which the identity of the individuals would not get disclosed. Any institution or university seeking access to the data need to file a request and the request would be accepted only if such access is sought for the purposes of statistical, epidemiological, scientific or any other form of academic research or such purposes should be in concern with the health reasons mentioned under this protocol. The research institution and university should not, whether knowingly or unknowingly re-identify the individuals through the provided data and if any such action is being made then any right granted to them under this protocol would be terminated and they would be liable to penalties under the applicable law in force, at that time. Further these anonymised data could be shared by the research institutions or universities to another institutions or universities registered in India only for the purpose for which it has been granted approval and not otherwise.

As per the protocol any violation of these directions may lead to penalties as per section 51 to 60 of the Disaster Management Act, 2005 and other legal provisions as may be applicable.

CONCLUSION

Before *Puttaswamy case*³¹, there was no substantial precedent guaranteeing right to privacy in India. With the welcome developments in the *Puttaswamy case* the Supreme Court of India in 2017, gave right to privacy a fundamental value by recognizing it under Article 21 of Indian Constitution guaranteeing that every individual in India would enjoy their fundamental

³¹ Supra note 5

right of privacy and the violation of which will amount to infringement of the right to life and personal liberty guaranteed under the Constitution.

As the coronavirus outbreak reached its peak in India in 2020, it became necessary for the government to come up with an instant measure to handle the health emergency. In view of this, the government launched a contact tracing app named Aarogya Setu for collecting the information of those who were infected to provide them with proper treatment and take precautionary measures for those who are at risks. But soon after its launch, the Central government found itself in troubled waters. Major section of citizens started criticizing the sudden launching of the app, its policies and the directives of the government stating that the app is infringing the right to privacy of the individuals that has been recognized under Article 21 of the Indian Constitution.

Considering the public opposition for the app, the government decided to issue a notification on 11th May 2020, holding a protocol to answer all the questions of the citizens which had till now created confusion and distress in the country. This protocol clearly mentioned that the data of the individuals are safe in the central server and these data would be used in a fair and non-discriminatory manner. The protocol further gave the assurance that no extra information would be collected through the app from users' device without their consent and the data would be used only for health purposes and not as a tool of surveillance once the pandemic is over. Another notification was also issued on 17th May, 2020 making Aarogya Setu rather advisory.

The concerns over data protection intensified in India following the government's stance on citizens' data in the Economic Survey of 2018-19. Although the protocol and government notifications addressed many public concerns, several concerns are yet to be addressed in respect of the Aarogya Setu app, its policies and government's directives. The absence of a parliamentary legislation and the authority of an executive to issue directions interfering with the fundamental right to privacy have been an area of strong debate among constitutional lawyers and advocates of human rights. Moreover, the absence of a strict sunset clause in the Protocol raises doubts. The Aarogya Setu app and the protocol while allow the users to de-register and thus withdraw consent, a concrete legal framework demanding erasure of collected personal data is absent. A provision for such legal framework is present in the Personal Data Protection Bill, 2019 but it has not yet been enacted as a law. Even though the decision to make Aarogya Setu open source and optional is praiseworthy, the transparency

and government's legal responsibility in case of breach of data still remains uncertain in the absence of a Personal Data Protection law. In view of these, the demand for the data protection law has amplified. The Personal Data Protection Bill, 2019 is currently being considered by the Joint Parliamentary Committee on Personal Data Protection Bill which is due to submit its report suggesting amendments by the second week of the Winter Session in 2021. Hopefully, 2021 will witness the transition of the Personal Data Protection Bill into an enacted law which will bring a statutory framework protecting the right to privacy in India.

LEGAL POSITION OF ELECTRONIC CONTRACTS IN INDIA

Akshay Bhargava*

Abstract

Electronic contracts are a precious reward given to us by internet. It is one of the divisions of E-business. E-contracts are only different in their mode of occurrence as it takes place via medium of internet. By giving sanctity to this type of contract, business transactions worldwide have been put at an ease.

The aim of writing this paper is to highlight the expanded mode for formation of contracts via electronic mode and enlists the challenges, which may occur while making such contracts and suggesting the remedies to deal with the challenges. The paper consists of five sections. First section will give the introduction of the study which consists of nature and definition of electronic contract, essentials of contract, scope, advantages and disadvantages of Electronic contract. Second section of this paper is analytical study of the laws governing E-contracts in India. Third section enumerates the jurisdictional issues which are appended with formation of electronic contracts and Forth section enlists some case laws related to electronic contracts. Last section holds the conclusion from the author's perspective.

The methodology adopted for the purpose of writing is doctrinal research by way of collecting data from secondary sources such as Books, articles, journals, and judicial pronouncements.

Keywords: *E- contract, E-business, Jurisdictional Issues, Cyber Law, Consent*

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INTRODUCTION

Definition, Nature and Scope of Electronic Contract

A contract refers to an agreement between the two private parties which creates mutual legal obligations for both of them. According to the Indian Contract Act, 1972, the definition according to Section 2(h) states that a contract is an agreement which is enforceable by law. E-contract can be defined as an agreement which has taken place through any electronic medium such as email, internet and fax and is enforceable by law i.e. it must fulfill the prerequisites of a valid contract as per Indian Contract Act, 1872.

Such contracts are not paper based but rather entered in electronic forms. An electronic contract is an agreement “drafted” and “signed” in an electronic form. An electronic agreement can be drafted in the similar manner in which a normal agreement is drafted.

E-contracts are born out of the need for speed, suitability, efficiency and ease of business. In recent times due to pandemic, there has been a shift in modes of doing business, and people are even more inclined towards electronic modes of contract. This popularity and practice calls for more strong and efficient laws to prevent fraud.

Essentials of an Electronic Contract

Other than its mode of formation, an electronic contract is no more different from a contract which is entered into by conventional means and methods. Some of the following essential ingredients are discussed below which an electronic contract must contain:

- Offer to be made

An offer can be made personally through e-mail; fax etc. or the consumer may visit the website to browse the available goods and services showed on the seller's website. The latter category is essentially an invitation to offer and hence this is not considered to be an offer. In response to the said invitation of offer, the seller has the choice whether to continue with that dealing or not. If yes, then it is required on the part of seller to make an offer to the willing party who first proposed him an invitation to offer. But still, if the buyer does not want to continue that dealing then in spite of giving acceptance on his part, for the time being he is at liberty to revoke his acceptance but subject to a condition that the said acceptance is

revocable at any time but before the completion of communication of acceptance against the proposer.

- *The offer needs to be acknowledged*

The acceptance is generally assumed after the offer is made by the consumer or in relation to the invitation to offer¹. An offer can be revoked at any time until the acceptance is made. E contract can be accepted by the way of giving acceptance through e-mail or by filling the form online or by clicking on the 'I Agree' tab link.

- *Lawful consideration*

Section 2(d) of Indian Contract Act defines the consideration as an act or abstinence or a promise, done at the desire of the promisor, such act or abstinence or promise is called consideration². Any contract which is to be enforceable by law must have a lawful consideration. A lawful consideration is one in which both parties get something in return and which fulfils the mandate of sec 23³and sec 24⁴of Indian Contract Act, 1872.

A valuable consideration in the sense of law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other⁵.

- *Contracting parties must be competent to contract*

Parties to a contract are deemed to be capable of entering into a contract, if they satisfy the requirements of section 11⁶ and section 12⁷ of Indian Contract Act, the section declares

¹ Bangia R.K. , Law of Contract I, Allahabad Law Agency, 2018

² Cheshire & Fifoot , Law of Contract, Lexis Nexis , tenth edn. 2010

³ Sec 23- What consideration and objects are lawful, and what not.-The consideration or object of an agreement is lawful, unless-The consideration or object of an agreement is lawful, unless-it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

⁴ Ibid.

⁵ Lush J,Currie v. Misa, (1875) LR 10 Ex 153

⁶ Sec 11- Who are competent to contract.—Every person is competent to contract who is of the age of majority

following persons to be incompetent to contract

- i. Minors
- ii. Persons of unsound mind
- iii. Persons disqualified by law to which they are subject⁸.

One of the landmark judgments on the capacity of a minor to enter into a contract is *Mohiri Bibee v. Dharmadas Ghose*⁹, It was held in the above mentioned case that the Indian Contract Act, 1872 makes it mandatory that all contracting parties should be competent to contract and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act.

In English Law, contract by a person of unsound mind is voidable at his option if he satisfies the court that at the time of entering into the contract he was unable to understand the nature of contract and the other party knew it but in India the agreement of a person of unsound mind is absolutely void just like a contract of a minor¹⁰.

- *Free Consent*

Free consent is a *sine qua non* for a legally enforceable contract. Section 10 of Indian Contract Act, 1872 enlists 'Free Consent' as an essential factor for a valid contract. It has been defined under section 13 that the parties to contract must be doing the concerned act

according to the law to which he is subject,¹¹ and who is of sound mind and is not disqualified from contracting by any law to which he is subject. —Every person is competent to contract who is of the age of majority according to the law to which he is subject,¹¹ and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

⁷ Sec 12- What is a sound mind for the purposes of contracting.—A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. —A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

⁸ Avtar Singh, *Contract & Specific Relief*, p. 152, Eastern Book Company, 10th Edn. 2008

⁹ (1903) 30 IA 114 : 30 Cal 539

¹⁰ *Mcchaiman v. Usman Boari* (1907) 17 Mad LJ 78

after their meeting of minds only. If they are not agreed on the same thing in the same sense, then this does not meet the criteria given under the principle *Consensus ad idem* mandated by sec 13 of Indian Contract Act. While on one hand, the latter defines the term *Consent*, on the other side section 14 of Indian Contract Act gives us insight on the circumstances when consent can be said to be free-

Consent is said to be free if it is not caused by-

- i. Coercion (sec 15)
- ii. Undue influence (sec 16)
- iii. Fraud (sec 17)
- iv. Misrepresentation (sec 18) or
- v. Mistake (subject to provisions given under sections 20,21 and 22)

If the consent of a party is caused by coercion, undue influence, fraud, misrepresentation or mistake, the contract is always voidable at the option of the same party whose consent was so caused.

- *Intention to create legal relation*

While entering into a contract, there has to be an intention to create a lawful relation. If there is no intention on part of both the parties to create a legal relationship, the contract stands void due to the lack of intention to create a lawful relation, not every loose conversation can be termed as a contract. The intention does not only mean intention to enter in a contract but also the intention to face the consequences whichever follows. In the famous case of *Balfour v. Balfour*¹¹ the court of appeal held; there are agreements between the parties which do not result in a contract within the meaning of contract law. Such arrangements do not result into contract at all, even if there may be some consideration for the agreement, such agreements are not lawful contracts because the parties did not intend to create a legal relationship between them and neither can they be said to be ready for facing its consequences.

In those family agreements where parties intend to create a legal relationship between them

¹¹ (1919) 2 KB 571

are certainly termed as contracts, such as an agreement between the relatives to share a house has been held to be binding¹².

In an another leading case on this subject *Jones v. Padavatton*¹³ where a mother persuaded her daughter to leave her attractive job and pursue legal education in England, for which she promised to bear all the expenses and also providing her the place of living. Later on after five years when her daughter could not complete her education, and got married, the mother stopped sending allowances and started her eviction proceeding from her property. It was held that the daughter had to leave her attractive carrier and gone to other country for education and the mother could not get out of her promise under these circumstances. The agreement between them is undoubtedly resulting in a contract. Mother's appeal was allowed on the ground that she only agreed to support her daughter and not her husband, since the daughter got married and could not complete her education; she was not entitled for getting any allowances.

TYPES OF E-CONTRACT

Electronic Contracts are generally of three types-

- *Shrink-wrap*

These are usually licensed agreements which are applicable in case of Software products buying. As soon as the person purchasing the products opens the software, the terms and conditions to access the software are taken to be automatically accepted and the same are then enforced upon the buyer. These agreements are accepted by the user at the time of installation of the software from a CD-ROM.

In India there is no judicial decision till date on validity of a shrink-wrap agreement.

- *Click Wrap or Web-Wrap*

These agreements are web based and it requires the consent of the buyer or the visitor of the page or software by clicking 'I Agree' or 'I Accept', by clicking on such buttons the acceptance of the user is recorded and his agreement upon all terms and conditions of

¹² *Parker v. Clark*, (1960) 1 WLR 328

¹³ (1969) 2 All ER 616

contract is considered. Those users who after reading the terms and conditions do not agree with it are not allowed entering the software or website.

- *Browse-Wrap*

This type of agreement generally intends to be binding upon two or more parties by the use of website. In case of a browse wrap agreement, a regular user of a particular website is deemed to accept the terms of use and other policies of the website for continuous use.

ADVANTAGES AND DISADVANTAGES OF CONTRACT THROUGH ELECTRONIC MEDIUM

After doing an analysis of advantages and disadvantages of formation of electronic contracts, we find that on one hand the mode of entering into electronic contracts is simple, easy accessible and time saving while on the other hand, the public at large faces various complexities when it comes to seek any remedy for breach of their rights. Let us first discuss the pros or advantages of electronic contracts.

Advantages

- *Ease of access in contracting online*

Getting your documents attested online is fast which saves the time of both the parties. The contract can be accessed at any time and at any place and just needs a functional internet connection.

- *Ensures Fast Business*

Online contracting is a fast method to get the documents signed instantly. On the other hand, physical contract needs to be sent through a post or courier or through any person, which is time-consuming. It helps to keep one's business in a very effective and quicker operating mode irrespective of the fact that the contracting parties reside in different localities.

- *Improves Document Accuracy*

It is certainly be troublesome to verify documents physically. But the situation becomes more pathetic when at some later stage, it comes to the knowledge that one of the parties has missed out filling crucial information or failed to sign on an important page which creates too

much chaos in formation of a contract. But such a scenario can be easily overcome by shifting towards an advanced approach from a conventional one. By using digital signatures or by marking mandatory fields digitally, e transactions get to be prompted within a short span of time. It also makes an error to be rectified much conveniently and efficiently. It saves time and reduces the hassle of having to bug the signer to resend the application and re-verify it patiently¹⁴.

- *Save your time and money*

Electronic Contracts save time and money of contracting parties because of the fast speed and access of internet in every nook and corner of the world. The documents via internet can be shared within seconds and does not require any other expense of telecommunication or transportation.

Disadvantages

- *Security Issues in E-contract*

The moment you enter the global world of internet or the cyberspace, your personal and sensitive data becomes available in public domain. It can be leaked at any time and the privacy of user is constantly in danger. Hence, e-contracts must be entered into carefully and cautiously.

- *Restricted Storage*

Some of the electronic firms, which we generally use to sign for, have limited storage which makes it difficult for them to store all the documents on their servers. It leads to the dependency on other sources which today has becomes a concern for many stakeholders who are bothered about the confidentiality of their sensitive information. In such cases, one needs to ensure that the vendor can allow access to the digitally signed documents server according to Defense standards.

- *Dependency on Proprietary Software*

Electronic signature relies on proprietary software, which can be a concern for businesses that do not want to depend on other vendors for contracting. To overcome this, one must

¹⁴ Shreen Abdin, (2019, Oct 1) .Electronic Contract Pros & Cons, Available at: <https://www.lawyered.in/legal-disrupt/articles/electronic-contracts-pros-and-cons/>

choose a vendor that complies with digital signature standards set by the National Institute of Standards and Technology.

LAWS RELATED TO E-CONTRACT

- *Indian Contract Act*

Various Provisions of Indian Contract Act are applicable on E-contracts as E-Contracts are only different in the mode but otherwise they need to satisfy all the prerequisites of a valid contract.

- *Legal Recognition of E-Contracts*

The objective behind enacting Information Technology Act was to protect and encourage E-commerce. It is based on Model Law on Electronic Commerce which was adopted by United Nations Commission on International Trade Law. Section 2 covers the various definition such as Computer network, Computer System, Cyber security, Data, Digital signature etc.

Chapter 2 of Information Technology Act provides recognition to Electronic signature and digital signature.

- *Section 10 A of Information Technology Act, 2000*

Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of electronic records, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose¹⁵.

The language used by the legislature makes it clear that electronic contracts are to be treated as any other general hard-copy contract and it cannot be questioned on the ground of being signed virtually.

- *Section (11) of Information Technology Act, 2000*

An electronic record shall be attributed to the originator-

¹⁵ Section 10 A, Information Technology Act, 2000

- a) If it was sent by the originator himself;
 - b) By a person who had the authority to act on behalf of the originator in respect of that electronic record; or
 - c) By an information system programmed by or on behalf of the originator to operate automatically¹⁶.
- *Section (12) of Information Technology Act, 2000*

Section 12 talks about the modes of providing the acknowledgement of receipt to the contracting party if a particular medium is not stipulated in the contract.

- *Section (13) of the information technology Act, 2000*

Section 13 discusses the time and place of dispatch and receipt of electronic record.

Identity Theft and Impersonation

The It Act provides that the identity of a person shall be deemed to have stolen when any unique identification of a person (such as digital signature or password) is fraudulently or dishonestly used. The act prescribes for imprisonment up to 3 yrs and fine up to INR 1 Lakh.

Digital Signature

When a contract is entered into through an electronic mode, it is necessary for the enforcement of such contract to establish the genuineness of the transaction to prove that the proposal emanated from the originator and acceptance was signified by the acceptor from the appropriate persons. The signature of the parties is taken into consideration. It is a personalized thumb print and it is the encryption of an electronic document using a private key .It performs three different functions in order to ensure the security of the system and genuineness of the transaction:-

S.No.	Particulars (A)	Particulars (B)
1.	Data integrity	A digital signature helps in getting information in

¹⁶ Sec 11 of Information Technology Act, 2000

		case of any tampering with data, file or any message.
2.	Data authentication	A digital signature helps in verifying the initials of the person signing the message.
3.	No chance of disown	- No message signed and sent could be disowned by the receiver ¹⁷ .

- *Indian Evidence Act, 1872*

The evidentiary value of electronic contracts has been given recognition and can be understood in the light of various sections of Indian Evidence Act, 1872. Sec 65B of the Indian Evidence Act deals with the admissibility of electronic records. As per Sec 65B of the said Act, any information contained in an electronic record produced by the computer in printed, stored or copied form shall be deemed to be a document and it can be admissible as an evidence in any proceeding without further proof of the original subject to following conditions which must be satisfied, such as:

- The computer from where it was produced was in regular use by a person having lawful control over the system at the time of producing it,
- During the ordinary course of activities the information was fed into the system on a regular basis,
- The output computer was in a proper operating condition and has not affected the accuracy of the data entered.

JURISDICTIONAL ISSUES IN ELECTRONIC CONTRACTS AND EMERGING CHALLENGES

Jurisdictional issues in electronic contracts are bound to arise since the positive limits of classic statute do not fit in the eternity of the internet. Since these agreements exist in borderless environment, issues generally arise as to where to initiate legal action and what laws will be followed when the individual with whom contract is made resides outside a

¹⁷ [2006] EWHC 813 (Ch) (07 April 2006)

jurisdictional area. The boundlessness of the internet and the instantaneous transactions provides a tough opportunity for the courts to ascertain their jurisdiction upon the disputes concerning E-contracts.¹⁸

The Delhi High Court tried to determine the dispute over jurisdiction on the virtual space in Banyan Tree Case¹⁹ in the year 2009. The plaintiff contended that the court had the jurisdiction to hear the present case because the defendants even after residing outside the jurisdiction offered services within the jurisdiction of the court. The Court held that, since there is no long-arm statute in India for purpose of passing off action against the defendants, the plaintiff needs to satisfy the court that the defendants purposefully availed itself to the jurisdiction of the court.

The British Columbia Court of Appeal decision in *Brain Tech Inc v. Kostiuk*²⁰ provides the probable circumstances when a judgment can be enforced in another jurisdiction. Kostiuk was alleged to have used the internet to publish defamatory information about Brian Tech. Brian Tech obtained a default judgment in Texas on which he commenced action in British Court of Columbia. The court took the jurisdiction despite the tenuous link between the two courts²¹.

Cross Border Issues

Section 75 of Information Technology Act was amended in 2008 to remedy this problem and enact laws that are operative outside India. It provides punishment for commission of any offence through a computer system, by a person outside India irrespective of his nationality, if the act committed involves a computer system or network located in India. In absence of any specific legal framework for cyberspace in India, reliance is generally placed upon foreign judgments of those states which have developed the concept of cyber jurisdiction.

EMERGING CHALLENGES RELATED TO ELECTRONIC CONTRACTS

¹⁸ Rishabh Aggarwal, (2019, Dec 15), *Jurisdictional Issues in E-Contracts*, Available at: <https://www.legalbites.in/jurisdictional-issues-in-e-contracts/>

¹⁹ *Banyan Tree Pvt. Ltd. v. A. Murali Krishna Reddy*, CS (OS) 891/2008

²⁰ (1999), 171 DLR (4th) 46 (CA)

²¹ Mishra Sachin, *Determining Jurisdiction over E-commerce disputes in India*, Available at: <https://www.manupatra.com/articles/>

Contract with minor

It is not possible to determine the age of the person while entering into a contract through internet, neither does a contract require the age verification by legal documents. Generally the person himself declares that he is a major. The other party who entered in the *bonafide* legal relation has to suffer its consequences in case of non-enforceability of contracts against those who are exempted from every liability.

Quality of the goods delivered

While placing an order or making a contract for goods the quality of goods cannot be verified by the purchaser later on they have to suffer losses in terms of money and time. Cyber fraud is easier to commit as the identity of actual offender can easily be hidden.

CASE STUDY

Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.

The Hon'ble Supreme Court of India has passed an important verdict concerning the scope of determination of the existence of an arbitration agreement from correspondence between the parties under the Arbitration and Conciliation Act, 1996. The apex court was of the opinion that the existence of an arbitration agreement can be inferred from a document signed by the parties or an exchange of emails, letters, telegrams or other means of communication which provides a record of the agreement²².

Arizona Retail System Inc. v. Software Link

A question arose as to the building nature of the shrink wrap contracts in relations to the original copies of the software. Arizona Retail System Inc. purchased software from software link .There was a shrink wrap attached along with the real copy at the time of delivery. However , several other copies were sent later on to Arizona Retail System Inc. and shrink wrap was not attached to them . The U.S. district court for the district of Arizona held that shrink wrap applies only to the original copies²³.

²² 2010 (1) SCALE 574

²³ *Hotmail Corporation v. Van \$ Money Pie Inc.* 47 U.S.P.Q.2d (BNA)1020,1998 US Dist, 1998 WL388389 (N.D.Cal.Apr.16,1998)

LIC India v. Consumer Education & Research Center

The case relates to a policy issued by Life Insurance Corporation of India consisting of certain terms in the name of Public Purposes.

The Court noted that 'In dotted line contracts there would be no occasion for a weaker party to bargain so as to assume themselves to have an equal bargaining power. He has either to accept fully or leave the service or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forgo the service forever.'²⁴

Pro CD Inc. v. Zeidenburg

It was held that the defendant is bound by the terms of the license as he clicked on the box containing "*I agree*" thereby indicating his assent to be bound²⁵.

CONCLUSION

With the recent advancement within the areas of engineering, computer technology and software, technology has resulted in advancing the quality of living for individuals in a commendable manner. The communication between individuals isn't restricted because of the constraints of geographical area and time. Information can be transmitted and received widely and more rapidly than ever. The electronic commerce offers the pliability to business setting in terms of place, time, space, distance, and payment. With the expansion of e-commerce, there's a speedy advancement within the use of e-contracts. E-contracts provides measures compatible to facilitate the re-engineering of business processes occurring at several companies involving a composite technologies, processes, and business methods that aids the speedy exchange of knowledge.

The e-contracts have their own merits and demerits. On one hand they cut back costs, saves time, fasten client response and improve service quality by reducing paper work, thus increasing automation. Simultaneously on the other hand, the law governing e-contract lacks certain provisions like -there is no provision to determine the intention of the parties to enter into a legal relationship. With this, E-commerce is expected to improve the productivity and competitiveness of participating businesses by providing unprecedented access to an on-line

²⁴ 1995 SCC (5) 482

²⁵ *Pro CD. Inc. v. Zeidenberg* 86F.3d 1447 (7th Cir.1996)

global market place with millions of customers and thousands of products and services.

The cyberspace keeps the world interconnected, but the threats related to it cannot be denied. These jurisdiction related issues remain unsolved because owing to lack of technological advancements tracing the accurate jurisdiction of the parties becomes difficult as it involves three types of jurisdiction, one is of the originator, second is of the addressee and third is of the region where the host server is located.

Since the IT Act only provides for admissibility of electronic records and sets out the punishment but it is just an enabling statute. There is a need for special legislation regarding online transaction as there is no specific legislation which specifically governs online transactions and determine the jurisdiction. In the matters relating to website the precedent till now allow the plaintiff to sue the defendant anywhere in India where his website can be accessed, without considering the defendant's convenience.

There is lack of digital literacy among masses so they become more prone to cyber-crime and rate of conviction is very low. For resolving the issue education and digital literacy has a huge role to play. There is a need to comply with cyber ethics for every individual while using cyberspace. At the same time spreading awareness about the threats related to cyberspace, the ways to prevent it and available effective remedies upon breach are necessary.

ABORTION LAWS : A PARADIGM SHIFT TOWARDS THE APPROACH FROM PRO-LIFE TO PRO-CHOICE WITH RESPECT TO MEDICAL TERMINATION (AMENDMENT) BILL 2020

Vinal Sharma*

ABSTRACT

The much needed Medical termination of Pregnancy (Amendment) Bill, 2020 has been passed in the Lok Sabha and awaiting a nod from Rajya Sabha. The Amendment is the change which was called for with respect to the reproductive rights of a female. The Medical Termination of Pregnancy Act, 1971 regulates the conditions under which a pregnancy can be terminated. The introduced Amendment Bill makes some alterations in the conditions under which a pregnancy can be terminated, increasing the period within which the termination procedure can be carried out and changes alike. Getting an abortion in India is not just about finding the right doctor who can perform the procedure in a safe manner and through legal methods it's also about dealing with the stigma and navigating the laws around it. Though we may be living in 2020, if an Indian woman seeks termination of pregnancy even today, she cannot do so openly without judgment and people trying to change her mind.

This paper tries to examine and assess the new Amendment Bill taking into consideration the reforms this Bill aims to bring in the ideology and approach of society towards the reproductive rights of a woman and her choice and autonomy over her body. Amid all the rights a human has the supreme right is the right to life and personal liberty which should never be compromised at any cost and this right to life vary for every person and keep changing with the evolution of the society as a whole as its violation can shake the very foundation of the basic structure of the Constitution of India.

Keywords: Abortion, Reproductive Choice, Indian Courts, Right to life, Constitution of India

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“Of all the religion in the world, perhaps the religion of liberty is the only faith capable of purity”

– *Tiffany Madison*

INTRODUCTION

The right to abortion services forms a crucial part of the reproductive rights framework, with countless campaigns by the women's movement across the world and in India advocating for the right of women to access safe and effective abortion services. Because this right has been shaped by concerns about sexuality and morality, it is a hotly contested issue. Giving birth to a child is a journey, a woman goes through which is altogether a very different & difficult task too. For a woman to become a mother requires her to be physically as well as mentally & psychology prepared for giving birth to a child. Additionally, the choice has to be evaluated in the light of the right to life of the unborn child, leading us to the ‘pro-choice’ and the pro-life debate. In this debate, one opinion is that terminating a pregnancy is the choice of the pregnant woman, and a part of her reproductive rights and the other one opines that the state has an obligation to protect life, and hence should provide for the protection of the foetus. Across the world, countries set varying conditions and time limits for allowing abortions, based on foetal health, and risk to the pregnant woman. A reproductive rights framework lays emphasis on the right of a woman to be able to exercise her agency in being able to decide the number and spacing of her children.¹ Reproductive right is a relatively new concept, and it gained traction after the International Conference on Population and Development (ICPD). The outcome document of the ICPD, held in 1994 in Cairo, helps to highlight the arguments that were made around the abortion debate. The Cairo Programme of Action says that reproductive rights are to be enjoyed by all couples and individuals. They must be able to decide the number, spacing and timing of their children, so that they may attain the highest standard of sexual and reproductive health. Decisions regarding reproduction must be made free of ‘discrimination, coercion and violence’. In this context, the Cairo Programme of Action regarded the woman as the decision-maker.² The Platform for Action that was adopted at the Beijing Women’s Conference is a reaffirmation of the Cairo Programme’s ideas on

¹ Malavika Parthasarthy “Integrating Mental Health Perspectives into the Legal Discourse on Reproductive Justice in India (Journal of National Law University Delhi)

² International Conference on Population and Development, *Programme of Action*, Cairo (Sept. 5–13, 1994) Available at: https://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf (Accessed on: 01.02.2021)

reproductive health. It laid stress on equal relationships between men and women in the matter of reproduction, including the right to integrity, consent and shared responsibility for sexual behavior and its consequences. The Platform also condemns forced pregnancy, which includes forced initiation and continuation of pregnancy.³

In India, abortions are regulated by the Medical Termination of Pregnancy Act, 1971 which was passed on the recommendation of the Shantilal Shah Committee in pursuance of the objective of legalizing abortion to address the growing number of unsafe abortions in India.⁴ The debate of legalizing abortion started with the movement called “Pro-Choice” or the United States Abortion rights movement which was a socio-political movement in the United States supporting the view that a woman should have the legal right to an elective abortion, meaning the right to terminate her pregnancy, and is part of a broader global abortion-right movement. In 4th century AD, abortion was allowed only till the first three months of pregnancy. In the Middle Ages and until the 1900s, abortions were not allowed legally in many countries. For instance, England in 1869 came up with a legislation called ‘Offences Against the Persons Act’, that outlawed abortions for any reason. In the modern era, the first country to allow termination of pregnancies on a slew of legal grounds was the former Union of Soviet Socialist Republics (USSR) in 1920. Nazi Germany, practised selective abortions, as seen in the 1933 legislation called “Law for the Prevention of Progeny with Hereditary Diseases”, that was used to terminate differently abled children. They were closely followed by Japan in 1948 and several European countries in the 1950s. Interestingly, Britain reversed its stand in 1967 and started allowing abortions. USA has a fractured history of abortion rights. In the 1950s, the medical community in America started discussing ‘planned parenthood’ - a subtle synonym to describe abortions. This laid the ground for the American legal institute to plead for abortions to be legally allowed in cases other than rape in 1959. In the 1960s, Mississippi, California and Colorado became the first states to allow abortions. However, by the 1970s, only 16 of the 50 states supported the abortion rights movement. Later due to the US Supreme Court’s decision in *Roe V Wade*, in 1973, allowed abortions nationally. This, however, caused a political and legal friction between “pro-life” groups and abortion lobby in America.⁵

³ Johanna B. Fine ‘The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally’ Health and Human Rights, 19 Health. Hum. Rts. J. 69, 69 (2017).

⁴ K.D. Gaur, *Abortion and the Law in India*, Journal of the Indian Law Institute, Vol 28, No.3 , pp. 348-363

⁵ Saurabh Kumar, A Critical Analysis on the Abortion Laws in India, Available at:

LEGAL PROVISIONS DEALING WITH MEDICAL TERMINATION OF PREGNANCY IN INDIA

Owing to its colonial legacy and Great Britain's act of outlawing abortions during 1869-1967, Section 312 of the IPC disallowed as an induced act of miscarriage. However, post-independence things changed significantly. In 1952, India introduced family planning programme to check its expanding population. In 1964, the Central Planning Commission formed a committee- under the leadership of the Health Minister of the state of Maharashtra, Shri Shantilal Shah, to look into the need to bring in changes to the IPC and introduce other needed legislation to deal with termination of pregnancies purposefully. The committee submitted its report in 1966, which called for deletion of Section 312 of IPC which was not accepted and the provisions are there in IPC and the need to bring in a special law to deal with termination of pregnancies. They cited the changes in Great Britain's abortion laws to support the need for India's abortion laws to be changed. As a result, an exclusive abortion-related legislation- the Medical Termination of Pregnancy (MTP) Act, 1971, came into being. Apart from MTP Act there are certain provisions given under Section 312-316 of IPC which deals with offences related to miscarriage. According to Prof. K. D. Gaur, under section 312 of IPC⁶, the framers of the Code have carefully avoided use of the word 'abortion' in Section 312, which relates to an unlawful termination of pregnancy. This was perhaps done with a view to avoiding injury to sentiments of the tradition bound Indian community. The section speaks of 'miscarriage' only, which term has nowhere been defined in the Code. The MTP Act (No.34 of 1971)⁷ confers protection to a registered allopathic medical practitioner against any legal or criminal proceedings for any injury caused to a woman seeking abortion, provided that the abortion was done in good faith under the terms of the Act. The Act allows an unwanted pregnancy to be terminated upto 20 weeks of pregnancy, and requires a second doctor's approval if the pregnancy is beyond 12 weeks.

As per the official statements, the Act had been envisaged with the following three objectives:

<https://blog.ipleaders.in/critiquing-indias-abortion-laws/> (Accessed on: 07.02.2021)

⁶ Indian Penal Code , Section 312 - Causing miscarriage - Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both and if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation — A woman who causes herself to miscarry, is within the meaning of this section.

⁷ Government of India. The Medical Termination of Pregnancy Act [Act No. 34, 1971]. New Delhi: Ministry of Health and Family Planning, 1971.

- (i) Health measures, when there is danger to the life or risk to physical or mental health of the woman,
- (ii) Humanitarian grounds, such as when pregnancy is caused as a result of a sex crime or intercourse with a lunatic woman etc, and
- (iii) Eugenic grounds, when there is a substantial risk that the child, if born, would suffer from deformities and disease.

The Act consists of only 8 sections & is a landmark in the history of social legislation in India. According to Prof. K. D. Gaur the Act was enacted with the motive that “*it will go a long way towards encouraging women to play a role outside home, in achieving the goal of economic independence and in emancipating them from the age old economic exploitation by men folk. Autonomy and independence of a woman is directly as well as closely related to her ability to decide for herself whether she wishes to bear and rear the child or not. The inability to decide freely and responsibly on the spacing of children has, in turn, deprived many women of the advantages of health, education and employment and their roles in family, public and cultural lives on equal footing with men*”. This right and opportunity to fully participate is an element of human dignity and respect recognised in a number of inter-national human rights agreements and covenants.⁸

Another object of passing the Act, besides the elimination of the high incidence of illegal abortions, was perhaps to confer on the woman the right to privacy,⁹ which includes the right to space and limit pregnancies, and the right to decide about her own body.¹⁰ Another important feature of the Act was to encourage a reduction in the rate of population growth by permitting termination of an unwanted pregnancy of a married woman on the ground that a contraceptive device failed.¹¹ But if we observe through various data available & various case laws, it can be observed that these objects have not been fulfilled completely in the socio-legal aspect. This was the provision of the MTP Act, 1971. Besides these provisions as the

⁸ Mc Dougal Lasswell and Cuen, *Human Rights for Woman and World Public Order: The Outline of Sex Based Discrimination*, 69 Am. J. Int. L. 497 at p. 504 (1975). The Declaration on Social Progress and Development and the Proclamations of Teheran pro- vide that parents have a basic human right to determine freely and responsibly the number and the spacing of their children.

⁹ The U.S. Supreme Court in two landmark decisions, *Roe v. Wade* 41 U.S.L.W. 4213 1973); 410 U.S. 113 (1973) and *Dow v. Bolton* 41 U.S.L.W. 4233 (1973), has upheld the right of a woman to an abortion for the first three months of pregnancy as being an element in the right of privacy given by the Fourteenth Amendment of the U.S. Constitution.

¹⁰ *H. L. v. Matheson*, 1980, 450 U.S., 398

¹¹ Gazette of India, 17 Nov. 1969, s. 2 p. 880, for statement of objects and reasons of the M.T.P. Bill 1969

society is dynamic and laws needs to be dynamic with the societal requirements there are some amendments have been made in the MTP Act of 1971 by The Medical Termination of Pregnancy (Amendment) Bill, 2020. The recent Amendment Bill amends the Act to increase the upper limit for termination from 20 to 24 weeks for certain categories of women, removes this limit in the case of substantial foetal abnormalities, and constitutes Medical Boards at the state-level. The Statement of Objects and Reasons of the Bill states that several cases have been filed before the Supreme Court and various High Courts seeking permission for aborting pregnancies at stages beyond the 20-weeks limit under the Act, on the grounds of foetal abnormalities or pregnancies due to rape faced by women.¹² It also states that with the advancement of medical technology, there is a scope to increase the upper limit for terminating pregnancies especially for vulnerable women, and in cases of severe foetal abnormality.¹³

Termination due to failure of contraceptive method or device: Under the Act a pregnancy may be terminated up to 20 weeks by a married woman in the case of failure of contraceptive method or device. The Bill allows unmarried women to also terminate pregnancy for this reason.¹⁴

Medical Boards: All state and union territory governments will constitute a Medical Board. The Board will decide if a pregnancy may be terminated after 24 weeks due to substantial foetal abnormalities. Each Board will have a gynaecologist, paediatrician, radiologist/sonologist, and other members notified by the state government.¹⁵

Privacy: A registered medical practitioner may only reveal the details of a woman whose pregnancy has been terminated to a person authorised by law. Violation is punishable with imprisonment up to a year, a fine, or both.¹⁶

WHY NOT ‘ABORTION’ BUT ‘MEDICAL TERMINATION’ OF PREGNANCY IN INDIAN LAWS?

¹² Statement of Objects and Reasons, Medication Termination of Pregnancy (Amendment)Bill, 2020

¹³ Ministry, Health & Family Affairs, *Medical Termination of Pregnancy (Amendment) Bill 2020*, Available at: <https://www.prsindia.org/billtrack/medical-termination-pregnancy-amendment-bill-2020> (Accessed 07.02.2021)

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

Some attribute the curious choice of words ‘medical termination of pregnancy’ in the 1971 Act to the colonial hangover of using technical jargon. But that’s not the case. The intended reason behind the using of the term “Medical Termination of Pregnancy” instead of the commonly used term “ Abortion” is aimed at ensuring that abortion laws in the country aren’t framed as granting women a choice or a right to undergo safe abortions, but as procedures to protect doctors against prosecution for conducting abortions. To understand that lets understand the History of the Medical Termination of Pregnancy Law (hereinafter called ‘MTP’). The discussion on the need for abortion laws in India started since 1960s. Around then the government set up the Shantilal Shah Committee to evaluate whether an abortion law was needed in the country. At that time, abortions were strictly illegal under Section 312 of the Indian Penal Code, 1860, and ‘causing miscarriage’ of a woman was a crime punishable with imprisonment up to three years and/or a fine. The Committee carried out a review of the legal, medical and socio-cultural aspects of abortion and recommended legalised abortion and a law on comprehensive abortion care. The Committee’s recommendations eventually led to the passing of the MTP Act, 1971, which allows for only medical termination of pregnancies. Moreover the sections of MTP Act begin with “*Notwithstanding anything contained in the Indian Penal Code*” clearly signifying that this was more of a protection for doctors conducting ‘medical terminations’ than a comprehensive abortion care for women, as the Committee had originally advertised. This particular choice of words in the law is aimed at not keeping penal provision intact to protect doctors from criminal prosecutions. Further, framing of Section 3 of the MTP Act, which rests the decision of undergoing a medical termination solely on the doctor’s opinion, also points to lack of autonomy for women. However, even when the MTP Act was introduced, the penal provisions weren’t nullified. The law on causing miscarriages continues as is and the punishments remain the same, i.e., imprisonment and/or fine.¹⁷ In a famous case of United Kingdom of *Rex v. Bourne*¹⁸, where a girl under the age of fifteen, was raped and got pregnant as a result of rape. An eminent obstetrics surgeon and gynaecologists, who terminated the pregnancy was charged under Section 58 of the Offences Against the Person Act 1861¹⁹, for causing abortion against the

¹⁷ Shonottra Kumar, *Why India’s law on abortion does not use the word ‘abortion’*, Available at: <https://theprint.in/opinion/india-law-abortion-medical-termination-pregnancy-act/423380/> (Accessed on: 01.02.2021)

¹⁸ [1938] 3 All E.R. 615 at p. 621; See D. S. Devies, *The Law of Abortion and Necessity* 1938 L.R. 126.

¹⁹ Section 58 makes an attempt to procure abortion by administering drugs or using instruments to procure abortion and Section 59 for procuring drugs, etc., to cause abortion punishable with imprisonment for life and up to five years respectively. Indian law of abortion has been modelled on Sections 58 and 59 of the Offences

law. Justice Macnaghten observed that “*if the operation was done bona fide to save the life of the mother, the defendant was entitled to an acquittal, that the bona fide object of avoiding the practically certain physical or mental breakdown of the mother would afford an excuse, that if a doctor in good faith thought it necessary for the purpose of preserving the life of the mother, not only was he entitled to perform the operation, but it was his duty to do so, and that the burden of proving that the procurement of abortion was not lawful was upon the Crown*”. The court directed the jury that if the Crown had satisfied them beyond reasonable doubt that the defendant did not do the act in good faith for the purpose of preserving the life of the girl, he was guilty, but that if it had failed to do so, he was entitled to a verdict of acquittal. The jury gave a verdict of acquittal since the Crown failed to comply with the obligation of proving that the operation was not procured for the purpose of preserving the life of the woman. So this one such landmark decision was there which was considered in India in protecting the interest of doctors performing medical termination in good faith and the law makers cautiously used the term ‘medical termination of pregnancy’ instead of ‘abortion’.

COVID-19 PANDEMIC AND ITS EFFECTS ON ABORTIONS IN INDIA

The world’s biggest Pandemic of the century broke out in 2019 i.e. COVID-19 which is highly communicable. To curb the transmission of this virus biggest lockdown was imposed in almost all the countries in the world and India was no new in this. In India to curb the COVID-19 biggest lockdown in the country was imposed in the month of March 2020. This lockdown caused an unintended consequence by breaking the Family Planning services in India. India’s lockdown to flatten the COVID-19 curve has been followed by reports of increasing domestic violence, mirroring the global trend, and which UN Women has called a ‘shadow pandemic’. This places women at an increased risk of unwanted pregnancies with fewer means to assert their bodily autonomy. There is a pre-existing issue with contraception access, especially in rural areas, which could become aggravated as public health workers responsible for distributing contraceptives are engaged with COVID-19 issues. Further, disruptions in pharmaceutical supply chains are likely to impact the availability of contraceptive methods and medical abortion drugs.²⁰ A public health crisis of this scale renders invisible the rights of those already at the margins. Reports have

against the persons Act 1861, with certain modifications.

²⁰ Rupavardhini B.R. & Vrinda Agarwal ‘*The Pandemic Can’t Be an Excuse to Overlook Women’s Reproductive Rights*’ Available at: <https://thewire.in/health/covid-19-pandemic-women-reproductive-rights-abortion-access> (Accessed 1 February 2021)

begun to emerge of women struggling to access abortion services during the lockdown even though the health ministry has classified abortion as an essential service. Even otherwise, India has a poor record in sexual and reproductive health services. In 2017, the Comptroller and Auditor General of India's performance audit report on reproductive and child health under the National Rural Health Mission flagged several issues with physical infrastructure, equipment and medicines, human resources, and provision of safe abortion services. Despite the medical termination of pregnancy laws, women face barriers in abortion access. The recent amendments to the Medical Termination of Pregnancy Act 1971 are meant to remedy some longstanding lacunae in the law, but the pandemic threatens to undo all progress on this front. Abortion and maternal care are time-sensitive interventions. Recognising this, a PIL was filed in the Delhi High Court for directions to the Centre to ensure access to medical services for pregnant women. As a relief measure, the high court directed the Delhi government to ensure a helpline service is made available for pregnant women and is publicised through newspapers and the social media. Even though the lockdown restrictions have been uplifted but still return of normalcy will take time hence ensuring sexual and reproductive health must be an integral part of the government's immediate response strategy otherwise it could cause immeasurable damage to the progress that India has made in meeting the sustainable development goal of gender equality. Reproductive rights are inalienable and have legitimate demands on public resources especially during a crisis.

PARADIGM SHIFT TOWARDS A NEW APPROACH

The Indian state's approach to reproductive rights historically has focused on population control rather than enhancing individual autonomy and removing structural barriers to reproductive health services, which is reflected in the barriers to provision of services. As a consequence of the early adoption of family planning and population control measures in the 1950s, India was one of the first countries to legislate on abortion and legalise conditional abortion. While contraception was also made available, the focus was on meeting targets for sterilisation rather than temporary spacing methods. This has shifted focus away from universal provision of abortion and contraception to meeting top-down targets for population control. The legality of the abortion is contingent on the mental and physical health of the pregnant woman and the likelihood of the unborn child having a physical or mental abnormality. The mental health of the person is likely to be negatively impacted if the

pregnancy is without consent (i.e. rape, or the failure of a contraceptive method used by a married couple). The supreme law of the land which gives and protects the fundamental rights to a person recognizes reproductive rights as one of them as these rights are essential to the realization of all human rights and violation of the same is critical to ensure gender justice and equality of women in the society. The Constitution of India recognizes many of these same rights as fundamental rights that the government has an obligation to uphold, including the right to equality and non-discrimination (Articles 14 and 15) and the right to life (Article 21) which is understood through jurisprudence to include the rights to health, dignity, freedom from torture and ill treatment, and privacy.²¹ Although India was among the first countries in the world to develop legal and policy frameworks guaranteeing access to abortion and contraception, women and girls continue to experience significant barriers to full enjoyment of their reproductive rights, and denials of women's and girls' decision-making authority. Historically, reproductive health-related laws and policies in India have failed to take a women's rights based approach, instead focusing on demographic targets, such as population control, while also implicitly or explicitly undermining women's reproductive autonomy through discriminatory provisions such as spousal consent requirements for access to reproductive health services. Although abortion is legal on multiple grounds until 20 weeks of gestation and throughout pregnancy where necessary to save the life of the pregnant woman under the Medical Termination of Pregnancy Act (MTP Act), 56% of the 6.4 million abortions estimated to occur in India annually are unsafe and result in 9% of all maternal deaths.²² With this new Medical Termination of Pregnancy (Amendment) Bill ,2020 the legislature has taken a step forward in breaking the 'Pro-life' approach which was followed with respect to abortions and reproductive choices a women had in the country , many a times ignoring the female liberty and autonomy over her body like the "Statement of Objects and Reasons" of the Bill states that several cases have been filed before the Supreme Court and various High Courts seeking permission for aborting pregnancies at stages beyond the 20-weeks limit under the Act, on the grounds of foetal abnormalities or pregnancies due to rape faced by women.²³ It also states that with the advancement of medical technology, there is a scope to increase the upper limit for terminating pregnancies especially for vulnerable

²¹ *Parmanad katara v.Union of India AIR 1989 SC 2039*

²² 7 Frost, Jennifer *Abortion in India: A Literature Review*, Guttmacher Institute (2014) referencing the Report on Medical Certification of Cause of Death, 2010, New Delhi

²³ Supra note 12

women, and in cases of severe foetal abnormality.²⁴ Currently, the medical termination for pregnancy requires the opinion of one doctor, if, it is done within 12 weeks of conception and two doctors if, it is done between 12 and 20 weeks.²⁵ The Bill allows abortion to be done on the advice of one doctor up to 20 weeks, and two doctors in the case of certain categories of women between 20 and 24 weeks.²⁶ This adaptation and recognition of Pro-Reproductive Rights has been long journey and is still a long journey ahead. In this journey the Courts have played a very important role in shifting towards such approach.

A 2004 Supreme Court ruling undermined women's reproductive autonomy by holding that a woman's decision to undergo abortion or sterilization without her husband's consent could constitute mental cruelty,²⁷ subsequent judicial decisions have moved toward greater constitutional protection of this right. In 2009, the Supreme Court recognized women's reproductive autonomy as a fundamental right, stating, "*There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21.*"²⁸ In 2011, the High Court of Punjab and Haryana reiterated women's rights to reproductive autonomy by dismissing a suit filed by a husband against a doctor who had performed an abortion without the husband's consent saying that "*it is a personal right of a woman to give birth to a child...No body [sic] can interfere in the personal decision of the wife to carry on or about her pregnancy...unwanted pregnancy would naturally affect the mental health of the pregnant women [sic].*"²⁹ Further, in the 2013 case of *Haloo Bi v. State of Madhya Pradesh and Others*, the High Court of Madhya Pradesh affirmed the importance of providing victims of rape access to abortion without requiring judicial authorization, stating "*we cannot force a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation which the petitioner is suffering daily, will certainly cause a grave injury to her mental health.*"³⁰ In the 2016 case of *High Court on its Own Motion v. State of Maharashtra*, the Bombay High Court ruled to improve women prisoners' access to abortion and strongly affirmed women's rights to abortion as an aspect of the fundamental right to live with dignity under Article 21. The judgment recognizes that unwanted

²⁴ Supra note 13

²⁵ Medical Termination of Pregnancy Act, 1971

²⁶ Medical Termination of Pregnancy (Amendment) Bill, 2020

²⁷ *Samar Ghosh v. Jaya Ghosh* (2007) 2004 SC 151. 19

²⁸ *Suchita Srivastava & Anr v. Chandigarh Administration*, (2009) 11 SCC 409.

²⁹ *Dr. Mangla Dogra & Others v. Anil Kumar Malhotra & Others*, C.R. 6337/2011

³⁰ Human Rights Law Network (HRLN), The High Court of Madhya Pradesh allowed a pregnant female prisoner to exercise her reproductive rights under the Medical Termination of Pregnancy Act (2013).

pregnancies disproportionately burden women and states that forcing a woman to continue a pregnancy “represents a violation of the woman’s bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.” The decision boldly recognizes that ‘*an unborn foetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control their own body and fertility and motherhood choices should be left to the women alone. Let us not lose sight of the basic right of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant*’.³¹ The cases above illustrate the significant and evolving role the judiciary can play in India to address the legal and practical barriers which operate to deny women and girls their reproductive rights. While litigation has its challenges, including long time frames and difficulty in implementation of decisions, the robust recognition of reproductive rights as fundamental rights emerging from Indian courts has created a mandate for the government to shift away from population control approaches, confront discriminatory stereotypes that limit women’s authority, and instead center women’s rights to dignity, autonomy, and bodily integrity in reproductive health related laws and policies.³²

This transition of approach from Pro-life to Pro-choice has not been easy as there was and still a debate continue over the issue that ‘at what point does the life of foetus becomes worthy of protection and after how many months a woman’s right of termination should be restricted under the MTP Act? Abortion laws rely essentially on deciding when the life begins and societies will always debate over it. Therefore a society need laws to regulate it as where there is a mismatch of opinions and values in the society and presence of uncertainty then laws provide a frame within which people can navigate k owing with certainty that what is right and wrong.

CONCLUSION

Over the last decade, Indian courts have issued several notable decisions recognizing women’s reproductive rights as part of the inalienable survival rights implicitly protected

³¹ *High Court on its Own Motion v. The State of Maharashtra* 19 September 2016

³² Reproductive rights in Indian Courts, Available at: <https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.pdf> (Accessed on: 02.02.2021)

under the fundamental right to life. In certain ground-breaking judgments, the courts have even for the first time recognized reproductive rights as essential for women's equality and have called for respect for women's rights to autonomy and decision-making concerning pregnancy as getting an abortion in India is not just about finding the right doctor who can perform the procedure in a safe manner and through legal methods, it's also about dealing with the stigma and navigating the laws around it. Though we may be living in 2020, if an Indian woman seeks termination of pregnancy even today, she cannot do so openly without judgment and people trying to change her mind. In cases spanning maternal health, contraception, abortion, and child marriage, Indian courts have adopted robust definitions of "reproductive rights" that reflect human rights standards.³³ While court decisions are not uniform, several trailblazing rulings have boldly affirmed women's rights to remedies for violations of reproductive rights-including the first case globally to recognize maternal health as a right-and laid the foundation for Indian courts to continue to play a strong role in preventing and addressing ongoing violations of these rights. In the landmark case of *Devika Biswas v. Union of India*³⁴ the Supreme Court in its decision unequivocally held that Article 21 includes the "reproductive rights of a person." The Supreme Court recognized reproductive rights as both part of the right to health as well as an aspect of personal liberty under Article 21. Recent jurisprudence concerning abortion in India also reflects progressive evolution in the judiciary's articulation of reproductive rights. The recent amendment in the Medical Termination of Pregnancy Act 1971 through Medical Termination of Pregnancy (Amendment) Bill 2020 has placed a step towards those women who wishes to make individual choices from their perspective and predicament by liberalizing some of the provisions in the prevailing Act of 1971. The amendment has raised the Upper limit of Medical termination of Pregnancy from 20 weeks given to 24 weeks in the cases where women are rape survivors, victims of incest, Differently-abled women and minors. Failures of contraception has also been acknowledged as well as it is made available to "any women or her partner" which replaces the earlier provision saying that it was only available for "only married woman other husband" which is also a step towards giving a women the choice over her body and autonomy. The amendment is forward looking and will place the Country among nations with a highly progressive law allowing legal abortions on a much broader range of therapeutic , humanitarian and social grounds which will help in empowering

³³ AIR 2016 SC 4405

³⁴ *Ibid.*

especially those who are socially , economically vulnerable in the society. The amendment also provides that there is no limit for gestational age in case of fetal abnormalities addressing maternal mortality and morbidity arising from unsafe abortions which will spare them from stress and agony of seeking permissions from courts. The amendment also clarifies the role of medical practitioners who hesitate to perform the procedure. The critics of the amendment says that the amendment does not go far enough as it does not deals with the question of when life starts in the womb of a pregnant women and rights of that unborn foetus. The question is more of the social and moral approach inclined towards rights of the one who is not even born ignoring the rights of the one who is responsible to bring that life into existence. The amendment is a huge jump in the abortion laws, there is still the problem of it being only a conditional right – i.e., one can get an abortion only based on a doctor's opinion. Anubha Rastogi, a lawyer and member of Pratigya Campaign Advisory Group said that "*First trimester abortions should be allowed as per request/decision of the pregnant person and it should become a legal right. Moreover, constituting medical boards at all levels would be an operational nightmare. Medical boards will further add to delays and complicate access to abortion, apart from putting an unnecessary burden on an already weak healthcare system. The number of specialist doctors to constitute such boards is limited in many districts and smaller towns,*" Law is a dynamic process where it should keep changing for the development and betterment of the society at large and bringing certainty in situations where there is difference of opinions and uncertainty over some issue in the society. As Bentham says "it is the greatest happiness of the greatest number that is the measure of right and wrong". So this amendment law is a step towards creating a bridge between those who supports reproductive rights of women and those who supports rights of unborn even if there may be some issues in it also but still it is a step taken forward. This amendment makes the point that some of its provisions can be arbitrary for some member of the society but it is necessary. Now its high time that we start giving recognition of woman's right to freely exercise their reproductive and sexual rights including right to terminate her pregnancy. The Medical Termination of Pregnancy (Amendment) Bill, 2020 is a progressive law which should be welcomed and should be enforced at the earliest.

PANDEMIC INDUCED POVERTY AND ITS IMPACT ON ECONOMIC DEVELOPMENT IN INDIA

Palak Agarwal*

ABSTRACT

Pandemic is defined as a widespread occurrence of an infectious disease that causes an effect in a geographic region and causes socio-economic disruption in the world. Now it becomes difficult for the people to eliminate world poverty due to COVID-19 pandemic situation. Effect of infection on rural – urban migration has debilitated livelihoods which majorly consist of migrant laborers which belong to the poor and weak section of the community. The Pandemic had made many poor families of the community in the world face very challenging livelihood consequences. As per the International Labour Organization (UN-ILO) reports, employees working in the informal sectors of India are likely to be burdened by poverty due to the worst pandemic situation in the country nowadays . The report came out in April, 2020 and if the situation stays the same then poverty in the country will worsen day by day with no. of corona cases crossing 25 Lakhs in India by August end. Rural economy in India is having both short and long term effects due to the outbreak of COVID – 19. The COVID – 19 is having a strong negative effect on both developed and weak economies of the world. Indian Government has introduced an economic package which mostly includes long term measures to fight with the situation and short term measures such as cash and wage subsidy to migrant laborers and marginal farmers. Various strategies that can minimize the pandemic impacts on the livelihood and the economic activities of the poor communities are being suggested. This paper targets to analyze how the outbreak of COVID – 19 is causing the socio-economic impact in the economy and how hard it is for the poor communities to follow the guidelines issued by the Central and State Government towards social isolation (quarantine) or the lockdown, having disruptive effects on production, reduction on agricultural works and activities, slowing down the tourism, trade and industry business which ultimately slowdowns the economy.

Keywords: Pandemic, COVID-19, Poverty, Economic Development, Social Isolation

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INTRODUCTION

The economy of India has been drastically disrupted due to the coronavirus pandemic in 2020. The Ministry of Statistics reported that in the fiscal year 2020, India's growth went down to 3.1% in the fourth quarter, which was mainly attributed to the effect of the pandemic. While the country was already in a state of pre-pandemic slowdown, the sudden outburst of the pandemic increased the risk to the current economic scenario of the country. The World Bank and other institutions initially noted that India's growth in the financial year of 2021 might be the lowest figure the country has ever seen in 3 decades, after the economic liberalization in the 1990s. India also announced an economic relief package in an attempt to mitigate the losses caused due to the pandemic, however, despite this, the GDP figures of the country downgraded to further lower figures, indicating a possible recession. The effect of the pandemic and an analysis of the pandemic possibly triggering poverty in the country, and the relevant measures taken by the Government to address such issues are detailed herein below.

POVERTY BEFORE LOCKDOWN AND AFTER LOCKDOWN IN INDIA

The Pre-COVID-19 scenario demands attention as well as India was barely dragging itself in terms of economic growth. “*The International Monetary Fund (IMF) contradicted India’s growth forecast by 1.3 percentage points to 4.8% for 2019-20 while the RBI have estimated growth in 2019-20 at 5%.*”¹ It is to be noted that such low projected growth was, among other reasons (stress in NBFCs) because of weak rural income growth. A report released in the month of June by the World Bank² forecasted that at least 7 to 10 crore people may be pushed into poverty as an effect of the pandemic, corresponding to a global growth that was predicted at 5-8% in this fiscal year, whereas, the projections in April only showed a number of 4 -6 crore, implying an uptick in poverty estimates.

For India as per a prediction by a paper COVID-19 may double the poverty scenario.³ This paper illustrates the poverty level pre and during COVID using the NSSO and Planning

¹ Gita Gopinath, *India’s Slow Growth is a Drag on the World*, LiveMint, Available at: <https://www.livemint.com/news/india/india-s-slow-growth-is-a-drag-on-the-world-imf-11579541807331.html> (Accessed on: 20.01.2020, 11:22 PM)

² Remya Nair, *India Could See Millions Pushed Into Extreme Poverty Due To Pandemic*, ThePrint, Available at: <https://theprint.in/economy/india-could-see-millions-pushed-into-extreme-poverty-due-to-pandemic-world-bank-analysis/440298/> (Accessed on: 12.06.2020, 2:09 PM)

³ Shweta Saini, *Covid-19 may double poverty in India*, Financial Express, Apr 30, 2020.

Commission Data. The difference in poverty ratio and threshold is derived by using the monthly per capita expenditure of households. Using the same a simple example has been illustrated as the poverty threshold levels were estimated at Rs. 768 and Rs. 941 per person in Uttar Pradesh in 2011-12 for a month for rural areas & urban areas respectively. The poverty ratio was calculated to be 29.4%. UP's poverty ratio comes to be 57.5% when measured against the same poverty threshold levels if an income shock of 25% is introduced and after applying this new ration one can easily find that about "*71 million more people would be impoverished in the state.*" The conclusion of the said data states that the overall poverty here rises to 46.3%, i.e., more than twice the 2011-12 levels, and higher than even the 1993-94 levels; and subsequently, will have an additional 354 million poor, taking the total count of the country's poor to about 623 million.

STEPS UNDERTAKEN BY THE CENTRAL & STATE GOVERNMENT TO TACKLE WITH THE SITUATION OF POVERTY DURING & AFTER LOCKDOWN

The palliative measures considered by the Government of India in late March as highlighted disclosed that there are almost 33 crore accounts under the "*Pradhan Mantri Jan Dhan Yojana*" that could have been used for the purpose of cash transfer of a fixed amount to the vulnerable sections.⁴ In most of the states this became an efficient "*Public Distribution System*" for cash handout and through this system beneficiaries were identified. According to the National Food Security Portal in India, there are a total of "*23.53 crore ration cards in the country*".⁵ It was assumed that all these cards belonged to the citizens who were below the poverty line so a transfer of Rupees 1,000 was considered which estimated a cost of Rs. 23,500 crore for the Centre. Eventually, key relief packages offered by the Indian Government were monthly allowance of "*500 rupees for three (3) months*" under the "*Pradhan Mantri Jan-Dhan Yojana*" exclusively for bank account holders who were women, this initiative sought to ensure universal access to banking facilities. To fight the situation of poverty during the pandemic the Indian Government on 26th March announced a financial package of Rs. 1.7 trillion, comprising direct cash transfers and free food. Under the PM-KISAN Scheme in lockdown around 6 crores farmers were benefited and payments of Rs. 13,855 was done towards the first instalment under the scheme. It was also said that the

⁴ Raghuvir Srinivasan, *Blunting the Economic Impact of a Pandemic*, The Hindu, Mar 21, 2020.

⁵ Harikishan Sharma, *What is the "One Nation, One Ration Card" System?*, The Indian Express, May 16, 2020.

wages under the employment guarantee scheme will be cleared by the government which amounted to Rs. 11,499 crores and out of which 4.431 crores had already been released by the government and moreover it was also said that there will be an increase in the wages under the “*MGNREGA Scheme*”, and if the promise is kept then there will be a rise in national average wage i.e. from Rs. 182 to Rs. 202 per person per day. However, the packages have failed to meet the bare minimum requirement of rural citizens.

Government doubled the collateral free loan amount to approximately Rs. 20 Lakhs for women in self-help groups and moreover government for the next three months is trying to provide 8.3 crore women with free LPG refills under the “*Ujjawala Scheme*”.⁶ “*Under the National Social Assistance Programme, Rs 1,400 crore has been disbursed to about 2.82 crore old age people, widows and disabled people.*”⁷

SOCIO-ECONOMIC IMPACT ON THE ECONOMY DUE TO COVID-19 & LOCKDOWN

India has successfully lifted about 271 million people out of poverty during 2006-2016. However, the current pandemic seems to threaten this gain made by India when around 90% of India’s workforce that includes 400 million workers engaged by the informal business sectors was at a higher risk of being more affected by poverty during the crisis, which is related with the farming sector which has now halted due to the restrictions imposed on mobility and lack of access to labor and hindrance of remittance to the village people.⁸

A Private think-tank CMIE reveals that unemployment in India has risen to 27% as of the 3rd of May, 2020 and has further increased thereafter. Although in the month of May, 2020 the no. of people with no income were around 7.5% of the workforce as against 9% in the month of April, 2020 but the same has increased when compared with the pre pandemic situation where the level was at 6%. According to them, incomes are paused, as the percentage of the workforce earning less than Rs 3,000 a month elevates to 24% of the workforce as against 15% before the onset of the crisis. Experts have suggested that the coronavirus pandemic has magnified the fault lines within the consumer economy, especially income inequality.

⁶ HT Correspondent, *20 Days, 20 Steps: A Look At Government’s Measures Against Covid-19 Amid Lockdown*, The HT, April 13, 2020.

⁷ *Ibid.*

⁸ PTI, *Coronavirus crisis hit poor the hardest; leaves more people without income than pre-pandemic*, Financial Express, June 25, 2020.

When addressing the agriculture sector and its impact due to the crisis, which is bestowed upon such a vulnerable section of the Indian society, the state of affairs is quite disheartening. COVID-19 is disrupting the services of the agriculture industry and the supply chain as there is unavailability of migrant labor which leads to the halting of many agricultural activities specifically in the northwest India regions.⁹ There are interruptions in the existing supply chain structures due to the transportation and movement hurdles and related concerns. Although prices have declined for essential commodities such as wheat, vegetables, and other crops, consumers continue to pay more for acquiring such goods. Reports have also shown that milk sales have also been affected due to the sudden and long closure of hotels, restaurants as well as confectionery and sweet shops. For India the economic crisis will be much more severe, for two reasons. First, Pre-COVID-19, the economic scenario in India was already on the decline and experiencing slow growth due to widespread issues relating to employment, non-competitive income range, education and employment issues faced in the rural regions and widespread inequality. It is also to be noted that the informal sector in India is more exposed to vulnerability in this crisis since they are not on an equal pedestal to the formal sector in terms of stability of work, income and other protection. According to available data, of the 465 million workers in India, around 422 million, about 91% of the population belonged to the informal sector in the year 2017 – 2018.

The migrant issue crisis evolved as one of the most difficult repercussions India had to face during the pandemic. Lakhs of migrant workers were left stranded in the place where they were employed, with little or no supply of proper food and proper shelter. As most of the migrant workers relied on a day to day income, many of them had no or very little cash to even avail of the ration or other essential products, including medicines. Although relief measures were announced specifically by the Government on the 26th of March, 2020, the relief packages have not reached them on time or are taking a long time which is further adding to their woes.¹⁰

Last year, India had one of the largest Diasporas in the world, amongst all the countries in the

⁹ S. Mahendra Dev, *Addressing Covid-19 Impacts on Agriculture, Food Security & Livelihoods in India*, International Food Policy Research Institute, Available at: <https://www.ifpri.org/blog/addressing-covid-19-impacts-agriculture-food-security-and-livelihoods-india> (Accessed on: 08.04.2020)

¹⁰ Tina Edwin, *Why Migrant Workers Are Protesting: No Money to Buy Essentials, Limited Access to Food*, The Hindu – Business Line, Apr 16, 2020.

world, and was remitting millions of dollars and significantly contributed to the economy.¹¹ Between the years 1990 and late 2000s, India saw a threefold increase in migration from India, rendering it the largest country of origin for migrants¹². However, their conditions changed substantially in the months of February and March of this year, as the coronavirus pandemic caused havoc in the country, rendering many migrants without jobs and shelter. Desperate and despairing, they approached the Indian Government in the hope of a solution. However, to date, only around 8,78,000 Indians have been repatriated through the Vande Bharat mission.

A study conducted By SWAN observed that the livelihood of at least twelve crore people in the country had been affected due to the crisis and the enforcement of the Government's directive to pay the full amount of wages without any deduction have not been fully complied with by all the organizations. Construction Workers who are not duly registered are not able to access the aid properly from the cess collected by the Labour Welfare Board. "*Very few States recognized the distress of migrant workers and extended relief measures such as free rations to those without ration cards and cash transfers to stranded migrants.*"

A study conducted by SWAN evidenced that in the first phase of the lockdown period, wages were not paid by the employers to their workers which got stranded due to the pandemic and were about 89% and also that almost 74% of the migrant workers were getting only less than half of their daily wages throughout the lockdown period, where the average wage of most migrant workers itself is only about Rs. 400 a day.

LAWS AND ACTS GOVERNING LOCKDOWN (DISASTER MANAGEMENT ACT) & INVOKING OF EPIDEMIC DISEASE ACT

In order to cope up with the pandemic, the Government resorted to legislation, as old as 123 years for rescue. In order to ensure enforcement of all advisories of the Union Health Ministry and State Government in this crisis, "*Section 2 of the Epidemic Diseases Act 1897*" was invoked. Apart from this the Disaster Management Act was also invoked to bring into force the initial "*21-day nationwide lockdown*" that began on the midnight of 24th March 2020. The Government was empowered to enforce actions to battle the crisis with the aid of

¹¹ S. Anisha, *In India, Coronavirus has created a "crisis within a crisis" by bringing migration abroad to a halt*, Available at: <https://scroll.in/global/970268/in-india-coronavirus-has-created-a-crisis-within-a-crisis-by-bringing-migration-abroad-to-a-halt> (Accessed on: 25.08.2020, 06:30 AM)

¹² *Ibid.*

the aforesaid legislations.¹³

The Epidemic Diseases Act, 1897

The Epidemic Diseases Act is one of the shortest legislation in India, with only four sections and was formulated for “*providing for better prevention of the spread of Dangerous Epidemic Diseases.*” The Central Government has the power to prescribe regulations related to inspection of ship or vessel leaving or arriving in any port & to detain any person planning to leave or enter India under Section 2A. Restricting the international and domestic travels also falls under the provisions of the act as per advisory issued by the government. The State Government can prescribe regulations to any person or group of people to contain the spread of coronavirus.

The Disaster Management Act, 2005

The Disaster Management Act ('DMA') was enacted by the legislation to handle the issues arising out of natural disasters at the Central as well as State Government levels.

Under “*Section 2 of the DMA Act*” disaster is defined as a "catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man-made causes". In March this year, the Central Government of India identified the coronavirus as a critical situation or in other words as Pandemic. Under the provisions of the DMA Act, the Centre, as well as the States, has the power to enforce lockdowns and restrict any free public movement. The government is also empowered to have access to the “*National, State as well as District Disaster Response Fund*”

The Penalties¹⁴

Penalties are prescribed under the “*Section 3 of the Epidemic Diseases Act, 1897*” for violating the regulations or order made under this Act. These falls under Disobedience to order duly promulgated by a public servant as per “*Section 188 of the Indian Penal Code*”, such offences are punishable by imprisonment of six months and fine of an amount up to Rs

¹³ Rahul Gul, *The Legal Framework behind the Lockdown*, National Herald, Available at: <https://www.nationalheraldindia.com/india/explained-the-legal-framework-behind-the-lockdown> (Accessed on: 06.05.2020, 09:48 AM)

¹⁴ RSTV Bureau, *Epidemic Act & Disaster Management Act Enforced to Combat Covid-19*, RSTV,, Available at: <https://rstv.nic.in/epidemic-act-disaster-management-act-enforced-combat-covid-19.html> (Accessed on: 31.03.2020, 7:01 PM)

1000 or with both.

Sections 51 to Section 60 of the DMA enlist the penalties for the violators of the rules framed under the Act. Violators can be jailed for up to 1 year or fine, or both and the jail term can be extended to 2 years if the behavior is of more dangerous nature. Apart from the aforementioned Acts, several state governments are also invoking “*Section 144 of the Indian Penal Code*”, which prohibits the gathering of four or more people in a particular area. This provision is invoked to enable the administration to keep a check and control crowding and prevent the spread of the virus.¹⁵

WITHDRAWAL OF MHA ORDERS

In March, 2020 the Labour and Employment Ministry had issued an order advising all the establishments not to terminate contracts of their employees working, especially the casual and contractual workers and should not reduce the wages and salaries of their employees due to Covid-19 pandemic. The advisory also stated that if the working of an establishment is suspended due to the pandemic, then also the employee of such establishment will be considered on duty, therefore an order was issued. Many state governments also issued a similar kind of advisory like this which stated that the initial lockdown period would be treated as paid leave working professionals in any establishment i.e. till 31st March, 2020.

Subsequently the nationwide lockdown was extended and some state government extended their previously passed orders of treating the lockdown period as paid leave and some stated issued a new advisory under the “*Epidemic Diseases Act, 1897* which stated that the employees whether temporary, outsourced or contractual of private establishments are needed to stay at home and work from of home if possible and the employees would be treated as on duty as per the government orders and shall be paid full salary without any cut.” MHA Order and other orders & advisories issued by the state government were challenged before the Apex Court as being unconstitutional on various grounds of fundamental rights and if they are forced to pay the salaries during the lockdown period when there is not much revenue earned by the industries then the industries and establishments will collapse.

Many employers resorted to the option of reduction in salaries of the employees by not

¹⁵ *Ibid.*

following the MHA Order and state government advisory. These reductions were done forcefully and in some cases voluntarily as the industries knew, no one wanted to quit their job and every person needed at least some amount of money to live during these situations which the world was facing. Other measures which the employer resorted to were leave without pay, terminating large no. of employees when they are not earning much revenue. Many counter petitions were filed seeking protection from wrongful termination of employment and irregular payment of wages. “*The principle of no work-no wages cannot be applied during the present pandemic situation due to Covid-19 and also ordered the employer to ensure that the contractor pays full wages except various allowances like food and conveyance allowance, to the employees from March, 2020 to May, 2020. It was decided by the Aurangabad bench in the petition filed by Rashtriya Shramik Aghadi.*”¹⁶ New MHA Orders has lifted almost every restriction including restriction on private offices and units to pay the full salaries and “*wages to the workers during the period of lockdown*” is no longer relevant as now offices and establishments are allowed to operate which requires their employee to report back to their work but with a condition to follow social distancing norms and other protection norms.¹⁷

CASE LAW RELATED TO PAYMENT OF WAGES DURING THE LOCKDOWN

State Authorities which facilitate all the Private Establishments, Factories, Trade Unions etc. can now avail interim measures for the “*Payment of Wages during the lockdown*”. Such interim measures were issued by the Supreme Court in July.¹⁸ Employers and employers’ associations of various sectors filed Writ Petitions challenging the orders issued under Disaster Management Act, 2005 and further subsequent orders issued by various States and authorities at different points of time where directions were issued for all employers, including employers who are industries or shops or commercial establishments falling within the ambit of the Shops and Commercial Establishments Act shall be liable to make prompt and full payment of wages to the workers of the organizations on or before the due date without making any deductions, for the period of time such establishments are under closure

¹⁶ *Rashtriya Shramik Aghadi v. The State of Maharashtra & Ors.* (Writ Petition No. 4013 of 2020).

¹⁷ Seema Jhingan & Tanmay Mohanty, *MHA Withdraws Order Requiring Compulsory Payment of Wages*, Mondaq, Available at: <https://www.mondaq.com/india/employment-and-workforce-wellbeing/937246/mha-withdraws-order-requiring-compulsory-payment-of-wages> (Accessed on: 19.05.2020)

¹⁸ *Ficus Pax Private Limited v. Union of India* (Writ Petition (C) Diary No. 10983 of 2020)

during the lockdown.¹⁹

Moreover, any private establishment or employer can enter into negotiation and settlement scheme regarding the payment of wages for 50 days to their employees during the period when no work was carried out by the industry and was closed due to the lockdown imposed in the nation and if they are unable to settle the claims, then they can submit a proper request to the concerned labor authorities who are entrusted with the obligation to conciliate the dispute between the parties who on receiving such request, may call the concerned Employees Trade Union/workers Association/ workers to appear on a date for negotiation, conciliation, and settlement.

Any industries, factories, companies, commercial establishments, employer's establishments or any other enterprises that remained functional during the lockdown period are also entitled to follow the steps enumerated in the Direction, even if such organizations were not running in their full capacity. Further, any existing rules pertaining to unpaid wages of more than fifty days shall not apply in any manner prejudice industries, private establishments or factories that allow employees to continue working in the establishment.

CONCLUSION

According to the NCRB Data 42,480 Farmers and Daily Wagers committed suicide due to poverty in 2019. In 2020 a total of 195 people died of suicide in Noida since January and numbers have spiked following the announcement of lockdown. In January the number of suicide cases were 16, in February the cases were 19, in March the cases were 15 and then the numbers had spiked due to the announcement of lockdown in the country i.e in the month of April the number of suicide cases were 24, in May the number went up to 31, in June it went up to 34, in July the cases were 30 and in August 26 people died of suicide due to poverty. The Indian economy shrank 23.9% year-on-year in the second quarter of 2020, much worse than market forecasts of an 18.3% drop. It is the biggest fall down till date as the Indian Government imposed a coronavirus lockdown in March, 2020 and had extended the same in many phases. Various sectors of the economy saw a decline like the Construction Sector saw a decline of 50.3%, Hotels & Transportation saw a decline of 47%, Mining & Quarrying saw a decline of 23.3%, Finance & Real Estate Business saw a decline of 5.3%, Exports saw a

¹⁹ Krishnadas Rajagopal, *Lockdown Wages: Supreme Court Allows Firms to Negotiate with Staff*, The Hindu, June 12, 2020.

decline of 19.8% and Imports went down to 40.4%. To fight the situation of declining GDP and to recover the Economy, the Indian Government had announced unlock in the country so that the various sectors of the economy can operate and can recover itself as soon as possible but at the same time the country saw a rise in the no. of corona case which have now crossed the mark of 40 Lakhs in India in the 1st week of September, 2020 and is expected to cross the mark of 50 Lakhs by September end.

DEVELOPING A NATIONAL PLAN OF ACTION ON VIOLENCE AGAINST WOMEN AND GENDER VIOLENCE: A HUMAN RIGHTS APPROACH

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INTRODUCTION

On October 16, 2017, new hashtag #MeToo-inundated U.S. social media, "*If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem,*" wrote the actor Alyssa Milano on Twitter¹, building upon the "Me Too" movement founded by activist Tarana Burke a decade earlier.² Over the next month, millions of women and many men posted #MeToo on their social media accounts, many with painful accompanying stories.³ The hashtag campaign came on the heels of multiple shocking allegations of sexual and intimate partner violence against women committed by high-profile men-Harvey Weinstein, Bill O'Reilly, Roger Ailes, Bill Cosby, Ray Rice, and Donald Trump, to name a few. Subsequent revelations of sexual violence by powerful men followed, and sexual harassment and assault stories dominated news headlines.⁴

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¹ Alyssa Milano, Twitter post, Oct. 15, 2017, Available at: https://twitter.com/alyssa_milano/status/919659438700670976

² Tarana Burke, a Black woman from Harlem, founded the grassroots "Me Too" movement in 2006 to spur "mass healing" for sexual violence survivors in underprivileged communities. Zahara Hill, "A Black Woman Created the "Me Too" Campaign Against Sexual Assault 10 Years Ago," Ebony Magazine (Oct. 18, 2017), Available at: <http://www.ebony.com/news-views/black-woman-me-too-movement-tarana-burke-alyssa-milano#ixzz4yWw6RMT3>; Me Too Movement website, Available at: <https://metoomvmt.org/>.

³ According to U.S. News and World Report, "[i]n the first 24 hours following Milano's invitation to women to share their personal experiences by replying "Me Too" to her Facebook post, the social media platform received 4.5 million posts. On Twitter, her tweet drew 70,000 replies, while another 1.7 million tweets on the topic have been posted, according to the social media platform. More than 85 countries have registered more than 1,000 tweets with the "MeToo" hashtag." Sintia Radu, "How #MeToo Has Awoken Women Around the World," U.S. News and World Report (Oct. 25, 2017), Available at <https://www.usnews.com/news/best-countries/articles/2017-10-25/how-metoo-has-awoken-women-around-the-world>. See also Emanuella Grinberg and Jennifer Agiesta, "One fifth of Americans know someone who said #MeToo," CNN (Nov. 9, 2017), Available at <http://www.cnn.com/2017/11/09/us/cnn-poll-sexual-harassment-assault/index.html> ("1 in 5 Americans said close friends or family members shared stories about sexual harassment or assault on social media, according to a CNN poll").

⁴ Doug Criss, "The (incomplete) list of powerful men accused of sexual harassment after Harvey Weinstein,"

Many have described this moment in our country - indeed in our world - as a “tipping point” on gender violence.⁵ Malcolm Gladwell defines a tipping point as “the moment a social trend passes a threshold and starts to spread like wildfire.”⁶ Sexual assault, sexual harassment, domestic violence, dating violence, and stalking have increasingly become regular topics of conversation in schools, in the media and public spaces, and in law and policymaking—due largely to survivors, advocates, and institutional champions stepping up and speaking out. An estimated three to five million people participated in women’s marches in hundreds of cities and towns across the United States (and hundreds of thousands more worldwide) on January 21, 2017.⁷ Approximately 440,000 people have taken the It’s on Us pledge online to be a part of the solution to ending sexual assault, and students have hosted over 3,000 It’s On Us events on 575 college campuses nationwide.⁸ Domestic violence, once a footnote in public policy discussions, has become a leading focus in our national discourse about gun safety⁹ and “sanctuary cities” that refuse to enforce immigration law.¹⁰ State and local governments,

CNN (Nov. 1, 2017), Available at <http://www.cnn.com/2017/10/25/us/list-of-accused-after-weinstein-scandal-trnd/index.html>. While most advocates have praised the #MeToo movement for bringing much-needed attention to an issue that has historically been swept under the rug, some have criticized the mainstream manifestation of the “MeToo” movement and the “Weinstein effect” for primarily focusing on high-profile, white, cis-gender women, not on those most vulnerable to violence: women of color, gender-nonconforming individuals, and women who work in service industries, low-wage industries, and in industries dominated by men. Others have criticized #MeToo for being a “trauma-driven spectacle” that promotes a hierarchy of trauma; and still others have expressed caution that a public battle against sexual assault can become a moral panic against sex. See, e.g., Harry Lewis, When “Me Too” is Too Much (And Not Enough), *The Huffington Post* (Nov. 10, 2017), Available at: https://www.huffingtonpost.com/entry/when-me-too-is-too-much-and-not-enough_us_5a066ff4e4b0ee8ec3694195; Masha Gessen, When Does a Watershed Become a Sex Panic, *The New Yorker* (Nov. 14, 2017), Available at <https://www.newyorker.com/news/our-columnists/when-does-a-watershed-become-a-sex-panic>; Annie Lowrey, The Inequality Beneath the Sexual-Harassment Headlines, *The Atlantic* (Oct. 26, 2017), Available at: <https://www.theatlantic.com/business/archive/2017/10/sexual-harassment-media-hollywood-entertainment/544068/>.

⁵ CNN Town Hall, *Tipping Point: Sexual Harassment in America* (Nov. 9, 2017), Available at: <https://www.youtube.com/watch?v=YKX9tnf1a4k>

⁶ Malcom Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (2002).

⁷ Women’s March, Sister Marches, Available at <https://www.womensmarch.com/sisters>; Erica Chenoweth and Jeremy Pressman, “This is what we learned by counting the women’s marches,” *The Washington Post* (Feb. 7, 2017), Available at https://www.washingtonpost.com/news/monkey_cage/wp/2017/02/07/this-is-what-we-learned-by-counting-the-womens-marches/?utm_term=.2f0457dd03b9.

⁸ It’s on Us, Available at <http://www.itsonus.org/>; personal correspondence with Tracey Vitchers, It’s on Us Executive Director, Nov. 16, 2017.

⁹ See, e.g., Everytown for Gun Safety, *Guns and Domestic Violence*, Available at: <https://everytownresearch.org/guns-domestic-violence/>.

¹⁰ PBS NewsHour, Officials worry Trump’s vow to squeeze ‘sanctuary cities’ could hurt health programs (May 1, 2017), Available at <https://www.pbs.org/newshour/health/officials-worry-trumps-vow-squeeze-sanctuary-cities-hurt-health-programs>; P.R. Lockhart, Women Are Now Living With the Fear of Deportation If They Report Domestic Violence, *Mother Jones* (May 25, 2017), Available at <http://www.motherjones.com/politics/2017/05/immigrant-sexual-assault-domestic-violence-survivors-fear->

much like the Obama-Biden administration (in which I had the honor of serving as the White House Advisor on Violence Against Women),¹¹ are taking unprecedented action to ramp up prevention and response efforts to gender violence.¹² If there ever was a tipping point on sexual and intimate partner violence in the United States, it is arguably now.

Tipping points do not inevitably result in systemic change, however. A coordinated and systematic national response to violence against women and gender violence in the United States—one which builds upon the decades of advocacy and the collective outpouring of energy, angst, and experience in the current moment, and one that pulls together the public and private sectors, and government at all levels (federal, state, and local)—is needed to create lasting change.

A national plan of action on violence against women and gender violence in the United States can be a catalyst for such lasting change. UN Women, the United Nations organization dedicated to gender equality and the empowerment of women, has urged all countries to adopt such plans; and approximately 50 countries, located on every continent (except Antarctica), have adopted national plans of action on violence against women and/or gender-based violence.¹³

The United States does not have a national plan of action on violence against women or gender violence. That makes it a global outlier. Many of the countries that have adopted national plans—including Canada, the United Kingdom, Australia, Germany, Spain, and Ireland—are considered “sister countries” to the United States, due to shared legal, political, and cultural traditions. While the Violence Against Women Act in the United States is a landmark piece of legislation and has many of the hallmarks of a national action plan on violence against women, it does not constitute a whole-of-government, goal-oriented,

enforcement-survey#.

¹¹ The Council on Women and Girls: Violence Against Women Accomplishments, The United State of Women White House Summit (June 2016), Available at: https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Women%20and%20Girls_VAW.pdf.

¹² See, e.g., “Illinois Attorney General Issues Sexual Assault Response Guidelines,” Illinois Public Media News (July 14, 2017), Available at <https://will.illinois.edu/news/story/illinois-attorney-general-issues-sexual-assault-response-guidelines>; Richard Winton, “L.A. prosecutors form special Hollywood sexual assault task force,” L.A. Times (Nov. 9, 2017), Available at <http://www.latimes.com/local/lanow/la-me-da-sexual-task-force-prosecutors-20171109-story.html>; <http://thehill.com/homenews/administration/342977-12-state-ag-s-urge-devos-to-keep-obama-era-college-sexual-assault>

¹³ UN Women, Handbook for National Action Plans on Violence Against Women (2012), Available at <http://www.unwomen.org/media/headquarters/attachments/sections/library/publications/2012/7/handbooknationalactionplansonvaw-en%20pdf.pdf?la=en&vs=1502>.

community-informed, forward-looking national plan of action, for reasons discussed below.

While the United States should develop a national plan of action on violence against women and gender violence, that plan should not (and, presumably, would not) come from the Trump administration. This administration has rolled back important protections for women, girls, and gender-nonconforming individuals,¹⁴ and has ended important White House initiatives on gender equality and violence launched by the Obama-Biden administration.¹⁵

But women's rights are human rights, and human rights start at home, as Eleanor Roosevelt once famously said.¹⁶ A national plan of action on violence against women and gender violence should ultimately be a product of activism that is cultivated locally and then coordinated nationally. Two ways of engaging in local mobilization include the Cities for CEDAW campaign¹⁷ and the dozens of municipalities that have passed resolutions declaring, "freedom from domestic violence is a fundamental human right."¹⁸

NATIONAL PLANS OF ACTION ON VIOLENCE AGAINST WOMEN: AN OVERVIEW

Over the past two decades, international human rights treaties and monitoring bodies have called upon Governments to formulate and implement national plans of action to eliminate

¹⁴ See, e.g., Tara Palmeri, "White House council for women and girls goes dark under Trump," Politico (June 30, 2017), Available at: <https://www.politico.com/story/2017/06/30/donald-trump-white-house-council-for-women-and-girls-239979>; Sunny Frothingham and Shilpa Phadke, "100 Days, 100 Ways the Trump Administration Is Harming Women and Families," Center for American Progress (April 25, 2017), Available at <https://www.americanprogress.org/issues/women/reports/2017/04/25/430969/100-days-100-ways-trump-administration-harming-women-families/>; Brittany Levine Beckman, "8 things Trump's done to hurt girls since taking office," Mashable (Oct. 11, 2017), Available at: <http://mashable.com/2017/10/11/trump-international-day-of-the-girl-hypocrisy/#sjL0BYINbSqj>.

¹⁵ Among the many initiatives in the Obama-Biden administration to combat violence against women were: the establishment of the position of White House Advisor on Violence Against Women, the White House Council on Women and Girls, the White House Task Force to Protect Students from Sexual Assault, the Sexual Assault Kit Initiative, the White House Interagency Working Group on Violence Against Women. The Council on Women and Girls: Violence Against Women Accomplishments, The United State of Women White House Summit (June 2016), Available at: https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Women%20and%20Girls_VAW.pdf These significantly expanded upon initiatives established by President Bill Clinton, including the President's Interagency Council on Women and the White House Office of Women's Initiatives and Outreach. See The Clinton Presidential Library, Records of the President's Interagency Council on Women, Available at: <https://clinton.presidentiallibraries.us/items/show/36493>.

¹⁶ Available at: <https://www.nps.gov/elro/learn/education/classrooms/wheredohumanrightsbegin.htm>

¹⁷ Available at: <http://citiesforcedaw.org/>.

¹⁸ Available at: <http://www.lawschool.cornell.edu/womenandjustice/DV-Resolutions.cfm>

violence against women.¹⁹ Such action plans constitute strategic, long-term, multi-sectoral “blueprints” or programs of activity designed to address the underlying causes of violence against women and strengthen the systems that respond to it - as opposed to more reactive approaches.

Many countries have heeded these calls, and have adopted dedicated plans on violence against women. In some countries, plans focus on a particular form of violence, such as domestic violence, human trafficking, female genital mutilation/cutting, and forced marriage. Many national action plans on violence against women set out measures in relation to support for victims/survivors; prevention, including awareness-raising and education, and engaging men and boys; training and capacity-building efforts; prosecution, punishment and rehabilitation of perpetrators; and research.²⁰

Some countries have even developed second or third generation action plans, which contain lessons learned or impact assessments of earlier efforts. These subsequent plans often focus attention on specific groups of women, or different forms of violence, not addressed in the first plan. Action plans and strategies to address violence against women are also increasingly adopted at the provincial and local levels, as well as by independent public and private institutions, such as universities. Many countries also have incorporated targets and activities to combat violence against women in other existing national action plans on, e.g., health, HIV/AIDS, development/social inclusion, and integration/migration.²¹

Guiding Principles²²

UN Women has recommended that national action plans on violence against women should reflect several guiding principles, described below:

- 1) Embrace a human rights-based approach that acknowledges that violence against women is a violation of human rights; defines violence against women according to

¹⁹ These treaties and monitoring bodies include, inter alia: the UN Committee on the Elimination of Discrimination against Women, the UN Committee on Human Rights, the Beijing Platform for Action (adopted by the Fourth World Conference on Women in 1995), the UN Declaration on the Elimination of Violence against Women, the UN General Assembly, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of Belem do Para”), the Mechanism to follow-up the Convention Belem do Para (MESECVI), the Council of Europe, and the European Parliament of the European Union. See UN Women, Handbook for National Action Plans on Violence Against Women (2012), pp. 5-8.

²⁰ UN Women, Handbook for National Action Plans on Violence Against Women (2012)

²¹ *Ibid.*

²² *Ibid.* at 10-15

international human rights norms; and responds explicitly to State obligations under relevant human rights treaties;

- 2) Recognize that violence against women is a form of sex discrimination and a manifestation of historically unequal power relations between men and women;
- 3) Identify the different forms of violence against women: physical, sexual, psychological/emotional, and financial; domestic violence, sexual violence, marital rape, stalking, sexual harassment, trafficking and sexual exploitation, child marriage, female genital mutilation, and other practices; violence that happens across the life course; in public and private spheres; and in national and transnational contexts;
- 4) Address the root causes, prevalence and impact of violence against women, and identify gaps for future work; and
- 5) Take account of multiple and intersecting forms of discrimination and disadvantage, and tailor strategies and action that recognize how women's experience of violence is shaped by factors such as their race, color, religion, political or other opinion, national or social origin, property, marital status, sexual orientation, HIV/AIDS status, migrant or refugee status, age, or disability.

Developing and Implementing Plans of Action²³

UN Women has emphasized that developing national plans of action “is not just about drafting actions, but setting up the structures and engaging stakeholders necessary for its effective implementation. Engagement, advocacy and cooperation, between government departments, between government and non-government organizations, and between people and communities are essential to coordinate and sustain the document’s actions. Structures for coordination, information sharing and networking, and for the ongoing communication of, and advocacy for, the plan’s messages, are just as important as the plan itself.”²⁴ Thus, the development and implementation phases of national action plans should include:

- 1) Developing a coherent, comprehensive, and sustained program of activity that includes cross-cutting actions to establish and build the capacity of governance structures;

a

²³ *Ibid.* at 16-68

²⁴ *Ibid.* at 16

focus on primary prevention and meaningful response systems to violence against women; an articulation of concrete goals, actions, timelines, implementing entities; designated funding sources; and evaluation, monitoring, and reporting mechanisms;

- 2) Establishing and fortifying a mechanism to facilitate direct, ongoing, and meaningful engagement with civil society;
- 3) Creating effective and accountable governance structures that ensure leadership, oversight, support and engagement at the highest political levels and across all levels of government in all aspects of the plan;
- 4) Ensuring the creation of a whole-of-government implementing institution that includes a high-level board or steering committee (lead institution), comprised of senior government officials across all government departments and other stakeholders, and which makes high-level decisions and coordinates activities concerning implementation of the Plan. This body should be adequately-resourced and have substantive expertise along with a strategic mandate to drive action;
- 5) Supporting community organizations and networks to drive activity at the local level and ensure coordinated action across geographical locations;
- 6) Ensuring coherent, comprehensive, and consistent approaches to legislation and policy related to violence against women;
- 7) Building capacity of professionals involved in the prevention of, and response to, violence against women;
- 8) Regularly collecting, communicating and analyzing comprehensive statistical and qualitative data, disaggregated by sex, race, age, ethnicity and other relevant characteristics, on the nature, prevalence and impact of all forms of violence against women; and supporting independent research on emerging issues;
- 9) Developing primary prevention programs that address social and cultural norms, including awareness-raising strategies and sensitization of the media; that are established in key educational, organizational and community settings; that target and engage specific groups, such as men and boys, parents, children and young people; and that address associated factors which can exacerbate or intensify violence against women;

- 10) Establishing an effective, integrated response system that provides care, support, and empowerment of survivors; provides measures of protection and justice for victims; coordinates and integrates key systems; and provides for universal coverage across geographical locations and for all women;
- 11) Providing sufficient and ongoing funding for the plan's cross-cutting actions (including training, collection and analysis of data, legislative and policy reviews, and the establishment and activity of institutions and mechanisms (i.e. research and monitoring bodies) necessary for the plan's effective implementation; and
- 12) Supporting broader law, policy, and social efforts to support gender equality.

*Evaluation, Monitoring and Reporting*²⁵

As UN Women explains in their report, effective and independent monitoring “is a cornerstone of human rights based policy-making and democratic principles” that can foster improved implementation of national plans of action over time, “by identifying successful initiatives/programmes [sic] for further development, and problem areas for timely management.”²⁶ Key features of regular and comprehensive evaluation, monitoring and reporting of implementation progress include the following elements:

- 1) Clearly defined indicators and targets that are closely linked to the goals and objectives of the national action plan, to monitor progress and evaluate effectiveness;
- 2) A multi-sectoral mechanism to monitor implementation of the plan, that (i) gathers and analyzes information; (ii) monitors progress in attaining the plan’s objectives; (iii) identifies good practices and obstacles; and (iv) proposes measures for future action;
- 3) Ensuring meaningful participation of civil society and other stakeholders in all phases of the plan;
- 4) Comprehensive and regular evaluation of projects, programs of action, and whole systems; and
- 5) Regular and accountable reporting procedures on implementation and progress of the plan.

²⁵ *Ibid.* at 69-73

²⁶ *Ibid.* at 69

THE UNITED STATES' NATIONAL RESPONSE TO VIOLENCE AGAINST WOMEN

Despite being a global leader in the violence against women arena, the United States has never developed a national plan of action to combat violence against women. When pressed on this point in a case before the Inter-American Commission on Human Rights, the United States responded that the Violence Against Women Act (VAWA), originally passed in 1994 and reauthorized three times - in 2000, 2005, and 2013 - is effectively our national action plan, since VAWA constitutes “a comprehensive legislative package”²⁷ that has invested billions of dollars toward protecting victims and preventing and responding to violence against women.

Indeed, the 2013 reauthorization of VAWA took the legislation in an increasingly progressive direction that addressed multiple and intersecting forms of discrimination and disadvantage.²⁸ Despite VAWA’s substantial contributions, however, it does not contain some of the core features of a national action plan - such as a strategic vision for ending violence against women in the United States, or a declaration that violence against women is a human rights violation and a form of sex discrimination, or a set of goals or benchmarks to measure progress. VAWA also does not identify the many laws, policies and programs that, whether explicitly or not, affect survivors’ lives.

Another shortcoming is that since VAWA is primarily focused on the criminal justice response,²⁹ it does not sufficiently take into consideration other important aspects that should be included in a national action plan, such as: economic justice issues, access to affordable housing, health care, workplace policies on domestic violence and sexual assault, the public health perspective, education, prevention initiatives, youth dating violence, children who witness violence, children in the juvenile justice system, the ‘*sexual assault to prison pipeline*’, access to public benefits for low-income survivors, institutional accountability, and gender-based violence (a more expansive term than ‘violence against women’). These issues

²⁷ *Jessica Lenahan v. United States*, Inter-American Commission on Human Rights, U.S. Government merits brief response (2008), p. 27 (on file with author). For information on the Lenahan case, Available at: <http://www.law.miami.edu/academics/clinics/human-rights-clinic-gonzalez-usa>.

²⁸ Violence Against Woman Act of 2013

²⁹ VAWA grant making by the Department of Justice Office on Violence Against Women (OVW) from 2008-2016 increasingly focused on social and economic justice issues, but the primary focus and funding remained on the criminal justice system. See, e.g., U.S. Department of Justice, Office on Violence Against Women, 2016 Biennial Report, Available at: <https://www.justice.gov/ovw/page/file/933886/download>

are scattered across various pieces of legislation and different agencies, without a coordinated approach. The value of a national action plan is that it would look more comprehensively at all these different issues as important aspects of preventing and addressing intimate partner violence and sexual violence, with a lens of intersectionality and with a more coordinated approach across sectors, along with benchmarks.

THE UNITED STATES' NATIONAL ACTION PLANS ON GLOBAL VIOLENCE AGAINST WOMEN

By contrast, the United States has developed national action plans on violence against women outside the U.S. and in other thematic areas within the U.S. Take, for instance, the United States National Action Plan on Women, Peace, and Security (“WPS Strategy”), enacted pursuant to a United Nations Security Council Resolution 1325, and whose goal is “to empower half the world’s population to act as equal partners in preventing conflict and building peace in countries threatened and affected by war, violence, and insecurity.”³⁰ The plan contains five high-level objectives - National Integration and Institutionalization; Participation in Peace Processes and Decision-making; Protection from Violence; Conflict Prevention; and Access to Relief and Recovery - along with a detailed Action Framework for inter-agency coordination; an implementation, monitoring, and reporting strategy; and a call to action.³¹

Another example is the United States Strategy to Prevent and Respond to Gender-Based Violence Globally (“GBV Strategy”), whose goal “is to strengthen and marshal U.S. expertise and capacity to prevent and respond to gender-based violence globally.”³² The GBV Strategy contains four laudable objectives:

- 1) Institutionalize coordination of gender-based violence prevention and response efforts among U.S. Government departments and agencies and with other stakeholders;
- 2) Integrate gender-based violence prevention and response efforts into existing U.S. Government work;
- 3) Collect, analyze, and use data and research to enhance U.S. Government’s gender-

³⁰

Available

at:

<https://www.usaid.gov/sites/default/files/documents/1868/National%20Action%20Plan%20on%20Women%2C%20Peace%2C%20and%20Security.pdf>, p. 2.

³¹ *Ibid.*

³² Available at: <https://www.state.gov/documents/organization/258703.pdf>, p. 17.

- based violence prevention and response efforts; and
- 4) Expand U.S. Government programming that addresses gender-based violence.³³

The GBV Strategy does exactly what a national action plan should do: it memorializes United States commitments to strengthen gender-based violence prevention and response through inter-agency coordination in accordance with human rights principles. However, there is a catch: it only applies to U.S. foreign policy - that is, to the U.S. Government's efforts in other countries.

Both the GBV Strategy and the WPS NAP were developed pursuant to Executive Orders signed by President Obama. They are detailed, proactive, and aspirational, and recognize the national security benefits of a thoughtful approach to gender violence.

NATIONAL ACTION PLANS IN THE UNITED STATES

The United States has adopted at least two national action plans to address human rights issues within the U.S., one of which relates directly to violence against women. In 2014, in commemoration of the 150th anniversary of the Emancipation Proclamation, President Obama released a Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States, co-chaired through an inter-agency process by the Departments of Justice (DOJ), Health and Human Services (HHS) and Homeland Security (DHS).³⁴ This five-year plan was designed to “reaffirm the American values of freedom and equality by asking federal agencies to develop a plan to strengthen services for victims of human trafficking in the United States.” The plan featured four key goals, each with accompanying objectives:

- 1) Align efforts by promoting strategic and coordinated services for victims at the federal, regional, state, territorial, tribal and local levels;
- 2) Improve understanding by expanding and coordinating human trafficking-related research, data, and evaluation to support evidence-based victim services;
- 3) Expand access to services by providing outreach, training, and technical assistance to increase victim identification and expand availability of services; and

³³ *Ibid.*

³⁴ Available at: <https://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf>

- 4) Improve outcomes by promoting effective, culturally-appropriate, trauma-informed services that improve the short- and long-term health, safety, and well-being of victims.³⁵

The Trafficking Plan of Action contained a detailed timeline for future action, specifying federal agency participation in specific actions tied to each objective.³⁶

In December 2015, the White House released a National HIV/AIDS Strategy/ Federal Action Plan for the United States.³⁷ The plan contains a vision statement, an implementation strategy, action items, and goals that were both prevention and response-oriented:

- 1) Reducing New HIV Infections;
- 2) Increasing Access to Care and Improving Health Outcomes for People Living With HIV;
- 3) Reducing HIV-Related Disparities and Health Inequities; and
- 4) Achieving a More Coordinated National Response to the HIV Epidemic

Interestingly, five of the plan's core policy recommendations address the intersection of HIV/AIDS, violence against women and girls, and gender-related health disparities. This intersectional approach stemmed directly from a 2012 Presidential Memorandum establishing a Working Group on the Intersection of HIV/AIDS, Violence Against Women and Girls, and Gender-related Health Disparities - an example of the power of high-level leadership on this issue.³⁸

As we make the case for why the United States should have a national action plan on violence against women and gender violence, one cannot resist highlighting one of the most

³⁵ Ibid., In September 2015, the United States was one of the 193 Member States of the United Nations that committed to the Sustainable Development Goals (SDGs), which includes, among 17 areas of global action, a priority to “eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation” (Goal 5, Target 5.2). Given the requirements for data monitoring to measure country-level implementation of the SDGs, the absence of a national plan of action on violence against women may be a challenge for the US. The lack of a NAP also impedes our ability to meaningfully, and credibly, engages with other countries in multilateral contexts.

³⁶ Available at: <https://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf>

³⁷ Available at: <https://www.hiv.gov/sites/default/files/nhas-2020-action-plan.pdf>

³⁸ Presidential Memorandum -- Establishing a Working Group on the Intersection of HIV/AIDS, Violence Against Women and Girls, and Gender-related Health Disparities (March 30, 2012), Available at <https://obamawhitehouse.archives.gov/the-press-office/2012/03/30/presidential-memorandum-establishing-working-group-intersection-hiv-aids->

recent White House national action plans: the 2015 National Action Plan for Combating Antibiotic- Resistant Bacteria.³⁹ Surely if we can have a national action plan on bacteria, we can have one on violence against women.⁴⁰

PROPOSAL: DEVELOPING A LOCALLY-DRIVEN NATIONAL ACTION PLAN ON VIOLENCE AGAINST WOMEN AND GENDER VIOLENCE

As discussed at the outset of this chapter, while the United States should develop a national plan of action on violence against women and gender violence, that plan should not come from the current administration. This is a moment for states and municipalities to rise to the challenge of developing locally-driven action plans that can, collectively, form a national action plan on violence against women and gender violence.

One vehicle to accomplish this might be in the more than 30 municipalities across the United States that have adopted local resolutions or proclamations recognizing that freedom from domestic violence is a fundamental human right.⁴¹ Another vehicle is the Cities for CEDAW campaign, a grassroots effort that provides tools and leadership to empower local women's, civil and human rights organizations and municipalities to effectively initiate the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in cities and towns across the United States.⁴²

These freedom from DV resolutions and the Cities for CEDAW campaign have inspired legislation and reporting in some municipalities.⁴³ But few, if any, of the municipalities have

³⁹ The White House, National Action Plan for Combating Antibiotic Resistant Bacteria (March 2015), Available at:

https://obamawhitehouse.archives.gov/sites/default/files/docs/national_action_plan_for_combating_antibiotic-resistant_bacteria.pdf.

⁴⁰ Moreover, as detailed in the report, The Spirit of Houston, the idea of a U.S. national action plan on women's rights is not new. With the blessings of Presidents Ford and Carter, 20,000 people gathered in Houston for the first National Women's Conference in 1977. This government-sponsored national gathering included first ladies, activists, artists, writers, and more to focus on issues of concern to women. Conference attendees ultimately proposed a national action plan with 26 planks that ran the gamut of issues that touch women's lives-employment, violence, disabled women, women in prison, abortion, and more - and a statement urging final ratification of the Equal Rights Amendment. Mim Kelber, Ed., *The Spirit of Houston: The First National Women's Conference (1978)*.

⁴¹ See Freedom from Domestic Violence as a Fundamental Human Right Resolutions, Presidential Proclamations, and Other Statements of Principle, Available at: <http://www.lawschool.cornell.edu/womenandjustice/DV-Resolutions.cfm>

⁴² CEDAW is a United Nations treaty that promotes all women's equality. The United States is one of only a handful of countries in the world that has not ratified CEDAW. For more information on the Cities for CEDAW campaign, See, <http://citiesforcedaw.org/background/>

⁴³ For example, the Miami-Dade County Commission amended its anti-discrimination ordinance in July 2014,

adopted a local action plan of the type described in the UN Women Handbook.⁴⁴ Especially in progressive jurisdictions, such plans could, both individually and collectively, capture a vision that is both proactive and reflective of what freedom from gender violence truly looks like, and could also prioritize the populations who are being erased, or undermined, by federal policymaking in the Trump era.

adding victims of domestic violence, dating violence, or stalking to the list of protected classes regarding discrimination in employment, family leave, public accommodations, credit and financing practices, and housing accommodations. In Austin, the resolution tasked the local Family Violence Task Force to provide biennial reports on the challenges faced by survivors of domestic violence and recommendations on how to improve services to those survivors.

⁴⁴ The City of San Francisco's CEDAW Ordinance and establishment of the San Francisco Department on the Status of Women have taken meaningful steps toward establishing a local action plan. *See* <http://sfgov.org/dosw/cities-cedaw>.



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