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“...standards of morality in a society change with the passage of time. A particular activity, which was treated as immoral few decades ago may not be so now. Societal norms keep changing.”

- **Dr. A. K. Sikri J.**

Indian Hotel & Restaurant Assn. v. State of Maharashtra,
(2019) 3 SCC 429, para 79

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Lex Revolution

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- To develop and promote academic research activities on various contemporary socio-legal issues and trends in law,
- To provide a platform to discuss the problems related to socio-legal and research issues.

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MESSAGE

It is with great pleasure we announce the release of Volume V Issue-1 (2019) of ***Lex Revolution*** ISSN 2394-997X as an intellectual platform for contemporary issues pertaining to various fields of Law, Human Rights and Social Science. Research and dialogue is the sine qua non for the development of any legal system. Our goal is to provide scholars worldwide with comparative papers on recent legal developments on the international level. The journal focuses on education, research and existing legal concerns with an editorial board comprising of academicians, professionals, researchers, advocates and students.

We owe our sincere gratitude to legal luminaries Prof. Gopal Krishna Chandani, Prof. S. K. Gaur & Sr. Advocate Mr. K. N. Chaubey for their valuable guidance and motivation for making this journal a reality. We would like to acknowledge the generosity of AdvocateKhoj who have been the continuous platform for us encouraging various forms of legal dialogue with our readers and contributors.

Finally, we would like to thank all prominent members of our Editorial Board for joining us in this new fascinating and promising academic voyage.

We are indebted to the various Contributors, teachers and Research scholars whose views and opinions have been incorporated in the text.

- **Editorial Board**

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COPYRIGHT PROTECTION OF PERFORMERS IN INDIA

Deepika Dwivedi & Dr. Vivek Kumar***

Abstract

This paper deals with the copyright protection which is given to the performers under the Copyright Act of India. It discuss about the definition of performers as given under the Copyright Act, background of the performers right in India. It also mentions the International conventions for the protection of the performer's rights. Various rights exclusive and moral rights are also mentioned in the paper. It also talks about those acts which amounts to infringement of the rights conferred to the performers along with the remedies provided in the act for their protection.

Keywords: *Performer rights, copyright, intellectual property rights, sound recording, video recording, broadcast, injunction, Anton pillar order, etc.*

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INTRODUCTION

Copyright is a type of intellectual property protection which grants exclusive right for a certain term of year to an author, composer, etc., or his assignee to print, publish and sell copies of his original work. Performer's rights were not recognised for a very long term by the Indian Copyright Act, like musicians, singers, actors, acrobats, etc¹.

Following conclusions of Uruguay round of multilateral trade Negotiation on 15 December 1993, the parliament enacted the copyright (second amendment) Act in 1994 as it became clear by then that it would be obligatory for India to protect the rights of performer in order to become a member of the upcoming. The object of the amendment act was to extend protection to all the performers by means of a special right, to be known as the "performer" right" in respect of the making of sound recording or visual recording of their live performances, and of certain related act².

Meaning and definition: The definition of 'performance' has been amended by the Amendment Act of 1994 to mean, in relation to performer's right "*any visual or acoustic presentation made live by one or more performer*". Further the definition of 'performer' has also been inserted by the 1994 Amendment. Section 2 (qq) of the Copyright Act ,1957 defines performer to include an actor, singer, juggler, musician, dancer, acrobat, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance.

A person shall not be treated as a performer, whose performance in a cinematograph film is casual or incidental in nature and in the normal course of the practise of the industry is not acknowledged anywhere including in the credit of the film. Such a person, however shall be considered as performer for the purpose of section 38B(b) which provides moral right to performer to restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation³.

BACKGROUND OF PERFORMER'S RIGHT

Prior to Copyright (second amendment) Act 1994, the copyright Act, 1957, did not cover any right to the performer. Their performance did not come under any of the subject matter of copyright viz. Literary, dramatic, musical, or artistic work, cinematograph film or record. The

¹ Shweta S. Deshpande, *Copyright Protection of Performers Right*, Journal of Library & Information Technology, 2008, Vol. 28, No. 3

² Ahuja V.K, *Law of Copyright and Neighboring Rights*, (LexisNexis, Haryana, Second Edition)

³ Id.

act also did not confer anything like neighbouring or related right on performers, as it did to the broadcasting authority. The question whether copyright subsisted in the performance of a performer was decided by the Bombay high court, in negative in the case of *Fortune films International v. Dev Anand*⁴.

INTERNATIONAL CONVENTION FOR THE PROTECTION OF PERFORMERS

1. Rome Convention ,1961

Under this convention following rights to performer were granted under Article 7 of the convention:

- Right to prevent the broadcasting and communication to the public of their live performance without their consent.
- Right to prevent fixation of their live performance without their consent.
- Right to prevent reproduction of the fixation of their live performances without their consent under the following circumstances :-
 - a) If the original fixation was made without their consent,
 - b) If reproduction is made for purpose different from these for which the performer gave their consent.

If the original fixation is made in accordance with permitted exceptions under Article 15 and the reproduction is made for purposes different from these referred to in Article 15⁵.

2. Agreement on Trade Related Aspects of Intellectual property rights (TRIPS, 1994).

Article 14 of TRIPS gives following rights to performers:

- To prevent fixation of their live performance on a phonogram. The coverage of this provision is narrower than Rome convention as it is restricted to phonogram whereas Rome convention deals with fixation on any medium.
- To prevent broadcasting by wireless means and communication to the public of fixed performance as in the Rome convention.

⁴ AIR 1979 Bom 17, Supra note 2

⁵ Chawla Alka, *Law of Copyright*, (LexisNexis, Haryana, First Edition, 2013)

There are no rights of broadcasting and communication to the public of fixed performance as in the Rome convention. The period of protection for performer's right is 50 years from the end of the calendar year in which the fixation was made on their performance⁶.

3. WIPO Performances and Phonograms Treaty (WPPT,1996)

WPPT gives economic rights and moral rights to the performers. Article 5 of the Treaty approximates Article 6 of the Berne convention Paris Act in require that performer receive rights of attribution and integrity in their live aural performance or performances fixed in phonograms.

This is the first moral right have been prescribed for performance in an international agreement.

Treaty aims that that the performers receive the economic rights to fix their performance and to broadcast and communicate unfixed performances to the public (Article 6); to reproduce their performances fixed in phonograms, directly or indirectly (Article 7) and to distribute performance fixed in phonograms, to the public (Article 18(1)). The Treaty also requires a limited right for commercial public rental of performance fixed in phonograms (Article 19) and a “right of making available.....fixed performance” that corresponds to the WIPO copyright treaty rights of communication to the public and encompasses means by which “members of the public may access them from a place and a time individually chosen by them” (Article 10).

The treaty gives phonogram producers comparable rights of reproduction (Article 11), distribution (Article 12), rental (Article 13) and making available (Article 14) Article 15 entitles both performers and phonograms producers to equitable remuneration for the use of phonograms for broadcasting or communicating to the public⁷.

4. Beijing Treaty on Audio-Visual performance, 2012

The protection of performing artists in audio-visual domain was kept out of WPPT, 1996, because no consensus was obtained between the countries. After that, several committees of experts and standing committees were organized by WIPO to re discuss this matter. The Diplomatic conference, 2000, deals exclusively with the

⁶ Id

⁷ Supra note 5

protection of audio- visual performers but the differences in the opinion were not resolved and that made it impossible to adopt the treaty. On June 26, 2012 WIPO adopted the Beijing Treaty on Audio-Visual performances which seeks to strengthen the weak position of performers in this industry by providing a legal basis for the international use of audio-visual productions, both in traditional media and in digital networks. This safeguards the rights of performers against the unauthorised use of their performances in audio-visual media, such as television, film and video⁸.

RIGHTS OF PERFORMER UNDER THE COPYRIGHT PROTECTION ACT

The following are the exclusive rights given to the performer under the Copyright Act:

- 1) Right to make sound recording or visual recording of the performance.

Under section 1 (xx) of the Copyright Act, the performer has right to make sound recording or visual recording to make sound recording or visual recording of his performance. He also has right to authorize the recording of live performances, and has exclusive right to make sound recording from which such sounds may be produced by way of any medium on which such recording is made or method by which the sounds are reproduced . Copyright protection will only be given when the sound recording is lawfully made. And if it contains any material which is an infringement of any literary, dramatic, or musical work, protection will not be given.

- 2) Right to produce a sound recording or visual recording of the performance.

Performer has another right to produce sound recording or visual recording of his performance. He also has the right to make copies of the recording, copies to the public or to rent or lend those copies.

Following particulars must be displayed in the recording:

- Copy of the certificate granted by the board of film certification.
- Name and address of the person who has made the video film and a declaration that he has obtained the necessary licence or consent of the owner of the copyright in the work for making the video film , and
- Name and address of the owner of the copyright in such work.

⁸ Supra note 5

If failed in providing the above particulars, it will be a punishable offence.

3) Right to broadcast the performance.

Performers are given with another important right to prevent their live performance being broadcasted. Broadcasting means communicating to the public by any means of wireless diffusion in form of signs, sounds and visual image, or by wire, including rebroadcasting.

4) To communicate the work to the public otherwise than by broadcast.

Performer has right to prevent the communication to the public otherwise than bye broadcast.

Other than these, Section 38 B provides two moral rights to the performer of a performance. These rights are available to them independently of their rights after assignment either wholly or partially.

They are as follows:

- i. The right to be identified as the performer of his performance except where omission is dictated by the manner of the use of the performance that would be prejudicial to his reputation.
- ii. The right to restrain or claim damages in respect of any distortion mutilation or other modification of his performance that would be prejudicial to his reputation⁹.

INFRINGEMENT OF PERFORMER'S RIGHTS

Section 38 of the Copyright Act, provides for the protection of the rights of the performers from the person who without consent of the copyright holder, does any of the mentioned Acts, then he will be deemed to have infringed performers rights, those acts are:

- a. Sound recording or visual recording of the performance, or
- b. Reproduction of the sound recording or visual recording or reproduction for the purpose different from those for which performer gave his consent ,
- c. Broadcasts the performance , and
- d. Communicate the performance to the public otherwise than by broadcast.

⁹ Supra note 1

The offence of infringement will only be held committed when the rights of the performer are in continuance of the protection under the Act¹⁰.

REMEDIES AGAINST INFRINGEMENT OF PERFORMERS RIGHTS

Under sections 55 and 66 to 73 of the Copyright protection Act, remedies are available which are given to the holder of the copyright. They are given under:

- Civil remedies, under this the holder of the copyright or his assignee or his exclusive licensee or a legatee may obtain injunction or claim damages.
- Criminal remedies, other than the civil remedies copyright act enables criminal proceedings as well against the infringer. The offence of infringement is punishable with imprisonment which may extent from a minimum of three years or with a fine of the order of rupees fifty thousand to two lakhs.
- Anton pillar order, in appropriate cases the court may on an application by the plaintiff pass an ex- parte order requiring the defendant to permit the plaintiff accompanied by solicitor or attorney to enter his premises and take inspection of relevant documents and Articles and take copies thereof or remove them for safety. The need of such an order arises where there is a serious danger to relevant documents and infringing Articles are being removed or destroyed so that ends of justice is not defeated.¹¹

CONCLUSION

The above paper concludes that the copyright is a type of intellectual property right protection granted to the creators of the original works of authorship. Copyright law gives exclusive and moral rights to the performers like actors, musicians, jugglers, snake charmer etc. Such protection leaves a positive impact in encouraging persons to improve their creativity. Various international conventions are also mentioned which discuss or grant certain rights to the performers.

¹⁰ Supra note 1

¹¹ Supra note 1

PRISON & UNDER TRIAL REFORMATIVE JUSTICE: A CRITICAL ANALYSIS OF FICTION & REALITY OF PRISON

Lakshay Bansal *

Abstract

"Prison - a place where the criminal justice system puts its whole role."

The Performa, if fails will make the whole criminal justice in vain. The doctrine behind punishment for a crime has been changed due to the evolution of new human rights jurisprudence. The concept of reformation has become the watchband for prisons. Human Rights suggest that no crime should be punished in a cruel, degrading or in an inhuman manner.¹ On the secondary, it is held that any punishment that amounts to cruel, degrading or inhuman should be treated as an offence by itself.² The contrary caused to the criminal justice and its mechanism has been adopted universally.

Universally, it becomes a well-accepted rule that the mechanism in criminal administration must follow reformative policies.³ It is also evident that all undertrials shall be treated with respect with the inherent dignity and value as humans.⁴ It is also strongly argued that the community can never tolerate a scheme of correction that does not maintain a connection with the evilness of the crime done.⁵ Thus punishment always retains a subjective role. In this purview, the rights guaranteed under the International legal system must be looked into and legislative concern for the same in India

Keywords: *Prison, Under Trials, Dignity, Liberty, Justice.*

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¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

² Id. at Article 4

³ International Covenant on Civil and Political Rights, 1966, Art.10 (3) mandates that the essential feature of the correctional system should be reformation and rehabilitation of prisoners.

⁴ Basic Principles for the Treatment of Prisoners1990, Principle1.

⁵ Frank Pakenham, Lord Longford, the Idea of Punishment (1961), Geoffrey Chapman, London, p. 55.

INTRODUCTION

The term prison has been defined in the Prisons Act, 1894 in an exhaustive manner.⁶ Prison can be any place by virtue of a government order being used for the detention of prisoners. Thus even a jail comes under the purview. A similar definition has been given to prison by Prisoners Act, 1900.⁷ It excludes police custody and subsidiary jails. According to International Human Rights, prison can be only a place for the treatment of convicted persons. According to this imprisoned person means a person deprived of personal liberty as a result of his conviction in any offence and imprisonment means such condition of an imprisoned person.⁸ The modern idea about prison has been envisaged by the judiciary; even the concept of open jails has been evolved. Krishna Iyyer, J opined prison as:

"A reformatory philosophy, rehabilitative strategy, therapeutic prison treatment and enlivening of prisoner's personality through a technology of fostering the fullness of being such a creative art of social defence and correctional process activating fundamental guarantees of prisoner's rights is the hopeful note of national prison policy struck by the constitution and the court. "

Thus now all the dignity that human holds is availed inside the four walls of the prison. Prison life takes away many freedoms from an inmate like; liberty, heterosexual relations, security autonomy and so on.⁹ The concept of penal reform had its birth from the reformatory theory of punishment.¹⁰ The reformative aspect thinks of incorporating humane values into the prison system and the prison officials have to work for the achievement of the same.¹¹

THE LEGAL FRAMEWORK ON PRISONER'S RIGHTS

Indian Constitution formulates prison administration as a portfolio of state to legislate on.¹² The Fundamental responsibility of administration is to ensure custody and control of

⁶ The Prisons Act, 1894, s. 3 (1)

⁷ See s. 2 (b).

⁸ See Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, 1988.

⁹ Gresham Sykes, "The Pains of Imprisonment" in Norman Johnston, Leonard Savitz et al. (edi.), The Sociology of Punishment and Correction (1962), John Wiley & Sons, Inc, New York, p.131

¹⁰ Rupert Cross, Punishment Prison and The Public (1971), Stevens and Sons, London, p. 43

¹¹ M.J. Sethna, Society and the Criminal (3rd Ed.,1971), N.M. Tripathi Pvt. Ltd., Bombay, p.35

¹² The Constitution of India, 1949, Schedule 7 List II, Entry 4.

prisoners.¹³ A National Framework is needed to vary State Legislations to control the inconsistency in the prison management.

India still runs with a century-old legislative framework for prison administration.¹⁴ Prisons Act is only focused on the classification of prisoners by their nature and status of imprisonment. It failed to look down the principles laid down by the judiciary into its premises as well as recommendations by the human rights law. Prisons Act also attempt to cast the responsibility of prison administration over the state.¹⁵ Even the solitary confinement is still retained in the Act against which the judiciary had made their coherent dissent.¹⁶ The liberty to move, talk, Share Company with co-prisoners if substantially denied would be volatile of Art. 21, unless it has the backing of law and this law should lay down a fair, just and reasonable procedure.¹⁷

It concerned about the prisoner's right to and meet visitors but that too is confined to under-trial prisoners and civil prisoners.¹⁸ The concept of prison labour and earning are very vague from the Act.¹⁹ Moreover, the environment is an unseen one which makes things more complicated. To conclude, it is important to point out that it still maintains separate confinement as a punishment for the offences done inside the prison²⁰ as the policies of rehabilitation and reformation are still have to be made into the Act.

JUDICIAL INITIATIVES IN PRISON JUSTICE

“Society must strongly condemn crime through punishment, but brutal deterrence is fiendish folly and is a kind of crime by punishment. It frightens, never refines; it wounds never heals”-- Krishna Iyer.²¹

The Indian Prison Administration was structured and modified by virtue of judicial initiatives. Some essential rights were incorporated into the Indian legal system by the judiciary. The below-given analysis will help to pin down the judicial activism in enhancing

¹³ Paul F. Cromwell, Jr., *Jails and Justice* (1975), Charles Thomas Publisher, Springfield, p. 95

¹⁴ The Prisons Act, 1894

¹⁵ Id. at s. 4

¹⁶ Id. at s. 29

¹⁷ *Sunil Batra v. Delhi Administration* AIR 1978 SC 1675

¹⁸ Id. 15 at s. 40

¹⁹ Id.

²⁰ Id. at s. 46 (8)

²¹ “Justice in Prison: Remedial Jurisprudence and Versatile Criminology” in Rani Dhavan Shankardass (Ed.), *Punishment and the Prison: Indian and International Perspectives* (2000), Sage Publications, New Delhi, p.58

the rights of prisoners.

Reformation as the objective of punishment: Krishna Iyer, J. was the person who argued for orienting reformative treatment of prisoners. In all the judgments, he incorporated reformative values into the prison administration. The concept of crime was also redefined. It was observed that²²:

“Crime is a pathological aberration that the criminal can ordinarily be redeemed that the state has to rehabilitates rather than avenge. The sub-culture that leads to anti-social behaviour has to be countered not by undue cruelty but by re-culturisation. Therefore, the focus of interest in penology is the individual and the goal is salvaging him for society. The infliction of harsh and savage punishment is thus a relic of past and regressive times.”

The Court also supported the Gandhian approach of treating offenders as patients and the therapeutic role of punishment. Krishna Iyer, J. delivering the judgment also pointed out that the judge must use a wide range of powers in reformatting the criminal.²³ Thus the concept of reformation was planted even out of the four walls of the prison.

Free from torture and cruel treatment: The Supreme Court in other instances established that the prison treatment should not cause any kind of torturous effect. Even the practice of separate confinement and solitary confinement was reviewed. The court clearly pointed out that the prison authorities cannot make prisoners to solitary confinement and hard labour.²⁴ As to locate these practices, the Supreme Court directed the district magistrates and sessions judges to visit prisons in their jurisdiction and afford effective opportunities for ventilating legal grievances. They were to make rolling enquiries and take preferred remedial action. Thus the concept of judicial activism was recognized by the Supreme Court through this judgment.

Discussing on the same premise the court vehemently criticized the practice of using bar fetters unwarrantedly.²⁵ The court held the treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast, would certainly be arbitrary and questionable under Art. 14. Thus putting bar fetters for a usually

²² *Mohammed Giasuddin v. State of Andhra Pradesh*, AIR 1977 SC 1926

²³ The judgment observes that the judge have to use their power to provide actual hospital treatment for the prisoners and liberal parole in advancing the reformation of prisoners

²⁴ *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579

²⁵ Id.

long period, day and night, and that too when the prisoner is confined in secure cells from where escape is somewhat inconceivable without any due regard for the safety of the prisoner and the security of the prison is not justified.

The human right to be safe in prisons as mandated by the international human rights law is being incorporated into Indian law by judicial initiatives. International law gives widest possible protection²⁶ to the prisoners from torture and that kind of a protection can only be accommodated by the legislature.

Maladministration in prison: Every under trial has got a right to enjoy all the liberties and freedoms entrusted to a normal human by the international human rights laws.²⁷ The authorities must be focused to look after the management of prisons with this outlook. It has been powerfully argued that any inconsistency in the administration of prison will also cause bound over the human rights of prisoners. The view of Indian Judiciary also accompanies this, to a greater extent. Talking about the maladministration in prison, apart from the official codes the foundation of discipline between the prisoners will also be of a high rising factor of concern. The Indian prison experiences even made the Supreme Court ask whether the prison term in Tihar jail is a postgraduate course in crime.²⁸ Serious allegations were made against the unhealthy relations between jail authorities and criminals and the same has been going on in the present days and if we look a few years back, the Supreme Court ordered to launch a prosecution against some Superintendents and other jail officials for offences punishable under Ss. 120B, 217 & 218 of the Indian Penal Code.²⁹ Concluding this judgment, the court preferably observed that:

“...norms relating to entry of persons to the jail, maintenance of proper records of persons who entered the jail have been observed more in the breach than in observance and the rules and regulations have been found thrown to the winds ... What is still more shocking is that persons have entered the jail, met the inmates and hatched conspiracies for committing murder. The High Court appears to have justifiably felt aghast at such acts of omissions and commissions of jail officials which per se constituted offences punishable under various provisions of the IPC and has, therefore, necessarily directed the launching of criminal

²⁶ The body of Principles for the Protection of All Persons, Under Any Form of Detention or Imprisonment, 1988, See Principle 6 and its explanation

²⁷ See Basic principles for the Treatment of Prisoners, 1990, Principle 5

²⁸ Rakesh Kaushik v. B.L. Vig, Supdt. Central Jail, New Delhi, AIR 1981 SC 1767

²⁹ State of Maharashtra v. Asha Arun Gawali, AIR 2004 SC 2223

prosecution against them, besides mulcting them with exemplary costs.”³⁰

The reformative ideal justice was variably spoiled at the consent and convenience of jail authorities and the same went against the basic aims of human rights laws. The court in other instances stressed the need to provide a proper atmosphere, leadership, environment situations and circumstances for re-generation and a reformatory approach.³¹ Illegal cognizance between criminals and prison officials make all these aims in vain.

Freedom of speech and expression: Prisoners alike others can access other human rights made in Universal Declaration of Human Rights and international covenants.³² Indian judiciary had also relied upon the right of a prisoner to enjoy the right to freedom of speech and expression.³³ It is the judiciary which took such a view before the *Kesavananda Bharati* judgment came and evolution of the concept of justice as fairness and reasonable. It is worthwhile in discussing the judicial declaration of the right of the press to interview prisoners. The aforesaid judgment has certain implications over the right of prisoners in exercising their right to freedom of speech and expression.

A Writ Petition was filed under Art. 32 by the Chief reporter of Hindustan Times, Smt. Prabha Dutt seeking a writ of mandamus or order directing the respondents Delhi Administration and Superintendent, Tihar jail to allow her to interview two convicts Bill and Ranga who were under a sentence of death, whose commutation petition to the President was rejected.³⁴ The Court held the restricted right to interview the prisoners subject to their willingness to attend the same. The freedom of press person to interview an undertrial prisoner will not be like that of the prisoner sentenced to death. Supreme Court remarked that the right to interview a prisoner will not become an exclusive right as in the case of life convict and it should be decided on merits depending on each case.³⁵

Right to have healthy atmosphere in prison: The Supreme Court identified nine major problems afflicted upon the prison administration system, namely, overcrowding, delay in trial, torture and ill-treatment, neglect of health and hygiene, insubstantial food and inadequate clothing, prison vices, deficiency in communication, streamlining of jail visits

³⁰ Id.

³¹ *Sanjay Suri v. Delhi Administration*, AIR 1988 SC 414

³² Supra note 20

³³ *State of Maharashtra v. Prabhakar Prandurang Sanzguri & Anr.*, AIR 1966 SC 424

³⁴ *Prabha Dutt v. Union of India*, AIR 1982 SC 6

³⁵ State, through Supdt. Central Jail New Delhi v. Charulatha Joshi and another, AIR. 1999 SC 1379

and management of open-air prisons, among which, an unhealthy living premise was recognized as a severe problem.³⁶ A decade after this judgment situation remained the same and the same was revealed before the court by another judgment.³⁷

The bitter experiences of the prisoners were made through a letter by one of the prisoners P. Bharathi of central Prison, Puducherry to one of the Honorable Judges of Supreme Court. The letter was ordered to be treated as a writ petition. It talked about the poor hygienic condition and maintenance inside the prison and also restrictions on the visit by relatives of the prisoner. There was no toilet facility inside the cell to answer the call nature during night time. Two plastic buckets with a lid were provided for this purpose during night time and in the next day morning, the buckets containing excreta are made to be cleaned by the inmates of the cell on a turn basis. This was made as per the existing prison rules and the authorities accepted that the rules require a radical change to fall in line with present-day requirements. This judgment will help to realize the disparities in state legislation as well as the need for a centralized legal framework in regulating the prison affairs.³⁸

On prison labour: Prison labour also involves certain inconsistencies with human right. The extent of labour to a prisoner will depend upon the punishment and nature of imprisonment. But prison labour must be understood as a tool for reformation instead of taking it as a form of punishment. Following this doctrine Krishna Iyer, J. in a leading case law directed the prison authorities to engage a convict in agriculture as he traditionally belongs to that sector of the society.³⁹ The Court further concluded the objective of prison labour as,⁴⁰

“When prisoners are made to work, a small amount by way of wages could be and should be paid so that the healing effect on their minds is fully felt. Moreover, proper utilization of services of prisoners in some meaningful employment, whether as cultivators or as a craftsman or even in creative labour will be good from the society’s angle as it reduces the burden on the public exchequer and the tension within.”

This approach by the court has been criticized as the argument supports the use of income of a prisoner against his expenses inside the prison. On the other hand, the government should not take afoul from the income of a prisoner as it can be used for the well-being of his family

³⁶ *Ramamurthy v. State of Karnataka*, (1997) SCC (Cri) 386

³⁷ *P. Bharathi v. Union Territory of Pondicherry & Others*, 2007 Cri. L. J. 1413

³⁸ Id.

³⁹ *Faramir & Another v. State of Uttar Pradesh*, (1979) 3 SCC 645

⁴⁰ Id.

or according to his lawful aspirations. The old position was based on the conviction that the man who broke the law has placed himself in debt of society for which he has to compensate.⁴¹ This can also be done in creating earning habits and making a prisoner self-confident. Need for adequate wages by prisoners were again raised before the Supreme Court and where the court held the application of the Minimum Wages Act, will be of great use.⁴² The real message to be conveyed by prison labour was made herein as, reformation should be a major objective of a punishment and during incarnation, every effort must be made to re-create the effective man out of a convicted prisoner. An assurance to him that his hardworking and capacity to build actively would eventually develop into handsome saving for his own rehabilitation would help him to get facilitation of the moroseness and desperation in his thoughts and fundamental fabric must be relied upon while toiling with the rigorous of hard labour during the period of his jail life. In this judgment, the court recommended to the State concerned to make law for setting apart a portion of wages earned by the prisoners to be paid as compensation to the deserving victims, of the offence, the commission of which entailed the sentence of imprisonment to the prisoner either directly or through a common fund to be created for this purpose or in any other feasible mode.

In addition to the above rights, the judiciary had glorified more rights which constitute certain new rights for prisoners. Under Para 873, the Punjab Jail Manual, a body of the condemned convict, after it falls from the susurration is required to remain suspended for a period of half an hour. This practice was contested to be violative of the right to dignity and fair treatment continues in respect of the dead body of the condemned man.⁴³ Glorifying the extent of the right to dignity the Court observed that:⁴⁴

The right to dignity and fair treatment under Article 21 of the Constitution of India is not only available to a living man but also to his body after his death. The jail authorities in the country shall not keep the body of any condemned prisoner suspended after the medical officer has declared the person to be dead. The limitation of half an hour mentioned in Para 873 of the manual is directory and is only a guideline. The only mandatory part of the above quoted Para is that the condemned person has to be declared dead by the medical officer and

⁴¹ Frank Pakenham, Lord Longford, *The Idea of Punishment* (1961), Geoffrey Chapman Publication, London, p.

⁴² In the matter of Prison Reforms, Enhancement of Wages of Prisoners, etc, AIR 1983 Ker 261. See also the *State of Gujarat & Another v. Hon. High Court of Gujarat*, AIR 1998 SC 3164.

⁴³ *Paramanand Katara v. Union of India & Another*, (1995) 3 SCC 248

⁴⁴ Id

as soon as it is done the body has to be released from the rope.

The inherent and aforesaid speculation of every human life is there with the prisoners. Judiciary cannot give any ultimate saturation to the prisoners as it can only look upon the matters made to them. It is contended that the state must develop a new legal framework within which the prison administrations enhance and so developed national law must be focused on all the above mentioned legal rights propounded by the judiciary along with the international human rights guarantee.

LACUNAE IN LEGISLATION

Primarily the recommendations by the state secretaries were the premise from which the prison reforms were introduced. This was changed by the introduction of *Mulla Committee on Jail Reforms*.⁴⁵ The committee headed in the chairmanship of Mulla made a National Policy on Prisons. It also contended for the constitution of a national commission on the prison.⁴⁶ It took more than two-decade for the Indian legal system to draft certain laws in regards to the Mulla recommendations.⁴⁷ The bill so prepared was well supported by the draft bill made by the National Human Rights Commission. The Commission made follow up over the 1996 bill and developed another model bill within a period of two years.⁴⁸ This bill made by Commission attempted to consolidate the entire developments made in India after Mulla recommendations. Stepping with NHRC; Government of India drafted a new bill in the same year.⁴⁹ This bill was identified as a consolidated version of Indian laws on the prison.⁵⁰ But still, it remains as a chance of luck as it is kept away from parliament.

CONCLUSION

Despite the inadequacies in legislation, the judiciary on its own creative spirit had contributed much to prison administration thereby ensuring fundamental human rights of prisoners. Many of those rights were recognized by the international human rights law. Any change brought out in a penal system cannot be called as penal reform.⁵¹ The concept penal reform had changed in a way that there should always be a nexus between penal reform and the

⁴⁵ Jayasree Lakkaraju, Women Prisoners in Custody (2008), Kaveri Books, New Delhi, p. 138.

⁴⁶ Id. at p 117

⁴⁷ The Indian Prisons Bill, 1996

⁴⁸ The Prison Administration and Treatment of Prisoners Bill, 1998

⁴⁹ The Prison Management Bill, 1998

⁵⁰ Supra note 20

⁵¹ Rupert Cross, Punishment, Prison and The Public (1971), The Hamlyn Trust, London, p.43

reformatory theory of punishment.⁵² The era of hands-off doctrine in prison administration is left behind in the history all over the world⁵³ and now it is always a matter of judicial scrutiny. Indian prisons are equally corruptive; like any other public institutions.⁵⁴ The new law should be also careful to cure the menace of corruption from the prisons. It is true that the prisoner is far more likely to be reformed if he can recognize the justice of the penalty than if he cannot.⁵⁵ Law on prisons should always find a free space in itself for the treatment of prisoners based on their conviction.

⁵² Id.

⁵³ Mike Place and David A. Sands, "The Evolution of Judicial Involvement" in Paul F. Cromwell, Jr., Jails and Justice (1975), Charles Thomas Publisher, Springfield, pp. 237-45. 52 Indra J. Singh, Indian Prison: A Sociological Enquiry (1979), Concept Publishing Company, Delhi, pp. 160-161.

⁵⁴ Supra n. 29 at p.59

⁵⁵ Id.

RAY OF HOPE FOR HUMANITY BEHIND THE BARS

*Pranav Kumar Kaushal **

Abstract

“In our world, prisons are still laboratories of torture, warehouses in which human commodities are sadistically kept and where spectrums of inmates range from driftwood juveniles to heroic dissenters” - Justice V. R Krishna Iyer

The constitution of each and every country talks about the word ‘Human Dignity’. Does this word does not suits on the person who is behind the bars? If it is so why we always talk about the rights of a human being and why we are always silent on the topic of rights of the prisoner. This is so because we do not treat that person into the category of human beings if he or she commits a crime. This is thought of that society towards the person who commits a crime. Society always believes in the notion “once a criminal is always a criminal”. But nobody looks the circumstances that it is that social environment and context which had forced him or her to do such offence. Therefore the people of modern society always treat prisoner or convict as “a person who is no more a human being”. Does a person under prison is no more a human being? Won’t that person be a member of that human race if he commits a crime? Does that person behind the bar is debarred to be included within the category of human beings? Does a prisoner or a convict be outside the sphere of the word “dignity”? It is very unfortunate that the civilized society is not been able to provide just the minimal rights to the prisoners. “Man has advanced his mind but never tried to advance his thought process”. A person behind the bar also belongs to the same society where other human beings belong. Thus, “Imprisonment does not deprive prisoner to have certain basic rights”.

Keywords: Prisoners, Crime, Imprisonment, Human Dignity, Fundamental Rights

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“A prisoner does not shed his basic constitutional rights at the prison gate”¹

INTRODUCTION

Does a person on becoming a prisoner lose all his rights to human existence? Whether that person is excluded from the category of “human beings”? The father of the nation i.e. Mahatma Gandhi Ji said that “Every person is a mixture of good and evil², is there not plenty of evil in us? There is enough of it. The fundamental rights guaranteed under the constitution are not absolute but contain many restrictions on their enjoyment. Right to freedom of the person is one of the most important rights that have been calculated foremost into the category of fundamental rights.³ When a person is convicted or punished for any offence or put in prison his status is considered different from an ordinary human being because a prisoner is devoid of all fundamental rights that can be claimed by him. How a prisoner is treated inside the prison? Nobody cares because a prisoner is no more a part of that society of human beings if he or she commits the offence. The reality is that a prisoner is treated and served with the food of cruelty and barbarous making the prisoner aware that now he won’t be counted as a human being and he would further be known not be by his name but he would be called a criminal by that society which considered him earlier as a human being. This is the story of the entire prisoners who are put behind the bars of inhumanity. We always talk about the dignity of an individual. Whether a person behind the bar has nothing to do with the word of dignity? Whether a prisoner loses to have self-respect and self-worth after being convicted of an offence? Why prisoners are made to suffer, just because they are criminals and the only way is to treat them like animals. Why we are not following the reformatory theory? Providing death punishment for all offence will decrease the crime rate. There is a universal tagline that *“Human beings are not born criminals but they are made”*. If human beings are not born criminal then what is the reason behind every crime? How a human being is turned into a criminal? Is there any factory that made a human being to do a criminal act? Yes, there is a factory and the name of that factory is

¹ The view was observed by Justice P.N Bhagwati in *Francis Corah Mullin v. The Administrator, UT Delhi*, AIR 1981 SC 746

² Gandhi M.K. Harijan, 10-6- 1939, pp158-159

³ The right to freedom of the person comprises the following:— Article 20(1) protection against ex-post facto laws; Article 20(2) protection against double jeopardy; Article 20(3) privilege against self-incrimination; Article 21 Protection of personal life and liberty; Article 22(1 to 3) Protection in case of arrest; Article 22(4 to 7) Safeguards in case of preventive detention; The fundamental rights under Article 19 are conferred only on citizens, but the discussed above are available to all persons, whether citizens or not.

“social environment and social context” that forces a person to do that act.

HUMAN RIGHTS *versus* PRISONER’S RIGHTS

“*We all are prisoners but some of us are in cells with windows and some without*”- Kahlil Gibran

There is big line that is always drawn between the human rights and prisoner’s rights. Majority of people believed that one who is convicted and is undergoing punishment does not deserve to have any kinds of right of his or her human existence. But what rights actually means? If anybody who is having knowledge of rights will never raise question on prisoner’s rights. Rights are legal, ethical, political, social and economic natural rights by society enforced by state without which human beings cannot survive. Every human being is entitled to have the basic rights without any discrimination of his or her status. Why we are not been able to provide just the basic rights to that humanity behind the bars? Albert Einstein while addressing at Chicago has said that the existence and validity of human rights are not written in the stars but these are ideals which the human being has evolved through struggle and conviction which resulted from historical experience.⁴ Human rights are the natural rights which are provided to all human beings without any discrimination.

PRISONER’S RIGHTS

“*Prisons are built with stones of law*”- when Human rights are harassed behind the bars constitutional justice come forward to uphold the law-William Black

A prisoner does not lose all rights when being imprisoned. They lose only the part of rights which are necessary consequences of the confinement and the rest of the rights are preserved.⁵ A prisoner is a person who is deprived of liberty while being in a confinement. The rights of prisoner are governed by national and international law. International convention include International covenant on Civil and Political Rights 1966. It provides that “Every prisoner who is detained, including every sentenced prisoner has right to live with human dignity including least exercise and provision, at State as well as national expenses of adequate accommodation, nutrition, reading materials and medical treatment. The binding principle at International level is that “all persons deprived of their liberty shall

⁴ Albert Einstein. Ideas and Opinions, New York: Random House (1954)

⁵ A. K. Roy v. Union of India & Another, AIR 1982 SC 710

be treated with humanity and with respect for the inherent dignity of human person.”⁶ In general, the prisoners will not be tortured nor subject to cruelty, inhuman and degrading treatment and punishment.⁷ According to Article 10 the United Nations committee on International Covenant on Civil and Political Rights, the state party must have positive obligations towards all people who are deprived of their liberty to be treated with humanity and with dignity while dealing with the prisoners.⁸

It is a well-established fact that conviction or death punishment to prisoner for a crime does not reduce a person into non-person, so he is entitled to basic rights which are available to him inside the prison. Different court through different interpretations had widened the scope of prisoner’s rights and held that prisoner is a human being as well as natural person. Being a prisoner he or she does not ceases to be a human being and natural person.

*“Conviction for crime does not reduce the person into a non-person, whose rights are subject to the whim of the prison administration and therefore, the imposition of any major punishment within the prison system is conditional upon the absence of procedural safeguards”.*⁹

PRISONER’S RIGHTS *versus* FUNDAMENTAL RIGHTS

The apex court of India held that conviction for crime and imprisonment does not put farewell to the fundamental rights mentioned in Part III of Indian constitution to the humanity behind the bars. Constitutional “Karuna” is thus injected to incarcerated strategy to produce and reform prison justice.¹⁰ The Supreme Court held that the conditions of detention cannot be extended in such a way that it deprives the fundamental rights of the prisoner.¹¹ Prisoner retains all the basic rights which are enjoyed by the citizens of India except those which is lost at the time of confinement. Moreover the rights enjoyed by the prisoner under Article 14, 19 and 21, though are limited but it does not mean they are static

⁶ International Covenant on Civil and Political Rights, 1966, Article 10(1). This is also reiterated by Principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1979 and Article 2 of the Code of Conduct for Law Enforcement Officials, 1979.

⁷ Article 7, International Covenant on Civil and Political Rights

⁸ General Comments No. 21, UN Human Rights Committee on Civil and Political Rights, 1992, para 4.

⁹ Charles Wolff v. McDonnell, (1974) 41 Law Ed 2nd 935, DBM Patnaik v State of Andhra Pradesh, AIR 1974 SC 2092, Sunil Batra v. Delhi Administration, AIR 1978 SC 1675

¹⁰ Charles Sobaraj v. Supdt Central Jail Tihar, AIR 1978 SC 1514

¹¹ State of Maharashtra v Prabhakar Pandurang Sanzgir, AIR 1966 SC 424

and will rise to human heights when challenging situation arises.¹²

“Every prisoner’s liberty is circumscribed by the very fact of his confinement in the prison cell, but his interest in the limited liberty left to him only to more substantial”- Justice Dougals

Right to fair procedure: The “embryo” or the traces of prisoner’s right in India can be find in the most celebrated decision of *A.K Gopalan v. State of Madras*¹³ it was held that when a prisoner is totally deprived of his personal liberty under the procedure that has been established by the law, the fundamental rights including right to freedom of movement are not available¹⁴ but a prisoner cannot be denied to have the basic fundamental rights. Another most important case was the *State of Maharashtra v. Prabhakar Padurang*¹⁵ in this case it was held that the conditions of detention cannot be extended to the deprivation of fundamental rights consistent with the facts of detention.

Right to life and Personal Liberty: “By the term “life” means more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any organ of the body through which soul communicates with the outer world”¹⁶ – Field J.

The Honourable Supreme Court of India has adopted the annotation of Article 21 and expanded the concept of life given by Field J that “life means more than mere physical existence”. Right to life is not restricted to mere animal existence. It means more than just physical survival.

Right to live with Human Dignity: In the new and wider interpretations of Article 21 of Indian constitution the Honourable Supreme Court of India held that ‘Right to live’ does not mean the confinement to physical existence but it includes within the ambit the right to live with Human dignity.¹⁷ While expanding and widening the ambit of Article 21, the Supreme Court of India held that the word ‘life’ may include all those things which are the bare

¹² Supra note 10

¹³ AIR 1950 SC 27

¹⁴ Id., B.K.Mukerjee J. at p. 93

¹⁵ AIR 1966 SC 424

¹⁶ Field J. in *Munn v. Illinois*, 94 US 11

¹⁷ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 followed in *Francis Coralie v. Delhi Administration*, AIR 1981 SC 746

necessities of life such as food, shelter, clothing and adequate nutrition.¹⁸ The Supreme Court also extended the concept of life and held that ‘Life’ is not limited to “death” but, when a person is executed with death penalty and doctor gave the death certificate and dead body was not lowered down for half an hour after the certificate of death, is thus violation of Right to life under Article 21 of Indian Constitution.¹⁹ It is thus only because of wider interpretation of Article 21 which has guaranteed every human being outside or behind the bars certain basic rights and not even the State has the authority to violate those rights. A prisoner does not cease to be a human being even when he or she is lodged in a jail, prisoner still continues to enjoy certain basic fundamental rights including right to life.²⁰ There have been debates over the topic that convicts are not wholly devoid of their fundamental rights.

*“However, a prisoner liberty is in the very nature of things circumscribed by the very fact of his or her confinement. His interest in the limited liberty left to him is the more substantial”.*²¹

Right to Health and medical Treatment: Right to health and care is an essential ingredient of Article 21 of the Indian constitution. Article 21 casts an obligation over the state to provide health and medical facilities to all human beings. Every doctor has an obligation to preserve the life of others and state cannot interfere to delay and avoid the discharge the services extended by medical profession. Denial of government hospital to provide medical facilities to an injured person is a violation of “right to life” under Article 21 of the Indian constitution. “Preservation of human life whether it is outside or inside the prison is of paramount importance”²². The right to health and medical treatment is a basic human right. The Gujarat High Court held that the jail authorities are under the obligation to take care of ailing convicts and it is the duty of the jail authorities to provide them the medical facilities and take them to the hospitals for medical treatment.²³

Right to Speedy Trial: Speedy trial is a part of fundamental right inserted under Article 21 of the Indian Constitution. Delay in disposal of cases is denial of justice so every court is

¹⁸ *Francis Coralie v. Delhi Administration*, AIR 1981 SC 746

¹⁹ *Pandit Parmanand v. Union of India*, (1995) 3 SCC 248

²⁰ *State of Andhra Pradesh v. Challa Ramkrishna Reddy*, AIR 2000 SC 2083

²¹ *DBM Patnaik v. State of Andhra Pradesh*, AIR 1974 SC 2092

²² *Parmannd Katara v. Union of India*, AIR 1989 SC 2039 : (1989) 4 SCC 286; *Consumer Education and Research Center v. Union of India*, (1995) 3 SCC 42; *Kishore Brothers Ltd v. Employee’s State Insurance corporation*, (1996) 2 SCC 682

²³ *Rasikbhai Ramsing Rana v. State of Gujarat*, (DB) 1997 Cr LR (Guj) 442

expected to adopt and take necessary steps for expeditious trial and quick disposal of cases.²⁴ The court held that right to speedy trial is available to all accused at all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial. The court further said that the accused cannot be denied the speedy trial on the ground that he had failed to demand a speedy trial.²⁵

“Justice delayed is justice denied” ‘if the stream of justice dries there would be discontent, disharmony and chaos in the society as that stream does not fulfil the thirst of person for justice’

Right to free Legal aid: A substantial or we can say a major part of prison population in the country consists of under trials and those inmates whose trial is yet to commence. Thus right to free legal aid is an essential mandate of Article 21 of Indian constitution. The Supreme Court held that free legal aid and assistance at state cost is a fundamental right of a person accused of offence which may involve jeopardy to his life and personal liberty.²⁶ Neither the state government nor any government can deny, providing the concept of free legal aid and assistance to the accused and the state government is under constitutional mandate to provide legal assistance to a poor accused by pleading financial or administrative inability.²⁷

Regarding this right of free legal aid, Justice Krishna Iyer said that “This is the state’s duty and not government’s charity”. If a prisoner is unable to exercise his constitutional right to appeal including Special Leave to appeal for want of legal assistance, the court will grant him such rights under Article 142, read with Article 21 and 39 A of the constitution. The power to appoint or assign counsel to the prisoner does not object to the lawyer named by the court. On the other hand implication of free legal aid and assistance is the duty of the state and state must pay the lawyer an amount fixed by the court.²⁸

CONCLUSION

“An eye for an eye only ends up making the whole world blind”-Mahatma Gandhi

²⁴ *Kadra Pahadiya v State of Bihar*, AIR 1983 SC 1167

²⁵ *A.R. Antulay v. R.S. Nayak*, AIR 1984 SC 1630, again some directions were passed by SC in the case of *Common Cause Society v. Union of India*, AIR 1996 SC 1619

²⁶ *Sukdas v. Arunachal Pradesh*, AIR 1986 SC 991

²⁷ *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1369 and followed in the case of *Khatn (II) v. State of Bihar*, AIR 1981 SC 928

²⁸ *MH Hoskot v. State of Maharashtra*, (1978) 3 SCC 544 : AIR 1978 SC 1548

The present scenario is that even after conviction of person, the role of judiciary does not come to an end. But even after this, Judiciary has to play effective and supervising role with regard to the treatment of prisoner inside the prison. When a person is put inside the prison he loses some fundamental rights such right to freedom of movement, freedom of association etc. but still he is entitled to have some basic rights inside the prison. The state is under constitutional obligation to protect the humanity behind the bars.

“Bail is the rule and Jail is the exception”- Justice Krishna Iyer

The prisoners are entitled to claim the residuary fundamental rights even when they are imprisoned in the jail. Thus, a prisoner is entitled to have rights such as

- Right to live with human dignity
- Right to have fair trial
- Right to have Speedy trial
- Right to Bail
- Right to have Parole
- Right to have medical and health facilities
- Right to free legal aid
- Right to consult lawyers
- Rights of inmates of protective homes
- Right against cruel and unusual punishment
- Right to have reasonable wages in prison
- Right against bar fetters, handcuffing and protection from torture.

There have been many judgments which have clearly elaborated the rights of prisoners. But what is actually happening in India we all are aware that a thing which is in the document has never made a practical application in India. The people of India are made to realize that there have been many things that have been going for the prisoner but in reality no schemes are made available to them. These schemes may look good only in documents but never

tried to have its practical application. Does anybody know how many people are there inside the prison? How many of them are still under trial? How many of them are imprisoned without any offence. Nobody even research for such things because a person who is behind the bar is no more to be called as human being? The leader of the state makes many policies for the people but nobody makes any scheme for the prisoner. When the budget of nation is presented in the house of people every section of society is provided with certain benefits but have anybody said about the word ‘prisoner and his rights’ whether any budget that has been passed in the house of people contain something for the humanity behind the bars. We provide millions of budgets to every department but nothing has been done to improve the prison justice. Does anybody sees a politician going to prison just to see what is actually happening in the prison cell. The answer is no because people behind the bars cannot vote.

“*Society is guilty if anybody suffers unjustly*”- Justice Krishna Iyer

STALKING OF MEN BY WOMEN: GENDER NEUTRALITY IN SEXUAL HARASSMENT LAWS

*Pragati Tripathi **

Abstract

This article discusses about stalking of men by women: gender neutrality in sexual harassment laws. The objective of this article is to express the importance of gender neutral laws in India and discuss the problem of sexual offences with men like stalking. Stalking is very common these days and due to increase in social media websites it becomes very easy for a stalker to stalk. This is the reason that cyber stalking is most famous form of stalking. In India law does not recognise the problem of sexual harassment, that the harassment can be done to a man too and women can also be preparatory of such offences by putting men in the position of victim. In such kind of offences stalking is very common which is increasing day by day and there is no law to protect men from it. There are some laws in India which give the provision of sexual offences like in Indian penal code, The Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressed) Act, 2013 but none of the provisions of these laws protect a man against such offences. This is a clear violation of their fundamental rights granted under Article 14, 15 and 21 of the constitution. So, there is a need to have some amendments in the old laws and make new laws which can protect peoples of our country irrespective of their gender. PIL was filed in Supreme Court for need of amendment in laws but court has held that it is the duty of legislature. Although there can be possible misuse of such laws but this cannot be a ground of not providing protection of law to men from such heinous offences. Crime has no gender so law should also be the same.

Keywords: Fundamental Rights, Sexual Harassment, PIL, Gender Neutral, Equality etc.

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INTRODUCTION

If we talk about sexual offences related to women then it will be a common thing for our society because of the day by day increase in these type of offences, but when we swap the dice and sight man getting harassed by some women it become an amusement matter for our society. It is taken either as something which is not possible or don't exists or that man was not capable of handling the situation as he was not 'men enough'. This is the perception of the society in the matter of sexual offences against men which has ultimately leads to the increase in such offences day by day. Offences against men are becoming more dangerous in comparison to women because law is silent on their part no remedy or punishment for women offenders are provided in statutory which has given women a green signal and a liberty to increase such acts. At present, sexual harassment laws in India are not gender-neutral. The law is silent on how to deal with a woman who is harassing a man. A men also gets harassed in same way as a women and felt it as badly as a women but the difference is that women are under the shields of law regarding harassment offences whereas for men no such provision given under the law. Now a day's stalking is a very ordinary form of harassment which is also used by females to harass a man. It is a very general tool of sexual harassment which can further take form of other heinous offences.

STALKING OF MEN BY WOMEN

Stalking is unwanted or obsessive attention by an individual or group towards another person. Stalking behaviours are related to harassment and intimidation and may include following the victim in person or monitoring them. Stalking is an offence which can be against anyone, male or female. Stalking of men by women is also in picture these days. There are many instances when it was found the women are stalking men through social networking sites, e-mails or physically. Cyber stalking getting increased day by day as it is very easy medium of committing such offences. Facebook, WhatsApp, Twitter and other social networking sites are used very habitually by every individual and this provides a chance to the stalkers to stalk a person very effortlessly. Reasons for such stalking by women can be attraction from opposite sex, for the purpose of revenge, female fetish etc. Stalking is also considered as one of the form of sexual harassment. Sexual harassment is a form of discrimination based on sex. The Ontario Human Rights Code (the Code) prohibits all forms of discrimination based on sex and includes provisions that focus on sexual harassment. The Code offers this protection in five "social" areas: services, goods and facilities; occupancy of accommodation

(housing); contracts; employment; and membership in vocational associations such as trade unions. If left unchecked, sexual harassment can limit a person's ability to earn a living, get housing, get an education, feel safe and secure, and otherwise take part fully in society. Organizations that do not take steps to prevent sexual harassment from taking place can incur major costs in decreased productivity, low morale, increased absenteeism and health care costs, and potential legal expenses and it can happen to either women or men.

Stalking is a criminal offence under section 354D of Indian Penal Code. It says that -“Any man who- follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking.”

Although it provides punishment only to male offenders as it is considered that these are the offences against women only. Due to such view male victims has no remedy in India against such offences which in some ways promotes such offences. Under section 354D the word used is ‘men’ this makes it clear that the offender of this offence can only be a man and for the victim the word used is ‘women’ so it can only be against a woman and not a man. Even the laws which are there to protect a woman from such offences are not very effective in their implementation then we can assume how bad the situation of those men are who are victim of such offences and have no remedy against it.

LAW RELATING TO SEXUAL OFFENCE IN INDIA & GENDER NEUTRALITY

The Indian legislation completely negates the fact that men can be victims too. Currently, sexual harassment laws in India are not gender-neutral, and, for the most part, recognise that in sexual harassment cases, the victim is a female and the perpetrator is a male. For instance, the Section 354 of IPC criminalises assault or use of criminal force to woman with intent to outrage her modesty. Other sections of the IPC include 354A (punishes sexual harassment committed by a man against a woman), 354B (punishment for intent to disrobe a woman), 354C (voyeurism), 354D (stalking), 375 (criminalises rape of a woman by a man) and section 509 (word, gesture or act intended to insult the modesty of a woman). The question of modesty, if at all, only exists in women. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act of 2013 also complete ignorance of the thing that

can also be the victim of such offences.¹ Also, while most of the provisions in the Protection of Children from Sexual Offences Act are gender-neutral with respect to the perpetrator, Section 3 (which criminalises ‘penetrative sexual assault’) does not apprehend a female perpetrator.²

Section 377 of the IPC which is widely understood as an anti-sodomy law recognises male as victims in sexual harassment cases. Section 377 of IPC states ‘voluntarily carnal intercourse’ with any man, woman or animal” as an unnatural offence. Breaking this down, it simply means that men, who have undergone sexual abuse or any other kind of sexual violence, can find recourse under Section 377 against any gender. Section 377 is one of the few gender-neutral provisions that India has, unlike rape.³

It is worth noting that the Justice Verma Committee which was constituted to recommend reforms to sexual harassment laws in 2013 had proposed gender-neutral language for sexual offences in India. However, this suggestion was not eventually incorporated in the Criminal Law (Amendment) Act, 2013.⁴

The first gender-neutral sexual harassment law in India is the UGC (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations 2015 which incorporate a gender-neutral meaning of sexual harassment.⁵

NEED OF GENDER-NEUTRAL LAWS IN INDIA

Generally, harassments of men by women or by other men start during their educational life. There are many instances when it was found that a male child was getting harassed by hands of his teacher or other staff of school. Sometimes it also happens at their work place. Unlike in the case of women where the preparatory of such offence is generally men, in case of men a preparatory can be a woman or a man too. It is seen that many time men who is stronger and older harass the other men of younger age. Also, many research have seen that men who are more feminism or different from the traditional men who used to think that they are superior because they are men or having an open mind suffer with such problem more than

¹ Available at: <https://www.firstpost.com/india/vijay-nair-sexual-harassment-case-rising-incidents-against-men-emphasise-need-for-gender-neutral-laws-in-india-3452286.html>

² Id.

³ Id.

⁴ Id.

⁵ Id.

others. Such kind of harassment gives a very bad effect at the mental condition of victim such as it may cause anxiety, depression, alcohol abuse etc. Because men did not even have a remedy against such laws it will become difficult for them to express or share such problems with other people. This can also be a cause of increase in the suicide cases as when a person becomes incapable of fighting with his problems and also, he knows that he can't even talk about it as society and law will not recognise this problem, suicide becomes his final option. All such problems ultimately decrease the growth of not only an individual but of whole country because if a person is not mentally healthy because he is suffering harassment then he cannot work well and because these problems are increasing day by day number of victims of such problem will increase and ultimately development of whole country will get affected. To stop such kinds of problems and to make our society and country more secured gender-neutral laws are necessary in India.

Over 50 countries have legislations or labour codes to prevent sexual harassment at work. These laws and rules are largely governed by every country's culture and understanding of gender equality. While countries like the USA, UK, Australia and Germany view men and women as equals and allow for complaints to be filed by either, some countries like India still discriminate between genders.⁶

The time when the criminal laws of India like IPC were enacted the scenario of men and women were very different and women were considered as deprived section of the society. So, the law makers have considered these offences only against women but now situation are very different and the position of women in society has changed, they are not the deprived section of the society as they were in ancient times. So, the law should also be changed according to the circumstances. As there is no remedy for male victims of sexual harassment it is also a violation of their fundamental rights as Article 14 of the Indian Constitution talks about equality. Equality under this Article means equality in equal circumstances and as the circumstances are different from the ancient times now, men and women are at same dais of crime. If there is a law against crime then it must be applicable on everyone and protect everyone because anyone can be victim and offender irrespective of their gender. If differences are there in applicability of law and it does not provide protection to men but only to women then it is a clear violation of right to equality because such differentiation is totally unreasonable. Article 15 of the Constitution prohibits discrimination against any citizen on

⁶ Available at: <https://www.thebetterindia.com/101407/sexual-harassment-need-to-be-gender-neutral/>

grounds only of religion, race, caste, sex, place of birth or any of them. But the laws related to offence discriminate on the basis of gender which is violation of Article 15 of Constitution.

If a law does not recognise women as an offender of some offence and only portray man as preparatory of such offence and not victim of such offences then it is clearly discrimination on basis of gender. Such laws are also in violation of Article 21 which is right to life and personal liberty. If a man is getting harassed or stocked by some person then it will create a hindrance in his life and personal liberty as he will not be able to enjoy his life and live it freely. So, to stop all these it is important to make a change by amending the old laws and to protect everyone equally from such a heinous offence. Now India also needs a law which can protect both men and women equality and give punishment to anyone who commit such offence irrespective of their gender.

RECENT CASES

Recently PIL has been filed in SC for making laws pertaining to rape, sexual harassment, stalking, voyeurism, outraging the modesty etc also gender-neutral. The petition asks that the word “any man” used under these offences in Indian Penal Code be declared ultravires the Constitution. The petition under Article 32 of the Constitution seeks to challenge the constitutional validity of sec.354 IPC, sec.354A IPC, sec.354B IPC, sec.354C IPC, and sec.354D of IPC and also sec.375 IPC which stipulates discrimination against any citizen of sex and which in turn is directly in teeth and in violation of Article 14 and Article 15 of the Constitution. The petitioner-in-person, advocate Rishi Malhotra, said the term ‘man,’ wherever it is used in the definition of crimes under the IPC, should be replaced by ‘whoever,’ thus making the crime applicable for both men and women.⁷

The judges on the Bench led by Chief Justice Dipak Misra reacted with different questions, all voicing an opinion that it is up to Parliament to gauge the changed social circumstances and may be revamp the colonial penal code.⁸

“So, you are saying that a woman can stalk a man. Well, the law is open for change. Let Parliament look into it,” Justice D.Y. Chandrachud observed. The Chief Justice responded,

⁷ Available at: <https://www.indiatoday.in/mail-today/story/men-victims-too-pil-in-supreme-court-wants-women-punished-for-rape-1142456-2018-01-12.html>

⁸ Available at: <http://www.livelaw.in/sc-dismisses-pil-make-rape-sexual-harassment-stalking-outraging-modesty-gender-neutral/>

observing that Article 15 was specifically intended to protect women and children from discrimination and dismissed the petition⁹ and the petition was dismissed.

SUGGESTIONS ON LAW TO BE MADE GENDER NEUTRAL

Following are some suggestions to secure men from sexual offences and stop the growth of such heinous offences:

- There must be an amendment in Indian penal code to provisions which deals with sexual offences and the word which is used for preparatory and victim i.e. male and female respectively must be changed to word “person” so that it can protect and punish anyone who commits such offence irrespective of their gender.
- The Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013 must also be amended and make it gender neutral.
- There must be a law which protects children both male and female from sexual offence at any places like middle school, high school because this is the place where it starts and increasing day by day.
- Some awareness programme must be done in different organisation to make people aware about such offences and ask them to raise voice against it.
- One of the main contributions against such offences can be our contribution. We are the one who should make people aware about such problem. In 2017 #MeToo movement is started for women to come in front and talk about the sexual harassment which they have suffered, The point has reached in history I think this is the time to start a #me_too movement for men too so that it is recognized as a serious issue rather than being an amusement for the society.
- If gender neutral laws are made in future the legislature should also impose some security measures to avoid the possible misuse of such laws.
- The perspective of society towards men and women should be changed because women are not in the same position now as they were in ancient times and the position of men has also been change. Society should adopt such changes.

⁹ Id.

CONCLUSION

A crime cannot have a gender that it can only be committed by men and not women so law must not also have based on gender. This is the high time when our legislatures have to check all the laws and made the adequate amendment to make the actually gender neutral because if the sexual offences against men are not recognised by law as a problem then it will affect the whole country at large level in future. Legislature by making a law should not distinguish between criminals on basis of their gender. A criminal is a criminal either it is a man or a woman both have the criminal intend to commit such offence and the same capacity to commit it so they must be punished in same ways. However, such laws would be criticised on the ground that there will be huge misuse of it but just because a law can be misused does not mean that we should ignore the rights and security of these people for whom such law should be made. Every law has some loopholes because of which it gets misused but it does not mean that we should stop protecting rights of peoples. Such matter can be dealt carefully by legislature and a safe guard must be imposed to avoid its misuse. Because there is no law which can punish offenders of sexual crimes against men it has ultimately facilitated them to grow more and more. This will create a very dangerous position and it may become impossible to ensure security of people in our country in future. So, to avoid all the dangerous outcomes of letting free such offenders gender neutral laws should be made in India because this is the need of the society and a law should be changed according to the changes in the environment.

SURROGACY LAWS

Leena Latwal *

Abstract

Surrogacy provides an option to the childless parents for having their own genetic child through this method. As according to The Black's Law Dictionary, defines surrogacy as "the process of carrying and delivering a child for another person". This mode fulfils the desires of the childless parents to have their own child and the desires of the surrogate mother who are poor and needy. As everything has pros and cons, in the same way Surrogacy too involves the pros and cons with it. Where on one hand it fulfils the desires of both the intending parents and the surrogate mother, then on the hand it also has resulted into exploitation of the surrogate mothers and even of the parents. Surrogacy is being widely used as commercial surrogacy, therefore, in order to regulate the laws relating to surrogacy, and to prevent the surrogate mothers to be exploited, there is an urgent need of legislation to be enacted and followed. Such legislation must not be in violation of the Indian Constitution and must have the aim to prevent the women's from being exploited.

Keywords: Surrogacy, Intending Parents, Commercial, Exploitation, Legislation etc.

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INTRODUCTION

According to Jeremy Bentham, “*law is used as an instrument for securing the greatest good of the greatest number*”. Surrogacy involves the process of begetting a child from another woman for the intending parents. Such woman is called to be the surrogate mother. Surrogate Mother in other meaning is a substitute mother, where she carries pregnancy for another couple. Therefore, the simple meaning of surrogate is ‘deputy or substitute’. In general, the term “surrogate mother” talks about a woman who decides to bear a child for the couple incapable of having a child. There are different categories under which a surrogate mother can be divided. *Firstly*, where the wife is sterile, there the child can be sought through either natural or artificial insemination of the women with the sperm of the male couple. And after the birth of child born out of the woman, the impregnated woman gives the child to the infertile couple. This type of surrogate mother is called as ‘half surrogate mother’. *Secondly*, where both the husband and wife are impotent but are not sterile, then the couple can have seek a child by impregnating baby-bearer woman by means of artificial devise with both the sperm and the ova of the such couple. In this case the baby-bearer mother is known to be the ‘whole surrogate mother’. And *thirdly*, where both the husband and wife are sterile and impose there is need to find a sperm donor. In such the baby bearer woman would be artificially inseminated with donor semen. And after the birth of the child, the mother would hand over the child to the intending parents as per the agreement between them. The baby-bearer mother in this case is known as ‘AID surrogate mother’. So, in order to opt for surrogacy as a method to become parents, the surrogate mother and the intending parents enter into a contract with favourable terms and conditions.

There are cases where some women are not capable to conceive and bring a child for various reasons such as, the failure of the embryo to implant, repetitive miscarriages, pelvic disorder, hysterectomy, high blood pressure, liver and heart diseases. So in such cases, the couples are only left with two ways that is to either opt for adoption or ART.

Surrogacy provides right to be parents to such parents who cannot have a child through natural means. This procedure to have a child is the right of such parents. This right of parenthood is ensured under Article 21 of the Constitution of India. Therefore, there is an urgent need of such regulation that protects the right of the intending couples to become parents. Such laws should also focus at protecting the surrogate mother and prevent her from being exploited.

Meaning of Surrogacy

The word ‘surrogate’ has originated from a Latin word called ‘surrogatus’, that means a substitute, that is, a person appointed who is being appointed to act in the place of another. So a surrogate mother is such woman who carries a child on behalf of another woman, either from her ovum or from the implantation.

The Britannica defines ‘surrogate motherhood’ as “*the practice in which a woman bears a child for a couple unable to produce children in the usual way*”.

The Report of the Committee of Inquiry into Human Fertilization and Embryology or the Warnock Report (1984) termed ‘surrogacy’ as “*the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth*”.

A standard definition of ‘surrogacy’ is given by the American Law Reports¹ as following: “*...a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child's birth.*”

SURROGACY IN INDIA

Past Scenario of laws relating to Surrogacy

The use of surrogacy method to have children has been in use since the time of Mahabharata, when Kaurav had his hundred sons though this method. But that method was not recognized at that period. This method of begetting a child through Surrogacy came in limelight through the leading case of *Baby Manji Yamada v. Union of India*.²

This was the leading case relating to the development of surrogacy laws in India. It had also attracted the world-wide attention and has exposed multifaceted legal issues concerning surrogacy that had been prevailing in India since a very long time. Mr. Ikufumi Yamada (husband) and Miss Yuki Yamada (wife) were the infertile couple who were unable to conceive child. They came to India in the year of 2007 for having a child through surrogacy and had chosen a baby-bearer woman from Gujarat to act as surrogate mother. Then a

¹ American Law Reports, *Validity And Construction Of Surrogate Parenting Agreement*, 77 A.L.R. 4
70. (1989)

² (2008) 13 SCC 518

surrogacy agreement was also entered into between commissioned parents and the surrogate mother. It is to be noted that the sperm of husband Mr. Ikufumi Yamada and a donor egg were used for the fertilization process to beget the child. Then the embryo was implanted in the surrogate mother's womb and thereafter the commissioned parents of baby Manji left India for Japan. Later, it was found that the commissioned parents got separated due to some matrimonial issues. Even the custody of Baby Manji, who was born on 25th July, 2008 was refused by both Miss. Yuki Yamada and the surrogate mother. Mr. Ikufumi Yamada had the interest in the custody of the baby Manji. He then came to India along with his mother Emiko Yamada to take Baby Manji with him and consequently the child was kept in their custody. But, in the process of carrying the baby Manji to Japan, the Japanese embassy refused to issue a passport to Manji saying that she has been born in Indian and so she became an Indian citizen and thus an Indian passport and a no-objection certificate is needed to leave the country. But according to Indian laws, an infant child's passport needed to be linked to the mother's passport and this was not possible as both the Yuki and the surrogate mother refused to take custody of the baby. Then on 3rd August, 2008 the Manji was moved to a hospital in Jaipur because of the law and order situation in Gujarat. There the baby was given Proper care and protection that was provided to her with much needed care including breast-feeding by a woman. Mr. Yamada had to return to Japan as his visa got expired. Then later the Birth Certificate also got issued indicating the name of the genetic father, Mr. Ikufumi Yamada. To this an NGO named 'SATYA' filed a writ petition to issue a Writ of Habeas Corpus and to produce the child before the Rajasthan High Court. This contention of the NGO was brought before the Court in the name of the surrogacy where a lot of irregularities are being committed. At present there is no law regulating surrogacy in India so this mode to produce child is being generally misused and turned into money making racket resulting in exploitation of Women. Therefore, it was then prayed that the Government of India should enact appropriate laws relating to surrogacy and prohibit the exploitation of surrogate mother and the infertile couple. Later, the Rajasthan High Court issued direction to the Rajasthan Police for demanding the baby to be produced before it within four weeks and also sent show-cause notices to the Federal and State Governments. Then later On August 13, 2008 Emiko Yamada, the mother of Mr. Ikufumi Yamada moved before the Supreme Court of India praying it to intervene and maintain justice for the Baby.

The Apex Court on the basis of the petition filed by Emiko Yamada granted the custody of baby Manji to her and also issued a notice to the Government of India. It also sought the

response from the Indian Council for Medical Research (ICMR), since Yamada's lawyer contended that National Guidelines for Accreditation Supervision and Regulation of ART Clinics in India, 2005 directs the baby as a legitimate child of the biological father. On this the court also issued a notice to SATYA and made it as the third party.

The Supreme Court of India observed that surrogacy is a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but handover to a contracted party. She may be the child's genetic mother or she may be, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In some cases surrogacy is the only available option for parents who wish to have a child that is biologically related to them.³ The case was disposed of with a direction that the victim may produce his/her before the Commission constituted under the Commissions for Protection of Children Rights Act, 2005. So, Emiko Yamada then approached before the Commission for demanding the permission to take baby Manji to Japan. This issue got resolved after the Japanese Government, on humanitarian grounds, issued a one-year visa to her. Baby Manji finally went Japan with her Grandmother Emkio Yamada ending months of ambiguity over her fate. According to the Japanese authorities, it is possible for baby Manji to become a citizen of Japan once a parent- child relationship was established, either by Mr. Yamada recognizing his paternity or through adoption.

In Baby Manji's case the Court did recognize the concept of surrogacy but could not give any specific guidelines to regulate the Surrogate laws. In fact, the court underlined the significance and the requisite of the institution of surrogacy in the interest of childless parents. This situation would only change when the surrogacy bill would take the form of an Act.

Current Position relating to Surrogacy Laws

India has been emerging as a frontrunner in international surrogacy and homes for many intending parents. Indian surrogates have been progressively more famous with fertile couples in developed nations because of the comparatively low cost. At the same time, Indian clinics are becoming more competitive both in the pricing, hiring and retention of Indian females as surrogates.

Though, in 2008, the Supreme Court of India has permitted the commercial surrogacy in

³ Id.

India in the Baby Manji case with a direction to the Union Government to pass an appropriate Law governing Surrogacy in India but till date no such law has been enacted. At present the Surrogacy Contract between surrogate mother and intending parents is guided by the Indian Contract Act, 1872 and also with the guidelines of the Assisted Reproductive Technique (ART) Clinics. The Legislature has even drafted ART BILL, 2008 which is still pending and looking at the present scenario of Indian Parliament it is not possible to say when we should the said bill to become law.

By giving due regard to the interest of both the parties to the surrogacy contract and in order to avoid the commercialization of the human reproductive system, abuse of women and the commodification of Children, the Law Commission of India has submitted its 228th report on “*Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy*” with the following relevant suggestions⁴:

- Surrogacy arrangement will continue to be administered by contract between parties, which will encompass all the terms wanting consent of surrogate mother to bear child, medical techniques of artificial insemination, contract of her husband and other family members for the same, indemnification of all reasonable expenses for carrying child, agreement to hand over the child born to the commissioning parent(s), etc.
- The surrogacy arrangement mentioned in the contract should not be for commercial purposes.
- The surrogacy agreement should include financial support for surrogate child in the occasion of death of the commissioning couple before delivery of the child, or divorce between the commissioning parents and subsequent willingness of none to take custody of the child.
- A surrogacy agreement must take care of life insurance cover for surrogate mother.
- One of the commissioning parents should be a donor as well, in order to bring the bond of love and affection with the child and also to avoid the chances of various kinds of child- abuse, which have been noticed in cases of adoptions. In case the commissioning parent is single, he/she should be a donor in order to have a surrogate child. Otherwise, adoption is the only way to have a child.

⁴ Law Commission 288th Report, Available at: <http://lawcommissionofindia.nic.in/reports/report228.pdf>

- Surrogacy law itself should recognize a surrogate child to be the legitimate child of the intended parent(s) without there being any need for any declaration of guardian or adoption
- The birth certificate of the child should contain the name(s) of the intended parent(s) only. It is required in order to avoid any future ambiguity.
- Right to privacy of donor as well as surrogate mother should be essentially maintained.
- Sex-selective surrogacy should be strictly restricted.
- All the cases of abortions of surrogate child should be administered by the Medical Termination of Pregnancy Act 1971.

This Report has come largely in the support of legalizing Surrogacy in India and emphasizing on the proper way of operating surrogacy in India. Preventing exploitation of the women through surrogacy is one of the major worrying factors, which the law will have to address. The Law Commission through this report has strongly recommended law against Commercialization of Surrogacy. Therefore, this is a great step forwarded to the present situation, but it is still not enough to control the irregularities of the present day. We can only strongly expect an appropriate legislation to come in the coming year or next, aiming to control the surrogacy business in India.

RIGHT TO REPRODUCTION- A CONSTITUTIONAL RIGHT

This right to reproduction is linked with the right to parenthood and is further linked with the Right to life and personal liberty under Article 21 of the Indian Constitution. The Judiciary in the case of *B. K. Parthasarthy v. Government of Andhra Pradesh*⁵, the Andhra Pradesh High Court upheld “the right of reproductive autonomy” of an individual as an aspect of his “right to privacy” and agreed with the decision of the US Supreme Court in *Jack T. Skinner v. State of Oklahoma*⁶, which characterized the right to reproduce as “one of the basic civil rights of man”.

Even Article 16(1) of the Universal Declaration of Human Rights 1948 says, “*men and women of full age without any limitation due to race, nationality or religion have the right to*

⁵ AIR 2000 AP 156

⁶ 316 U.S. 535(1942)

marry and start a family". So, if reproductive right gets under the constitutional umbrella, then the surrogacy that allows an infertile couple to exercise that right also gets the same constitutional protection.

SUGGESTIONS

- There is need that the Surrogacy agreements are to be treated like other contracts and the principles of the Indian Contract Act 1872 and other laws will be made applicable to these kinds of agreements.
- The commissioning parents or parent should be made legally bound to accept the custody of the child irrespective of any abnormality to the child, and if the refusal to do so then it shall constitute an offence.
- The child born to a married couple or a single person through the use of ART shall be presumed to be the legitimate child of the couple or the single person, as the case may be.
- Any person who wants to have a child through surrogacy, irrespective of the nationalism, caste or sex should be allowed to opt for surrogacy.
- There should be equality that must be maintained between the commissioning age of the male and female couple who want to opt for surrogacy.
- If the commissioning couple separates or gets divorced after going for surrogacy but before the child is born, then also the child shall be considered to be the legitimate child of the couple.
- A surrogate mother shall relinquish all parental rights over the child. The birth certificate in respect of a baby born through surrogacy should always bear the name(s) of genetic or intended parents/parent of the baby.

CONCLUSION

Surrogacy is mode that provides any couple to become parents who are unable to have children due to some or the other reasons. This mode of getting to be the parents provides the intending parents a glimpse of hope to become parents. But it also seems sarcastic that

people are engaging in the practice of surrogacy when there are a million of Indian children that are orphans and without any parent. It is because adoption of a child in India is a complex and a lengthy procedure and the childless couples who want to give a home to orphans are left with no option but other than surrogacy. So there is a strong need to modify and make the adoption procedure simple for all. And this will bring down the rates of surrogacy. According to the present situation only altruistic surrogacy must be legalized and the commercial surrogacy should be strictly prohibited and marked as crime. There should be laws enacted to cover the grey areas of surrogacy and to protect the rights of vulnerable women and children. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones.

THE PARADIGM OF PRIVACY TOWARDS DIGITAL COLONIALISM- AN INTRODUCTION

*Abhivardhan**

Abstract

It is our deemed right and ability to ask about the right of which we take reference for our considerable liberty and permission; what is the essence in that right, which leads us to find the most obscure solutions in an individual, a group or a state's life. Privacy, being a civil right, is thus in that line. However, when we categories rights as positive and negative rights, we do forget that the element of ethics must be completely removed in some special kinds of implicit rights, which pertain to the idealistic theory of rights. Digital Colonialism is the wake of not only an outcome of Information Technology but also a specific relation with cyber contingencies. Thus, when there exist the fate of IHRL, we do not understand that human rights are the core application of any possibility that you can possibly achieve. The story of privacy spreads the essence and idea of personal liberty and social coherence. Without the character and presence of law and ethics, privacy exists as a neutral right towards a world, where from the historical chores to reality, the understood advent of cyber realm creates the wake of Digital Colonialism, when mere ethics is just variant cum arbitrary or variable sometimes; it does not have a confined locus nor a finalized or connected set of loci. Hence, in the light of the sociological, economic and historical aspects of India, such questions have been dealt by the article. Emerging as a pervading problem, Digital Colonialism has its own aspects globally, which has an intimate connection with the Right to Privacy and the question of its exposure and regulation. The article provides an earnest effort to discover the basic realm by the author.

Keywords: Jurisprudence, Privacy, Constitutional Law, Civil Liberty, Digital Colonialism etc.

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INTRODUCTION

Privacy is the qualitative right of mankind, which does not confine itself to personal liberty and is a method by which a human fulfils the need to shape his two perspectives- those of his circumstantial attributes and those of his personal attributes. According to Davis, “*When we speak of human society, therefore, we have in mind not merely the objective set of relationships between the members but the subjective set of norms as well. Unless we know both we cannot understand the society; for since they are not identical the normative order can never be completely deduced from knowledge of the factual order, nor vice versa. If there were no normative order there could be no normative society; for the innate equipment of the human organism is not sufficiently comprehensive or integrated to give automatic responses that are functionally adequate for the society.*¹” From the point of view of conduct, of course, this doesn't really matter: bad behaviour is bad behaviour, whether it is a violation of a right or not. But if we want to be clear about why this or that bit of bad behaviour is bad, then these distinctions do have to get made and looked into.² If we analyse the definition of privacy by Parker³, which is that privacy is control over when and by whom the various parts of us can be sensed by others⁴, then it is easily ascertainable that the intrinsic attribution to relation with a functionary relevance towards revelation under sensible considering limitation.

Privacy, in its conceptual realism, is devoid of the directive of any subjective presence or element; even if it is, then it shall be always bound by application. It creates the *sui generis* basis of the concept. It can be defined as a ‘neutral right’ by the virtue of ‘its own interactions, relations and revelation’ on an imitative basis. Hence, the emergence of digital colonialism gives us an insight of the diversity that realms to underline as well as undermine. Well, a colonial emergence is never so obvious. It emerges from the persistent or recurring mechanisms to pinch and intrinsically violate the IHRL. The events of the Second World War, and concern to prevent a recurrence of catastrophes associated with the policies of the Axis Powers, led to a programme of increased protection of human rights and fundamental

¹ Kingsley Davis, *Human Society* 53 (Surjeet Publications, New Delhi, Reprint 2004).

² Judith Jarvis Thomson, *The Right to Privacy*, 4 PPA 298 (1975)

³ In Richard B. Parker, *A Definition of Privacy*, RLR 281 (1974)

⁴ Supra note 1 at 304.

freedoms at the international level.⁵ Similar contingencies arose in response to the moving of a Soviet War Memorial, when hackers began interfering with Estonian government websites through distributed denial of service attacks⁶ ascribing the NATO treaty, which guarantees its members against a territorial intrusion, yet the era of cyber war and electronic intrusion represents a threat akin to traditional warfare that is of a new, still-developing nature.⁷ Well, the uncertainty in the international environment provoked by these shifts has added to the sense of complexity surrounding discussions and debates on ‘cyberspace’ and the use of information and communications technologies (ICTs) for attaining political, military or economic advantage.⁸

However, this is also imperative that “the broadest positive opportunities for the further development of civilization, the expansion of opportunities for cooperation for the common good of all States, the enhancement of the creative potential of humankind and additional improvements in the circulation of information in the global community⁹” is also an imperative subject-matter of consideration. Thus, Digital Colonialism is much of a specifically political, social and economic play, which governments and heads of states intend to do. It seems to be political, but even the law can introduce it.

THE DIVERSITY OF IMPLICATIONS TOWARDS A THEORETICAL PARADIGM IN THE CONCEPT OF PRIVACY

Privacy as a concept is clung by the diversity if implications towards a theoretical paradigm by the virtue of precedents, historical comprehensions and sociological understanding required so forth.

HISTORICAL AND SOCIOLOGICAL SIGNIFICANCE

⁵ James Crawford, *Brownlie's Principles of Public International Law* 634 (Oxford University Press, Seventh Edition, 2008).

⁶ Mary Ellen O'Connell and Louise Arimatsu, “Cyber Security and International Law”, International Law: Meeting Summary, Chatham House 3 (29 May 2012).

⁷ Kertu Ruus (2008). *Cyber War I: Estonia Attacked from Russia*, The European Institute, Available at: <http://www.europeaninstitute.org/index.php/component/content/article?id=67:cyber-war-i-estonia-attacked-from-russia>

⁸ Camino Kavanagh, Tim Maurer and Eneken Tikk-Ringas., *Baseline Review ICT-Related Processes & Events Implications for International and Regional Security*, BR 8 (2014), Available at: <http://f.cl.ly/items/0t073Y3i3P0v2o2x0q39/Baseline%20Review%202014%20ICT%20Processes%20colprint.pdf>

⁹ United Nations General Assembly, sixty-sixth session, Resolution adopted by the General Assembly on 2 December 2011 [on the report of the First Committee (A/66/407)], A/RES/66/24, 1

India has been a hub of historic-social beauty that its societies have experienced and put to an advent. Rig Vedic society was relatively egalitarian in the sense that a distinct hierarchy of socio-economic classes or castes was absent.¹⁰ However, political hierarchy was determined by rank, where *rajan* stood at the top and *dasi* at the bottom.¹¹ The psychological basis of Varna remains in thought and practice until the epical age of Ramayana and Mahabharatha. But in the post-epical age even the psychological basis of Varna recedes into the background, leaving only a life-less skeleton of a caste-system based mainly on material factors like birth and hereditary.¹² It shows that Privacy was a right but not for all. It was limited to the sovereign King and the aristocratic people, where an authoritarian cum patriarchal adversity affected its evolution as self-determination. The age of medieval India, being a diverse period in all its facets, was under continuation with the same system of privacy among the Hindu rulers and the Hindu society. As for the Hindus, their social life was relatively unchanged, although during military operations they suffered losses in property and life. Even when the harsh laws of war gave place to peace, the Hindus were burdened by certain handicaps. The loss of sovereignty itself was a major loss, especially in the case of the Brahmins and the Kshatriyas. The sultanate period was more difficult for them than any other period of Muslim rule.¹³ The *Sati*, the *Purdah* system, the *Jauhar* system and other customs itself illustrate the worst position of women at that time. In this way, a newer idea of maintaining privacy of women was applied. However, these attempts later on became worthless enough to save privacy of women and so personal dignity was always injured. In this age, privacy was joined with the idea of personal dignity. Then, we observe that the concepts of privacy and personal dignity were blooming in the age of modern India. There were still discriminatory practices in India. However, before the British Raj, concepts like *Sati* and Child Marriage were put to an end in the light of Hindu Renaissance under Raja Ram Mohan Roy, Dayanand Sarasvati, Jyotiba Phule and others. The concept of Harijans was introduced by Mahatma Gandhi and women became a part of the National Movement during the years of the Raj. At that time, Privacy had not become a right. Still, the society of modern India was connecting Privacy

¹⁰ Frits Staal, *Discovering the Vedas: Origins, Mantras, Rituals, Insights*, 54 (Penguin Books India, 2008)

¹¹ Upinder Singh, *A History of Ancient and Early Medieval India: From the Stone Age to the 12th Century*, 191 (Pearson Education India, 2008)

¹² M. S. Srinivasan, *The Vedic Society and Culture: A Psycho-Spiritual Perspective*—M.S. Srinivasan, (2012, September 6), Available at: <https://integralmusings.wordpress.com/2012/09/06/the-vedic-society-and-culture-a-psycho-spiritual-perspective-m-s-srinivasan.html>

¹³ Columbia Education, *Society and Culture under the Sultanate*, Available at: http://www.columbia.edu/itc/mealac/pritchett/00islamlinks/ikram/part1_08.html

with Ethics and Morality and after 1947, the conjoined ideas of Privacy and personal dignity widens and it is differentiated from personal dignity. The development of constitutionally guaranteed fundamental human rights in India was inspired by historical examples such as England's Bill of Rights (1689), the United States Bill of Rights (approved on 17 September 1787, final ratification on 15 December 1791) and France's Declaration of the Rights of Man (created during the revolution of 1789 and ratified on 26 August 1789).¹⁴ In the Digital Age in India, where technology takes a big leap, rises and dominates many aspects of the society, the social media, the ascent of technological devices such as Computers, Mobile Phones, Tablets and other advanced technological solutions has lead people to connect with others, express their thoughts, showcase their work, communicate with persons and to satisfy or facilitate their demands or needs. This age is a composition of arising risks and opportunities for digital consumers to access in the world of Internet. The point is that, whether we like it or not, we're entering a world where there is going to be massive data generation due to a whole lot of technological advances. So, we definitely need a modern data protection and privacy law.¹⁵

DIGITAL COLONIALISM: A SPECIAL OVERVIEW

Digital Colonialism is not a general defined theoretical concept- it is a cyber-realm of sovereign states towards a persistent insecurity and manipulative simulation of the reality of self-determination. It is simply a phenomenon of intrusion, where perception, globalization and liberalism are utilized to abridge and lock the privacies of entities. Well, this can also amount to a unilateral extraterritorial coercive measure as in the case of Russia's 'Web War-I' on Estonia in 2008, when on 20 July 2008, weeks before the Russian invasion of Georgia; the 'zombie' computers were already on the attack against Georgia.¹⁶ Here is a simple picture of the new socio-political, economic and representative phenomenon of mankind.

The website of the Georgian president Mikheil Saakashvili was targeted, resulting in overloading the site. The traffic directed at the Web site included the phrase

¹⁴ B.B Tayal and A. Jacob, *Indian History, World Developments and Civics*, A-23, (2005)

¹⁵ Devjyot Ghoshal, *QZ&A: Nandan Nilekani: Aadhaar is being demonised because it's so transparent*, (2017, April 13), Available at: <https://qz.com/957607/nandan-nilekani-aadhaar-is-being-demonised-because-its-so-transparent/>

¹⁶ John Markoff, "Before the Gunfire, Cyberattacks", *The New York Times*, (12 August 2008), Available at: <http://www.nytimes.com/2008/08/13/technology/13cyber.html>.

“win+love+in+Rusia”. The site then was taken down for 24 hours.¹⁷ Bill Woodcock, the research director at Packet Clearing House, a California-based non-profit group that tracked Internet security trends, said the attacks bore the markings of a “trained and centrally coordinated cadre of professionals.” Russian hackers also brought down the Russian newspaper Skandal.ru allegedly for expressing some pro-Georgian sentiment. “This was the first time that they ever attacked an internal and an external target as part of the same attack,” Woodcock said. Gary Warner, a cybercrime expert at the University of Alabama at Birmingham, said that he found “copies of the attack script” (used against Georgia), complete with instructions for use, posted in the reader comments section at the bottom of virtually every story in the Russian media.¹⁸

In the vicinity of a wider digital revolution approached by India in these years of the 21st Century, we may find the traces of excessive mass data collection and analysis with a dark side to this new approach due to the drift of our society towards the digital revolution. The dangers posed by hackers, companies, terrorists, governments and other entities have threatened the idea of privacy. The most significant fact to consider is that as we, the people, are connecting us and our personal information & any other possession, we are getting into a new sort of danger because of the fact that this exposure of vast information is misused by certain organizations and individuals, whom we call terrorists, hackers, robbers, etc. in such a way that we may get into an era of digital colonialism. This is the worst case of risks in the vicinity of digital revolution in India. a new theory known as Digital Colonialism is being asserted by different experts. This is just a new form of colonialism with some new propagandas and strategies, which must be stopped. However, let us consider the points given below:

- Conquer or otherwise achieve influence over the target territory¹⁹ (A).
- Secure the new colony militarily through the establishment and maintenance of military and police garrisons (B).
- Create an administrative, transportation and commercial infrastructure capable of

¹⁷ Georgia president's Web site falls under DDOS attack", *Computerworld*, (21 July 2008) Available at: <https://www.computerworld.com/article/2534930/networking/georgia-president-s-web-site-falls-under-ddos-attack.html>

¹⁸ Id.

¹⁹ Andrew Updegrove, *Government Policy and Standards – Based Neo-Colonialism*, 4 (2007)

supporting resource extraction, keeping the peace, and managing export and import functions (C).

- Recruit (and in some case import), train and supervise a labor force to extract the resources in question and distribute manufactured goods (D).
- Defend the colony against internal uprisings and external rivals (E).

These highpoints reflect how to dominate on a target territory and form colonies along with stable dominance over the acquisition. Here, the main idea that is needed to be considered is that the ways of spreading digital colonialism are somehow the same provided that the age and the devised ways of doing it have changed.

The agents or actors involved in propagating digital colonialism are (1) Government or other agencies associated with it or the system or authority in the level of it, (2) Terrorist organizations, (3) Hackers and IT companies or teams associated with the agenda of it (4) and certain other entities, whose physical existence is probable but uncertain to be discovered in terms of their physical reality. The basic assistant techniques that prove useful for it are (1) Perception, (2) Fundamentalism and (3) Attraction with misuse of curiosity.

A. In the strategy mentioned in this point, the agents or actors involved don't subjugate any mass or crowd, but they plan a special propaganda, join cohesive networks with government and other non-government institutions and communicate certain political, social, economic, ethical, cultural and other psychologically beguiling information in the masses, groups and even the state. Then they make their packet of influence, the main medium for keeping the influence on the masses. Then this medium is increased and controlled in such a way that the influenced entities do determine with ease that they cannot do away with the circumstances, which are they believing to be addressed, which has no probable, direct or indirect connection with reality. Such leads to the companies being made slave-like entities to those propagandist institutions. Such is their way of the conquest and the achievement of influence. Attraction becomes the player to succession of the plan.

B. Like the idea stated in this point, the slavery-like cohesion is maintained by manipulation. Masses, groups and even the state are coerced with gradual effects of the creation of mythical fear, threat and circumstances. Here, physical control may or

may not play an important role, but the role of psychological methods influences severely. The influenced become habitual to the fear and if this impact lasts for more than a century, then it would spread to the future generations as an inherited fear & threat, leading to the formation of a new ideology called the Neo-Psychology of Fear, Threat and Influence (NPFTI). Perception is cultivated as the causers wish.

- C. Now, as per this point is concerned, the colonies of a new type are formed, where no traces of its absolute physical existence are found, but this is just created under the influence of perception. Curiosity is threatened and regulated so that the invisible administrative systems are formed. Corruption, education, environment, economy, development, IT, politics, trade, foreign affairs and other common and specific issues become prone to this systematic influence.
- D. In terms of the mentioned point, the quasi-pseudo administration and other systems prepare volunteers, bureaucrats, spies, soldiers, labours and other mass and non-mass groups that under the influence, shelter their preserving key sectors related to trade and economy to make their own monopoly in and outside the acquisition to spread colonialism. In this way, this becomes no more than a political, economic and international pandemic.
- E. In the dominating institutions, their individuals try to maintain the stability of their establishments and in order to do it; they devise plans to influence external affairs with an innate strategy so that it does not affect them. Moreover, they subjugate the weak, the opposition and those activities pertaining to the realization of the breakdown of their set-up. In this way, they create a required equilibrium of their own kind so as to achieve absolute domination and arbitrarily accessible sovereignty.

All these points devise the worst ideas and plans devised to misuse the existence of massive data collection as the tool of colonization. Now, in case of the present scenario, for example, governments in different countries develop their own propaganda and start spreading fake news, creating tensions in their state to make the system in chaos. Then, they try to control the activities of the individuals via the digital portals and means. They can use GPS and track location, debar any individual from expressing his views on the social media in their territorial jurisdiction and then spread an imaginary feeling of fear among the people so that they may fear and do not raise their voice against the government. Companies, related to

digital media, can do it with ease. They can access to someone's personal information by hacking, gaining easy chains or means to access the users' private information and possession. They may coerce the individuals to follow their plan or they might be ruined as per they communicate or relate. Terrorists can also use this method. The ISIS and other organizations of terrorism are present on the social media sites such as YouTube, Facebook, Twitter, etc. and have spread viral videos in order to threaten people. The governments, ministered by the elected leaders of political parties getting a majority vote try to confine the opposition parties into a mere puppet and turn them into the object of condemnation. It is often observed as a part of their propaganda. However, by the policy of digital colonialism, they can surely make people highly bound to them so that they may even not vote against them. In India, the issue of EVM hacks remained a burning issue for a few months. Still, irrespective of the fact that who is behind all this, the so-called conspiracy, whose proof has not been accepted by the Election Commission of India, is under question as if it is proved to be true, then it is truly a severe invasion to the Right to Privacy. There is no guarantee of this event or plan's uncertainty, but it is yet to be proved. However, informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well.

CONCLUSION

Privacy, as a normative and subjective reality of truth and concern, needs to be rebooted. It needs to be brought out of the limitation that has it deeply faced. Moreover, the historical, social, economic and legal significance of mirroring of this concept shall always be a matter of data, but its direction and the rate can be extremely diverse, which is observable everywhere today. Digital Colonialism is just a facet of the expression and concern, which shall be an interest figure of concern always.