



Email: editor.lexrevolution@gmail.com

ISSN 2394-997X
Lex Revolution

Periodical Indexed Peer Reviewed
(Journal of Social & Legal Studies)

Volume VI, Issue 2, Apr-Jun 2020



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“The rights which the citizens cherish deeply, are fundamental – it is not the restrictions that are fundamental.”

- S. Ravindra Bhat, J. in
Sushila Aggarwal v. State (NCT of Delhi),
(2020) 5 SCC 1, para 86

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Lex Revolution

Periodical Indexed Peer Reviewed Journal of Social & Legal Studies

Quarterly Published International Research Journal

Lex Revolution welcomes and encourages scholarly unpublished papers on various fields of Law, Human Rights and Social Science from students, teachers, scholars and professionals. The Journal invites the submission of papers that meet the general criteria of significance and academic brilliance. Authors are requested to emphasize on novel theoretical standard and downtrodden concerns of the mentioned areas against the backdrop of proper objectification of suitable primary materials and documents. The papers must not be published in parts or whole or accepted for publication anywhere else. The Journal follows double-blind peer review process for selection of the manuscripts for publication.

OBJECTIVES:

- 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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CYBER-CRIME: A THREAT TO DIGITAL ERA

Kaanchi Ahuja*

Abstract

Crime in a developing nation is viewed as a hindrance to its development as it adversely affects all members of the society, along with the security of the country. Technological advancements provided a necessary boost to efficiency and accuracy of human beings but at the same time it facilitated illegal use of digital technology for commission of cyber-crime. In today's world where everything is available at the option of a simple click, the possibility of committing a crime has also been made available at the instance of just a click. Cyber-Crime is an offence where the computer is either a tool or a target. The term WWW which stands for World Wide Web has now been replaced as World Wide Worry because of extensive growth and rapid increase in computer related crimes. The Government of India enacted a comprehensive statute called the Information Technology Act, 2000, while meticulously integrating international conventions, treaties and obligations. This Act covers the wide spectrum of technological information matters, which also including cyber violations, penalties and modes of curbing of cyber-crimes in India. This paper aims to identify the meaning of the term 'Cyber-crime' and enumerate the various types cyber-crimes committed in today's digital era. It also traces the development of cyber legislation in India and discusses the important case studies relating to matters concerning the cyber-crimes. Lastly, numerous positive remedies have also been incorporated for effectively curbing cyber-crimes in our country.

Keywords: *Cyber-crimes, IT Act, Cyber law legislation, Kinds of cyber-crime, Cyber Attacks*

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INTRODUCTION

Crime is both a social and economic phenomenon. It is as old as human society. Plethora of prehistoric books and folklore stories have expressed and articulated different crimes committed either by individuals either against one another (civil crime) like theft or personal injury or crimes against the nation (criminal crime) like spying, treason or war. Our ancient Indian texts and scriptures, like the Kautilya's Arthashastra, which is written around 350 BC, is considered to be an authentic administrative treatise in India, which enumerates and explains in detail the various crimes and security protocol steps which were ought to be taken by the rulers against the possible happening of a crime in the state and also advocated punishment and compensation for a list of offences. Different kinds of punishments have been prescribed for listed offences and the concept of restoration of loss to the victims has also been discussed in it.

Crime in any form adversely affects all members of the society. Due to the huge perforation of technology in almost all walks of the society beginning from corporate governance and state administration and then commencing towards the small business and shop keepers who are computerizing their billing system, one can find computers and other electronic devices pervading the entire human life. Such is the power of digitisation and the penetration is so deep that a man cannot even spend a day without the electric devices.

The development and expansion of technology has made man rely on Internet for all his needs. Internet has given everyone an easy access to everything while sitting at their place of comfort. Social networking, online shopping, storing data, gaming, online studying, job search and online workplace transition, has resulted in man thinking that everything is easily possible in this digital era. The development of internet and its related benefit has also led to the origin, evolution and development of cyber-crimes. Cyber-crimes are committed on

plethora of platforms in diverse ways and because of lack of awareness; it could be carried out and committed very easily.

In matters of Cyber-Crime, India is also not far behind the other countries where the rate of incidence of cyber-crimes is increasing day by day. In a report published by the National Crime Record Bureau report (NCRB 2011) the incidence of cyber-crimes under the information Technology Act has increased by 85.4% in the year 2011 as compared to 2010 in India, whereas the increase in incidence of the crime under Indian Penal Code is by 18.5% as compared to the year 2010¹. Vishakhapatnam has been marked with the maximum number of incidence of cases while Maharashtra has unfortunately developed into a centre of cyber-crimes with maximum number of incidence of registered cases under cyber-crimes category.² Hacking with computer systems and obscene publication were the main cases under the Information Technology Act for cyber-crimes. Maximum offenders arrested for cyber-crimes were in the age group of 18-30 years. 563 people in the age group of 18-30 years were arrested in the year 2010 which has increased to 883 in the year 2011.³

GENESIS OF INFORMATION TECHNOLOGY LEGISLATION IN INDIA

The 1990s saw an advent growth in globalisation and computerisation with multiple nations computerising their governance and e-commerce witnessing an enormous spurt of growth. Until then, majority of the international trade and their transactions were facilitated and completed through documents which were transmitted either through post or by telex.

¹ The Hindu, ‘NCRB data: Cyber-crimes reached a new high in 2017’, Available at: <https://www.thehindu.com/data/cyber-crime-cases-in-india-jumped-77-in-2017-compared-to-2016/article29889061.ece> (Accessed on: August 02, 2020, 10:00 AM)

² DNA, ‘Maharashtra leads in Cyber-Crimes’, Available at: <https://www.dnaindia.com/india/report-maharashtra-leads-in-cyber-crimes-1709708> (Accessed on: August 02, 2020, 11:30 AM)

³ National Crime Records Bureau, ‘CHAPTER-18: CYBER-CRIMES’, Government of India, Available at: https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/CHAP18_2003.pdf (Accessed on: August 02, 2020, 03:00 PM)

Evidences and records until then were majorly paper evidences and records with other forms of hard copies. Because bulk of international trade was carried out through electronic means and modes of communication, along with emailing system gaining momentum, an urgent and necessary need was felt for recognising electronic record i.e. the data what is stored in a computer and external storage.

The United Nations Commission on International Trade law (UNCITRAL) on E-commerce was adopted in 1996. The General Assembly of United Nations passed a resolution in January 1997 inter alia, recommending all the States in the United Nations to give favourable considerations to the said Model Law which provided for recognition of electronic records and treating it at par with paper documents (technological neutrality).

It is against this background that the Government of India enacted the Information Technology Act with the objective to provide legal recognition of transactions carried out by means of ‘electronic commerce’ which included the use of substitute communication and storage of information facility, to aid the process of electronic filing of documents with the Government agencies and further to amend the Indian Penal Code , the Indian Evidence Act , the Bankers Books Evidence Act and the Reserve Bank of India Act and for matters therewith or incidental thereto.

The Information Technology Act, 2000 was therefore passed as the Act No. 21 of 2000 and received the President assent on June 09 and was made effective from October 17, 2000.

The act recognises and accords the following issues:

- 1) Legal Recognition of Electronic Documents
- 2) Legal Recognition of Digital Signatures
- 3) Offenses and Contraventions

4) Justice Dispensation Systems for cyber-crimes

However, a need for an amendment – a detailed one – was felt for the Information Technology Act almost from the year 2003-2004. Numerous industry bodies were consulted for their expert assistance and advisory groups were organised to dwell into the perceived lacunae in the Information Technology Act for comparing it with similar legislations in other nations and thereby suggest recommendations.

Such recommendations were scrutinised and after consideration on such administrative plans, the consolidated Amendment Act (i.e. Information Technology Amendment Act 2008) and was placed before the Parliament of India. The Amendment Act 2008 got the President assent on February 05, 2009 and was made effective from October 27, 2009

WHAT ARE CYBER-CRIMES?

Cyber-crime is neither defined under Information Technology Act 2000 nor in the Information Technology Amendment Act 2008 nor in any legislation in India. In fact, the said terminology cannot be defined. Offence or crime has been dealt with elaborately listing various acts and the punishments for each under Indian Penal Code 1860, Code of Criminal Procedure 1908, Code of Criminal Procedure 1973 and quite a few other legislations too. Hence, to define cyber-crime, we can say in lay man understanding that it is just a combination of crime and computer. To further simply it, it can be explained as ‘any offence or crime in which a computer is used, is cyber-crime.’

Thought-provokingly enough, even a petty offence like stealing or pick-pocketing can be brought under the ambit and purview of cyber-crime if such data or aid has been utilised for committing such an offence and the same is facilitated by a computer or such information is stored in a computer and is used (or misused) by the fraudster. In a cyber-crime, computer or the data itself a target or manifests as the object of the offence or a tool in committing some

other offence, thereby providing the necessary inputs for that offence.

The Information Technology Act, 2000 defines various terminologies like computer, computer network, data, information and all other necessary pre-requisites that form part of a cyber-crime. Cyber-crimes can be defined as unlawful acts wherein a computer is used as a tool or a target or combination of both. Cyber-crime is a general term that includes all types of digital crimes including credit card frauds, bank robbery, illegal downloading, industrial espionage, child pornography and denial of service attacks. It also covers crimes wherein computers or networks are used to enable and facilitate the desired illicit activity.

TYPES OF CYBER-CRIME

Cyber-crimes can be categorised in two ways:

1. The crimes in which the computer is targeted. Examples include hacking, virus attacks and DOS attacks.
2. The crimes in which the computer is used as a tool of weapon. Such crimes include cyber terrorism, intellectual property rights violations, credit card frauds, EFT frauds and pornography.

The different kinds of Cyber-Crimes can be categorised as:

1. Unauthorised access and hacking

Unauthorised access and hacking means any kind of access which is taken without the permission of the rightful owner or person in charge of the computer, computer system and computer network. Hacking means an illegal access into a computer system and/or network and every such act towards illegally entering into a computer and/or network is hacking. Hackers write or use computer programs and modules to attack the target computer. Majorly the act of hacking is committed for monetary gains, such as stealing the credit card

information, transferring money from various bank accounts to their own accounts followed by withdrawal of money. Government websites are the most targeted sites for the hackers. Recently the Indian Railway Catering and Tourism Corporation (IRCTC) the ticket-booking website of Indian Railways was hacked and the IRCTC officials fear that personal data including mobile numbers, credentials, personal information including date of birth and other important details of the customers have been sold for Rs. 15,000/- in a CD to the interested party.⁴

2. Web hijacking

Web hijacking means, taking forceful content of another person's website. In this case the owner of the website is deprived of the control over his website and its content.

3. Pornography

Pornography means showing sexual acts in order to because sexual excitement the definition of pornography also includes pornographic websites; pornographic magazines produced using computer and internet pornography delivered over mobile phones.

4. Child Pornography

The internet is being excessively used as a medium to sexually abuse children. The children are viable victim to the cyber-crimes. Computers and internet having become a necessity of every household, the children have got easy access to the internet. There is an easy access to the pornographic contents and paedophiles lure the children by distributing pornographic materials and then try to meet them for sex or take their nude photographs including their engagement in sexual acts and sexual positions.

⁴ India Today, 'IRCTC website hacked, information of around 1 crore people feared stolen', Available at: <https://www.indiatoday.in/india/story/irctc-website-hacked-information-of-around-1-crore-feared-stolen-321712-2016-05-05> (August 03, 2020, 11:00 AM)

5. Denial of Service Attack

This is an act in which the hacker floods the bandwidth of the victim's network or fills his email box with spam mail depriving him of the services he is entitled to access. This is used to bring the network to crash by flooding it with useless traffic. Another variation to a typical denial of service attack is known as Distributed Denial of Service (DDoS) attack wherein the perpetrators are many and are geographically widespread. Many DoS attacks, such as Ping of Death and Teardrop attacks exploit limitations in the Intellectual Property protocols. For all types and kinds of DoS attacks, certain software's exist whereby system administrators can be installing to protect and limit the damage which might be caused by the attacks.

6. Virus Attacks

Viruses are the programs that have the capability to infect other programs and make copies of itself and spread into other programs programmes that multiply like viruses but spread from computer to computer are called worms. This software attaches them to other software. Virus, worms, Trojan horse, Time bomb, Logic Bomb, Rabbit and Bacterium are malicious viruses. Such viruses usually affect the data on a computer, either by altering or deleting it.

7. Software Piracy

Software piracy refers to illegal copying of programs or the counterfeiting and distribution of products. These kinds of crimes also include copyright infringement, trademark violations, computer source code theft and patent violations.

Domain names are also trademarks and protected by ICANN's domain dispute resolution policy and also under the trademark laws⁵. They register the domain name identical to

⁵ World Intellectual Property Organisation (WIPO), 'WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP)', Available at: <https://www.wipo.int/amc/en/domains/guide/> (August 03, 2020, 10 AM)

popular service provider's name so as to attract and defraud users⁶.

8. Salami attacks

These attacks are used to instigate financial crimes. The key here is to make the alteration so insignificant that in a single case it would go completely unnoticed. For example, a bank employee inserting a program in the banking system which deducts a small amount of money (let's say Rs. 5/- a month) from the account of every customer. No account holder shall probably notice this unauthorised debit but the bank employee will make a considerable amount of money every month.

9. Phishing

It is an act of sending email to an entity or individual, falsely claiming to be an established, legitimate enterprise in order to scam the user into providing their private information which will be used for the purpose of identity theft. Such an email id or link or form would direct the user to visit the required website where they are asked to update personal information, such as passwords, credit card number, social security number and bank account details. The website however, in reality is a bogus site and is set up only for the purpose of stealing the user's information.

10. Sale of illegal articles

This category of cyber-crime includes the sale of narcotics, weapons and prohibited wildlife ornaments and skin by posting information on websites, auction sites and bulletin boards or simply by using email communication.

11. Online gambling

⁶ Mondaq – Connecting knowledge and People, 'India: Cyber Squatting Laws In India', Available at: <https://www.mondaq.com/india/trademark/208840/cyber-squatting-laws-in-india> (August 02, 2020, 04:00 PM)

There are a million of websites, all hosted on servers abroad, that offer online gambling. It is believed that all these websites are actually frontiers for money laundering. Examples of Hawala transactions and money laundering with the help of digital platform over the internet have been reported.

12. Email spoofing

Email spoofing refers to email that appears to originate from one source but actually has been sent from another source. Emails spoofing can also cause monetary damage.

13. Cyber defamation

When a person publishes defamatory matter about someone on a website or sends emails containing defamatory information to all of the persons, friends it is termed as cyber defamation.

14. Forgery

Computers, printers and scanners are used to forge counterfeit currency notes, postage and revenue stamps, mark sheets etc. and are made with the help of computers, high quality printers or scanners.

15. Theft of information contained in electronic form

This cyber-crime category includes theft of information stored in computer hard disc, removable storage media etc.

16. Email bombing

This type of act refers to sending a numerous number of emails to a particular person so as to enable the email account (in case of an individual) or mail servers (in case of a company or an email service provider) to crash.

17. Data diddling

This kind of an attack involves altering raw data just before it is processed by a computer and then changing it back after processing is completed. The dynamics of the information is changed from the way it should be entered into by inculcating a virus that changes data. This is done with the help of the programmer of the database or application, or anyone else involved in the process of having information stored in a computer file. It also involves automatic changing of the financial information for some time before processing and restoring the original information.

18. Physically damaging a computer system

As the name suggests, this type of offence involves theft of a computer, some part or parts of a computer or a peripheral attached to the computer.

19. Breach or privacy or confidentiality

Privacy is a fundamental and inherent right which is essential for protection of human dignity and security. Privacy enables us to produce and create barriers, which in turn helps us to manage boundaries which protect us from unwanted and unwarranted interference in our lives, therefore allowing us to determine who we are and how we want to interact with the world around us. Privacy enables us to establish boundaries and limitations for those who want to access our bodies, places, things, communication and information. Therefore breach of privacy can be understood as unauthorised use, distribution or disclosure of personal confidential information.

Confidentiality refers to protecting information from being accessed by unauthorised parties. In other words, only the people who are authorised to do so can gain access to sensitive data. A failure to maintain confidentiality means that someone who shouldn't have access has

managed to get it, through intentional behaviour or by accident. Such a failure of confidentiality, commonly known as breach, typically, cannot be remedied. Leakage of such information to other persons may cause damage to business or person and hence such information should be protected.

20. E-commerce/ investment frauds

Economic investment frauds are methods that use false and fake claims to impelate investments, or sometimes call for the purchase, use or trade of forged or counterfeit securities. Such products and services which are purchased online or contracted by individuals digitally are in actuality, never delivered. This type of a fraud is a common example of misrepresentation of a product to entice customers for online transactions and non-delivery of products. Such fraudulent scheme makes and advertises a promise of exuberant high profits and gains.

CYBER LAWS VIZ-A-VIS CYBER-CRIMES

Numerous cyber offences have been made punishable under multifarious Indian Statutes.

Some of these are as follows:

I. Cyber-crime under Information Technology Act, 2000 (Chapter XI)

- a. Section 65 deals with Tampering with Computer Source documents
- b. Section 66 deals with Computer related Offences (Hacking in computer systems, Data alteration, etc.)
- c. Section 66 A deals with Punishment for sending offensive messages through communication service, etc.
- d. Section 66 B deals with Punishment for dishonestly receiving stolen computer

resource or communication device

- e. Section 66 C deals with Punishment for identity theft
- f. Section 66 D deals with Punishment for cheating by personation by using computer resource
- g. Section 66 E deals with Punishment for violation of privacy
- h. Section 66 F deals with Punishment for Cyber Terrorism
- i. Section 67 deals with punishment for publishing or transmitting obscene material in electronic form
- j. Section 70 deals with Protected Systems and authorisation in regard to this
- k. Section 72 deals with Penalty for breach of confidentiality and privacy
- l. Section 73 deals with Penalty for publishing [electronic signature] certificate false in certain particulars

II. Cyber-crime under Indian Penal Code, 1860

- a. Section 383 deals with Extortion
- b. Section 420 deals with Cheating and dishonesty inducing delivery of property
- c. Section 463 deals with Forgery
- d. Section 499 deals with Defamation
- e. Section 500 deals with Punishment for Defamation
- f. Section 503 deals with Criminal Intimidation

III. Cyber-crime under Special Acts

- a. Online sale of drugs under Narcotic Drugs and Psychotropic Substances, 1985
- b. Online sale of arms under the Arms Act, 1959

COMBATING CYBER-CRIME UNDER INFORMATION TECHNOLOGY ACT, 2000

The Information Technology Act totally has 13 chapters and 90 sections. The Act encompasses diverse headings commencing from definitions, authentication of electronic records, digital signatures, electronic signatures and much more. Elaborate procedures for certifying authorities (for digital certificates as per Information Technology Act 2000 and since replaced by electronic signatures in the Information Technology Amendment Act 2008) have also been spelt out.

The Information Technology Act 2000 defines many important words used in common computer parlances like Addressee⁷, Affixing⁸, Asymmetric Crypto System⁹, Certificate Authority¹⁰, Computer¹¹, Computer System¹², Communication Devices¹³, Cyber Security¹⁴, Digital Signature¹⁵, Key Pair¹⁶, Private Key¹⁷ and Public Key¹⁸.

Section 3 which was originally ‘Digital Signature’ was later renamed as ‘Digital Signature and Electronic Signature’ in the Information Technology Amendment Act 2008. Thus,

⁷ Section 2(b), Information Technology Act, 2000

⁸ Ibid, Section 2(d)

⁹ Ibid, Section 2 (f)

¹⁰ Ibid, Section 2(g)

¹¹ Ibid, Section 2(i)

¹² Ibid, Section 2(l)

¹³ Ibid, Section 2(ha)

¹⁴ Ibid, Section 2 (nb)

¹⁵ Ibid, Section 2 (p)

¹⁶ Ibid, Section 2(x)

¹⁷ Ibid, Section 2 (zc)

¹⁸ Ibid, Section 2(zd)

introducing technological neutrality by adopting electronic signatures as a legally valid for the purpose of executing signatures.

Section 4 to 10A deal with electronic governance issues and procedures and the legal recognition to electronic records. It discusses procedures on electronic records, storage, maintenance and validity of contracts formed through electronic means.

Procedures relating to electronic signatures and regulatory guidelines for certifying authorities have been laid down in the succeeding sections.

IMPORTANT INDIAN CASE STUDIES

1. *Nasscom v. Ajay Sood & Ors.*¹⁹

In a landmark judgement in the case of National Association of Software and Service Companies versus Ajay Sood and Others, the Delhi High Court declared ‘phishing’ on internet to be an illegal act, entailing an injunction and recovery of damages.

Explaining the concept of ‘phishing’ in order to provide a landmark precedent the court stated that it is a form of internet fraud where a person pretends to be a legitimate entity (like bank or insurance company) so as to extract personal information and data from a customer and gain unauthorised access to codes, passwords. Personal data so collected by misrepresenting the identity of legitimate party is commonly used for collecting an undue advantage. The Delhi High Court also stated that even though there is no specific legislation in India to penalise phishing, it held phishing to be an illegal act. Phishing was explained by the court as ‘misrepresentation made in the course of trade leading to misunderstanding regarding the source and origin of e-mail. Such an act has the potential to cause extensive damage and loss not only to the customer but also to the person whose name, identity and password is

¹⁹ 119 (2005) DLT 596, 2005 (30) PTC 437 Del

misused."

2. *Central Bureau of Investigation v. Arif Azim or SONY.SAMBANDH.COM CASE²⁰*

India saw its first Cyber-Crime conviction in this case. A complaint was filed by Sony India Private Ltd, which runs a website called www.sony-sambandh.com which includes the participation of Non Resident Indians. It enables NRI's to send Sony products to their near and dear ones in India after they paying for it online though a digital portal and the company delivers these products to the recipients.

In May 2002, a person logged into this website and ordered a Sony Colour Television set and a cordless head phone. The person gave the credit card number for payment and requested that the products be delivered to Arif Azim in Noida. The payment was duly cleared and the company delivered the items to Arif Azim. However after 1.5 months the credit card agency informed the company that this was an unauthorized transaction as the real owner denied this purchase. The company lodged a complaint for online cheating with CBI. A case u/s 418, 419 and 420 of the IPC was filed and Arif Azim was arrested. Inquiry revealed that Arif Azim was working at a call centre in Noida and had gained unauthorised access to the credit card number of an NRI, which was further misused for this purchase. Arif pleaded guilty and the court convicted Arif Azim under Section 418, 419 and 420 of the Indian Penal Code.

3. *State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru²¹(Parliament Attack Case)*

Bureau of Police Research and Development (BRD), Hyderabad solved the complex task of retrieving information from the recovered laptop of terrorists who had planned and attacked Indian Parliament. The laptop was sent to Computer Forensics Division and the analysis proved that the laptop contained several evidences that confirmed of the two terrorists'

²⁰ 2003

²¹ AIR 2005 SC 3820

motives, namely the sticker of the Ministry of Home that they had made on the laptop and pasted on their car to gain entry into Parliament House along with the fake ID card containing the Government of India emblem and seal.

4. *Shreya Singhal v. Union of India*²²

Two women were arrested for posting allegedly offensive and objectionable comments on Facebook about the propriety of shutting down the city of Mumbai after the death of a political leader. The police arrest them under Section 66A of the Information Technology Act, 2000. However the police released the women and dismissed their prosecution. But such an incident invoked substantial criticism and these women then filed a petition, challenging the constitutional validity of Section 66A on the ground that it violates the right to freedom of expression. The Supreme Court declared Section 66A of the Information Technology Act, 2000 as unconstitutional and therefore declared it as null and void on grounds of violation of the freedom of speech guaranteed under Article 19(1) (a) of the Constitution of India and neither was it a ‘reasonable restrictions’ under Article 19(2).

5. First case convicted under Information Technology Act 2000 of India²³

This case relates to obscene, defamatory and annoying message sent to a divorcee woman in the message group of Yahoo. The posting of the message resulted in humiliating and harassing phone calls to the lady in the belief that she was soliciting. Based on a complaint made in February 2004, the Police traced the accused to Mumbai and arrested him. The accused was a family friend of the woman and was allegedly interested in marrying her. She married another person but later divorce took place. The accused saw this as a new opportunity and started contacting her once again. On her reluctance to marry him, the

²² (2013) 12 SCC 73

²³ *State of Tamil Nadu v. Suhas Katti*, CC No. 4680/2004

accused took up the harassment through the Internet. The Charge was filed under Section 67 of Information Technology Act 2000, 469 and 509 Indian Penal Code before the court. The court based came to the conclusion that the crime was conclusively proved. The court held that the origination of the obscene message was traced out and the real culprit was brought to the court. The accused was found guilty of offences under section 469, 509 IPC and 67 of IT Act 2000 and the accused is convicted and sentenced.

6. Two Nigerians sentenced seven years for online fraud²⁴

A Kerala Court sentenced two Nigerians to five years rigorous imprisonment as they both had cheated a doctor in the Kerala district for Rs 30 lakh. The Nigerians were sentenced under sections 420, 468 of IPC and section 66(D) of Information Technology (Amendment) Act 2008. According to the case, the duo had cheated the doctor after they sent an e-mail asking to pay Rs 30 lakh as processing fee. A plan by the police succeeded when the Nigerians were lured into Kerala then arrested. This was the first verdict against financial fraud under the Information Technology Act.

REMEDIES TO REDUCE COMPUTER RELATED OFFENCES

Multidimensional public or private or public-private collaborations between law enforcement agencies and information Technology & Information Security organisations can be established to handle the problem of cyber-crime. System consisting of software and hardware that authenticates both manual and automatic access and transfer of information should be regulated between organisations.

Some of the remedies which can be utilised to reduce computer related offences are enumerated as follows:

²⁴ Dhananjay, ‘*Cyber-Crime Convictions & Judgments*’, Alert Indian, Available at: <https://www.alertindian.com/node/18#gsc.tab=0> (Accessed on: August 10, 2020, 11:00 AM)

1. Use different passwords and username combinations for forfeit accounts. One should update them every 6 months and should resist the urge to write them down somewhere,
2. Keep social media profiles like Facebook Twitter YouTube Snapchat LinkedIn private. Update the security settings frequently and be careful before agreeing to anything and staying alert when sharing any kind of information through your online posts,
3. Protect your sensitive data and information by using encryption method,
4. Do not share your personal identity credentials like name address phone number and financial information online,
5. Keep your computer current with the latest updates,
6. One of the best ways to keep cyber-crime and attackers away from one's computer is to administer software fixes and by regularly updating the computer from any incident of undue unauthorised advantage,
7. Protect your computer with security software. Security software includes firewall and antivirus programs which protect the computer's first line of defence. It protects communication and data stored in the computer and
8. When faced with such crimes, one should not panic but report the same to the local police. The following websites can provide help to any victim of cyber-crime:
 - a. <http://www.Cyber-Crimehelpline.com>
 - b. <http://www.cyberpolicebangalore.nic.in>
 - c. <http://www.cybercellmumbai.gov.in>

CONCLUSION

Since the advent of technological era and its development in the recent times, cyber-crimes has undertaken a disguised and distinguishing nature from the Internet and cyberspace and can be termed as invisible, technology - based crimes having no geographical borders. Cyber-crime investigation is not efficacious and fool proof as it has a high risk of failure due to misuse, stealing and destruction of evidence. There is a need to educate people and spread awareness about the consequences of cyber-crimes. There is also a need to regulate the social networking sites and its content flow. It should be mandatory for every citizen to adopt cyber etiquettes while utilising the online information and communication technology. The advent of technology within two decades has touched every individual life either directly or indirectly in this digital era, with its own advantages and disadvantages. Unfortunately so, it has also given birth to most deadly of crimes including cyber terrorism where a single click of a mouse can kill thousands of people. In order to legally control and prevent such crimes, the human kind needs to collectively be in pace with this technology and take informed decisions.

THE COMPROMISE OF THE FUNDAMENTAL RIGHT TO PROPERTY

Research Question: Should the Right to Property fall within the ambit of the ‘Basic Structure of the Constitution of India?

Nandini Modi* & Vasundhara Gupta**

Abstract

The aim of this research paper is to expose the acts of legislature in trying to fulfil the arbitrary and political motives under the garb of Article 31A and 31B which led to a compromise of the fundamental right of property. The right to property is a basic right which every human should have in order to feel safe and protected, however this fundamental right was very brutally uprooted from the Indian Constitution, resulting in unrest and lawlessness in the country. The citizens of the country were doubly oppressed, firstly they were deprived of their right to property for reasons which were arbitrary and maligned and secondly they were also not adequately compensated for the loss they had to suffer.

Through this paper, an attempt has been made to throw light on the fact that stripping off the fundamental right to property from the constitution and not providing it protection under the basic structure doctrine has been the worst decision especially for the underprivileged.

Keywords: Right to Property, Basic Structure, Fundamental Rights, Indian Constitution

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INTRODUCTION

There has been a constant tussle between the judiciary and the legislation with respect to right to property. Right to property has been subjected to various changes, starting as a fundamental right under Article 19(1)(f) then being amended numerous times by the Parliament to finally being abolished and becoming a mere legal right in India. The end result of this decision has not proven to be fruitful to the country and it stands in clear violation of the basic structure doctrine of the Indian Constitution. The basic structure upholds the supremacy of the Constitution and preserves its secular, republic, democratic, federal, and sovereign characteristic. It also includes individual freedom, liberty and dignity, equality within its ambit. If these fundamental rights are excluded from the basic structure of the constitution of India it would result in the nullification of these essential elements like right to life, freedom and liberty. The basic structure lies outside the amendatory process of the Parliament since changing it would lead to the abrogation of the core principles and values on which the whole Constitution of India is based upon and which is fundamental to the well-being of the public. Right to property should also fall within the spheres of the basic structure and any violation of that right would amount to the violation of the basic structure doctrine.

In the *Kesavananda Bharati Case*, Justice Khanna says, “*no article of the constitution is immune from the amendatory process simply because of the fact that it relates to a fundamental right and is contained in part III of the Constitution.*” Therefore, the right to property was not a basic feature of the constitution; however, the rest of the bench did not support his belief.¹ The unanimous decision of the nine judge bench showed that the fundamental right could never have been beyond the scope of the basic structure of the

¹ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461

constitution.² Since, right to property was a part of Article 19 of the constitution; it too fell within the ambit of the basic structure and should have been protected from the amendatory process which led to its deletion from the constitution of India.³

Earlier, the framers of the constitution had given sufficient importance to the right to property by introducing Article 19(1)(f) and Article 31 as a fundamental right. Just like section 299 of Government of India Act, 1935 which secured the right to property and contained safeguards against expropriation without compensation and against acquisition for a non-public purpose.⁴ The articles so provided in the constitution briefly stated that every citizen has an individual right to acquire, hold and dispose of property.⁵ However, it is the responsibility of the state as well, that the wealth and means of production are not concentrated in limited hands but are also distributed to sub serve the common good.⁶ This leads to a conflict between the state's power to implement the said principles and citizen's rights since the fundamental right of property is not absolute.⁷ The right is subject to law of reasonable restriction in the interest of the general public.⁸ The state's power is also subject to the condition that the law made by them that infringes the fundamental right should pass the test of reasonableness and public interest.⁹

REASON WHY FUNDAMENTAL RIGHT TO PROPERTY WAS SCRAPED OFF

The main reason which led to the deletion of the fundamental right to property was when

² Ibid

³ Ibid

⁴ Sushanth Salian, *History of the Removal of the Fundamental Right to Property*, Centre for Civil Society 232, 233-234 (2002)

⁵ Ibid

⁶ Ibid

⁷ Ibid

⁸ Ibid

⁹ Ibid

Articles 31A and 31B were inserted in the constitution through the first Amendment Act, 1951.¹⁰ Under this Amendment Act, any law providing for acquisition by the state of an estate so defined or any rights which lead to modification or extinguishment of such rights could not be questioned on the ground that it was inconsistent with, or took away or abridged any of the rights conferred by articles 14 or 19 or 21.¹¹ Article 31-B and Schedule Nine was an attempt to usurp judicial power, under the subsequent amendments.¹² With the introduction of these articles and Schedule Nine, the legislature was able to get away with the void laws which infringed the fundamental rights.¹³ Since, it was stated in article 31B that none of the acts or regulations specified in the Ninth Schedule nor any of the provisions shall be deemed to be void on the ground that they are inconsistent with Part III, notwithstanding any judgements, decree or order of any court or tribunal to the contrary.¹⁴ The list kept on increasing with the increasing amendments.¹⁵

The use of these amendments to add more and more laws to the Ninth Schedule resulted in the substitution of constitutional philosophy by totalitarian ideology.¹⁶ It represents a cynical attitude to the rule of law and the philosophy underlying our constitution.¹⁷ The main objective of the ninth schedule of the constitution was to protect only land reform law from being challenged in the court however; it was being misused for political gains.¹⁸

¹⁰ Gopal Sankaranarayanan, *The Fading Right to Property in India*, Law And Politics In Africa, Asia And Latin America (Apr. 19, 2019 8:47 PM),

¹¹ Ibid

¹² Ibid

¹³ Ibid

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Salian, Supra note 4

¹⁷ Ibid

¹⁸ Ibid

Further, the parliament amended clause 2 and inserted clause 2-A to article 31, which enabled the state to deprive a person of his property in an appropriate case by law.¹⁹ This gave an arbitrary power in the hands of the state to confiscate a citizen's property which is a clear infringement of the fundamental right of the citizens.²⁰ Their main attempt was to usurp the judicial power.²¹

The reasonable restrictions so imposed by the state were gradually proving to be unreasonable especially with the amendment of clause 2 of article 31.²² This occurred after the famous case of *Bela Banerjee v. State of West Bengal*²³. In this case private land was acquired for the settlement of immigrants and development under the West Bengal Development and Planning Act.²⁴ According to the act the owners of the land were given compensation which amounted to the market value of the property on December 31, 1946 no matter when the land was compulsorily acquired.²⁵ The Act was challenged saying it is unconstitutional and void as the compensation provided was not 'just' and thus Article 31(2) of the constitution was violated.²⁶ As parliament suffered a blow it came up with 4th Amendment.²⁷ As a result the amended clause 2 stated that no law could be called in question in any court on the ground that the compensation provided by that law is not adequate.²⁸ This gave unreasonable powers to the state and made it the final arbiter on the question of

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid

²² Ibid

²³ AIR 1954 SC 170

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

compensation.²⁹ It gave an arbitrary power to the state to fix at its discretion the amount of compensation for the property acquired or requisitioned.³⁰

Since all these amendments fell under the Ninth Schedule, they remain protected from the dangers of judicial review even though they infringed the fundamental rights of the constitution.³¹ Like in the case of *Kochunni v. State of Madras*, the Supreme Court did not accept the plea of the state that Article 31(1) after amendments gave an unrestricted power to the state to deprive the person of his property.³² However, later in the cases judiciary decided that a law should be provided for compensation for public purpose and should also satisfy the double test of ‘reasonable restriction’ and ‘public interest’ provided by article 19(5).³³

The scenario was such that whenever the judiciary invalidated a law by terming it as unconstitutional the legislature would conveniently amend the constitution in order to uphold its supremacy over the judiciary.³⁴ These legislative manipulations finally lead to the deletion of Article 19(1)(f) and article 31 from the constitution of India³⁵. Thus, it was no more a fundamental right but a legal right.³⁶ The amendment also led to the insertion of 300 A which says that no person shall be deprived of his/her property without a valid lawful reason. “Therefore, in one fell swoop, the right to property was taken from a position of pre-eminence and consigned to be a mere legal right.”³⁷

RESULT OF RIGHT TO PROPERTY BEING SCRAPPED OFF

²⁹ Sankaranarayanan, Supra note 11, at 224

³⁰ Ibid

³¹ Salian, Supra note 4, at 236

³² 1960 AIR 1080

³³ Salian, Supra note 4

³⁴ Ibid

³⁵ Ibid

³⁶ Sankaranarayanan, Supra note 11, at 229

³⁷ Ibid

The Stripping of the fundamental right to property led to unrest among the people especially the weaker and the less privileged sections of the society.³⁸ Arbitrary licensing policies and widespread acquisition of land for private purposes led to a rise in protests and resistance movements in India with Marxist nationalism cutting a red swathe across the nation.³⁹ India being a developing nation requires more and more land for infrastructure projects like highways, airports housing and power projects.⁴⁰ As a result, with the support of the local government many small landholders were deprived of their land for very less compensation.⁴¹ In order to address these problems a number of bills were introduced in parliament both for the limited basis on which land was acquired and for the rehabilitation of those who had been displaced.⁴² However, with the deletion of the fundamental right there is no proper redressal for this problem and therefore the victims of these state actions have a very limited recourse to the law, only seeking greater compensation amounts, which have also lost the protection earlier afforded by Article 31.⁴³

The council of Europe chose a cautious rode in granting the right to property.⁴⁴ They never intended to challenge the concept of ownership such as absolute control, even though they feared that giving such a right could cripple social and economic reforms.⁴⁵ The very first right to property was authorized in in Article 1 of the First Protocol to the Convention ('P -1') which did not include any idea of compensating the person who has been deprived of his

³⁸ Sankaranarayanan, Supra note 11, at 230

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ibid

⁴³ Ibid

⁴⁴ Tom Allen, *Property as a Fundamental Right in India, Europe and South Africa*, 15 Asia Pac. L. Rev. 193, 203-207 (2007)

⁴⁵ Ibid

private property.⁴⁶ The plain text of the law focused on the acquisition of property based on the grounds of lawfulness and public interest.⁴⁷ It further gave the State unfettered discretion to determine what would qualify as a justifiable ground for acquiring private property.⁴⁸ However, with time this law was given a broader interpretation by the courts. In the case of *Sporrong and Linnroth v. Sweden*, the court made it very specific that it would engage in a substantive review of property legislation.⁴⁹ The Court stated that, “an interference with property would satisfy P1-I only if ‘a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.’”⁵⁰ Similarly, in *James v. United Kingdom*, the Court stated that, “compensation terms are material to the assessment whether a fair balance has been struck between the various interests at stake.”⁵¹ Accordingly, the “taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable.”⁵²

Neither did the plain text of the law imply that the interference of State in private property would not be a subject to substantive judicial review nor did it signify the application of the fair balance test.⁵³ However, the court expanded the interpretation of the law based on an internal development of the proportionality doctrine and did not rely on external changes in social and economic sectors.⁵⁴ Interest in property was made a subject to judicial review

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

because while some human rights are absolute in nature, others can be subject to an interference by the State based on proportionality and it would be irrational to consider an interest as a human right if the State would have the absolute power to abrogate it.⁵⁵

The Court of Human Rights approach to compensation was less stringent with respect to the approach adopted by the Indian Courts.⁵⁶ However, both the courts felt that the compensation must have a reasonable nexus to the value of property.⁵⁷ Though, the council could permit compensation less than the full amount where the deprivation of the property from its owner would result in a heightened economic growth or social justice.⁵⁸ In the case of *Lithgow v. United Kingdom*, as in *R C Cooper*, compensation was required by the legislation on the basis of valuation of principles that excluded the full value of some assets.⁵⁹ Though, the amount of compensation did not even equal to the company's cash reserves, in Lithgow, with some of the nationalized companies still the court of Human Rights held that State had satisfies the basic criterion of fairness.⁶⁰ This was because compensation was reasonably related to the value of property; moreover, the valuation could be justified, even though the actual amounts of compensation were very low, because it simplified and accelerated the nationalisation process⁶¹. However, compensation to be based on a system of valuation that excluded consideration of some assets would mean that there would be no relationship between compensation and the value of the taken property, therefore the Supreme Court of India was not willing to allow it.⁶² However, the principle adopted by the Supreme Court had its

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid

drawbacks.⁶³

PROBLEMS THAT AROSE DUE TO THE DELETION OF THE RIGHT

Even if we assumed that there was a socially justified public purpose in place for taking away the land of an individual, the problems that arose, in order to ensure efficient allocation of resources were that what compensation should be paid and who should decide the amount of the compensation, the judiciary or the legislature.⁶⁴ If the legislature were to fix the compensation, there is a possibility for it to be undervalued.⁶⁵ Also, if the legislature ascertains the compensation which is not reasonably related to the value of the property or is based on arbitrary principles then the compensation must be judicially reviewed.⁶⁶ The principle that bases compensation on market value is problematic where the acquisition is on a large scale because in such cases the market value of the land will be an inadequate compensation for the value lost in account of the damage caused to the social world, for example the construction of Narmada Dam.⁶⁷

Secondly, the problem that arose after the deletion of the fundamental right to property and introduction of the Ninth Schedule was that the public purpose for which the property of the individuals was taken away from them was not under judicial review. It is important that public purpose should be open to judicial review.⁶⁸ This is because since the takings involved a forced exchange that generates a surplus, this surplus should be divided in proportion to the

⁶³ Ibid

⁶⁴ Jaivir Singh, *(Un)Constituting Property The Deconstruction of the 'Right to Property' in India*, pp.24-29 (Working Paper Series 2012) (2004)

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid

investment made in the state by citizens.⁶⁹ This gave the government a power of unfettered discretion to determine what would qualify as a justifiable public purpose.⁷⁰

WHY DELETION OF THE RIGHT WAS NOT A SUITABLE MOVE-CONCLUSION

Since, compensation and determination of public purpose could be arbitrarily decided by the parliament without any reasonable justification; it breached Article 14 of the constitution which guarantees equality before the law.⁷¹ This disturbs the doctrine of basic structure as the principle of equality constitutes the heart and soul of the constitution. Therefore, right to property should be a part of the basic structure to avoid such difficulties.

Therefore, it is important to restore the fundamental right to property to the people; it is one of the important rights which need to be protected under the Part III of the constitution. The amendments so made to the Article 31 (1)⁷² and 31(2)⁷³ of the constitution should be deleted because they give nothing but arbitrary and unreasonable power to the state and thus gives way to legislative manipulation. “If the fundamental right to freedom of speech or personal liberty pertains to basic structure, there is every reason that the fundamental right to property should also pertain to it, as the former set of rights could have no meaning without the latter. Protection of freedom depends ultimately upon the protection of independence, which can only be secured, if property is made secure.”⁷⁴

From the above discussion it is crystal clear that there are a plethora of problems attached to

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Article 14

⁷² Article 31

⁷³ Article 31

⁷⁴ Sankaranarayanan, Supra note 11, at 254

right to property being made a mere statutory right. Article 19(1)(f)⁷⁵ is deeply embedded in the whole fabric of our constitution that it cannot be uprooted without leaving a void and broken threads behind. The fundamental right to property should also pertain to the basic structure like the fundamental rights to freedom of speech or personal liberty, as the latter set of rights would have no meaning without the former.⁷⁶ Even the framers of the constitution understood the unique conditions of the country and the needs of the people and therefore they made the laws accordingly. They visualised the society, in which every citizen would own some property not only as a means of livelihood but also as a security chip from economic oppression and tyranny.⁷⁷ The Supreme Court of America which first accepted the distinction between personal rights and property rights and accorded a preferred position to the former has also accepted the fact that the distinction between the two rights is not possible by saying that “the dichotomy between personal liberties and property rights is a false one.”⁷⁸ This is because people have rights and property has no rights. Whether the property in question is a welfare cheque, a home or a savings account, the right to property without unlawful deprivation is a ‘personal right’, not less than the right to speak or the right to travel.⁷⁹ The court said that a fundamental interdependence exists between the personal right to liberty and the personal right in property.⁸⁰ Neither is of importance without the other.⁸¹ Therefore, the right to property is a fundamental part of the basic structure of the Indian constitution and separating this right from the doctrine would lead to its destruction.

⁷⁵ Article 19(1)(f)

⁷⁶ Vyshnavi Neelakantapillai, *Right to Property under the Indian Constitution*, Lawyers Club India (Mar. 07, 2011), Available at: http://www.lawyersclubindia.com/mobile/articles/details.asp?mod_id=3515 (Accessed on 01.09.2020)

⁷⁷ Ibid

⁷⁸ Sankaranarayanan, Supra note 11, at 254

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ Ibid

ISONOMY IN ADVERTISING RIGHTS: A STUDY TO INVESTIGATE NUANCES OF LEGAL ADVERTISING AND HOW IT SHOULD BE REGULATED

Vaishnavi Bansal* & Swikruti Nayak**

Abstract

Law being considered as one of the noblest profession has been restricting the scope of advertising its services. However, this fear of commercializing the profession has in no way contributed to upholding its nobility but rather degraded its quality of services. The right kind of a lawyer can be found when information about their legal services is accessible to the right kind of audience. For making information publicly known the right kind of media has to be used. Advertising is one kind of harmless medium which not only enables people to sell their information but also ensures that it reaches the target audience. Many countries around the world have permitted at least some forms of advertising by lawyers. Introduction of guidelines and regulations regarding advertising appears to be the emerging norm. In India, the wide ambit of legal advertising is yet to be recognized and explored. It must be remembered that, lawyers are also the citizens of this country and deserve the same access to resources like others including the right to advertise. This freedom to advertise will guide people to make informed choices for hiring a lawyer. But as no freedom should be absolute, advertising of legal services is also bound have constraints. Therefore, regulating legal advertisements becomes paramount to ensure that lawyers play within the rules of the game.

Keywords: Legal Advertising, Lawyers, Judicial System, Indian Constitution, Freedom to

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INTRODUCTION

The legal profession is a fraternity by itself and is a master of its own affairs.¹ It has the power of having its own rules of etiquette, conduct and media communication. This power originates from the fact that since India achieved Independence, legal profession is considered to be a noble profession, instead of a commercial service.²

In 1967, advertisement in any form by any member of the legal fraternity was considered as misconduct³ and this view still holds true today as in October, 2019, the Bar Council of Delhi took action against many advocates and NGOs for advertising their work on social media platforms like Facebook and WhatsApp.⁴

This article describes the legal provisions and the reasoning behind them for banning legal advertisements. It analyses the view of both the proponents and opponents of this ban and also discusses the current status of legal advertising in other countries. It highlights how some members of the profession are able to find some loopholes between the rules and lastly, suggests on imposing some regulations in this sector.

POSITION OF LAW

The Bar Council of India has the general power to make rules which prescribe that a standard

¹ *C.D. Sekkizhar v. Secretary, Bar Council, Madras* AIR [1967] Mad 35

² *The Bar Council of Maharashtra v. M. V. Dabholkar*, [1976] 2 SCC 291; *Chairman, M.P. Electricity Board v. Shiv Narayan* [2005] 61 ALR 791; *Advocates Association of Western India v. Union of India*, Writ Petition No.1927 of 2011 Bombay High Court

³ Supra note 1

⁴ Sushil Batra, ‘Bar Council takes against advocates, NGOs, soliciting professional work through advertisements’, ANI News, (October 29 2019), Available at: <https://www.aninews.in/news/national/general-news/bar-council-takes-action-against-advocates-ngos-soliciting-professional-work-through-advertisements20191029131256/> (Accessed on: 11.06.2020)

of professional conduct and etiquette must be followed by the advocates.⁵ An action by the disciplinary committee can be taken when an advocate has been found guilty of any professional or other misconduct by a State Bar Council.⁶

Advocates Act 1961 Chapter 2 Rule 7(1)(b) provides the standards of professional conduct and etiquette for advocates as one of the functions of Bar Council of India.

Rule 36:

An Advocate shall not solicit work or advertise, either directly or indirectly, whether by circulars, advertisements, touts, personal communications, interview not warranted by personal relations, furnishing or inspiring newspaper comments or producing his photograph to be published in connection with cases in which he has been engaged or concerned. His signboard or name plate should be of a reasonable size. The signboard or name plate or stationery should not indicate that he is or has been President or Member of a Bar Council or has been President or Member of a Bar Council or of any Association or that he has been associated with any person or organisation or with any particular cause or matter or that he specialises in any particular type of work or that he has been a Judge or an Advocate General.⁷

On 28th March, 2008, following the decision of the Supreme Court in *V.B. Joshi v. Union of India*,⁸ Rule 36 of Bar Council of India Rules was amended to incorporate a proviso that permits advocates to furnish website information such as the name of the State Bar Council where they originally enrolled, professional and academic qualifications, area of practice

⁵ The Advocates Act, 1961 (Act no. 25 of 1961), s 49(1)(c)

⁶ The Advocates Act, 1961 (Act no. 25 of 1961), s 35

⁷ Rule 36, Bar Council of India Rules

⁸ *V.B. Joshi v. Union of India*, Writ Petition (Civil) No. 532 of 2000

amongst other things.⁹

PURPOSE ENVISAGED WHILE DRAFTING RULE 36

As stated earlier, Rule 36 of Bar Council of India Rules bars legal advertising in India on the simple notion of law being a noble profession. It is believed that permitting advertising in the law profession will affect the dignity of the profession as it will breed unhealthy competition among the law fraternity with regards to overcharging fees, disproportionate spending on advertisements by different firms and an overall distraction from providing quality service.¹⁰

The legal profession cannot be treated as a trade or business because as an officer of the court, an Advocate has to secure justice for those in need within legally permissible limits.¹¹

In the words of Justice Krishna Iyer- “*the canon of ethics and propriety for the legal profession totally taboo conduct by way of soliciting, advertising, scrambling and other obnoxious practices, subtle or clumsy, for betterment of legal business.*”¹² The Supreme Court in *Bar Council of Maharashtra v. M. V. Dabholkar*,¹³ observed that law is a branch of administration of justice; not a money-making trade and so commercial competition by the way of circulars and advertisements should not vulgarize the profession. So, a postcard sending the name and description of work is considered to be violative of professional rules.¹⁴

A writer, publishing an article in a newspaper under the signature of being a practicing advocate in the courts is also deemed to be cheap way of advertising, that is not encouraged.¹⁵

⁹ Bar Council of India, *Amendment to Rule 36, in Section IV, Chapter II, Part VI of the Bar Council of India Rules regarding advertisement by Advocates*, Resolution No. 50/2008 (March 24, 2008)

¹⁰ Isha Kalwant Singh, ‘Advertising by Legal Professionals’ (2016) Bharati Law Review, p. 277

¹¹ R. N. Sharma, *Advocate v. State of Haryana*, [2003] 3 RCR (Cri) 166 (P&H)

¹² *The Bar Council of Maharashtra v. M. V. Dabholkar*, (1976) 2 SCC 291 para. 23

¹³ Ibid

¹⁴ *Government Pleader v. S. A Pleader*, AIR [1929] Bombay 335

¹⁵ *In Re: (Thirteen) Advocates v. Unknown*, AIR [1934] All 1067

In *J.N. Gupta v. D.C. Singhania & J.K. Gupta*,¹⁶ the advocates had given advertisements in the newspaper to notify the public about a change in its address. Thereafter, they made a publication in the International Bar Directory, giving information about their employees under the headings- “Singhania & Company” “firms major cases”, and “representative clients” and this information related to eminent clients and cases was considered to be a professional misconduct. In another case, the Madras High Court held that writing articles for publication in newspaper under an advocate’s signature and not having a moderate- sized sign board or name plate, is considered to be a breach of professional etiquette, otherwise both the actions amount to unauthorised legal advertising.¹⁷

Under our present system, many lawyers, especially young ones, are forced to be deceptive and dishonest. Time and again lawyers run for office, saying to the world, "I want to serve."¹⁸ However, their real purpose is to get their name in front of the public.¹⁹

PERILS OF MODERN ADVERTISING

Lawyers with their advertisements can be led astray by the Internet. The danger of this modern technology is the freedom to put up a completely bogus advertisement in such a convincing way, that people can be misled. Consumers recognize the existence of puffery,²⁰ but that does not stop them from believing in false advertisements and making wrong comparisons between law firms or lawyers. Internet advertising can lead to unfair competition as there is no legal limit on the number of internet domains, a law firm or a

¹⁶ *J.N. Gupta v. D.C. Singhania & J.K. Gupta*, B.C.I. TR. Case No. 38/1994, Disciplinary Committee proceedings of Bar Council of India

¹⁷ *S. K. Naicker v. Authorised Officer*, [1967] 80 Mad. LW 153

¹⁸ James G. Frierson, Legal Advertising (1975) 2 Barrister 6

¹⁹ Ibid

²⁰ Fredrich C. Zacharias, ‘What Direction Should Legal Advertising Regulation Take’ (2005) Professional Lawyer Symposium, pp. 45,52

lawyer can own.²¹ If the legal sector will have an unregulated access to advertise anything and anywhere on the internet, then legal advertising will lead to more confusion instead of facilitating the potential consumers to make an informed-decision. Another problem with unregulated internet advertising can be that a lawyer's information can mislead the viewers living outside his jurisdiction of practice.²² Then extra efforts have to be undertaken by the potential consumers to identify which lawyer is legally practicing in their state or country.

The Bar Council of India has not recognized online portals which give a leeway to lawyers to overcrowd the webpage with pop-ups. In 2018, the Allahabad High Court issued orders to 15 online portals which included 'Justdial', 'MyAdvo', 'Lawrato', etc. to adhere to Rule 36 and Rule 37 of the BCI Rules which prohibits advertising, touting and solicitation of work by lawyers, because any deviation from it would incite legal consequences.²³

Excessive advertising can artificially inflate the expectations of consumers and leave them dissatisfied with the services rendered by their lawyer.²⁴ This will put them back in the same position of dissatisfaction as when there was a complete ban on advertising.

REFUTING THE ARGUMENTS AGAINST RULE 36

According to authors' point of view, freely available information in the form of advertisements will assist the consumers to find their right lawyer. When consumers get to see a fair competition, only then the quality of services in the legal sector will improve and

²¹ Ibid at 62

²² J. T. Westermeier, 'Ethical Issues for Lawyers on the Internet and World-Wide Web' (1999) 6(1) Journal of Law and Technology, p.5

²³ An interim order was issued in the Writ Petition, *Yash Bharadwaj v. Union of India*, WP No. 23328/2018 (MB) dated December 12, 2019. Pursuant to this order, a contempt order was passed to the same online portals on February 4, 2020.

²⁴ Terence Shrimp and Robert Dyer, How the Legal Profession Views Legal Service Advertising, (1978) 42 Journal of Marketing, pp. 74, 76

people can make decisions which they won't regret later.²⁵ As of now, a lawyer's online website and positive word of mouth publicity are the only useful tools available with people to select their lawyer. Clients will build a stronger fiduciary relationship with their lawyers when they have some basic useful information of the lawyer beforehand such as the matters he has argued before the court, government policies he has worked upon, etc. The client's decision is given primary consideration and hence advertising by lawyers will make potential clients mindful of the current legal scenario and tells them which lawyers are suitable and willing to help them.²⁶

From an economic perspective, advertising would raise the demand for legal consultancy services. The prevalent argument against legal advertising is that a lawyer cannot know in advance what his charge will be thus he has no price to advertise. However, this should never stand in the way to advertise because services without a price tag can also be advertised and a margin can always be fixed by the lawyer.²⁷ This will also increase transparency in terms of their fees and encourage competition to provide a more responsible service. Thus, both the service provider and the buyer will be contended with each other because of useful public information.

Indeed, there are concerns regarding gross misuse by lawyers such as furnishing dishonest information or shifting of focus of lawyers from sharpening their legal acumen to marketing. But they are not large enough to stand in the way of permitting legal advertising because these can be managed by the appropriate regulations and guidelines governing legal advertising. Moreover, the legal profession's advantage of helping clients and providing

²⁵ Max J. Luther, III, 'Legal Ethics: The Problem of Solicitation' (1958) 44(6) American Bar Association Journal, p. 554

²⁶ Shivam Gomber, 'Right to Advertise for Lawyers' (2016) 3 Udgam Vigyati

²⁷ Supra note 22

assistance to potential clients outweighs these concerns. For example, it would provide opportunities to young lawyers because big lawyers and firms any way advertise themselves through sponsoring and hosting events and seminars.²⁸ It would also provide Indian lawyers global recognition, owing to the prohibition of legal advertising, as they are losing out on potential clients at an international level.²⁹

CONSTITUTIONAL VALIDITY OF RULE 36

Historically, lawyers have a reputation of serving the public interest.³⁰ Well-informed decision-making in aggregate is a matter of public interest.³¹ For having a well-informed citizenry, free flow of information is necessary and hence right to free speech becomes indispensable.

Article 19 of Constitution of India provides six liberties to the people of India, one among which is freedom of speech and expression. This freedom under Article 19 can have reasonable restrictions namely, defamation, contempt of court, decency or morality, security of the state, friendly relations with other states, incitement to an offence, public order and maintenance of the sovereignty and integrity of India.³² Now, Rule 36 does not violate “public order” as public order has been held to be synonymous with public peace, safety, tranquillity and the like.³³ Moreover, according to Supreme Court of India it is possible that a right may not have express mention in Article 19 but can have implicit mention in rights of

²⁸ Supra note 10

²⁹ Findlay Christopher (ed.), *Priorities and Pathways in Services Reform — Part II: Political Economy Studies* (World Scientific Studies in International Economics, 2013)

³⁰ Legal Advertising: Should Legal Advertising Be Restricted?, Available at: <https://law.jrank.org/pages/8137/Legal-Advertising-SHOULD-LEGAL-ADVERTISING-BE-RESTRICTED.html> (Accessed on: 25.06.2020)

³¹ K.K Matthew, ‘Commercial Advertisement and Freedom of Speech’ (1978) 4 SCC Journal p. 1

³² The Constitution of India, art 19(2)

³³ *O.K. Ghosh v. E.X. Joseph*, AIR [1963] SC 812

Article 19³⁴. Rule 36 not only affects the freedom of speech and expression of lawyers to advertise their services but also affects the rights of clients and prospective clients to information both of which are enshrined under Article 19(1)(a).

The scope of right to advertise is fully and finally considered by court in *TATA Yellow pages v. MTNL*³⁵, where the Supreme Court concluded that commercial speech cannot be denied the protection of Article 19(1)(a) just because it arose from a commercial source. Thus, legal advertising should also be granted protection under the provision because there stands no reason for not weighing it on the same scale as other types of commercial advertising.

The judiciary in many precedents like *PUCL v. UOI*³⁶ held that right to receive information comes under the umbrella of right to freedom of speech and expression. In the concerned case, it was held that voters have the right to receive information because an informed decision can be made only by being aware of the antecedents of candidates.³⁷ Equating the same reasoning to the current issue, potential clients should not be barred to receive information about lawyers so as to make an informed choice.

In addition to violating free speech, Rule 36 also violates the right to practice any profession or to carry on any occupation, trade or business. It does not satisfy the reasonable restrictions to this right provided under Article 19(6).³⁸ For an activity to be against public interest, it has to be immoral, obscene or presents something which goes against public morality.³⁹ However,

³⁴ *Maneka Gandhi v. Union of India*, AIR [1978] SC 597; *Kharak Singh v. State of Uttar Pradesh*, (1964) 1 SCR 332; For conjoint reading see also *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamal*, (2005) 8 SCC 534

³⁵ *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*, AIR [1995] SC 2438, p. 2446

³⁶ *People's Union of Civil Liberties v. Union of India*, AIR [1997] SC 568

³⁷ Ibid.

³⁸ The Constitution of India, art 19(6)

³⁹ *Chintaman Rao v. State of M.P.*, AIR [1951] SC 118

advertising is not against public interest and is in fact, a resource or mechanism which helps in mechanisms and resources for effectively carrying on a trade or occupation⁴⁰. Thus, there stands no logical and legal explanation of restricting legal advertising through Rule 36.

LAWYERS TAKING ADVANTAGE OF LOOPHOLES IN RULE 36

Even on the face of a ban on advertisements, some lawyers are able to see some options in-between.

Law firm directories available on the internet give the exact same profile as the firm does on its own website. The information available on such directories is only limited to name, email-id and telephone number. But the number of cases the lawyer has dealt with and his contributions to the field of law through his research papers are unknown to potential consumers. Although this kind of information should be available to all, it is not permitted under the law. Hence, going by the principle laid down by Rule 36, such kind of unregulated internet advertising are directly contravening the law. This is because, thus, this information in the author's opinion is completely in consonance with the law. But what comes in contradiction is that this online information can be easily accessed at the website of the firm to which that lawyer is affiliated or This information on the website is comes with a disclaimer that it does not violate Rule 36 and it does not amount to advertising, but in fact it can be accessed by just a click of the mouse. They in no way fall short of displaying the concerned lawyer's supremacy over more number of activities than others in the fraternity, along with numerous claims which work in the same way as an advertisement works in selling its product.

On a different note also in the world of internet, it is very difficult to say that what is

⁴⁰ *Sakpal Papers v. Union of India*, AIR [1962] SC 305

preached is practiced, as there is a priority listing of the websites even on the google search engine and sponsored websites appear on the top of the search list. There is also a case of Google AdWords which captures a consumer's typing and search history on their devices and then enables them to see the related ads to ensure more efficient and competitive advertising. This however, is not practiced in India in the field of legal advertising⁴¹ but its impact if allowed can be horrendous.

When the BCI has put regulations on the legal advertising, often it is found that there are no restraints on different modes of indirect advertising other than print media. For example, lawyers can advertise through election manifestos. Even the recent trend of having yourself listed on those lead generation sites like Just Dial, Sulekha Yellow Pages,, Getlocal etc. flouts the rules.

Even the recent trend of having yourself listed on those lead generation sites like JustDial, Sulekha Yellow Pages, Getlocal etc. flout the rules. Can these be regarded as same as listing yourself on the directory? The authors highly doubt so because listing in these can have priority appearance, once a lawyer manages to pay a hefty fee to these sites. And the other question which also arises is what about the rating they receive? Can these ratings also work as a type of advertisement for the lawyer? If it is seen from the angle of public interest it helps the masses to choose better but at the same time, it also contradicts the age-old principle of law being a noble profession and soliciting work being considered a misconduct.

INTERNATIONAL SCENARIO

United Kingdom

⁴¹ Connor Mullin, "Regulating Legal Advertising on the Internet: Blogs, Google & (and) Super Lawyers" 20 *Georgetown Journal Legal Ethics* 835 (2007).

Traditionally there was no rule against legal advertising. Although, there was no express legislation, the courts used to exercise its powers to discipline solicitors until a ban on advertising was introduced in 1934.⁴² The reasoning behind such ban was majorly economic, like undercutting the prices of established or informal fee schedules⁴³, to combat downward pressure put on conveyancing fees by the building societies,⁴⁴ aggravated conditions because of Great Depression⁴⁵ etc. However, with time restrictions, the rules started getting relaxed. For instance, by 1974, the Law Society through its “Guide to Professional Conduct” allowed listing of lawyers’ and firms’ names in directories, advertising by local law societies and advertising for work by lawyers in legal press⁴⁶ etc.

UK is divided into three separate jurisdictions of England and Wales, Scotland, and Northern Ireland.⁴⁷ Each jurisdiction has its own legal system and legal profession, with England and Wales and Northern Ireland recognising the two separate branches of barrister and solicitor and Scotland recognising the branch of advocate.⁴⁸ It was in 1984 that The Law Society Council decided to lift the traditional ban on legal advertising thus on October 1, 1984 the Council granted solicitors to advertise in England and Wales⁴⁹ considering government’s

⁴² Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts* (Heinmann Educational Books, London, 1967), p. 204

⁴³ ‘The Solicitors’ Practice Rules’, (1936) 182 Law Times, p. 266

⁴⁴ Supra note 42

⁴⁵ John Flood, ‘David B.L. Podmore, Solicitors and the Wider Community: Book Review’ (1980) 6(4) American Bar Foundation Research Journal, p. 1178

⁴⁶ Law Society, United Kingdom, A Guide to the Professional Conduct of Solicitors (1974)

⁴⁷ Hamish Amandson, *Free Movement of Lawyers* (Butterworths Law, London, 1992), p. 23

⁴⁸ Maimon Schwarzschild, ‘Class, National Character, and the Bar Reforms in Britain: Will there Always be an England?’ (1994) 9 Connecticut Journal of International Law, pp. 185, 223-24

⁴⁹ ‘Council Statement: Individual Advertising by Solicitors’ (1984) 81 *Law Society Gazette* 1802. The Law Society of England and Wales is an association founded in 1825 which governs solicitors in England and Wales. It has exercised control over aspects like code of ethics and practice rules of solicitors

intent to break up the solicitor's conveyancing monopoly.⁵⁰ In Scotland also advertising by both the barristers and solicitors is allowed and governed by Solicitors (Scotland) (Advertising and Promotion) Practice Rules 1995.⁵¹ While the laws of Northern Ireland are closely aligned with England and Wales,⁵² Solicitors in Northern Ireland are allowed to advertise but barristers are not and are their advertising practices are governed with The Solicitors Practice Regulations of 1997⁵³. Although, the right to advertise in UK was only restricted to press or radio, direct mailing to their professional connections and advertising on premises.

The Parliament of United Kingdom enacted the Legal Services Act of 2007⁵⁴ which sought to regulate legal services and provide free legal aid to reach the weaker sections of the society. The Bar Standards Board was created in 2007 as a representative arm of the General Bar Council of UK and had departments like professional practice, professional control, strategy and communications.⁵⁵ As of today, legal advertising is entirely regulated with the Bar Council and the Law Society has diverse roles which aim to reconcile public and professional interest.⁵⁶ However the current trend in UK can be culled out using the revised CCBE Code and the Solicitors' Publicity Code for England and Wales 2001 where a workable approach is adopted to check if a communication is not false or misleading; it is allowed to be

⁵⁰ S.H.Bailey and M.J. Gunn (eds.) *Smith & Bailey on the Modern English Legal System* (2nd ed, Sweet and Maxwell, London, 1991), pp. 137-38

⁵¹ Solicitors (Scotland) (Advertising and Promotion) Practice Rules, 1995

⁵² CCBE Code of Conduct for Lawyers in the European Community, 2002, Available at: http://www.ccbe.org/en/publications_en.htm (Accessed on: 21.05.2020)

⁵³ Louise L. Hill, 'Publicity Rules of the Legal Professions within the United Kingdom' (2003) 20 Arizona Journal of International Law and Competition, p. 323

⁵⁴ Legal Services Act, 2007, c. 29

⁵⁵ Bar Standards Board, Available at: <https://www.barstandardsboard.org.uk/> (Accessed on: 21.05.2020)

⁵⁶ Andrew Boon, *The Ethics and Conduct of Lawyers in England and Wales* (3rd ed, Hart Publishing, London, 2014)

advertised.⁵⁷

United States

The American Bar Association (ABA) proffered its advertising ban in 1908.⁵⁸ Thus, initially in United States, legal advertising was banned completely with the exception of business cards and letter heads.⁵⁹

However, as the scenario progressed in UK, with time US also saw progress as relaxation in the ban increased and advertising was permitted on various to the levels of media forums such as television and radio.⁶⁰ There were a series of decisions in US Supreme Court in 1960s which forced ABA to permit more and more exceptions to the ban and also paved the way to the long standing judicial dilemma regarding advertising ban.⁶¹ On June 27, 1977, in a 5 to 4 vote, in *Bates and O' Steen v. State Bar of Arizona*⁶² the Supreme Court of United States lifted the traditional ban on legal advertising, characterising it as a violation of attorney's First Amendment Rights of free speech under the United States Constitution. Although, the Supreme Court agreed that there should be some reasonable restrictions in terms of time, place and manner of advertising. The framework for guidelines was left to individual states.

Australia

Rule 36 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules

⁵⁷ Supra note 53

⁵⁸ Lori B. Andrews, *Birth of a Salesman: Lawyer Advertising and Solicitation* (ABA Press, Revised Edition, 1981), p. 1

⁵⁹ JM Altmans, 'Considering the A.B.A's Canons of Ethics' (2003) 71 *Fordham Law Review*, p. 6

⁶⁰ Harxus B. Steinberg, 'Lawyers and their Work by Quintin Johnstone and Dan Hopson, Jr.: Book Review Lawyers and Their Work' (1968) 17 *Catholic University Law Review*, p. 281

⁶¹ John B. Attanasio, 'Lawyer Advertising in England and the United States' (1984) 32(3) *The American Journal of Comparative Law*, p. 493

⁶² *Bates and O' Steen v. State Bar of Arizona* (1977) 433 U.S. 350

2015 provides that:

“36.1 A solicitor or principal of a law practice must ensure that any advertising, marketing, or promotion in connection with the solicitor or law practice is not:

36.1.1 false;

36.1.2 Misleading or deceptive or likely to mislead or deceive;

36.1.3 Offensive; or

36.1.4 Prohibited by law.

36.2 A solicitor must not convey a false, misleading or deceptive impression of specialist expertise and must not advertise or authorise advertising in a manner that uses the words “accredited specialist” or a derivative of those words (including post-nominals), unless the solicitor is a specialist accredited by the relevant professional association.”⁶³

Additionally, Australian Consumer law (formerly known as Trade Practices Act 1974)⁶⁴ prohibits legal advertising of misleading or deceptive conduct (sec 18), false or misleading representations about services (sec 29), and misleading conduct as to the nature of services etc. (sec 34). In 1996 the Federal Bureau of Consumer Affairs issued Guidelines for the Advertising of Legal Services.⁶⁵ These guidelines aim to assist lawyers to avoid making misleading or deceptive representations⁶⁶. Hence, in Australia also the legal advertising is allowed with some very basic restrictions.

⁶³ Legal Profession Uniform Law Australian Solicitors’ Conduct Rules, 2015 (27 May 2015), Available at: <https://www.legislation.nsw.gov.au/#/view/regulation/2015/244> (Accessed on: 25.06.2020)

⁶⁴ The Competition and Consumer Act, 2010 of Australia; Originally enacted as the Trade Practices Act, 1974.

⁶⁵ Queensland Law Society, “What are the rules about solicitors’ advertising generally?”, Available at: https://www.qls.com.au/Knowledge_centre/Ethics/Resources/Advertising/What_are_the_rules_about_solicitors_E2%80%99_advertisingGenerally (Accessed on: 25.06.2020)

⁶⁶ Ibid

THE IDEA OF REGULATING ADVERTISEMENTS

There poses a serious issue to the BCI rules because of the presence of number of advertising mediums in the recent times like print media, radio, television, web pages, emails, chat rooms, social media etc.

The main contention of opposing of the advertising in legal profession is that unregulated advertising would denigrate the profession and cause harm to the public rather than assuring truth and honesty.⁶⁷ That's why regulating under the strictest rules is necessary to ensure that people are not engaged in unnecessary litigations. Advertising "25 percent off this week if you want to sue your neighbor" obviously would not be proper, nor in the public interest.⁶⁸ Prohibition on legal advertising, especially quality claims made by lawyers protects the public from puffery, but consumers today are already accustomed to discount the puffery in communications about products.⁶⁹ In fact, self-laudatory statements made by lawyers have the potential of being misleading and will automatically be prohibited by appropriated regulations requiring advertisements to be true, accurate and non-misleading.⁷⁰

In the present scenario regulation is even far more difficult than the early times because of two reasons first that the justification for regulation on the basis of image concerns is no longer valid, second deals with the specific dangers that modern advertising creates.⁷¹ Elaborating on the first reason today almost all law firms have websites which are self-laudatory and in defence they just display a disclaimer before.

⁶⁷ Supra note 18 at p. 9

⁶⁸ Ibid

⁶⁹ Lori B. Andrews, 'Lawyer Advertising and the First Amendment' (1981) *American Bar Foundation Research Journal*, pp. 967, 1005

⁷⁰ Ibid

⁷¹ Supra note 24

Sadly, in this modern legal profession a lawyer's image is not only based on what he does but also on various other things. For instance, how he conducts himself in public, his image on television, literature, what other people say about him, even the shows like Boston and Suits have been influencing the image of lawyers in public eye. In short, it is simply unrealistic to expect legal advertising rules and enforcements of those rules to shore up the profession's image.

Even if legal advertising is regulated, one does not know how it will affect the demand and prices of various legal services, how will the behavior of potential consumers change and most importantly, whether it will improve the decision-making process of potential consumers. Moreover, implementation issues like what can be allowed to advertise, which kind of media platform will be allowed to advertise on and who in legal services should be allowed to advertise arise.⁷²

The authors are against the total prohibition on legal advertising and support advertising within restrained limits. Following are some recommendations for regulating and increasing the scope of advertising in law:

1. Advocates should not use other lawyer's or law firm's names to advertise. One lawyer should not belittle the other, also he should not be allowed to put in the name of the losing lawyer if he is mentioning any of his important case in his advertising claims.

2. The legal profession is no longer service-oriented, but it has also become a trade.⁷³
Lawyers are entitled to charge the appropriate fees from their clients, but they must also use their skills to dutifully render free legal aid.

⁷² Terence Shrimp and Robert Dyer, 'How the Legal Profession Views Legal Service Advertising' (1978) 42 *Journal of Marketing*, pp. 74, 76

⁷³ *C. Manohar v. B.R. Poornima* 2005 (1) ALD Cri. 56

Article 39-A of the Constitution of India provides that the State should by way of legislations or schemes, or any other way ensure that access to justice is not denied to any citizen because of their economic condition or other disabilities. Moreover, Rule 46 of the Standard of Professional Conduct and Etiquette requires lawyers to provide free legal assistance to the indigent and poor as this is their obligation towards the society⁷⁴. The government should ensure access to legal services by regulating the astronomical fees charged by lawyers.⁷⁵ Hence, the lawyers and law firms with the help of the government should advertise if they undertake any kind of legal aid or pro-bono services.

3. The restriction on showing of number of cases litigated, number of cases won, academic works, area of specialisation, awards won etc. on the visiting cards etc. should be done away with the eye on publishing of correct information which as stated above can be done by the body like censor board only, some certification mark can be devised for the authenticity of the claims and genuineness.
4. A restriction should also be imposed on the amount of expenses on advertisement that can be incurred in a given financial year. Of course, it has to be made in slabs related to duration of practice and area of expertise and should be subject to a sudden surge or decline in prices due to changes in the environment.
5. A regulatory body however should be set up so that advertising by lawyers doesn't go unrestrained and the authors vision the regulatory body to function like censor board does but should be state based for easy administration as the quantum here is humongous. These bodies can be made exclusively to keep a tab on legal advertising

⁷⁴ Standard of Professional Conduct and Etiquette, Bar Council of India Rules, Rule 46

⁷⁵ *B. Sunitha v. State of Telangana*, (2018) 1 SCC 638

and can have a check on the genuineness of the claims or if they resort to any unethical practices while advertising.

6. Besides regulating the content and expenses of advertisement, regulating the type of media used for advertising is also important⁷⁶. In print media, advertisements in newspapers can be allowed with large number of explanatory materials for the readers. In mass media, a lawyer engaged in arbitration can advertise in an arbitration journal instead of publications to readers who will never read arbitration-related services. Direct mailing to potential clients could also be allowed so that lawyers can better communicate their views.
7. Social media has helped people including lawyers to create a social identity. But unregulated advertising through social media platforms like WhatsApp, Facebook, Instagram, etc. will over-crowd this open space and increase the chances of spreading misinformation. The very goal of helping people to make more informed choices by advertising legal services would fail, if people are mis-guided by the false advertisements from lawyers. Thus, instead of unrestricted advertising on such social media platforms, website advertising, app advertising and promoting legal services through Google Ads should be allowed.
8. To maintain the bargaining power of Indian lawyers, the advertising by foreign firms should not be allowed. Though it will be not of much relevance as of current time because in India there are only very few areas they are allowed to function and they have a very narrow client space, mostly with the upper-upper class people or big firms.

⁷⁶ Supra note 45 at 1015.

9. Indeed, allowing advertising of legal services may give a backseat to young and newly graduated lawyers as compared to the already established lawyers. This is mainly because of their limited expenditure capacity on advertising and selling their work. The new legal advisors might have a great potential but they are not able to demonstrate it and promotions through advertising can help them to reach the general population at a relatively lower cost. Here, the government can lend its support by helping the young lawyers to advertise and increase their bargaining power in front of big established names by creating a state based databases on their government websites which will have their names, area of specialisation, fees, contact details etc. and these record can automatically be deleted once they reach certain years of practice or have litigated certain number of cases.
10. Although in present time's lawyers contribute extensively to the websites like LiveLaw, BarandBench, Mondaq, Legally Services India, etc. and they also provide recognition to them by publishing their name and little about them, their area of expertise etc. Nowadays, blogs have become an important medium for serious legal scholarship⁷⁷ and now far from conventional wisdom when blogging was just a distraction it now has the capability to affect their chances of being tenured.⁷⁸ Thus, Legal advertising in these sources is also going to help this section of the lawyers as they can use this as a source of cheap advertising for themselves, for example the page can have a link to their professional website. Also, since he will be contributing to the content on these sites, these sites will not be charging any kind of fees for putting up the lawyers contact link. However, these sites should be strictly regulated

⁷⁷ See Lawrence B. Solum, 'Blogging and the Transformation of Legal Scholarship' (2006) 84 Washington University Law Review, pp. 1071, 1072

⁷⁸ See Christine Hurt and Tung Yin, 'Blogging While Untenured and Other Extreme Sports' Berkman Centre for Internet and Society (April, 2006)

so that they do not charge any lawyer or engage in any kind of business lobbying for publishing their content because then it will degrade their quality of content.

11. Another way of increasing the advertising reach of the lawyers could be inviting them on YouTube channels and radio talk shows just like doctors are invited to give their insights about the profession and make people aware. This will have two-fold benefits, first in terms of their advertising and second and even more important, the general public will learn about the laws of the country. It has been found in many places that people are not even aware of their most basic rights available to them for taking a legal action.⁷⁹. For instance, a working labourer does not know anything about the Minimum Wages Act.

CONCLUSION

Advertisements, particularly modern advertising has proved to be a very effective way to disseminate useful information about a product and help generate more profits. A lawyer's efforts to make people aware of his legal work must involve non-laudatory, non-overreaching and truthful mode of representation⁸⁰

It is evident that advertising by lawyers in some way has been considered to be a professional misconduct in India as well as in other countries. India has imposed a ban by incorporating a legal provision along with official rules to establish which activities will fall within the ambit of professional misconduct. The scenario however is changing; different jurisdictions across the globe have recognised that a dynamic profession like law has to place itself on a relevant and competitive pedestal. UK and Australia have imposed the least amount of restrictive

⁷⁹ Sonja J.M. Cooper, 'Comments on Lawyer Advertising Papers' (2013) 14(1) Journal of Law and Literature, pp. 207, 227

⁸⁰ Harold G. Christensen, 'Advertising by Lawyers' (1978) 1978(3) *Utah Law Review*, pp. 619, 634

measures to regulate advertising while, USA has given the full freedom of advertising to legal practitioners.

Freedom of speech and expression and the right to carry out an occupation, trade or business is an inherent right guaranteed by democracies around the world and is recognized to be not absolute. The right to advertise subject to certain regulations stems from these very basic rights. Indeed, some lawyers have exploited loopholes in the provisions of law and used modern advertisement strategies like social media, legal directories and business listing websites. However, a law is created for the purpose of helping people and furthering the good intentions of the concerned community, in this case the legal community. The possible exploitation does not outweigh numerous advantages as explained in this article. As said by Marcus Tullius Cicero, “the good of the people is the greatest law”.

A gradual shift from a complete ban on advertisements to allowing some effective modes of advertising does not seem unfair. Lawyers should be permitted to advertise to the extent that it furthers the central lawyer mission of effecting an equitable distribution of justice without unacceptably impeding other lawyerly functions.⁸¹ As there are existing guidelines to regulate the conduct of advocates, regulations can be put in place for monitoring advertising and solicitation work done by them. A regulatory body has to act fairly and not capriciously or arbitrary,⁸² and this is ensured because every action taken by the citizens and the State in a democracy is subject to a judicial review. The above-mentioned suggestions along with other probable regulations on advertising can be applied to all providers of legal services as only then; justice will be served to the members of the legal profession as well as the society at large.

⁸¹ Supra note 69

⁸² *Century Plyboards (India) Ltd. v. The Advertising Standards Council of India* 2000 (1) BomCR 136

WILL THE STEP OF ‘DECRIMINALISATION OF ADULTERY’ TAKE US TOWARDS BUILDING A PROMISING ABODE FOR THE COUNTRYMEN

Kavya Budhiraja*

Abstract

The new law of adultery which became effective by virtue of the Joseph Shine case showcased a new phase of the institution of marriages in India. This new law decriminalised adultery and freed the citizens of India to have consensual relationships with individuals of their choice, and shall not be liable for the offence of ‘Adultery’ as was envisaged earlier under Section 497 of The Indian Penal Code. This article focuses on the interrelation and interdependence of Section 497 of The Indian Penal Code and Section 198(2) of The Code of Criminal procedure, thereby discussing their loopholes. The judicial take upon the validity of these provisions prior to the new law have also been discussed. Further the intention of the legislature and the courts have been enumerated in the light of recommendations made by various National committees regarding the said section. The author also puts light upon the prospective consequences of this new law and comes to a conclusion as to whether or not this law is appropriate of the country, and finally concludes by providing suggestions or prospective amendments.

Keywords: Adultery, Decriminalisation, Gender Discrimination, Gender Neutrality, Individualism, Aggrieved, Cognizance

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INTRODUCTION

“The great marriages are partnerships. It cannot be a great marriage without being a partnership.”

—Helen Mirren

The diversity of cultures found in India undoubtedly gives it an edge, whereby it becomes indispensable to highlight an issue which to say is ‘secular’ by nature. The issue of ‘Adultery’ has always been a concern for almost all countries around the world. Section 497 of the Indian Penal Code, 1860 envisages adultery to be an offence whereby a criminal prosecution is liable to be initiated against the male counterpart of the act. To begin with, the section deals with a situation wherein an act of sexual intercourse is being committed with a person who the other person has reason to believe or knows to be the wife of another man, the commission of such act, taking place without the consent or connivance of the man who is the husband of such person, also such act not amounting to the offence of rape, shall amount to the offence of Adultery. However, it is to be noted that only the male counterpart of such an act can be made liable and in no case can the female counterpart be prosecuted, even as an abettor.

The history or the background is quite evident to show that the time this section was made, India was not an Independent nation and hence all statutes bearing to those times are the giving of British-dominant rule. And so, this section is no exception. Upon bare reading of the section, it is easily identifiable that women in such cases are not made party to the offence. The same shall be pondered upon and discussed in detail in the upcoming parts of the article.

THE OLDEN LAW

Is Section 497 Inherently Discriminatory?

Having taken a glimpse of the said section, it is evident from its words that the male counterpart of the act can be made liable for the offence as already mentioned above. This leaves the doors open for thoughts that in spite of being a participant and playing a full-fledged role in the commission of the said act, why is then the female counterpart left untouched by the curtains of criminal conspiracy, if the male counterpart, on the other hand, is being made liable absolutely. This very situation gives birth to a paradox that in the time where we talk of the ‘*Right to Equality and Equal Protection of Laws*’¹ and the ‘*Right against Discrimination*’², is having such a legislation whereby a clear cut unparalleled distinction has been drawn to hold liable one offender and evacuate another for the same offence merely on the basis of ‘gender’ not discriminatory? Is a woman not capable to cheat? Is she not capable of being prosecuted for any other offence either? Can she never have a malafide intention?

This was one of the leading contentions the honourable Supreme Court of India relied on while deciding the case of *Joseph Shine v. Union of India*³ wherein the Petitioner, Joseph Shine, a non-resident Keralite filed a Public Interest Litigation (hereinafter referred to as “the PIL”) challenging the constitutional validity of Section 497 IPC read with Section 198(2) of The Code of Criminal Procedure (hereinafter referred to as “CrPC”). The facets of the same shall be discussed throughout various layers of the article as it unfurls. It cannot certainly be denied that the law of Adultery prevails on the notion inspired by the Victorian law whereby a woman was considered her “*Man’s Property*”, which is evident from the verdict of the honourable court mentioning- “*And, it is time to say that a husband is not the master.*”⁴

¹ Article 14, The Constitution of India

² Article 15, The Constitution of India

³ AIR 2018 SC 1676

⁴ *Ibid*

Furthermore, it is to be noted that the offence of ‘Adultery’ shall only be counted in cases where the adulteress is the wife of another man, meaning that the female counterpart of such relationship is ‘married’. It is clear *prima facie* that section 497 does not envisage the situation wherein the female counterpart is unmarried. So considering cases in which the husband is in an adulterous relationship with an unmarried woman, we find the law totally silent over this aspect. This evidently made such adulterous couples escape the liability under this section wherein the woman to such relationship is unmarried as the section clearly states- ‘*knows or has a reason to believe her to be the wife of another man*’.

Relation between Section 497 IPC and Section 198(2) CrPC

In the PIL, as already enumerated, the challenge was with regard to Section 497 IPC read with Section 198(2) CrPC. To know the relation between the two is quite interesting, and simultaneously perplexing. Having proven the discrepancy in the Section 497 IPC in terms of gender discrimination between the parties to the same act constituted an offence, it is time to look into the intricacies of Section 198 CrPC.

Chapter XIV of the Code holds multifarious cases in which a court can take cognizance of such cases, whereof Section 198 is a part. Section 198 sub-section (1) envisages court to take cognizance only of those cases wherein some person aggrieved by an offence against marriage files complaint, hereby implying that any person, though not direct party, may file complaint on behalf of the aggrieved person if the matter falls within the purview of either of the provisos to the sub-section. Section 198(2) continues that with regard to the sub-section (1), no person other than the husband shall be ‘*deemed*’ to be aggrieved of the offence of adultery under section 497 IPC. It becomes pertinent to mention here that as the current chapter deals with the taking of cognizance by courts, in the present situation, only the husband of the ‘adulterous’ wife has the sole right to file complaint against the man made

liable under section 497 IPC. In no case, can the wife of the man liable for the offence of adultery can approach a court under section 198(2) CrPC, which again amounts to nothing but depriving the wife of the adulterous husband to seek remedy under the realm of law. The term “deemed” has relevance in the section as per which there shall lay no other thought other than what is engraved in the words of law with regard to this section.⁵

Man v. Man: Evacuating Females Altogether

If probed vigilantly, we shall observe that the whole situation arising out of the umbrella consisting Section 497 IPC and Section 198(2) CrPC gives rise to a male domination situation, what we can undoubtedly identify as the ‘Man v. Man’ game. To elucidate this facet, consider two couples- Couple A and Couple B. Assume that the wife in Couple A, here WA and the husband of Couple B, here HB get into an adulterous relationship. Now, in this case, HB can be made liable for the offence of adultery exclusively, WA being absolutely untouched by the cuffs of court, which in turn means that only a man can be held liable. On the other hand, the criminal case and only be initiated by the husband of WA. The same is not available at the option of the wife of HB , who is nonetheless and in reality “aggrieved” by such act as well. The law does not provide any remedy for such a wife. The only remedy she has is to seek divorce whereof “adultery” has been a ground for granting a divorce decree. And so, once again these provisions have failed upholding the right to equality and the right against discrimination as guaranteed by the Constitution of India.

Under both the sections, the fundamental purpose of law has failed, which is to regard a man and a woman as equals. Of course, formulation legislations for the upliftment of women is

⁵ Section 4, The Indian Evidence Act, 1872 (1 of 1872)

permitted in under the Constitution of India⁶, but to deprive them from accessing a remedy which is available to a man is simply gender discrimination and is against constitutional morality. It cannot be denied that the said section was a result of Victorian law which had to be done away with anyway. But, an important question arises- *Was striking down the law altogether the ONLY way?*

The Judicial take over the years

The Supreme Court of India, in the case of *Yusif Abdul Aziz v. State of Bombay*⁷, heard the plea of Mr Yusuf Abdul Aziz who was charged under section 497 IPC for the offence of adultery and who raised a question upon the constitutional validity of the said section in contravention to Article 14 and Article 15, based on a sole categorisation on account of gender of the parties. However, in due course, the honourable court held that Section 497 IPC does not violate either Article 14 or Article 15 as the categorisation on the basis of Sex is totally ‘sound’ does not amount to any sort of discrimination. Moreover, Article 15(3) of the Constitution of India also holds Sex categorisation as valid. Further, the court said that because section 497 IPC does not make women accountable for the offence of adultery, women can easily escape their liability which gives them free license to get indulged in out of marriage relationships without having fear of being made liable.

In the case of *Sowmithri Vishnu v. Union of India*⁸ wherein the petition was filed by a school teacher who worked in Madras, in view to challenging the constitutional validity of section 497 on the basis of these reasoning, first, that even though the woman is untouched by the law in regard to the offence of adultery, yet there undoubtedly lies a constant social stigma to be undesirable faced by such women, and second, such woman may not be able to speak up

⁶ Article 15, The Constitution of India

⁷ AIR 1951 Bom 470

⁸ 1954 SCR 930; 1985 Supp SCC 137

for the protection of her own interest if she is not made party to prosecution, the Supreme Court relied on the *Yusuf Abdul Aziz verdict*⁹ and even hopped a step further by stating that it is only the women who are the victims and whereas men can only be seducers, women cannot. It further stated that there lies no hope for women to be brought within the purview of section 497 IPC. This verdict of the court was highly criticised bearing to the fact that women can never be culprits and men can never be innocent. This was nothing but mere standardisation of concepts that do not exist in reality. By one way, the court kicked out the possible of ‘consensual sex’ altogether.

With regard to Section 198(2) CrPC, in the case *V. Revathi v. Union of India*¹⁰, a petition was filed in the court challenging the validity of Section 198(2) read with section 198(1) CrPC regarding the ‘disability’ of the wife of the adulterous husband to initiate legal proceedings in the court of law against the act of her unfaithful husband. The said petition claimed whereas the husband of the adulteress wife is entitled under the said section to initiate proceedings against the adulterer, in the light of the same, the wife of the adulterer must not be bereft of the entitlement to bring legal case in action against the adulterer, her husband. The petitioner claimed that such a provision is against the Constitution and leads to “obnoxious discrimination”¹¹. However, the Apex court upheld the constitutionality of the said section and remarked that both these sections, ie, section 497 IPC and section 198(2) CrPC go well ‘hand in hand’. It further stated that any “outsider” who intervenes into the sanctity of an existing matrimonial relationship of a husband and his wife by establishing an illicit connection with one of the spouses is liable to be punished. However, all this can take place with a rider being attached to it that in no case can a woman be made liable for such an

⁹ Supra note 7

¹⁰ (1988) 2 SCC 72

¹¹ K.I. Vibhute, *Adultery in the Indian Penal Code: Need for a Gender Equality Perspective*, (2001) 6 SCC (Jour) 16

offence.

THE NEW LAW

The Apex Court Verdict

The Apex court, in its latest judgment concerning the Law of Adultery, completely struck down the existing law and hence, now the offence of Adultery stands decriminalised and no more shall the act amount to a criminal offence¹² The reason that the court relied upon was that in no way can one sex supersede another one, that is to say, for committing the same act one of the parties to such an act shall be made criminally liable and the other one, absolved absolutely, the reason whereof being a sole unreasonable categorisation on the basis of gender, which goes against the modern concept of ‘equality’ and thereby justice. The court further observed that throughout the criminal law, the concept of ‘gender neutrality’ is maintained, however, the same seems absent with regard to the provision envisaged under Section 497 IPC. It contended that women in all cases are looked as ‘victims’ because of the obvious societal presumption. However, this view stands no longer correct and is liable to be rectified.

IS THE NEW LAW IN HARMONY WITH THE INDIAN ETHOS?

Every niche, every state, every country holds a distinct identity which cannot be separated from it, something without which the entity shall lose its identity forever. India, being a country of diverse cultures has its roots in the ancient texts of the Puranas and Upanishads which have always glorified marriage or *Vivah* as a sacrament. The various ceremonies or *riti* which are performed at the time of marriage are completely based on Vedic wisdom, be it *satpadi*, *phere*, *kanyadaan*, etc. The vows taken by the bride and the groom are taken in front

¹² Supra note 3

of the sacred fire which is considered Lord *Visnu* himself.

Now, with this new law which emerged as the decriminalisation of adultery, the author firmly believes that mockery is being made of this rich culture of ours. By giving absolute freedom to the couple, can we ever expect our culture to sustain? Now even if they take sacred vows, would they ever care about their spouse or children or would even think once before entering into an adulterous relationship?

INTENTION OF LEGISLATURE

As our nation moved from a Police State to a Welfare State, we see law entering every phase of our lives. Earlier, the affair of marriage used to be a private affair and the State used to have minimal interference. However, the new enactments show that the Law has turned omnipotent and can be found in every part of our lives. This verdict of the apex court prompts questions upon the very intention of the legislature while formulating laws with regard to marriage. Following are a few enactments to this regard:

Hindu Marriage Act, 1955

It cannot be denied that the roots of Hindu Laws can be traced back in the *Vedic* texts of *Sanatana Dharma*. There are provisions envisaged under the act whose primary purpose is to maintain the sanctity of marriages and preventing them from falling apart. Section 9 of the act envisages ‘Restitution of Conjugal Rights’. As per this, if a spouse withdraws from the society of the other, without any reasonable cause, the court, if satisfied, may pass a decree of restitution of conjugal rights whereby the couple shall lead life together and shall start afresh.¹³ Even before passing a decree of divorce¹⁴, the courts endeavour passing orders for

¹³ Section 9, The Hindu Marriage Act, 1955 (25 of 1955)

¹⁴ Section 13, The Hindu Marriage Act, 1955 (25 of 1955)

judicial separation¹⁵ to maintain a ray of hope that the couple might get back together somewhere in future. The concept of ‘*Cooling period*’ is also backed by the same perspective.¹⁶

Muslim Women (Protection of Rights on Marriage) Act, 2019

This act was made effective by the Indian Parliament after the Apex court of India held the act of pronouncing divorce on the Muslim wives by their Muslim husbands by way of uttering “*Talaq*” thrice in the *Shayara Bano case*.¹⁷ Under Muslim law this practice was prevalent and was referred to as ‘*Talaq-ul-Biddat*’. This act was made effective in order to ensure that no more atrocities on Muslim women are done in the name of divorce. Again, the intention of legislature is to maintain the marital relationship of Muslim husband and wife and not to let the husband evade this responsibility by mere pronouncement of a syllable thrice.

Provisions for Maintenance

The Criminal Procedure Code envisages the provision for maintenance of wives who are not able to maintain themselves or earn for their livelihood. In such a case the husband is liable to maintain his wife even after he has legally divorced the wife.¹⁸ Similar provisions could be seen in the Hindu Laws as well.¹⁹

INTENTION OF THE COURTS

The intention of the courts in India is no different than to prevent marriages from falling apart

¹⁵ Section 10, The Hindu Marriage Act, 1955 (25 of 1955)

¹⁶ Section 13B, The Hindu Marriage Act, 1955 (25 of 1955)

¹⁷ *Shyara Bano v. Union of India* (2017) 9 SCC 1

¹⁸ Section 125, The Code of Criminal Procedure, 1973 (2 of 1974)

¹⁹ Section 25, The Hindu Marriage Act, 1955 (25 of 1955)

and preserving their sanctity. The same can be realised when instead of passing a decree of divorce right away, courts often pass a decree of judicial separation first, as already mentioned in the previous section. Special Family Courts have been formulated to deal with such sensitive family affairs cautiously. Moreover, the courts also opt techniques like those of mediation and conciliation whereby they also counsel the couple and strive to make them agree to a common platform where after they may lead a happy and healthy life together. All these attempts made by the courts are sufficient to showcase the intention to preserve marital relationships. They pass a decree of divorce only when all other means to preserve marriage are exhausted.

With this, the intention of both, the legislature as well as the courts in India, is clear, that they both endeavour preserving the sanctity of marriages. However, in the current scenario now, what would the courts or even the legislature even do when witnessing marriages getting torn off because of multifarious illicit affairs? In all the discussion, nowhere have children been mentioned, who are the most important stakeholders in any marital relationship. Why have they not been paid enough consideration deciding the case? By letting both the spouses free for ‘out-of-marriage’ connections, the children born out of such marital relationships shall be affected the most. What would remain the future of such children whose future, mind and career have all been put on stake?

WHERE DOES THE PROBLEM LIE?

The actual problem lies in ‘*Gender Discrimination*’, as even admitted by the Apex court while deciding the case. This concept of gender discrimination is undoubtedly against the constitutional provisions of Article 14 and Article 15. Almost all provisions prevalent in the country are based on the concept of what is known as ‘*Gender Neutrality*’. Gender neutrality refers to being indiscriminately over anyone, or devoid of any sort of biasness or partiality.

Nonetheless we see certain provisions in the Constitution provisioning for special legislations for certain sections of society such as women and children, but in all these instances, the intention behind the legislature was such that these few sections have not been that the foremen when it comes to leading constitutional engagements.²⁰

The provision regarding the law of adultery too demands for ‘gender neutralisation’. The Apex court, however, considered it correct to struck down the law in question, which as per the author, was not the correct approach. What the section truly demanded was an amendment in order to make the same as gender neutral from being gender bias. Before diving into the prospective amendments which could have been considered so as to achieve this desired goal, the author would first like to discuss the relevant authorities bearing this perspective, i.e. Law Commission of India Report of 1971 (42nd Report) and Malimath Committee on the Criminal Reforms of 2003.

Both these commissions were of the opinion to make Section 497 IPC ‘gender neutral’ by way of amendments.²¹ Nowhere did the indicate striking off the said provision altogether. And hence, here we can observe that the aforementioned commissions made recommendations for this provision to be made free from bias, leading to treating both the parties as equally liable for the act they had active participation in.

CONSEQUENCES OF THE NEW LAW

The author does not see the new law of adultery doing any good to the Indian culture and ethos besides providing mere momentary sexual gratification to the couples associating coming of different marital relationships. In the rosy image of the current scenario, we forgot

²⁰ Article 15(3), The Constitution of India

²¹ Decriminalisation of Adultery, Available at: <https://blog.nextias.com/decriminalisation-of-adultery> (Accessed on April 20, 2020)

to ponder upon its long term effects which can severely impact the country's future generations.

Rise in the Divorce Rate

It is not out of the context to mention here that this new law, having become effective, shall invite divorce cases at a higher rate. The reason for the same being that the ground of adultery as one of the grounds of divorce has not been struck down yet. Moreover, there is practically no other option available to the wife of the adulterer except filing a petition for divorce in the court of law. The idea of decriminalising adultery emanates from Western countries whose divorce rate, after decriminalisation of adultery, has reached up to 52% and still seems to be at a rise.²² Therefore, it cannot be denied that in order to curb India from following the same path, there is a strong need to preserve the institution of marriage, with one of the steps being restricting extra-marital affairs.

It is pertinent to mention, numerous programs are running across the United States of America (hereinafter referred to as “the USA”), commonly referred to as ‘*Marital Education Programs*’ with the purpose of strengthening the institution of marriage as nearly half of the population would end up getting divorced. One of such programs is “*Prevention and Relationship Enhancement Program*” (PREP) with a view to assist couples work on their team building, problem solving, imbibing values such as forgiveness and kindness which hold paramountcy in any marital relationship. This program was initiated by Dr Markman along with his associates. As a result, the couple who joined this course faced less negative interactions, underwent joys and times together and had comparatively less knots than those

²² Laws Related to Adultery in India, Available at: <https://blog.ipleaders.in/legalising-adultery-in-india/> (Accessed on April 30, 2020)

who did not.²³

Another such initiative in the USA in the form of a program is known as “*Practical Application of Intimate Relationship Skills*” (PAIRS) designed by Lori Gorden. This program takes into view why and how an individual reacts in his marital relationship, keeping in view the past of that individual. It would now be wrong to suggest that the past life of an individual plays a crucial role in moulding him into his present shape. This program serves the needs of various target groups, be it single parents, healthcare workers, military personnel to name a few. The primary focus lies on moving towards acting together and building confidence in each other.²⁴

The interesting fact that remains is that despite adultery being a criminal offence in many of the States in the USA, as nearly as 21 States, there can be seen a large number of divorce cases which keeps rising every year.²⁵

Distribution of Free License

The idea, as already discussed in the above sections, is that this very decision of decriminalising adultery, in one way or the other, provides free license to prospective couples coming in association in out-of-marriage relationships to associate freely now, without the fear of being prosecuted for the act. It sounds fine as long as it concerns those two individuals in an adulterous relationship. However, as soon as it comes to their families, especially their spouses and children, the impacts could be severe, which could even lead up to mental trauma or nervous shock, needless to mention it can destroy happy lives.

²³ Marital Education Programs Help Keep Couples Together, Available at:
<https://www.apa.org/research/action/marital> (Accessed on May 1, 2020)

²⁴ Ibid

²⁵ U.S.A. Laws on Infidelity and Adultery, Available at: <https://infidelityrecoveryinstitute.com/u-s-a-laws-on-infidelity-and-adultery/> (Accessed on May 4, 2020)

Upbringing and Mental Wellbeing of Children

In the entire act, children born out such marital relations shall be impacted the most, adversely. It is extremely crucial for the child to get love and affection from both his parents, especially at such a tender age when he is too young to understand and undergo these incomprehensible changes. The children must have been given special consideration while deciding the case as their mental nourishment can only be done if both the spouses, with full enthusiasm and commitment, work on a positive upbringing of the child. If we do not take care diligently, instead of building a better future generation, we shall be, knowingly, ruining the nation's bright future. Such acts can gravely affect the young kids' minds, their schooling, their career, and thereby their entire lives.

Diluting the Sanctity of Marriages in the Name of 'Individualism'

At no point could it be denied that by decriminalizing adultery, the institution of marriage has become vulnerable. Defending the validity of the provision, the then central Government contend before the honourable court that '*Diluting the law of Adultery would affect the sanctity of marriages.*'²⁶

The term *individualism* can be defined as the tendency of an individual to be self-reliant and free to pursue his endeavour without restriction. In a way, the individual rights of a person are given paramountcy in all aspects. As per Mark S. Weiner, "*the modern self that lies at the centre of liberal democratic practice developed only after a long historical process of dialectical negation and synthesis.*"²⁷

²⁶ Supra note 3

²⁷ Mark S. Weiner, *The Legal Foundations of Individualism*, Eighth Annual Telos Conference, Held on (February 15-16, 2014 in New York City), Available at: <http://www.telospress.com/the-legal-foundations-of-individualism/> (Accessed on May 4, 2020)

It is known that the recent verdict in the “*Triple Talaq Case*”²⁸ was widely accepted by the countrymen including people belonging to the religion wherein the said tradition was prevalent since ages. The argument was whether a Muslim man, in the name of his individual will or ‘individualism’, hampers the rights of his wife. In that case, the court upheld that such practices are entitled to be demolished having regards to the equal rights of the Muslim wives. Therefore, it is understood that we can only exercise our rights till the time they do not hamper the rights of other people.

Going by the logic of ‘*Individualism*’, it is wrong on the part of a Muslim husband, who ‘relying upon his individual will’, gives instant divorce to his wife and frees her from the bondage. The court considered this act wrong on account that Muslim wife’ basic human rights were being snatched away in one go, leaving her hopeless. The same way, we must acknowledge that it shall be correct to consider the individual will of the people who got indulged in an adulterous relationship, claiming it to be their individual choice. As by them doing such an act, the rights of various other people are violated. For instance, their spouse, who has to his credit the ‘*Right to Live a Dignified Life*’²⁹ which is an inherent part of Article 21 guaranteed to him by the Constitution, is left with no remedy except for seeking divorce. This, in no case, shall t an effective move for preserving families in the country.

PROSPECTIVE AMENDMENTS OR SUGGESTIONS

The author does not see the new law of adultery, which is no different than ‘*no law of adultery at all*’, going in synchronisation with the Indian culture and ethos, in furtherance of the reasons mentioned above, which might not seem a great issue to be worried for at the moment, but undoubtedly hold a strong significance in the long run and is worthy to be

²⁸ Supra note 17

²⁹ *Olga Tellis v. Bombay Municipal Corporation AIR 1986 SC 180*

concerned for. As per the author, the following could have been taken into consideration by the honourable court before striking down the law of adultery altogether:

1. What the Section 497 IPC really demands for is the facet of *gender neutrality*. The same could have been achieved by making women as equally liable as their male counterparts or the adulterer. The Apex court, while deciding the validity of the said provision, contended that “the husband is not the master of husband”. Going by this, if on one hand, we consider that women have their identity as individuals, then why were they put across a veil when it came to prosecution for adultery? The ideal approach would have been counting both the parties as ‘equals’.
2. Under Section 198(2) CrPC, the wife of the adulterer too must have been deemed to be counted as “aggrieved”, and should have been provided with *locus standi* to initiate criminal proceedings against her husband and the adulteress.
3. The olden law did not amount to an offence if the extra marital relationship took place with an ‘unmarried woman’. However, unmarried women too should have been made accountable for the act as good as a married woman. Ultimately, the purpose of this section was to curb such practices of extra-marital relationships.
4. There are two core objectives of any law:
 - a. To punish the offender
 - b. To act as a deterrent

In the present scenario, instead of treating females as an ‘equal’ in terms of prosecution and punishment, the sword has been given to the males as well, what to speak of acting as a deterrent for prospective offenders. Hence, freeing the spouses completely is not an option

that the author sees as effective.

CONCLUSION

Every law must strengthen the institution and sanctity of marriage and the law which does not, needs rectification. The judiciary as well as the legislation have always played a vital role in striving to preserve marriages from falling apart and keeping them intact. *Srimad Bhagawatam*³⁰ enwraps a beautiful verse explaining this very concept:

punas ca yacamanaya

jata-rupam adat prabhuh

tato 'nr tam madam kamam

rajo vairam ca pancamam

This verse purports that illicit affairs or extra marital relationships dilute the sanctity of marriages and destroys families. Therefore, the new law adultery shall provide no good to the Indian society and is certainly liable for appropriate amendments as enumerated by the author in the above sections.

³⁰ The Srimad Bhagavatam, verse 1.17.39

UNIFORM CIVIL CODE - IN RETROSPECT AND PROSPECTS

Manisha Patawari*

Abstract

The question as to whether after 70 years of the “Indian Constitution” is ripe enough to have a uniform set of civil law has been raised yet again. The Uniform Civil Code (UCC) has always been claimed as an effective tool to harmonize the personal law and therefore harmonizes our differences as a society. It is further seen as a mode to empower Indian women in our patriarchal society and will also help in uplifting their status in the social institutions such as family and marriage. This paper would discuss the entire dialogue around the UCC, the historical aspect, progress or steps taken towards achieving UCC, Judicial Approach and the arguments on its necessity and constraints in implementing the Uniform Civil Code. This paper also evaluate the world practices on uniform civil code and tries to evaluate the condition that is required for the implementation of UCC in India and if whether India has achieved the prerequisite or not.

Keywords: Adultery, Decriminalisation, Gender Discrimination, Gender Neutrality, Individualism, Aggrieved, Cognizance

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INTRODUCTION

Our uniqueness as country is known to the world not only in terms of its geography but also in term of social scenario, we are the bunch of different culture needle in the same thread by our constitution. The geography of any country defines a lot of thing about the people and their habits and we find all kind of topography in one country¹. India is a land of diverse culture, diverse people, different languages, art and architect and of course a country of so many religions. History tell us that we are not only the birth place of so many religion like, Hindu, Buddhist, Jains, Sikhs, Ajivikas etc. but has also given equal respect to the religion of people who have come to India be it Muslims, Christain, Parsis, Jews etc.² All who have come to India and made India their homes be it Aryans, Afghans, Kushans, Mughals etc. India is a society which believes in Anekantwad and rational thinking that is why we were able to derive so many concept of religion. History also taught us one important lesson so many kings have come and go, all followed different religion but nobody tries to force their civil laws on the people of other community. Also the concept of marriage and divorce are different for different community. In Hindu religion marriage is considered as a sacred thing were as in Islam marriage is a contract therefore when you go back to history the concept of divorce came to India with Afghans and Turk who used to follow Islam because marriage is a contract in Islam it can be revoked but in cases of Hinduism there was no concept of divorce. But as time passes by we realized the importance of an option to call off bad marriage and thus evolved the concept of divorce in Indian society. So now arises a question that in the country so diverse, and where the concept of family law is so different from religion to religion is it possible to have uniformity? The Indian culture has emphasized the spirit of

¹ Manorama Yearbook (India – The Country). Malayala Manorama. 2006. p. 515. ISSN 0542-5778

² Gill, Mehar Singh, Politics of Population Census Data in India, Economic and Political Weekly, 42 (3), pp. 241-249,2007

unity in diversity but, unfortunately, this spirit of cultural unity has not helped to bring political unity in India. Our history suggests that Indian Territory was divided into small sovereign entity which ultimately brought foreign subjection for a long period of time. Our culture was so unique and blends at the same time that no ruler ever tries to make uniform policy in case of civil law whereas in 1860³, it is the criminal law for entire British India was codified under Indian Penal Code. Diverse practices, rituals, ways of life etc. continues to exist even after Independence.

“On 26th November 1949, we the people of India through our Constituent Assembly solemnly resolve to secure to all its citizens ‘Justice, Liberty, Equality and Fraternity’”.

To achieve these goals the framers have introduced the concept of Basic human rights and directives to the state in the constitution of India. The fundamental rights were given immediate importance, by giving right to constitutional remedies under chapter III of the constitution and the ideas for which our society and resources were not developed that time, those were kept in chapter IV and termed as Directive Principle of State Policy (hereinafter referred as DPSP) as the future goals for the India.

Before discussing what our founding fathers think about Uniform Civil Code (hereinafter referred as UCC), let's go into the meaning of this term. The word civil code actually covers the entire system of laws that governs the rights relating to property and otherwise in personal matters like marriage, divorce, maintenance, adoption and inheritance⁴. Therefore the demand for a UCC would mean, unifying all the personal laws which would be applicable to all citizens of India irrespective of the religion in the matters mentioned above⁵. The founding

³ B.M.Gandhi. Indian Penal Code, EBC, pp. 1–796, 2018

⁴ Anonymous, What's a uniform civil code?, Jul 28, 2003, Available at: <https://economictimes.indiatimes.com/whats-a-uniform-civil-code/articleshow/98057.cms>

⁵ Anubhuti Rastogi, Uniform Civil Code, Law times Journal, Jan 24, 2019, Available at:

fathers saw a UCC as an important means to achieve national integration. In the beginning, the efforts were made to include it under chapter III but it was finally kept under DPSP because no consensus could be reached in between the framers of the Constitution.

The experts suggest that a homogeneous personal law can curb all the atrocities of our existing personal laws. Further time and again it is claimed as a miraculous cure for all the social problems of Indian women. The Indian Supreme Court has been continuously reminding the government of the glorious promise of our founding fathers UCC. The case of *Shayara Bano*⁶ again ignites the discussion on UCC. This led to the question that whether UCC will prove to be magic wand and all such oppressive and anti-women evil in existing in all the religion will be wiped off?

Relevance of UCC has been questioned time and again. These were not only raised in constituent assembly debates but were also discussed during early to mid-1950s when the Hindu personal laws were reformed. The demands were raised to reform all personal. In 1970's the debates were again ignited on UCC when attempts were made to introduce an Indian Adoption Bill. Further the Supreme Court has brought the question of UCC in discussion in many of its decisions like *Shah Bano*⁷, *Sarla Mudgal*⁸, Ahmedabad Women Action Group⁹ etc.

When most of the directive principles have become the part of fundamental right or have got a constitutional recognition in these 70 years, UCC has still not the priority of the our time rather the process of enactment of UCC has become more difficult in comparison to 1950s.

<https://lawtimesjournal.in/uniform-civil-code/>

⁶ AIR 2017 SC 609

⁷ AIR 1985 SC 945

⁸ AIR 1995 SC 153

⁹ AIR 1997 SC 3614

Today, our society is actually less prepared for it as nobody is ready to forfeit their vested interests. In order to remove the fear and distrust relating to UCC there is general need to educate and aware people. Further we need to harmonize the debate of secularism and UCC so that is can be acceptable by people. Our country is the lands were people are very close to the religion and cultural practices; seldom anybody actually questioned the exploitative religious practices. Therefore if we want to achieve a UCC for entire country scientific temperament is needs to be developed in the people.

The UCC is seen as a crucial tool to achieve secular, progressive and non-discriminatory personal law in India by the liberal thinkers and women's movement. The personal laws are seen as a source for exploitation of women by the feminist thinker. So, they have highlighted the need of a UCC to achieve gender justice. But is it actually the reality. The paper gives a clear prospective on the historical angle of UCC, its idea as a whole discussed by the drafting committee during the formation of our constitution, international prospective and the reality as to whether it has actually helped in addressing woman issues, judicial view on this, law commission recent reports and its view regarding UCC and the most recent judgement on triple talaq and the law related to it.

UNIFORM CIVIL CODE AND HISTORICAL ASPECT

Codification of laws is not a new process. It actually dates back to the Colonial Period. The Britishers have played a major role in giving shape to our legislative literature. The Lex Loci Report of October 1840 which emphasized on the codification of Indian law relating to crimes, evidences, contract and commercial transaction etc., had also recommended that personal law of the different communities should not be codified. The Colonial masters have codified the law of crimes in 1860, further drafted a Indian Contact Act to guide commercial transaction in 1872 both on secular grounds but very few attempts were made to codify

personal.

After 1947, the framers of the constitution were convinced that a certain amount of scientific temperament and education is the prerequisite for the imposition of UCC on citizens belonging to different religions. The issue of UCC was very sensitive and might have been seen as the encroachment by the state on the religious and cultural practices of our citizen. Considering that our independence was given by our colonial master only at the cost of division and communal riots and hatred, bringing an issue regarding religious laws would not have been a wise decision.

Uniform civil code and constituent assembly debates

Originally UCC was a part of Article 35 of the Draft Constitution. A demand was raised by the members of Constituent Assembly to add a proviso in Article 35 which would make the UCC non obligatory in nature and personal laws be kept out of its purview. The proviso read as, “Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law.”¹⁰

Observation and Arguments

UCC was considered to be a threat to the religious freedoms envisaged by the Constitution. However, there were many reasons given in favour of a common civil code. K.M. Munshi took a very rigid view in negating the claims of majoritarian over sweep over the minorities. He states, it is not therefore correct to say that such an act is tyranny of the majority.¹¹ If you will look at the countries in Europe which have a Civil Code, everyone who goes there from any part of the world and every minority, has to submit to the Civil Code. It is not felt to be

¹⁰ Constituent Assembly Debates (Proceedings), Vol. VII, Tuesday Nov. 23, 1948.

¹¹ Ibid

tyrannical to the minority. The point however is this, whether we are going to consolidate and unify our personal law in such a way that the way of life of the whole country may in course of time be unified and secular. We want to divorce religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance or succession. What have these things got to do with religion I really fail to understand? Munshi presented the unifying force of secularism, that one way of life shall be the way of life for all. However, this view is the most controversial of all since it seems to muffle the voice of diversity. The other reason backing the UCC was the issue of empowerment of women. Since right to equality was already acknowledged to one of the most coveted rights, the unequal footing of genders through the word of law could no longer be validated. Thus, the practices which undermined a woman's right to equality would necessarily be done away with. A common civil law governing the personal matters would bring all the women under one single umbrella and irrespective of race and religion the discriminatory practices would be put to an end. Shri Alladi Krishnaswamy Ayyar¹² gives a much more realistic reason to aim for a UCC and bases his argument on the fallacy of having strict water tight existence of the communities. He states that in a country like India there is much interaction between the various different communities which leads to the altercations between specific personal laws. Not only altercations but one legal system gets influenced by other legal system. He states: In very many matters today the sponsors of the Hindu Code have taken a lead not from Hindu Law alone, but from other systems also. Similarly, the Succession Act has drawn upon both the Roman and the English systems. Therefore, no system can be self-contained, if it is to have in it the elements of growth. Our ancients did not think of a unified nation to be welded together into a democratic whole. There is no use clinging always to the past. We are departing from the past in regard to an important particular, namely, we want the whole of

¹² Ibid

India to be welded and united together as a single nation. Are we helping those factors which help the welding together into a single nation, or is this country to be kept up always as a series of competing communities? That is the question at issue. He questions the very core of the dialogue of excessive cultural relativity and the cons of it. Having separate personal laws governed entirely by religion, which has as many interpretations as its followers, would limit the scope for reform. He took the dialogue of K. M. Munshi to another level by treating uniformity not as a necessary evil unlike Munshi who gave examples of other Islamic countries where forceful application of the majoritarian law was considered to be justified by him as long as it brought reform. B. R. Ambedkar was also a staunch supporter of the UCC. He denied the claims that a common civil code in a vast country, like India, would be impossibility. He stated that the only sphere which did not have a uniform law was that of marriage and succession; rest all areas of civil law, such as transfer of property, contract, the Negotiable Instrument Act, easement act, sale of goods etc. were uniform in nature¹³. Let us not forget that Ambedkar was a man who believed in reform along the western line. He differed from Mahatma Gandhi in this respect and considered the western model of law and social relations to be an apt reference point to bring social reforms in Indian setup. He did not wish to add the proviso to the already unenforceable Article 35 but was open to the slow inclusion of the communities with their voluntary consents once the legislature fulfills its promise to have a UCC. He stated, *I quite realise their feelings in the matter, but I think they have read rather too much into Article 35, which merely proposes that the State shall endeavour to secure a civil code for the citizens of the country.*¹⁴ It does not say that after the Code is framed the State shall enforce it upon all citizens merely because they are citizens. It is perfectly possible that the future parliament may make a provision by way of making a

¹³ Ibid

¹⁴ Ibid

beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be purely voluntary. Parliament may feel the ground by some such method. This is not a novel method. (*Emphasis Supplied*). It is a well-known fact that Ambedkar has always been a great critic of the dominant Hindu religion. In 1936 he had already underlined one of the many dogmas that infested Hinduism, *i.e.*, casteism and untouchability to the extent that he went on to denounces himself as a Hindu.¹⁵ Yet in the Constituent Assembly he denied the claims of UCC being a mouthpiece of the majority, or the tyranny of the majority. He stated that the manner in which the Shariat Act, 1936 was made applicable to all the Muslims in India was nothing but an example of how convenient uniformity in laws is and was welcomed by the Muslim brethren. The Muslims which were being governed by the Hindu laws in certain specific areas were all collectively and uniformly brought under the purview of this uniform law, for their own benefit. Similarly, if certain principles of the majoritarian religion, *i.e.* Hinduism would be incorporated in the UCC, it would be not by virtue of them belonging to Hinduism, but because they were suitable to the progressive society. This should not be qualified as a tyranny of the majority. He stated¹⁶: Therefore if it was found necessary that for the purpose of evolving a single civil code applicable to all citizens irrespective of their religion, certain portions of the Hindus law, not because they were contained in Hindu law but because they were found to be the most suitable, were incorporated into the new civil code projected by Article 35, I am quite certain that it would not be open to any Muslim to say that the framers of the civil code had done great violence to the sentiments of the Muslim

¹⁵ Dr. B.R. Ambedkar, *The Annihilation of Caste: The Annotated Edition*, 11 (Navayana Publication, New Delhi, 2014)

¹⁶ Supra note 10

community.¹⁷

This statement made by Ambedkar speaks loudly for itself and his commitment towards having a UCC to bring about the much necessary changes in the personal dimensions of an Indian irrespective of her religion and community. Post-independence his tooth and nail fight to pass the Hindu Code Bills, which also lead to his resignation from the cabinet, is yet again a proof of his drive to bring UCC. Although the proposed amendment to Article35 was not passed, yet there was no clear-cut majority on the issue of the UCC, some of the reservations echo even in the debates of 2016.

THE COMMON CIVIL CODE: CONSTITUTIONAL AND STATUTORY ASPECT

The Constitution of India requires “*the State to strive to secure for its citizens a Common Civil Code throughout India*”¹⁸ The Constitutional expert many a times gives two reasons for not implementing UCC in our country firstly, as UCC would be contrary to Article25 of the constitution and thus infringe the fundamental right of freedom of religion and secondly, it would amount to a tyranny to the minority. The Experts who are in support of the UCC gives a counter to the first objection and states that this objection is misconceived. According to them a common civil code would not violate Article25 as secular activity associated with religious is exempted from this guarantee. So they argue, since personal laws pertain to secular activities fall within the purview of the regulatory power of the state. Regarding the second point, it was argued that there are many Muslim countries in the world who has reformed their laws and further there are countries around the world who has the personal law of each minority been recognized as so sacrosanct as to prevent the enactment of a civil code. Further European countries have a common civil code and these were explored by all the

¹⁷ B. Shiva Rao, *The Framing of India's Constitution Vol. 2* (1st Ed., Universal Law Publishing Co. Pvt. Ltd. 2012)

¹⁸ Article44, *The Constitution of India*, P.M. Bakshi (6th Ed., Universal Law Publishing Co. Pvt. Ltd., 2016)

people around the world. Religious minority also never felt tyrannical about it.¹⁹

India is a unique country with more than 100s of culture, 1000s of language, and dozens of religions. But still it is not true that we don't have uniform laws. We have a uniform age of marriage and female of any religion cannot get married before the age of 18 and male of any religion cannot get married before the age of 21. Also there is an Act called Special Marriage Act under which person of any religion can register their marriage and this will apply to all irrespective of religion. Indian Succession Act is also there which governs intestate succession irrespective of religion. Maternity Benefit Act has been enacted to give benefits to all working lady in organized and unorganized sector irrespective of religion. Guardianship and Adoption Act also does not discriminate between religions. The list is still going on.

Goa Civil Code

The Goa civil code is largely based on the Portuguese Civil Code (Código Civil Português) of 1867, which was introduced in Goa in 1870. Later, the code saw some modifications, based on:²⁰

- 1) the Portuguese Gentile Hindu Usages Decrees of 1880 (Código de usos e costumes dos hindus gentios de Goa);
- 2) the Portuguese Decrees on Marriage and Divorce of 1910 (Lei do Divórcio: Decreto de 3 de Novembro de 1910). After the establishment of the First Portuguese Republic, the civil code was liberalized to give women more freedom and
- 3) the Portuguese Decrees on Canonical Marriages of 1946 (Decreto 35.461: regula o casamento nas colónias portuguesas)

¹⁹ Official Journal of the European Communities, 1989, N. C 158/400

²⁰ Vivek Jain & Shraddha Gupta "Uniform and civil", The Statesman (2014-05-15)

When Goa was merged in India in 1961 the civil code was retained in Goa. The original Code was replaced by the new Portuguese Civil Code of 1966. In 1981, the Government of India tried to evaluate if the personal laws can be extended to Goa and therefore appointed a Personal Law Committee. The move of the union was supported by the Goa Muslim Shariah Organization, but it was met with stiff resistance from the Muslim Youth Welfare Association and the Goa Muslim Women's Associations.²¹

INTERNATIONAL PROSPECTIVE

Though we consider our culture to be unique in it even though let's compare the international scenario in this regard. We will be discussing European civil code and law of Indonesia which is an Islamic country.

Family Laws in Europe

Though in 1984 European Union wants to have a European civil code but the matter of family law was kept out of it. The commission realizes that family law is related to culture so each of the country is free to make their family laws according to their culture and EU will not interfere in it. So European Civil Code has actually harmonies all other civil law in Europe except the personal laws.

European Civil code is not an old concept. It has come into picture to harmonies the private law in whole of European Union. Its main aim is to make a comprehensive law that will govern the core private law like the family law, the law of inheritance, property law and the Law of Obligations.

Let's see what is the structure of family law in United Kingdom does they have different laws

²¹ Partha S. Ghosh (23 May 2012). *The Politics of Personal Law in South Asia: Identity, Nationalism and the Uniform Civil Code*. Routledge pp. 19-22

for different community or they just have same law applicable for all irrespective of their culture and religion. Following are the laws that govern the personal relations in UK:²²

1. For Marriage and civil partnership

- Civil Partnerships Act 2004
- Marriage (Same Sex Couples) Act 2013

2. For Divorce and dissolution

- Matrimonial Causes Act 1973
- Children Act 1989
- Child Support Act 1990

3. For Domestic violence

- Family Law Act 1996
- Protection from Harassment Act 1997
- Children Act 1989

Personal Law in Indonesia

Indonesia has Islam as its official religion. But it does not force its law on its entire citizen irrespective of religion. The Indonesian legal system is based on Roman-Dutch law, modified by custom and Islamic law. People of different religion are allowed to follow their law in case of marriage and divorce. Out of the court divorces are not allowed in Indonesia unlike other Islamic countries. Even in the case of maintenance it secures the rights of both the

²² Available at: <https://iclg.com/practice-areas/family-laws-and-regulations/england-and-wales>

party. Law specifies that both spouses are equal and both are responsible for maintaining home and caring for children. Thus even after being an Islamic country Indonesia not only respects the rights of people of different religion but also it is very successful in implementing customized principle of Islam which is not discriminatory to one gender.²³

International Covenant on Civil and Political Rights, 1966, and International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979

The International Covenant on Civil and Political Rights, 1966, and International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979 are the two international conferences which was ratified by India. Under these conventions bounds India to enact a law with regard to gender equality. However, women in India continue to suffer under personal law. They are facing discrimination and inequalities as far as marriage, succession, divorce and inheritance²⁴. So, legal luminaries suggested enacting UCC irrespective of religion which would bring us a step closer to the ideals of the Indian Constitution and the provisions of the International law.

But can only uniform civil code solve these issues or there is any other method? Can't we just replace the discriminatory provisions like we have done in case of Inheritance law and made a room for a girl child in father's property or what we have done in case of triple-talaq rather than changing the whole map of personal law we can just make the law little more accommodative for all the gender to secure the equality irrespective of gender and religion. These acts are same for all the community irrespective of all religion and culture in England.

²³ Available at: <https://scholarblogs.emory.edu/islamic-family-law/home/research/legal-profiles/indonesia-republic-of/>

²⁴ United Nations , Report of the Committee on the Elimination of All Forms of Discrimination Against Women, 8, Supp. No. 38, A/55/38, 22nd Session 17 Jan-4 Feb 2000 and 23rd Session 12-30 June, General Assembly Official Records, New York, 2000

APPROACH OF THE JUDICIARY

The Supreme Court for the first time, directed the Parliament to frame a UCC in the year 1985 in the case of *Mohammad Ahmed Khan v. Shah Bano Begum*, popularly known as the Shah Bano case²⁵. In this case, a penurious Muslim woman claimed for maintenance from her husband under Section 125 of the Code of Criminal Procedure after she was given triple talaq from him. The Supreme Court held that the Muslim woman have a right to get maintenance from her husband under Section 125. The Court also held that Article 44 of the Constitution has remained a dead letter. The then Chief Justice of India Y. V. Chandrachud observed that,

“A common civil code will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies”

After this decision, nationwide discussions, meetings, and agitation were held. The then Rajiv Gandhi led Government overturned the Shah Bano case decision by way of Muslim Women (Right to Protection on Divorce) Act, 1986 which curtailed the right of a Muslim woman for maintenance under Section 125 of the Code of criminal Procedure. The explanation given for implementing this Act was that the Supreme Court had merely made an observation for enacting the UCC; not binding on the government or the Parliament and that there should be no interference with the personal laws unless the demand comes from within.

In *Mary Roy v. State of Kerala*²⁶, the question argued before the Supreme Court was that certain provisions of the Travancore Christian Succession Act, 1916, were unconstitutional under Article 14. Under these provisions, on the death of an intestate, his widow was entitled to have only a life interest terminable at her death or remarriage and his daughter. It was also argued that the Travancore Act had been superseded by the Indian Succession Act, 1925. The

²⁵ AIR 1985 SC 945

²⁶ AIR 1986 SC 1011

Supreme Court avoided examining the question whether gender inequality in matters of succession and inheritance violated Article 14, but nevertheless ruled that the Travancore Act had been superseded by the Indian Succession Act. Mary Roy has been characterized as a ‘momentous’ decision in the direction of ensuring gender equality in the matter of succession.

Finally, the Supreme Court has issued a directive to the Union of India in *Sarla Mudgal v. Union of India*²⁷ to ‘endeavour’ framing a Uniform Civil Code and report to it by August 1996 the steps taken. The Supreme Court opined that: “Those who preferred to remain in India after the partition fully knew that the Indian leaders did not believe in two- nation or three “nation theory and that in the Indian Republic there was to be only one nation- and no community could claim to remain a separate entity on the basis of religion.”

It is, however, to be noted what the Supreme Court expressed in Lily Thomas case²⁸. The Court said that the directives as detailed in Part IV of the Constitution are not enforceable in courts as they do not create any justiciable rights in favour of any person. The Supreme Court has no power to give directions for enforcement of the Directive Principles. Therefore, to allay all apprehensions, it is reiterated that the Supreme Court had not issued any directions for the codification of a Common Civil Code.

The Supreme Court's latest reminder to the government of its Constitutional obligations to enact a UCC came in July 2003 in *John Vallamattoon v. Union of India*²⁹, when a Christian priest knocked the doors of the Court challenging the Constitutional validity of Section 118 of the Indian Succession Act. The priest from Kerala, John Vallamattoon filed a writ petition in the year 1997 stating the Section 118 of the said Act was discriminatory against the Christians as it imposes unreasonable restrictions on their donation of property for religious

²⁷ AIR 1995 SC 153

²⁸ (2000) 6 SCC 224

²⁹ AIR 2003 SC 2902

or charitable purpose by will. The bench comprising of Chief justice of India V. N. Khare, Justice S. B. Sinha and Justice A. R. Lakshamanan struck down the Section declaring it to be unconstitutional. Chief justice Khare stated that, “*We would like to State that Article 44 provides that the State shall endeavour to secure for all citizens a uniform civil code throughout the territory of India it is a matter of great regrets that Article 44 of the Constitution has been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.*” Thus, as seen above, the apex court has on several instances directed the government to realize the Directive Principle enshrined in our Constitution and the urgency to do so can be inferred from the same.

IMPLEMENTATION OF UCC IN INDIA

The constitutional provision makes UCC as part of DPSP as non-justiciable. The reasons behind the whole idea of DPSP and the compulsion of the founding fathers to put UCC in the DPSP was feared that nothing can be done if the state fails to achieve the DPSP. In response to such fears Dr. Ambedkar said: that in a democracy the voters would access the performance of the government at the time of election and teach a lesson if the government fails to achieve the objectives stated in the DPSP. In free India the successive governments have enacted various statutes to govern the family relations irrespective of the religion of the parties. These includes,

- Special Marriage Act, 1954
- Hindu Code of 1955-56
- Dowry Prohibition Act, 1961
- MTPA, 1971
- Indian Adoption Bill, 1976

- 125 of CRPC
- Protection of Women from Domestic Violence Act, 2005
- Prohibition of Child Marriage Act, 2006
- Maintenance and Welfare of Parents and senior citizen Act, 2007
- Section 112 of Indian Evidence Act, 1972
- Compulsory Registration of Marriage
- Juvenile Justice Act, 2015

LAW COMMISSION REPORT

The Government of India through Ministry of law and justice has made a reference to the Law Commission in 17th June 2016 and gave it the task of addressing the issues concerning a UCC. The Commission appreciated this opportunity and address the ambiguity around the questions of personal law and UCC in India. In this paper the commission has tried to explain, acknowledge and finally suggest potential legislative actions which would address the inherent discrimination under all family laws. While analyzing the issue the Commission has attempted to best protect and preserve diversity and plurality of our cultural and social fabric of the nation.

The commission in its report stated that “*it is discrimination and not difference which lies at the root of inequality*”. While addressing these inequalities, a series of amendments were suggested by the commission to the existing family laws. Further the commission insisted that to limit the ambiguity in the interpretation and implementation of the existing law the codification of certain aspects of personal laws is necessary.

The question as to whether or not personal law are laws under Article13 of the Constitution

of India has been raised in dozens of cases but the most notable one is *Narasu Appa Mali*.³⁰ Since no consensus can be reached on a UCC the Commission suggested that the best way forward is to preserve the diversity of personal laws but at the same time ensure that it do not contradict the fundamental rights guaranteed under the Constitution of India. In order to achieve this, it is desirable that all personal laws relating to matters of family must first be codified to the greatest extent possible, and the inequalities that have crept into codified law, these should be remedied by amendment.

The recent Supreme Court judgment *Shayara Bano v. Union of India*³¹ outlawing the practice of triple talaq has taken a first step towards ending personal law practices that are discriminatory towards women but largely on the premise that triple talaq is also not an essential practice of Islam suggesting that bad in theology cannot be good in law. The court has not delved on the supremacy of fundamental rights in case of a conflict between the personal law and fundamental rights and the premise of *Narasu Appa Mali* has not been overturned.

CONCLUSIONS

Article 44 of the Constitution of India requires the state to secure for the citizens of India a Uniform Civil Code throughout the territory of India. As has been noticed above, India is a unique blend and merger of codified personal laws of Hindus, Muslims, Christians, Parsis. Further it's not that every aspect of personal law is governed by personal law. There are certain personal laws that are applicable irrespective of religion and gender. However, there exists no uniform in the matter of marriage and divorce. In a country as diverse as it's very difficult to make single law personal law as the concept of marriage and divorce remains

³⁰ *State of Bombay v. Narasu Appa Mali* AIR 1952 Bom 84

³¹ AIR 2017 SC 609

different as we see different religion. As far as women empowerment and gender equality is concern it's better to remove inequality from each law rather than making uniform law. We have so many minorities living together in a close net. Unless and until their sentiments are respected there will be no mistrust but as we try to force uniformity on them it might led to protest. So the author will suggest that we should leave UCC on time and rather than focusing and wasting our energy convincing people we should scoop out the discriminatory practices in all the religion. Like, we have done in case of child marriage, widow remarriage, triple talaq, securing property right to Hindu women etc.

He has achieved it in the past we can do it in the future when every religion will believe in equality then no uniformity would be needed. Diversity in unity is the essence of India. We should respect that to keep the soul of India alive.

Times have changed, societies have changed and it is high time that laws should accommodate these changes. Education, economic prosperity, agricultural improvements, crosses border migration and western influence has spread its hand over every nook and corner of Urban India. On the flip side, rural settlements are still struggling with adherence to customary and superstitious beliefs in family matters. A uniform civil code will not only change the entire perception of how families are governed but also affect the psyche of many. Minority might feel insecure, villagers might feel take it as an attack on their culture. If we follow the way of removing the bad practices from each personal law book we will not require any UCC in India. Law commission itself in a constitutional paper has stated that A uniform civil code "*is neither necessary nor desirable at this stage*" in the country, the Law Commission of India.³²

³² Available at: <https://www.thehindu.com/news/national/uniform-civil-code-neither-desirable-nor-necessary-at-this-stage-says-law-commission/article2483363.ece>

SUGGESTIONS

1. In order to promote the spirit of unity in the country government rather than enacting the UCC and forcing them on people should make people aware about special marriage act as under this Act if a marriage is registered it will be governed irrespective of the religion of the people solemnizing the marriage. This will help in accomplishing the objectives enshrined in Article 44 of the Constitution.
2. UCC is not important rather the object of UCC is so rather than separating people from their customs and practices government can bring positive changes in the religious laws so that the objective of women empowerment can be achieved.
3. The Uniform Civil Code might sounds good to eliminate discrimination but it's still not the right time to introduce UCC and force them on minority as there is lots of mistrust and biased. So government has to look out for the ways which can remove the discriminatory practices of every religion rather than wasting energy on UCC.
4. A committee of eminent jurists should be considered to evaluate the discriminatory practices and accordingly the government can bring legislation.

HUMAN RIGHTS: COMPARATIVE STUDY OF INDIA & CHINA

Ozasvi Amol* & Fariya Sharaf**

Abstract

Living in a civilized society, it is important to guarantee each and every citizen a sensibly noble life. From life, the concept of freedom, equality, respect, dignity, justice pops up in the mind. Freedom and equality are the essence of human rights which is the subject matter of present article. Human rights are the essential rights that are required for existence of human life. Mere life with no right is useless. The article explores the various topics related to human rights. It also tries to explain status of human rights and in China and India and the contradictory picture between writing and practical implementation of the rights given to the citizen in two nations. The first part of the article addresses the brief introduction of human rights followed with the history and development in it particularly with respect to India. It also compares human rights of India to that of China. The article also provides various reports given by NGOs and other committees. Since all aspects have loopholes too, the article also addresses the loopholes of human rights in India and China. It includes the landmark cases to give a clear picture of implementation of human rights in India. Human Rights are basic rights which every individual enjoys from the time of birth till death, these are inseparable natural rights, human rights unequivocally proclaim the inherent and inalienable rights of human .These rights are difficult to define but impossible to ignore ,it is the basic rudimentary right which every human being possess and exercises to enjoy a smooth life, human rights are prevalent since the time of emergence of civilization, these aspire to protect all people everywhere from several political, religious and cultural abuses.

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The main principle behind these entitlements is respect for every individual. The fundamental assumption is that each person is moral and rational being who deserves to be treated with dignity. The present article mainly focuses on history and development of Human Rights in India and its comparison with another nation state. The paper concludes by highlighting challenges faced by India with respect to laws related to human rights.

Keywords: *Human Rights, Freedom, Equality, Dignity, Nationality, Absolute Leadership, Democracy, Communist.*

INTRODUCTION

Human rights are the rights that are available to all humans simply because they are human beings. It starts from the birth and ends on the death. The article 1 of Universal Declaration of Human Rights states that “*All human beings are born free and equal in dignity and rights*”.¹ From this line we can confer that no two persons shall be discriminated in any manner with respect to caste, creed, race, sex etc. Every human being is autonomous, free and equal in each aspect. Human Rights give basic standard without which a human cannot live. The basic features of human rights are that these are:

- ***Interrelated and interdependent:*** This means that all human rights are complementary to each other.
- ***Universal:*** This means that it applies to all in equal manner.
- ***Indivisible:*** This means that rights cannot be differentiated on the basis of importance i.e. it cannot be treated as ‘less important’ or ‘more important’.
- ***Inalienable:*** It means that it cannot be lost under any circumstances because of the fact that they are pre-requisite for human existence.

The human rights are just like armour which protects us. They are the rules that tell an individual how to behave. They are like the judge because we can appeal to them. Human rights are just like emotions that belong to everyone. When an individual accepts human rights, he directly accepts that everyone is entitled to the rights.

The key values of human rights are human dignity and equality. These ideas make human rights less controversial and this is the reason why human rights receive support from every

¹ United Nation, *Universal Declaration of Human Rights*, Available at: <https://www.un.org/en/universal-declaration-human-rights/> (Accessed on: 28.07.2020)

culture in the world. Out of these two values other values derived from human rights are freedom, respect, no discrimination, justice, responsibility. The human rights under no circumstances can be eliminated it can only be restricted to a certain limit.

HISTORY OF HUMAN RIGHTS IN INDIA

Human rights continued from ancient civilization. Its history is about thousand years back which is based upon religious, cultural, philosophical and legal development. In almost every stages of mankind there always existed. Even the religious texts contained varieties of concept that are related to the human rights. Almost every religious text consists of human rights but the only change that took place were related to its development particularly the protection of human rights. Before the World War human rights were not codified neither national nor international level. From the beginning itself man struggled for his existence to achieve basic freedom. This struggle was a roadway for the emergence of the concept of human rights. The most defining feature of human rights is that these rights are difficult to define but cannot be ignored at all. The Indian perspective of human rights is divided in three stages namely ancient, medieval and modern. Concept of human rights is not a flower of European garden rather we can trace back the idea of human rights from Vedic period in India. In Vedas human rights are signified by equality and liberty. The charter of equality from Vedic period is defined in following words, "No one is superior or inferior all shall strive for the interest of all and progress collectively."² Kautilya always advocated for the welfare state and he said that the happiness of state lies in the happiness of its subject.³ From the facts and story it is revealed that society under Vedic age was organized and committed towards human rights. No discussion on Human Rights can end without referring to Ashoka. Ashoka inscribes 'All

² Nidhi Madan, *History and Development of Human Rights in Indian*, IOSR Journal of Humanities and Social Science, 01 (2017), p. 28

³ S S Ali, *Kautilya and the Concept of Good Governance*, Indian Journal of Political Science, 04(2006), p. 67

men are my children and just desire for my children that they may enjoy every kind of prosperity within this world and in next also as also as I desire the same for all men.⁴ King Ashoka worked day and night for the protection of Human Rights. The decline of Human rights was witnessed by the decline of Mauryan Empire. In the Mughal era with the entry of Akbar human rights were restored, great regard was given to social, religious and cultural rights. In his religious policy (Din-e-Elahi) he tried to preach secularism and religious tolerance. Various religious movements like Bhakti and Sufi made great contribution in the area of human rights.

Human Rights in Ancient Times:

The subject matter of human rights are not only restricted to the western region but it is a set of rules that epitomizes human values which is mutual for all. The rights mentioned in Universal Declaration of Human Rights 1948 did not come into being all of a sudden but was a milestone that traveled for centuries. The language of Human Rights may be product of European countries but the concept of Human Rights is as old as the human culture. Since vedic age the humans were concerned about freedom which was fundamental in nature. In the vedas, the concept of equality is signified in human rights.

The charter of equality says that “No One is superior or inferior all should strive for interest of all and should progress collectively”⁵

The importance of rights were also financed by Jainism , Buddhism and other minority religions.

Human Rights in Medieval Times:

⁴ Akhilesh Shivkumar, *The meaning of life according to Hinduism*, The Ohio State University, Available at: <https://www.ywam.org/get-involved-2/all-nations-verse-list/> (Accessed on: 02.09.2020)

⁵ Ram Madhav, *What Dalit wants?*, The Indian Express, July 22 2020

The medieval era is mainly signified by the Muslims like the Mughal rulers. At that period the human rights existed but with the advent of the Muslims. Then the Hindus were stressed due to this inequality. The essence of human rights seemed to vanished. Later when Akbar's rule started he restored back the rights for all. In Akbar's religious policy more emphasis were given on secularism.

Human Rights in Modern India:

It was the colonial era in which Indians were suppressed in all spheres by the Britishers. The Indians were not given basic rights like right to life, freedom ,equality. The Indian leaders and the people felt that their right to life is being violated so they thought of diverting back for their rights. This was the first demand for the fundamental rights that appeared in the constitution of India bill1895 which gave Indian their rights several sessions were held to discuss the matter of fundamental rights in more detailed way.

Finally human rights were enshrined in the constitution . The Part III of the Indian Constitution is related to fundamental rights. There are 6 rights given under the the constitution of India which is refered as Fundamental Rights.

HUMAN RIGHTS DEVELOPMENT IN INDIA

Human rights and its development reflects a separate evolution. This section deals with interface of human rights and its development. The main focus of the head is on the integration of human rights into its development. It shows that even though human rights are overlooked but is potentially worthwhile in exploring its development. One of the part in human rights is related to the concept of development that was regarded as human aspiration. The 30 articles mentioned in Universal Declaration of Human Rights is the sum total of all

social, economic and cultural rights which incorporates the depth of the world's developmental efforts.

The right to development was explained in the General Assembly declaration in 1986 that focuses on all rights and held that achieving these rights is both individual and collective responsibility. State has foremost responsibility to create favourable condition for the same.

Human Rights Enhanced In Article 21 Of The Indian Constitution

Article 21 reads: “*No person shall be deprived of his life or personal Liberty except according to procedure established by law.*”

The major landmark case, *Maneka Gandhi v. Union of India*⁶ led to widening the concept of article 21 ultimately leading to the broad interpretation of the same. In this, case several propositions were made to make article 21 more expandable and meaningful. An expanded and detailed meaning was given to read the ambit of fundamental right. Justice Ayer remarked “The spirit of man is at group of article 21. Personal liberties makes the worth of human and travel makes Liberty worthwhile.”⁷

In another case, *Parmanad Katara v. Union of India*⁸ the petitioner who was a human rights activist filed a writ petition. In the case it was held that every injured citizen must be given immediate help to preserve his life. To this an incident was reported that a scooter rider was knocked down by a speedy car. The petitioner saw the scooter driver bleeding heavily so he took him to the nearest hospital but the medical staff refused to attend the injured person. They asked the petitioner to take the injured to another hospital that handles medico-legal

⁶ AIR 1978 SC 597

⁷ Abhishek Saxena, *The ambit of art 21 of the Indian Constitution*, Ipleaders Intelligent legal solution, , Available at: <http://www.google.com/amp/s/blog.ipleader.in/rights-article-indian-constitution> (Accessed on: 13.09.2020)

⁸ AIR 1989 SC 2039

cases. On his way to the hospital the injured was the succumbed to death .The Supreme Court to this held that there is no second opinion in the fact that saving a human life is paramount. This is because once a life is lost the *status quo* cannot be restore. The Supreme Court further laid that article 21 post obligation on state to preserve the life of an injured.

India was a certifier to the Universal Declaration of Human Rights. Several fundamental rights given to Indians are similar to UDHR like Article 14 of the Indian constitution and Article 7 of the UDHR is related to *Equality before law*. In *Kesavanda Bharti v. Union of India*⁹ the Supreme Court observed that UDHR might not be legally binding but the rights which were adopted in India shows that India understands the basic nature of human rights.

In another landmark case, *Vishakha v. State of Rajasthan*¹⁰ where a women was raped by a group of five men and this incident was sexual harassment of woman at workplace. The offenders were liable for raping a woman . There was a clear violation of human rights with respect to equality and also the violation of article 19¹¹ and 21¹² of the Indian constitution.

FUNDAMENTAL RIGHTS IN CHINA

Chapter II of the Constituion of People's Republic of China contains the fundamental rights and duties of the citizens from article 33 to 56. In writing, the rights given to the chinese are non-discriminatory ,just and fair. It gives importace to all the social, educational and cultural rights of the subject. But it is the pseudo picture of the reality because in true sense the country is devoid of these egalitarian principles. The Constitution of 1982 provides various social, educational and cultural rights to the citizens for allowing them to become fully

⁹ AIR 1973 SC 1461

¹⁰ AIR 1997 SC 3011

¹¹ Article 19, Constitution of India

¹² Article 21, Ibid

developed, educated and learned individual. Right to education and freedom to enroll in scientific research is provided at all the citizen irrespective of their natinality, sex, occupation.

Elementary level education is mandatory for all citizens. It is said that “No one is denied education and no one can refuse education.”¹³ The state bolsters overall moral, intellectual and physical development of the youth and children. Citizens also enjoy the freedom to engage themselves in various pursuit. The state encourages new mind and intellectual ideas which helps in the development of the state and are fruitful towards the interest of people.

The Constitution envisages the fundamental rights of every citizen, inclusive of the right to vote and stand for election, the freedoms of press, of the speech of demonstration and of religious belief. Freedom of the citizens cannot be violated , as is their right to protection from unwarranted intrusions into their personal dignity and the sanctity of their homes. Freedom and privacy of individual are protected by law. Citizens are free to criticize or give suggestions to any state organ or functionary, and possess the right to supervise them..The Constitution is the paramount law of the state, with the supreme legal effect. The people of all ethnicity in China must observe it as the legal framework of their activities.

COMPARISON OF HUMAN RIGHTS IN CHINA AND INDIA

India and China are among the oldest civilization . For the Europeans the people residing in these countries are source of immense wealth and wisdom. This section of the article compares the human rights of India to that of China. The Human Rights situation in China is marked by a systematic crackdown . Due to the prevalence of unfair trials, torture and other malfeasance act the justice system of China remains to be plagued. While both the countries

¹³ Article 33, Constitution of the People’s Republic of China

have their own extended history their individual histories are very much different. China on one hand is a centrally run country that has limited power on the other hand India is governed by a set of rules in which the centre and the state have equal role to play. China is unitary in nature while India follows a quasi-federal system. In February, President Xi Jinping said that the legal system of China should be under the absolute leadership of Chinese communist party.

ANALYSIS OF FEW RIGHTS

Rights	India	China
<i>Freedom of expression</i>	In India Article 19(1)(a), of the constitution provides freedom of expression that enables an individual to express freely but with reasonable restrictions.	The Article 35, of the Constitution of People's republic of China says that people can be vocal about their views publically.
<i>Comment:</i> In reality the authorities in China have censored all the media despite being mentioned in the article that people can freely express themselves. The people of China have also reported that they have been threatened for being vocal on the other hand in India people have a right to express their views, criticise or appreciate government policies and judicial orders but in recent time we can see that this right is suppressed in the name of nationality by the people in power.		
<i>Freedom of Religion</i>	<i>This rights allows all citizens to propagate any religion.</i>	<i>This right allows individual to follow or practice any religion.</i>
<i>Comment:</i> The grim reality is that in recent months, the religious groups have been prosecuted which shows that China as a state interferes in the affairs of religion too. The Chinese government have tightened their grip on the Christians and Muslims. The discrimination		

among various religion is quite intensified, to such a level that it cannot be ignored.¹⁴ India being a secular nation still is trapped in the tug of war of religion and is not devoid of religious prosecution. There have been many episodes where religion is used as a tool for pesper the peace in the society.

<i>Rights of LGBTQ & LBGTI</i>	Revocation of sec 377 of Indian Penal Code	Laws are made but not empowered
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Comment: In China the LGBTI still face discrimination at their homes workplaces, school, institution and public. The authorities claim that they have implemented laws related to gender and sexual orientation but they did not make laws for the protection of interest of LGBTI. But the recent developments were made and the laws were framed with this respect. However China legally recognised same gender marriage but does not empower them.¹⁵ Also being a gay was considered as an act of ‘hooliganism’.

India has decriminalised sec 377 of IPC and now treats the third gender of the community treated equally and now enjoys equal protection but still their equality is a long road in India.¹⁶

REPORT OF NGOs AND COMMITTEES ON HUMAN RIGHTS

India: There are various reports and facts which clearly potrays the violation of human rights in India. There are end number of cases of human rights violation which is unheard. The few which are noted are highlighted by some of the NGOs, committee and organisation.

¹⁴ Ewelina U Ochab, *Is China conducting a crackdown on religion?*, Forbes; Available at: <http://www.google.com/amp/s/www.forbes.com/sites/ewelinaochab/2019/04/20/is-china-conducting-a-crackdown-on-religion/amp/> (Accessed on: 12.09.2020)

¹⁵ Xu Chen and Wilferd Yang Wang , *How China is legally recognising same-sex couples, but not empowering them* , The Conversation. , October 02, 2019, 12:21pm

¹⁶ Zainab Patel, *The long road to LGBT equality in India*, UNDP, Available at: <https://www.in.undp.org/content/india/en/home/blog/lgbtequalityindia.html> (Accessed on: 22.06.2020)

Report of Jammu and Kashmir coalition civil society(JKCCS)

The resident of Jammu and Kashmir in 2019 witnessed the bleakest days of their lives with no internet and lockdown of almost five months which was like a nightmare for them. However, the step is justified in the name of national interest and security. There was complete denial of digital rights. Even though this action was for the sake of nation but the people who were only dependent of the online activity faced sudden upheaval which was a source of livelihood. The report observes that this denial of digital rights is a form of discrimination and digital repression. This shutdown was previously an unknown fact but this ended in january 2020 when supreme court opined in *Anuradha Bhasin v. Union of India*¹⁷ and endorsed the “principle of proportionality for internet shutdown.”

NCRB report on rape

In a report by NCRB, one women in every 15 minutes is raped.¹⁸ The highly publicised gang rapes and murder of a woman in a moving bus in 2012 brought tenth of thousand people on the street and spurred demand for this heinous act from the reknowned filmstars and politican leading to more brutal punishment and new fast track court. But the violation is persistant and awaited. Rape is the foremost common crime against women in India.

China: China’s government sees human rights as exponential threat . Its cosequence would impose an existential threat to the rights of people worlwide. China, ‘league of its own’ when it comes to the human rights violations, official repression of the freedoms of religion,

¹⁷ Anuradha Bhasin v. Union of India , WP no. (civil) 1031 / 2019

¹⁸ Anonymous, *National Crime Record : One woman rape every 15 minutes in India*, CNBC tv, October 23, 2019

speech, movement, association is in threat. China has arbitrarily detained people of minorities and forced them to convert their religion.¹⁹

CONDITION OF HUMAN RIGHTS DEFENDERS IN CHINA AND INDIA

The human rights defenders carry out to shrink continuously .In China anyone who subvert state's power are charged heavily.The defenders of the crime are taken to unknown locations and are bitterly tortured there. The individuals who give independent voice to an issue receives crackdown. Many human rights lawyer in China who speak up over an issue suddenly disappeared and are tortured and treated savagely also there whereabouts still remained unheard by their families not only the human rights activist or lawyers or defenders but their families too are subjected to police harassment whereas in India a sepaate bill has been enacted namely ,The protection of human rights defender bills 2018 is an international law that extends to the whole of India. It applies to all human rights defenders in India. The National Human Rights Commission (NHRC) accept the laws for promotion and protection of human rights even though we have acts but it still requires the overall strengthening of all the aspects. The National Human Rights Commission chairman mentions about the changes to be taken place with this respect.²⁰

LOOPHOLES IN INDIAN LAWS WITH RESPECT TO HUMAN RIGHTS

This head reflects the position of Indian laws vis-a-vis the human rights. Loopholes in any country with respect to laws is due to absense the strong base.In India's constitution all the citizen of the country are privy to a set of six fundamental rights which are enforceable by law. These rights are deep seated in our constitution so that no one can challenge the rights of

¹⁹ Anonymous, *China Global Threat to human rights*, Human Rights Watch, Available at: <https://www.hrw.org/world-report/2020/country-chapters/global> (Accessed on: 26.06.2020)

²⁰ Justice H L Dattu, *NHRC Chairperson's message on 'Human Rights Defenders*, Available at: <https://nhrc.nic.in/press-release/nhrc-chairpersons-message-human-rights-defenders> (Accessed on: 22.07.2020)

anyone. However the amendment in constitution itself shows how human rights are largely confined to paper. It is a bitter reality dropping in every corner of the world and India stands among top countries where there are multiple cases related to human right violation. This is the reason India stands at 129th position out of 189 countries.²¹ Human rights laws made are more subjective rather than being applicable in the reality . Everyday one person or the other faces violation of these rights and these cases go unreported. One of the case that has plagued democracy is:

Rohith Vemula case: A student who died for the rights of dalits.

The deceased was a PhD student in Hyderabad University who was from dalit community. He along with four other people were suspended on a day. This suicide was an outcome of inhumane treatment to the members of the dalit community. A report of NHRC shows that the dalits were even prevented from being entered into police station in 28% villages.²² They were even allowed to sit separately and were given another seat for consuming food. This discrimination continued from colonial rule and exists even today. Even after 73 years of independence there are a number of cases related to inequality.

The recent case of encounter of Vikas Dubey has been a controversy. He was not the first person to die in police custody and is definitely not going to be the last of its kind. Police brutality in all the parts of its investigation is an accepted part of Indian consciousness. Many people have also contended that it was a perfect step by the police. This case needs to be analysed from a different sight that the cases of police brutality is increasing day by day and custodial killing is becoming acceptable. The killing of an accused in the name of encounter is a serious violation of human rights.

²¹ Jagriti Chandra, *India up one rank in UN development index*, The Hindu, December 10, 2019 at 01

²² Omar Farooq ,Rohith Vemula: *The student who died for Dalit rights*, BBC, January 19, 2016 at 01

CONCLUSION

This article has tried to explain the importance and relevance of human rights, it can be concluded that the history of human rights can be traced back from vedic age , passed with medieval , modern periods and reduced its importance in the form of fundamental rights and duties in our constitution. Human rights applies to all individual irrespective of race , nationality ,language, ethnicity or status. The rights given to the humans are protected by duties. These duties are given to the state that is state whose duty to protect the right of an individual. The humans are not only endowed with basic human rights but also economic, social, political, cultural and civil rights. The various articles in the constitution of India and the Universal Declaration of Human Rights gives us a clear picture of human rights laws and the punishment given to the violators or the defenders. From the colonial period the violation of human rights came into being is still prevalent till now what needs to be done is that more stringent laws are required for human rights and the government has to be strict in all the sense to the violators of the laws. China must give up its dream of empire bulding all of earth is now aware that the one road one be initiative is a sham. To gurantee rights in paper but the security and enforceabilty is hardly seen. Chinese society has been affected by economic changes the state is forced to rethink its role in national affair and its relation with citizens. Corruption rates in China is a mirror to the human rights violation and images created much be tarnished in order to protect the interest of it citizen.

SHORT COMMENTS ON THE PRESENT STATUS OF INDIA'S PUBLIC HEALTH POLICY & INTERSTATE MIGRATION ISSUE

Priyanka*

I am writing this short comment on the present status of India's public health policy & interstate migration issues because I believe that these topics are relevant to discuss for the present scenario. As we know, the COVID-19 crisis has thrown up challenges on the public health front and on the personal front for each one of us, we are not only doing our bit in handling this problem but we are also coping with the disorder in our lives.

The Strength and weakness of India's Public health policy

COVID19 presented a perfect chance to analyse our healthcare system and policy. It gave us an opportunity to rethink on the health issues. This pandemic is putting huge pressure on the already fragile healthcare system of our country.

The COVID-19 crisis has thrown up challenges on the public health front and on the personal front for each one of us. No doubt this pandemic has created a big storm in the nation, especially poor planning, lack of protective equipment and low public awareness are exacerbating the challenge.

As we know, our country is the largest democratic structure in the world and we are holding the second largest population in the world. So, the challenges towards the health system are the main issue for us. According to the WHO ranking of the health system, which was introduced in the year 2000, India ranked 112 out of 191 countries in this context¹.

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¹ Healthcare: India and Us can learn from each other, *Outlook*, 7 March, Available at: <https://www.outlookindia.com/newsscroll/healthcare-india-and-us-can-learn-from-each-other-comment/1754707> (Accessed on: 22.08.2020)

On examination it can be found that India spends only 1.2% of its national GDP on healthcare, which was 0.96% in the early 90s. Also, here we have to understand the Government's initiatives or policies very minutely. The union government, no doubt, brought many schemes for the betterment and development of the country. In this direction, the government introduced one of the biggest health schemes in the world, named 'Ayushman Bharat Scheme' to provide a comprehensive form of insurance coverage. We must say it was a great step forward in the field of public health systems, where the numbers of beneficiaries are approximately 300 million.

After going through the budget of current fiscal year, the government has allotted Central budget funds for the establishments of more hospitals in Tier II & Tier III cities. The budget also proposes to address the shortage of medical professionals throughout the country. Therefore, it can be said that Ayushman Bharat Scheme and the allocation of the recent funds are a good step in the health system because when a nation cares for the health of their people, the nation will always emerge as a prosperous treasure globally. But when we discuss the situations emerging of the current COVID 19, which is a global crisis, we find that the healthcare system of our country is not so developed to fight pandemic of this scale. It can be said that we are suffering from a poor health system. In this context, we have to understand the poor planning of our Indian health system. According to the World Health Organization, India has a dismal record of investing in public health and ranks 184 out of 191 countries in terms of share of GDP spent on healthcare. On 23rd March, 2020, our Prime Minister Mr. Narendra Modi announced an investment of 15 billion Indian rupees in the country's health system, to tackle a surge in cases of the coronavirus. Also, the World Bank has approved USD 2 billion aids to support India's efforts for providing social assistance to poor, vulnerable households amid the coronavirus outbreak. The question remains the same as to how enough these aid are to tackle the ongoing health issues.

Above all these, financial support or assistance we are not yet in a good position on health recovery from this pandemic. The Indian government has made strides since 23rd March in indigenous manufacturing of testing kits and ventilators. But it has failed to provide basic safety kits to doctors on the frontline.

As we know, our honourable PM announced that India rightfully decided to make protecting life as the first priority and the containment strategy focused on this. Remember his motto or slogan “*Jaan Bhi Jahaan Bhi*” (lives as well as livelihoods). This slogan denoted the clear picture of our strong commitment towards the healthcare system in this pandemic. Also, the national lockdown gave the health system time to organize itself, prepare for the possible community spread of the infection and ensure that adequate medical supplies and strategies are put in place. But on examining the steps taken by the government we found that a systematic nationwide lockdown was a good one to combat the virus. However, we didn't get much success in this regard. The cases of the novel Corona are increasing day by day in our country. There are 2,703,517 present cases and 51,955 death cases in India.²

Also in this context we have to understand that in our country at least 22% of the population lives below the poverty lines. And also, around 70% of the Indian do not have any health insurance. Along with these flaws of our health system, in our country, the private sector dominates quality healthcare delivery which is not accessible for every section of the society. Apart from this, India's health expenditure per capita is one of the lowest in the world, comparable to African nations etc.

Apart for all the above information, I want to discuss the present status of my own state, Bihar in this regard. As we know, the COVID-19 pandemic is putting huge pressure on the already fragile health care system in the Indian States. Here, I am discussing the state where I

² Available at: <https://www.worldometers.info/coronavirus/country/india/> (Accessed on: 22.09.2020)

resides i.e. Bihar, which is also known as “*Bimaru-Rajya*” since many decades (Because of so many inadequate planning or development).

No doubt this pandemic created a big storm in the state, especially poor planning, a lack of protective and low public awareness are exacerbating the challenge. Bihar's healthcare system faces risk of collapse. Simultaneously, if we analyse the situation of Bihar's healthcare system after five months of this pandemic's inception, we find no sign of development. Bihar still faces an acute shortage of resources like PPE kits and protective masks. Also, testing for the Coronavirus in Bihar is low, creating pressure on doctors. The situation of Bihar is very different from official claims or records. It seems that the state government did not utilize the money from the Central government to tackle the health crisis.

According to the recent census, Bihar has a population of 99 million people. If we figure out the healthcare system in this state, we find that the condition is very miserable. Bihar has less than 2,000 primary health centres and 150 community health centres to such a large population. No doubt, this state has consistently underinvested in its healthcare system in the past, leading to the expansion of a network of private hospitals, which can only be accessed by the privileged class.

The infection rate is increasing day by day, now it has reached at 8.52%. In this context, we have to know that a three-member central team also visited Bihar to assess the COVID-19 situation. Bihar, of late, has been witnessing an alarming rise in the number of patients.

In Bihar, the situation is pitiful, anarchic and explosive. The health system has collapsed here. However, the State government has of late been claiming to have achieved the figure of 10,000 sample tests a day and that the Chief Minister Mr. Nitish Kumar has set the target for 20,000 tests a day. But in reality, the above claim of the State government is a complete sham.

It is still a challenge for the State government or local administration to identify positive patients, containing and quarantine and also, tracking and tracing contacts. The State is not spending adequate amounts on the healthcare, especially on the lack of specialized COVID Hospitals for the treatment of patients. There is lack of well-trained doctors, nurses or attenders in the hospitals at District Government Hospitals. The doctors deny taking admission of patients in the case of COVID, though the vacant beds are available in the hospitals. They even don't know how to use or operate the ventilators for COVID's patients. There are so many incidents of negligence of PMCH and NMCH (Bihar's renowned Government Health System Bodies). Also, the hospital authorities are not following the basic COVID's protocols of cremation of patients.

Above all the mentioned chaos, recently the State government took a big decision on its health department. Amid mounting pressure from ministers and state's doctors association, the Bihar government removed Health Secretary Uday Singh Kumawat from the post and appointed a 1991- batch IAS Pratyay Amrit³ as a new Principal Secretary, Department of Health and Family Welfare, Government of Bihar. We can just wish for a better healthcare in Bihar.

In addition to these, the recent flood in Bihar has posed severe challenges amidst this global pandemic. As an official record of the Patna Meteorological Centre, a total of 2.4 million people have been hit by floods across 11 of 38 districts in Bihar.⁴ It is difficult for rural drowned areas to manage the safety protocols of COVID, such as maintaining social distance, wearing masks etc. So, I believe the Bihar government should follow some humanistic

³ Available at: <https://www.newindianexpress.com/nation/2020/jul/28/bihar-government-transfers-health-secretary-uday-kumawat-ias-officer-pratyay-amrit-to-replace-him-2175880.html> (Accessed on: 22.09.2020)

⁴ Available at: <https://www.hindustantimes.com/india-news/a-million-more-affected-by-floods-in-bihar-heavy-rain-forecast-in-northern-districts/story-D2dh4qHkaMLZoLhDezbP3I.html> (Accessed on 22.09.2020)

approach along with the Central government policy while resolving these two menaces. Therefore, the State government has to build a strong harmonious relationship between National Disaster Response Force and Bihar Health Department for the welfare and health safety of Bihar's people. It is high time for the government to carry the health policy in right direction to make our health system compatible to the world.

Interstate migration & multi-dimensional challenges: the way forward

As we know, Migration from one area to another in search of improved livelihoods is a key feature of human history. If we consider the migration issues in our country, it is also not a new one. No doubt, it also holds also multidimensional challenges to the nation.

There are two types of Migration in our country,

- 1) A long term migration, resulting in the relocation of an individual or household. In this type of migration workers migrated from their native place from another with their entire family and
- 2) Short term or seasonal migration, involving back and forth movement between a source and destination.

According to the census of 2011, India has 454 million internal migrants who are 37% of the total population of our country. And some of the reliable studies on migration show that migration is higher among the rural poor and especially among SCs and STs. As per the census 2011, about 16% of the total inter-state migrants in India belong to the SCs and 8% to STs. This is almost equal to their share in total population.⁵

Recent interstate migration issues emerged as a big failure of government's policy after the

⁵ Available at: <https://frontline.thehindu.com/cover-story/article31516414.ece> (Accessed on: 22.09.2020)

nationwide lockdown, which began on 24th March 2020. There were so many visuals in our mind, where the media represented the situation of desperate migrant workers. They were in hurry to reach their home on foot, by bicycles and hiding in vehicles. The recent interstate migration issue is the second biggest crisis after the partition of our country. Images of hundreds of the migrant workers, stranded at various transit points such as bus stops and railway stations etc. They were trying to make it back to their home on foot, and reflected the black side of the lockdown's effect over the nation's conscience.

We can find a clear diversion line between the state of origin (destination state) and the host state (source state). When this lockdown started the owner of the factories denied to pay these migrant workers and didn't help them humanely and financially. While analysing the migrant workers issue I found that there are certain groups of workers who suffered or were affected more in this crisis. These workers faced challenges based on the nature of employment undertaken by them, like domestic work, construction work, garment and textile industry and service sector etc.

The current crisis has demonstrated clearly the lack of proper implementation and thus the ineffectiveness of the existing legislation of our country. Actually the Central government has followed the Inter - State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 since a long period. This legislation or Act provides for guidelines for payment of minimum wages, journey allowance, displacement allowance, residential or accommodation allowance, medical facilities and protective clothing etc. But, I believe that this Act is not a solution to handle this crisis of migrants at present because India needs a strong and feasible legislation in this regard. I found that the present crisis gave us the worst experiences of flawed policy. In this context I would add some points. In our country there are no proper data/record or registration details of migrant labours. That's why, due to this

lack of accurate data, the government could not accurately estimate and provide migrant workers with necessary social security in terms of food, shelter and transportation when the first lockdown was imposed in India. So, I believe that in order to avoid recurrence of such a tragedy it is the necessity of time that all Indian states should maintain a dynamic database on migrant workers. In order to do this, the State governments need to create a proper detailed Migrant Workers Registers. This register will play a significant role in cooperation and collaboration between states. Also, this initiative will give a proper solution to handle this type of crisis in the unorganised or informal sector. Migrant Workers Registers will be useful to the state and to the migrants in many ways. It will enable the states to access the social security requirements of migrant workers more accurately and will lead to more targeted and accurate delivery of welfare schemes. This type of initiative will be a beneficiary tool in several ways. It will help the state government to take concrete steps to provide migrant workers with supply of essential services, such as electricity, water and subsidised housing to enable them to live dignified lives in their host states. Also, if the host state will give certain beneficial comforts, these migrants will also show loyalty and ensure their greater accountability in terms of gratitude.

In short, I believe that the nation lockdown and the tragedy of interstate migration gave a lesson and an opportunity to rebuild our policy in a particular manner. In this regard, the central government and state government should play a symbiotic role by ensuring understating and coordination while making any policy related to the migrant workers.

GANGA: THE BLISS TURNED INTO TRAGEDY

Amita Namdeo * & Ananya Saxena **

Abstract

This article ‘Ganga: The bliss turned into Tragedy’ deals with the historical and geographical importance of River Ganga for India. Ganga has been accorded living status and is worshipped as a goddess, but still is a home to the major pollutants in the country. The central idea pervading this article is to identify the problems and their probable solutions for cleaning Ganga. The article revolves around sources of pollution, how religious activities are intersecting with the right to clean environment, the role of judiciary, legislature and executive and how successful has been the journey so far has been highlighted. The article further aims to explain the environmental jurisprudence and how it is the jurisprudence involved in maintaining a state of equilibrium in the ecosystem. It also deals with the awareness and active participation among the citizens and Ganga Panchayats as a future recourse to enhance mass participation in cleaning Ganga. The article is mainly focussed on justice for Ganga because individually making collective efforts do matter.

Keywords: *Ganga, Environment, Clean River, Judiciary, Jurisprudence*

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INTRODUCTION

The journey of river Ganga began thousands of years ago. According, to the Hindu mythology river Ganga came to the Earth after a long struggle of King Bhagirath. King Bhagirath belonged to the Surya clan and his ancestors could not attain salvation because of their bad behavior and deeds. So, this “Goddess of Forgiveness” arrived to the planet of sins. It is said that to control the power and intensity of goddess Ganga, lord Shiva has to fold her in his head. This was a method adopted to use River Ganga only for the benefit of mankind. The River was sent to Earth for Mankind. But certainly, we have left no stone unturned to cripple her body, mind and soul.

GEOGRAPHICAL LOCATION OF GANGA

The river Ganga is the longest river in the land of Indus stretching across 2,500 km. The Ganga has the one of the largest river basins in the world. It passes through the states of Uttarakhand, Uttar Pradesh, Haryana, Himachal Pradesh, Delhi, Bihar, Jharkhand, Rajasthan, Madhya Pradesh, Chattisgarh and ends up in West Bengal.¹

Ganga originates at Gaumukh in the Gangotri glacier with the geographical location at 30°55' N, 79°7' E, some 4100 m above the mean sea-level.² At its origin, it is called “Bhagirathi”. At Rudraprayag, river Alaknanda joins river Bhagirathi to form the river Ganga. Ganga flows for 2550 kilometres being the longest flowing river in India. When the river enters West Bengal, it gets divided in two parts, one flows into Bangladesh, and the other flows in West

¹ *Status Paper on River Ganga*, National River Conservation Directorate, Ministry of Environment and Forests, Government of India 1, 6 (2009)

² Rakesh K. Jaiswal, *Ganga Action Plan – A Critical analysis* 1, 2 (2007)

Bengal where it is called Hooghly before draining in the Bay of Bengal.³

MYTHOLOGICAL SIGNIFICANCE OF GANGA

Ganga holds utmost importance in the Hindu religion. The largest social gatherings in the world known as “Kumbh Melas”⁴ are held alongside a river. Two of the four Kumbh Melas are celebrated at the Ganga river, in the towns of Haridwar (Uttarakhand) and Prayagraj (Uttar Pradesh). This is marked as a very important festival for all the Indians. The importance of this festival is highlighted in the fact that people of all religions and from all parts of India, become a part of it, unknowingly. Every Hindu desires to take a holy dip in the Ganga once before his/her death so that the Goddess of Forgiveness washes away their prints on sand of Life by its holy water. With this belief people, pay homage to river Ganga to ensure their presence in heaven. The holy towns, situated near Ganga include Varanasi, Prayagraj, Haridwar, Rishikesh, etc. The pilgrimage of pilgrims and their self-motivated goals disturb the ecological balance and serenity of these towns. These disturbances caused by invaders of ‘Punya’ violate the right to life of these cities and Ganga, itself.

The problems of Ganga originate from the thought that it is a self-cleansing river. This thought has motivated people to pollute Ganga in their own way. According to the ancient Hindu text Ganga Purana, Ganga is given a living status. The purity of water of River Ganga gets highlighted in the point that it contains many good viruses which can kill micro-organisms. This is the secret behind the purity of its water. The water of this river contains 25 times more dissolved oxygen as compared to normal water. This attributes this water the quality of being the breeding ground for large number of fishes, crocodiles, alligator,

³ Dipak Paul, *Research on heavy metal pollution of river Ganga: A review*, 15 Annals of Agrarian Science 278, 278 (2017)

⁴ Kumbh Mela is a major pilgrimage and festival celebrated in India on the banks of rivers in four towns namely, Haridwar, PrayagRaj, Nashik and Ujjain in the span of 12 years.

dolphins etc. The statistics prove that more than 500 million are dependent on river Ganga. It sponsors the irrigation of crops for more than one-third population of the second most populated nation.

PROBLEMS CAUSED DUE TO RELIGIOUS PRACTICES

In India, people in early stages of civilization were very reasonable and they possessed scientific temper. They gathered information about the quality of the water of the river Ganga and were amazed at its characteristics. The river Ganga traverses the long journey before reaching the plains, which makes it rich in sediments. Moreover, the factor that it flows from Himalayas, the area known for its medicinal herbs makes it rich in the medicinal qualities. This was the reason why people in the earlier days used to go to bathe in the river Ganga. It is said that, Ganga decomposes organic waste 15 times faster than any other river in the world. This was the reason why the entire practice of dumping flowers and garlands offered to the Almighty was evolved. But, at present time we are not only dumping organic waste but also pesticides along with the flowers in the river. The presence of pesticides on flower petals and leaf stalks is a very evident fact in the present world. According to a survey, in the time span of less than 30 years the flow of Ganga will be reduced to half and the population dependent on Ganga will become thrice.⁵ The above statement clearly remarks the future of India and its generation.

According to the recent survey by the newspaper The Hindu⁶, it was found that population of India will reach the peak around 2050, but it will drop in the later-half of the century. This research approved that the dependency rate of human beings on river Ganga will increase at a

⁵ Rishikesh Vlog, *Science Behind Ganga's holy water*, Available at: <https://www.youtube.com/watch?v=suiXDaFD1Hc>, (Accessed on: 15.07.2020, 11:30 a.m.)

⁶ *India's population may peak by 2047*, The Hindu, 16.07.2020

rapid rate. This research has also opened a door towards a dreadful future ahead. The growth in population in coming years would mean more pollution and excessive use of water of drying river Ganga. The number of ways in which Ganga can be exploited will definitely be on the surge. But, in this phase when 2050 is away we have to start marching towards a better environment. To start a *March For Heavenly Ganga*, we need to identify the key sources and the ways of pollution and how can we restrict the same, to save the river.

MAIN POLLUTERS OF GANGA

The problems in Ganga have mainly arisen because of the socio-economic development.⁷ The Ganga of today is far different from the Ganga of Satyuga.⁸ The rapidly changing conditions and characteristics of the river in this Yuga of Machines (Kaliyuga) can only be attributed to the actions of greedy human beings. The whole conspiracy of polluting the river began with the thought that dumping waste in the river will clean the land. But this ironical theory failed because we forgot that rivers too run on land. There are innumerable reasons for polluting the longest river of India. The degradation caused in the rivers is mainly due to rapid increase in population, rising standards of living, industrialization⁹ and urbanization.¹⁰ All these factors combined together have wretched havoc in the statues of Ganga. The thinking of majority of Indians that Ganga is a self -cleansing river has led it to the end-result of the world's second most populated state's dustbin.

⁷ Ganga River Basin Planning Assessment Report no. 1220123-002-ZWS-0003, ix (2018)

⁸ Satyuga is one of the four yugas, according to Hindu mythology and in this yuga people were virtuous and had full faith in God.

⁹ Industrialization refers to the act or process of industrializing: the widespread development of industries in a region, country, culture, etc. Available at: <https://www.merriam-webster.com/dictionary/industrialization>. (Accessed on: 12.09.2020)

¹⁰ Supra note 1

India has 12 major river basins, 46 medium river basins and 14 minor rivers and desert basins. Ganga river basin is the largest of these extending over the states of Uttarakhand, Uttar Pradesh, Haryana, Himachal Pradesh, Delhi, Bihar, Jharkhand, Rajasthan, Madhya Pradesh, Chhattisgarh and West Bengal.¹¹ The biggest reason behind such pollution is the unchecked flow of industrial waste into the river. The industrial pollution constitutes around 20% of the total pollution by volume, but its contribution is greater to Ganga due to higher constituents of pollutants.¹²

The numerous streams, carrying polluted water and directly pouring it in Ganga on the outskirts of the city are a common sight. The city municipal waste is another source of pollution for the river. Since, Ganga flows through multiple states and many towns, the municipal wastes of all the places contribute to the pollution of river Ganga. The untreated municipal waste is a major problem; wastes generated from the towns situated on the banks of Ganga are largely responsible for polluting Ganga. This happens because of lack of sewage treatment plants.¹³ Patna and Varanasi contribute 80% of the sewage wastes that pollute the Ganga.¹⁴ In Varanasi the water quality is very poor and it is no longer suitable for holy dips. The city lies between the two tributaries of Ganga namely Varuna and Assi which are vast sources of sewage.¹⁵ This is not the story of one city but he unending painful tale of Ganga. All the settlements situated near the river have become passage grounds for sewage. The runnels and small rivers draining into the river are the reality of even smart towns and cities.

¹¹ Supra note 1 at 1

¹² Ibid at 12

¹³ Ibid at 9

¹⁴ Basant Rai, *Pollution and Conservation of Ganga River in Modern India*, 3 International Journal of Scientific and Research Publications 1,1 (2013)

¹⁵ Karteek Kommana, *Pollution in River Ganga Problems and Prospects in Varanasi*, India_Trita 12:25, 21 pp, 3 (2011)

The establishment of industrial cities on the banks of the Ganga like Kanpur, Prayagraj, Varanasi and Patna, which host countless tanneries, chemical plants, textile mills, distilleries, slaughterhouses, and hospitals, prosper and grow along the Ganga and contribute to the pollution of the Ganga. The total number of grossly polluting units along Ganga and its tributaries is 478 near Varanasi, 378 units out of them have ETP¹⁶ operating satisfactorily, while 64 units ETPs do not operate satisfactorily and 79 such units have been closed down.¹⁷ One coal-based power plant on the banks of the Pandu River, a Ganga tributary near the city of Kanpur, burns 600,000 tons of coal each year and produces 210,000 tons of fly ash. The ash is dumped into ponds from which slurry is filtered, mixed with domestic wastewater, and then released into the Pandu River. Fly ash contains toxic heavy metals such as lead and copper. The amount of parts per million of copper released in the Pandu before it even reaches the Ganga is thousand times higher than what is there in the uncontaminated water.¹⁸ Thus, industrial pollution is soaring great heights in each and every city located on the banks of Ganga and such pollution if left unchecked will further escalate the issue of pollution.

The stretch from Kannauj to Kanpur and Allahabad to Varanasi remains critical and it needs focussed attention whereas water in upper stretches of Rishikesh and Haridwar is found safe for bathing standards.¹⁹ This data clearly manifest that pollution is different at different places. The level of pollution increases when Ganga enters into the northern plains. The most significant factor responsible for increase in pollution is insignificant flow in the river due to

¹⁶ ETP (Effluent Treatment Plant) process designed for treating the industrial waste water for its reuse or safe disposal to the environment, Available at: http://web.iitd.ac.in/~arunku/files/CVL100_Y16/Lecture%201%20ETP%20Textile_verII.pdf, (Accessed on: 12.09.2020, 5:30 pm)

¹⁷ Supra note 12

¹⁸ Major General (Retd.) Ajay Kumar Chaturvedi, AVSM, VSM, *River Water Pollution - A New Threat to India: A Case Study of River Ganga*, Vivekananda International Foundation 1, 7 (2019)

¹⁹ Supra note 11 at 25

various activities like irrigation, drinking water and power generation.²⁰ Thus, we need different plans and strategies for cleaning the river at different places. The flow of water must also be maintained constant.

Moreover, the temples situated in almost lane too are the cause of displeasure to the river. Ganga is the most accessible dustbin for approximately 2 million temples and 202 million Hindu households. In early India, the practice was initiated to immerse the offerings, flowers, clay statues of God etc, in the river. But, at present we are dumping flowers full of pesticides, deity clothes made up of synthetic material, statues made up of plaster of Paris, and all other stuffs used in temples. In the present world, when nothing is deprived of the use of plastic, river bed has no ability to escape. All the ground level problems in relation to dumping of waste in Ganga, that humans invented are related to the religious beliefs but are not supported by any religious texts. People go to take holy dips and bath in the Ganga, but they carry soaps and shampoos along with them. No religious text gives account for using chemicals in shape of soaps. If the people have full faith and believe that the Ganga can wash their sins, then why there is increase in the use of soaps along the ghats? Sins do not require any chemicals to get neutralised. The presence of Dhobighats along the banks of river Ganga has augmented the problem. People wash their clothes along the banks of the river using soaps and detergents. The froth thus generated, causes harm to the aquatic life of the Ganga and is detrimental to the water quality of the river. This factor has also resulted in the hardening of the water of river Ganga.

The site of river Ganga after Ganesh Chaturthi and Durga Puja speaks of our dubious holy theory of worship. The immersed idols of lord Ganesh or Goddess Durga speak about the choking effect, which the river is subjected to. The dumping of plastic waste in the river is a

²⁰ Supra note 11 at 26

way of cursing the river. During the festive season when the idols are immersed in the river, that too contributes to the pollution on a very higher scale. The immersion of idols takes with it plastics, chemicals, paints, garlands which make the water highly contaminated.²¹

The floating corpses and carcasses present an awful sight of the state of our mother Ganga. The deforestation and settlements in the catchment area of the river is another great threat to its existence. Large scale deforestation in the catchment areas further reduces soil's capacity to arrest flow of water and accentuates silt getting carried with the water.²² The environment activists, all across the world oppose this idea of residing near river banks. The people in different parts of India are settled near river banks to avail fresh water. The construction of ghats along the river is another type of encroachment along the river bank. All these construction activities violate the natural flow of river. The presence of trees along the river ensures that flow of river can be unidirectional and also prevent soil erosion. The deforestation has aided the flow of rivers and leads to flood in many parts of the country. The removal of trees in the catchment area of river Kosi makes it the sorrow of Bihar, leading to floods each year.

A major problem that still exists despite the cleanliness drive, "Sawacch Bharat Abhiyaan" lead by the Honorable Prime Minister Mr. Narendra Modi, is open defecation along the Ganga. The people are found defecating alongside Ganga. Ganga is seen as a solution to every problem, so we humans are deteriorating it to such extent, that we are using the pure goddess for reforming our waste. The problem of building toilets and spending money is getting resolved by much economical way of defecating along the banks of river Ganga. People in the villages, even those who have toilet use it hardly and prefer the open

²¹ Supra note 18

²² Supra note 18

environment. We all are aware of the diseases that can be generated because of defecation in open. The waterborne diseases are a result of open defecation. Moreover, Ganga is also the bathing tub for animals. The World Bank estimates that eighty percent of all diseases and illness in India and one-third of casualties are because of the waterborne diseases.²³

POLLUTION CAUSED BY AGRICULTURAL PRACTICES

The water of Ganga is also polluted by the surface- runoff from the agricultural farms situated near the river Ganga. The crops in India are grown with the help of fertilizers and pesticides. All these pesticides and fertilizers containing chemicals get washed away from the fields and either directly or through the streams and channels flow into the river. Accordingly, 10-15% of fertilizers get run off from the surface.²⁴ Moreover, the crop growing pattern of Indian agriculture system requires a large amount of water for irrigation. All this irrigation water is mainly derived from rivers through small channels and canals. Indira Gandhi Canal is one such example which is built on the confluence of Satluj and Beas River and provides water in the desert region. All these activities further disturb the flow of river. Dams and barrages for storing and diverting water for irrigation, domestic consumption and industry, affect the flow, particularly during dry months. This has serious implications for water quality and aquatic life in the river.²⁵ The 140 fish species, 90 amphibian species, reptiles such as Gharials and mammals like South Asian River Dolphin are now included in the International Union for Conservation of Nature's (IUCN) critically endangered list and a threat to their survival is of grave consequences.²⁶

²³ Ibid

²⁴ Pranav Awasthi, *Conservation of River Ganga – Is Public Participation the Key?* 5 Environmental Law & Practice Review 107, 109 (2016)

²⁵ Supra note 11

²⁶ Ibid

There are endless problems. It has been centuries since we are deteriorating our environment. A large number of small streams join the river during her journey in the mountains, however over a period of time, due to increasing pressure of the population, people have settled next to these small streams and thus the flow of these streams into the main course of the river gets blocked.²⁷ Such activities block the supply of fresh water into the river rendering its quality to get, further deteriorated.²⁸ This is a major problem which disturbs the flow of river, hampers aquatic life and leads to clogging of chemicals and waste in river bed. All this even disturbs the pattern of irrigation in the country. At present, when our agriculture is mostly dependent on crops which need good amount of water, accumulation of chemicals and reduction in water needed for irrigation will disturb the crop pattern of a large population.

As per the research performed by SWARA (State Water Resources Agency—Uttar Pradesh), the agriculture-water share of about 96% in the year 2001 will get reduced to about 79% by the year 2050, primarily because of increasing domestic and industrial demand.²⁹ The decreasing level of water in river Ganga, increasing population and increase in business sense, all these factors combined together will deteriorate the conditions in near future.

The climatic conditions too are affecting the rivers in a unique manner. Global warming is one such factor, which has toppled the entire environment. Global warming is resulting into faster melting of glacier (22 meters/year) and that will result into increase in floods during the monsoon and increasingly, reduced flow of water in the main stream of the river in coming

²⁷ Classifying Rivers – Three Stages of River Development, Available at: https://sswm.info/sites/default/files/reference_attachments/IMMOR%202006%20Classification%20Rivers.pdf, (Accessed on: 26.06.2020, 5:40 pm)

²⁸ Supra note 22

²⁹ Nitin Kaushal, Suresh Babu, Arjit Mishra, Nilanjan Ghosh, Vinod Tare, Ravindra Kumar, Phanish Kumar Sinha and Ram Ujagir Verma, *Towards a Healthy Ganga - Improving River Flows Through Understanding Trade Offs*, 7 Frontiers in Environmental Science 1, 3 (2019)

years.³⁰ This clearly highlights the irregularity of flow of water in the river which may result in extreme conditions, both drought and flood in coming days. The dams and barrages used for storing and diverting water for irrigation, domestic consumption and industry, affect the flow, especially during dry months³¹. The varying rain pattern and increasing pollution, together contribute towards irregular flow of water. The annual average rainfall in the basin differs from 39 to 200 centimeters, with average being 110 centimeters. Between June to October eighty percent of rainfall takes place. There is fluctuation in the flow characteristics of the river, reason being large temporal variations in precipitation taking place round the year.³² The irregular flow in the river also leads to soil erosion at different places.

HOW POPULATION IS AFFECTING GANGA?

The deforestation leads to decline in the land use pattern, making it prone to soil erosion. The sediment yield and its deposit on the river bed were not monitored.³³ Mountain soils, Sub-Montane soils and Alluvial Soils, covering 58% of the basin area, are very highly erodible, about 12% red soil also gets eroded easily.³⁴ All this ultimately leads to the loss of soil fertility and creates problems in farming techniques. The problem of changing weather conditions if left unheard will make Ganga, the sorrow of India.

The river Ganga is the source of drinking water to a large population. The Food and Agriculture Organisation (FAO) suggested that the water usage has been growing at more than twice the rate of the pollution increase.³⁵ This increase in water usage per person has

³⁰ Supra note at 22

³¹ Supra note at 25

³² Supra note at 16

³³ Supra note at 20

³⁴ Supra note 2 at 15

³⁵ Supra note 18 at 4 (2019)

resulted in a lot of pressure on water resources of the country. In 1951, water availability in India was 5177 cubic metres per capita per year, which had got reduced to 1342 cubic metres per person per year by 2000.³⁶ This data manifests that increasing need is not substantiated by increasing water resources. This is leading to the great water crisis in the near future.

In India, the economic growth is not taking place at the same phase as compared to pollution growth. This has pushed a large number of people below the poverty line. There are millions who depend directly on Ganga's water for drinking and sanitation. During the meeting of UNGASS held in New York in June 1997, the then Vice President of World Bank said that "By 2050 two out of every three persons in the world might not have access to fresh water and sanitation".³⁷ The increasing poverty will lead to the increase in pollution as population will increase, more industries will come up, to sustain the increased population, waste will grow, sewage will grow, and consumption of fresh water will increase. Hence, depression in economy will lead to inflation in pollution.

The Comptroller and Auditor General Report (CAG) disclosed that pollutants in the river across Uttar Pradesh, Bihar and Bengal were six to 334 times higher than the prescribed levels during the period 2016-17.³⁸ This report is clearly indicative of the failure of previous plans undertaken to clean river Ganga by the Government from time to time. The first such plan was launched in 1985.

INITIATIVES TAKEN BY THE GOVERNMENT TO CLEAN GANGA

The Prime Minister Rajeev Gandhi was the first person to draw his attention towards the rapidly deteriorating state of Ganga. In June 1986, he came up with Ganga Action Plan which

³⁶ Ibid at 4-5

³⁷ Supra note 15

³⁸ Supra note 18 at 11

covered 25 Class I towns (6 in Uttar Pradesh, 4 in Bihar and 15 in West Bengal) and Rs 862.59 crores were spent.³⁹ Its main objective was to improve the water quality by the interception, diversion and treatment of domestic sewage and to prevent toxic and industrial chemical wastes from identified polluting units from entering the river. The GAP also held an objective to control pollution from non-point sources. The ultimate objective of the GAP was to manage river basin, taking in account the various dynamic interactions between a-biotic and biotic eco-system⁴⁰.

Ganga Action Plan Phase II was launched in the year 1993, seeing and acknowledging the taste of failure by the Ganga Action Plan Phase I. Under the second phase the National River Conservation Plan was included in the year 1995 to include some other major rivers under the plan.⁴¹ It included several rivers like Yamuna, Gomti and several other tributaries of river Ganga.⁴² The second phase also involves construction of sewage treatment plants because this is one of the major sources of pollution of the Ganga. It included laying down 34 kilometres of sewers, renovation of the old sewerage system, and introduction of three new pumping stations which can bring improvement in the water quality of Ganga at Varanasi.⁴³

³⁹ *Ganga Action Plan – How Poorly Planned Sewage Treatment Plants Led to Overall Plan Failure*, Available at: <https://swarajyamag.com/politics/ganga-action-plan-how-poorly-planned-sewage-treatment-plants-led-to-overall-plan-failure>, (Accessed on: 27.07.2020, 7:30 pm)

⁴⁰ Critical Analysis of GAP, Available at: <http://www.ecofriends.org/main/eganga/images/Critical%20analysis%20of%20GAP.pdf>, (Accessed on: 27.07.2020, 5:12 pm)

⁴¹ *National Mission for Clean Ganga*, Available at: <https://nmcg.nic.in>, (Accessed on: 27.07.2020, 11:30 pm)

⁴² *Ganga Action Plan II was launched in 1993. Which Rivers are included under this action plan?* Available at: <https://www.iastoppers.com/flashcard/ganga-action-plan-ii-was-launched-in-1993-which-river-are-included-under-this-action-plan/>, (Accessed on: 27.07.2020, 12:57 a.m.)

⁴³ Ganga Action Plan Project Phase II, Varanasi, Uttar Pradesh, Available at: <https://www.watertechnology.net/projects/ganga-actionplanprojectphaseiiivaransaiuttarpradesh/#:~:text=The%20Phase%20II%20of%20the,stations%2C%20namely%20Phulwaria%2C%20Chaukaghata%20and>, (Accessed on: 27.07.2020, 12:30a.m.)

The studies undertaken during Ganga Action Plan indicated that a large proportion of pollution load in the river came from the municipal waste water generated in 25 Class I towns located on the banks of the Ganga, with a population exceeding one lakh. Therefore, the main focus under the plan was on interception and diversion of wastewater and its treatment in Sewage Treatment Plants, before being discharged into the river.⁴⁴ But, this plan failed due to the low efficiency of Sewage Treatment Plants. The presence of Coliform bacteria throughout Ganga remained high, which further proved to be a drawback of Ganga Action Plan (GAP).⁴⁵

The Ganga Action Plan launched in two phases could hardly improve the status of Ganga. This plan suffered from various limitations. They are listed as follows:

- The plan focused on very limited sources of pollution. This was the main reason behind ineffectiveness of this program.
- It concentrated on improving the water quality by focussing on organic pollution and dissolved oxygen levels.
- Only the wastewater of towns flowing through the drains to the river was targeted. Connections of household toilets to the sewer system, solid waste management, and some other vital aspects of municipal activities, which impinge on the water quality were not addressed.

The issue of ensuring environmental flows in the river was not attended to. This has become increasingly important in view of the competing demands of the Ganga water for drinking, irrigation and power generation. Adopting more efficient water conservation practices could have reduced the need for abstraction of water from Ganga.⁴⁶

⁴⁴ Supra note 1 at 16

⁴⁵ Supra note 19

⁴⁶ Supra note 20

This program only focussed on class I towns, ignoring villages and other settlements near the banks of the river.

The schemes under the Ganga Action Plan were generally centralised, which meant that sewage was transported to the outskirts of the town for treatment before the disposal. This made the sewer systems long, involved pumping and treatment, which involved in-depth capital and exhaustive energy.⁴⁷ This scheme witnessed poor control and management on the part of authorities. There was no central authority to which the officers associated with this plan were answerable. This scheme also set a bad example when it comes to corruption, as it was totally a centre funded scheme. It lacked State participation, which was its major drawback. The large amount of fund (nearly 451.70 crores under GAP-1)⁴⁸ allotted under this plan could not be utilised in the manner it was destined but was lost in the middle path.

The Ganga Action Plan if looked in the background of a steep increase in population as well as organic pollution load, it helped in preventing further deterioration of Ganga.⁴⁹ The time period of fifteen years between 1985 and 2000, witnessed a spent around US \$226 million on the Ganga Action Plan (GAP). This initiative, which was considered to be “the largest single attempt to clean up a polluted river anywhere in the world,” did not fetch the desired results.⁵⁰ Thus, this plan which was launched with high hopes hardly saw fulfilled dreams. This plan also suffered due to lack of technological intelligence. The flow of the program was not

⁴⁷ Supra note 1 at 28

⁴⁸ *National River Conservation Plan*, Available at: <https://www.jagranjosh.com/general-knowledge/national-river-conservation-plan14416210951#:~:text=The%20objective%20of%20National%20River,implementation%20of%20pollution%20abatement%20Schemes>, (Accessed on:24.06.2020, 12:05 pm)

⁴⁹ Supra note 1 at 18

⁵⁰ Supra note 13

certain, which aroused great confusions and let people shirk off from their responsibilities. The obstruction posed by religious authorities was another setback to this problem.⁵¹

According to the demands of various States and Government's plan, Ganga Action Plan was expanded in 1996 to National River Conservation Plan (NRCP). The new plan covered almost 36 rivers in 20 different states. The objective of NRCP is to reduce the pollution in rivers by switching to pollution abatement works.⁵² These works were mainly concerned with setting up Sewage Treatment Plants, opening ways for low cost sanitation works to prevent open defecation on river banks, river front development, plantation in catchment areas, setting up electric crematoria, etc.⁵³

Succeeding the Ganga Action Plan and National River Conservation Plan (NRCP), National Ganga River Basin Authority came, which was established in the year 2009 with its objectives being to reduce pollution, conserve Ganga, maintain environmental flows, improve the water quality of Ganga and focus on sustainable development. National Ganga River Basin Authority comes under the Ministry of Water Resources, River Development and Ganga Rejuvenation. With formation of this body Ganga was declared as the National River of India on 20 February, 2009.⁵⁴ The National Ganga River Basin Authority (NGRBA) was established through a Gazette Notification of the Government of India. It was established with the following objective:

⁵¹ Supra note 18 at 9

⁵² *National River Conservation Directorate Ministry of Environment, Forest & Climate Change Government of India*, Available at: <https://nrcd.nic.in>, (Accessed on 15.08.2020, 3:30pm)

⁵³ *National River Conservation Plan*, Available at: <https://www.manifestias.com/2019/06/24/national-river-conservation-plan/>, (Accessed on 22-06-2020, 4:50 pm)

⁵⁴ Supra note 1 at 7

- Ensuring Effective Abatement of Pollution and conservation of the Ganga by adopting a Ganga basin approach.
- To promote inter-sectoral co-ordination for comprehensive planning and Management
- Maintaining environmental flows in the river Ganga with the aim of ensuring water quality and environment sustainable development.⁵⁵

This too focuses on sewerage infrastructure, catchment area treatment, to protect the flood plains, and most importantly to create awareness amongst people so that they understand the need of the hour to keep the Ganga clean and safe. The powers and functions include mainly abatement of pollution, maintain ecological flow, rainwater harvesting, decentralised sewage treatment plants for proper, efficient and effective functioning. This involves Environmental Protection Act, 1986 to exercise and execute the functions.⁵⁶

The Ganga cannot be cleaned despite several steps. In 2014, Bharatiya Janata Party came to power in the Centre with its Prime Minister candidate getting elected from the city of Moksha, Banaras. Thus, the focus of the government shifted to river Ganga. In July 2014, the Government of India announced an integrated Ganges Development Project titled ‘Namami Gange’. It had a total budget designed at Rs 20,000 Crores. This program was way ahead of earlier programmes and was on the working platform with two objectives to be achieved. The first objective was effective abatement of pollution and second was of Rejuvenation of the National River Ganga.⁵⁷

This project has improved the conditions of river Ganga in certain areas. They are listed as follows:

⁵⁵ Supra note 1 at 10

⁵⁶ Supra note 41

⁵⁷ Supra note 18 at 10

- The navigability has been improved by connecting Varanasi to Kolkata through river Ganga.
- The Sewage Treatment Plants have increased and the number of toilets near the banks of Ganga too has increased. Through these steps the, rise of faecal Coliform bacteria can be controlled.
- The sewage treatment facilities are being developed to tackle additional 1187.33MLD capacity municipal waste.
- The 28 river front development projects are being carried out. The renovation of 182 ghats and 118 crematoria were installed.
- The river surface cleaning was carried out and an attempt was made to clear floating solid waste from the surface of ghats.
- The five bio diversity centres respectively at Dehradun, Narora, Allahabad, Varanasi and Barrackpore have been developed.
- The Forest Research Institute, Dehradun has been developed for forestry interventions for a period of five years (2016-2021) at a cost of Rs. 2300 crores. This project will help a lot in researching about the medicinal qualities of the plants.
- The mass media, social media, print and digital media campaigns to ensure public participation and raise public awareness are being carried out.
- The industrial effluent monitoring of 1072 number of Grossly Polluting Industries (GPIs) were identified in April, 2019. These are inspected on annual basis according to the set environmental standards.

- The Ganga Gram Panchayats is instituted in 1674 Panchayats in Five villages. A number of villages are being adopted by various Indian Institute of Technology (IIT) and Non-Governmental Organisation.⁵⁸

The 35 out of 86 planned Sewage Treatment Plants (STP) can only be built in the five years. The planned Sewer Network of 4031.41 kilometres cannot be completed even in the three years of time, but only 1114.75 kilometres could be laid down.⁵⁹ The pollution level of Ganga has not gone down till date. The level of pollution and water-borne diseases both are increasing at a rapid rate.

Under the project, ‘Namami Gange,’ district level task forces were set up with official and non-official members. This task force is headed by either the divisional commissioner or the district magistrates. The main work of these task forces is to monitor the effective working of these committees and to suggest new methods through which the methodology of cleaning the river Ganga could improve. The Ganga Project Directorate (GPD) envisages involving NGOs in the working of these committees.⁶⁰

On the official government website of the National Mission for Clean Ganga, a deadline has been clearly mentioned that by the year 2020 no untreated municipal sewage or industrial effluent will flow into the river Ganga.⁶¹ But, no plan could adhere to the deadline, and we find our Ganga still polluted. The fact that could not be denied here is that, it is already 2020; pollution must have increased multiple times from what it was before, rather than getting decreased drastically.

⁵⁸ Supra note 41

⁵⁹ Supra note 18 at 11

⁶⁰ Ibid at 12

⁶¹ Supra note 41

GANGA DRIVEN BY POLITICS

Ganga is no more just a river in India, it has shifted to being a subject of politics and arguments Ganga is seen lost, somewhere in politics. Uma Bharti, the then, Minister of Water Resources, River Development and Ganga Rejuvenation had announced that the Ganga will be pollution free by October 2016. The Ganga lost in politics is very evident because Uma Bharti made claims that the “Namami Gange” project was delayed because it was completely a center-funded project. The states were not giving any grants.⁶²

Later, in 2017, when the cabinet reshuffled, Uma Bharti took charge of Ministry of Drinking Water and Sanitation. She announced to fast unto death, if the plans and projects designed to clean Ganga and make it pollution free, do not get started by October 2018. As it is, the ‘Namami Gange’ project had a deadline of three years declared by the Government to clean the Ganga completely, and make it pollution free.⁶³

Judicial Steps to Secure Ganga

The censures have been imposed by the Supreme Court, later upheld by National Green Tribunal, which clearly remarked that even after spending 20,000 crores and 200 years, by the officials who are unaware of the importance of River Ganga.⁶⁴

In a landmark case, *Mohd. Salim v. State of Uttarakhand & others*⁶⁵, the division bench gave the status of “juristic persons”⁶⁶ to Ganga and Yamuna. The court backed up the decision by

⁶² *Ganga will be Pollution-free by October 2016*, says Uma Bharti, Available at: <https://www.thehindu.com/news/national/ganga-will-be-pollutionfree-by-october-2016-says-uma-bharti/article7283793.ece>, (Accessed on: 31.07.2020, 9:00 pm)

⁶³ Ibid

⁶⁴ *It will take more than a Prime Minister to Clean up the Ganga*, Available at: <https://thewire.in/environment/is-a-clean-ganga-too-much-to-ask-for>, (Accessed on 01.08.2020, 12:30 a.m.)

⁶⁵ 2017 SCC OnLine Utt 367

the reasoning that for socio-political-scientific development the shifting and evolution of fictional personalities to juristic personalities is necessary.⁶⁷ This recognition is with regard to the needs, faith and belief of the society. The rights and duties of the juristic person are that of the same as any natural person. Law has granted personality to juristic persons for good sufficient reasons.⁶⁸ Additionally court observed that protecting the rights and duties towards the rivers will help in preserving and conserving them.⁶⁹

Thus, Ganga and Yamuna were declared as the legal persons/living persons. Hindus have immense belief in these rivers and connect to them. The rivers have provided physical and spiritual sustenance, well-being of the people.⁷⁰ They are the support system since the time of inception of human existence.

The judiciary is making repeated efforts to bring Ganga back to its glory. A different tribunal exists altogether to look after the cases related to environmental laws. One of the landmark judgements of NGT include the Alaknanda case, in which 9 crores were taken as the compensation for the loss of lives and livelihood of the residents. The case is landmark because there was occurrence of a natural calamity; it was an act of God (Vis Major) famously known as Kedarnath floods. But the environmental jurisprudence, granted justice to the society by establishing the fact that the landslide and heavy rainfall lead to the occurrence of floods because of the construction of a dam.

JURISPRUDENCE OF THE RIVER GANGA

⁶⁶ Ibid at para 13

⁶⁷ Ibid at para 14

⁶⁸ Ibid at para 16

⁶⁹ Ibid at para 19

⁷⁰ Ibid at para 17

The Legislative significance of the river cannot be undermined owing to the atrocities committed on the river. The environmental jurisprudence clearly highlights importance of environment in the human life. The environment is the indispensable part of life and to save life we require safe environment. Right to life doesn't amount to mere existence it brings into picture qualitative existence. Environmental jurisprudence establishes that human life is dependent on the environment and a balance in the ecosystem needs to be established. The Right to Clean Environment is greater than the mere Right to Life itself is, because without sustainable environment there can be no life.

The various legislations have been made in the past to reserve Environment. The environment provisions were incorporated under Article 48-A⁷¹ and 51-A(g)⁷² by the Constitution of India in its 42nd Amendment in 1976 as a: "Fundamental Duty for the state as well as the citizens of India to protect and improve the natural environment."⁷³ Thus, this amendment clearly highlights the importance of environment. A healthy environment sustains a healthy life.

The United Nations Conference on Human Environment organised in Stockholm in the year 1972 laid down certain important principles for the protection of Environment.⁷⁴ They believed that most of the issues posed to the problem are caused by the under development. The numerous reasons like increase in population, unsustainable growth, poverty alleviation, etc. increase the risk to harm the environment.

⁷¹ Article 48-A, Constitution of India, 1950

⁷² Article 51-A(g), Constitution of India, 1950

⁷³ Indian Constitution and Environmental Protection, Available at:
<https://shodhganga.inflibnet.ac.in/bitstream/10603/230538/16/15%20chapter%206.pdf>, Accessed on: 22.07.2020 at 03:50 pm)

⁷⁴ Declaration of the United Nations Conference on Human Environment, United Nations Stockholm Conference 1972 Report

The principle laid down in this conference states, “*Man has the fundamental right to freedom, equality and adequate conditions of life, qualitative environment that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.*”

In the context of above stated principle, by doing irreparable damage to Ganga, we are not only hampering the right to safe environment of the present generation but Right to Life of our posterity, too. This declaration adopted in the conference demands an integrated and coordinated approach, in order to achieve sustainable development with liveable environment.

Moreover, the problems associated with pollution of Ganga lead to public nuisance to the entire population depending on the river. The negligent actions of certain industries and authorities running Sewage treatment plants are harming such a great population and causing irreparable damage to human health and environment.

The Water (Prevention and Control of Pollution) Act, 1974 was a legislation moved in order to reduce the pollution of various water bodies but its application is still a far-reaching effect. It defines “Pollution” as contamination of water or alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent which simply affects, public health, at large.⁷⁵ This unchecked pollution flow in the river also hampers the life of several species of aquatic life and living organisms, thus this flow from factories and cities in the river is taking deteriorating environment. This Act prescribes for the formation of Pollution Control Boards at State and Central level. The Central Pollution Control Board holds regular meetings to keep a check on pollution level in the river, but it has hardly been able to make much difference through its efforts. The Section 24 of this Act restricts the flow

⁷⁵ The Water (Prevention and Control of Pollution)Act, 1974

of toxic materials into the river.⁷⁶ The construction of settlements near the river bank is the root cause of many problems as discussed above, but the Act fails to provide any sanctions against those individuals. The Act gives immense power to the State Pollution Control Boards to take action against those who are dumping untreated waste in the river but fail to establish their accountability for increasing pollution.

The Environment (Protection) Act, 1986⁷⁷ is well known by the name of “Umbrella Act” since it covers water, air, land, and the inter-relationship which exists among and between water, air, and land and other living creatures, plants, micro-organisms and property.⁷⁸ The ambit of the Act is very wide and this Act, not being specific, in nature involves judicial reasoning to reach conclusions. The presence of loopholes in the Act has been quite evident in the journey of dispensing justice. To overcome the problem, National Green Tribunal Act, 2010 was passed.

The National Green Tribunal Act, 2010 passed by the legislature contributed a little more towards dispensing justice related to the environmental issues. The National Green Tribunal established by the National Green Tribunal Act, 2010 focuses on disposing cases related to the environment protection, and to recognise rights and duties of the citizens through cases relating to the same. The tribunal shall have appellate jurisdiction. The tribunal in Section 20 mentions to follow certain principles while passing the decision or order, they include principles of sustainable development, precautionary principle and the polluter pays principle.⁷⁹

⁷⁶ Section 24, The Water (Prevention and Control of Pollution)Act, 1974

⁷⁷ Environmental Protection Act, 1986

⁷⁸ Section 2(a), Environmental Protection Act, 1986

⁷⁹ Section 20, National Green Tribunal, 2010

The NGT in one of its decision *Tata Power Delhi Distribution Ltd. v. Manoj Misra*⁸⁰ decided the case and ordered the case based on the polluter's principle. The river Yamuna was blocked and encroached, but the tribunal ordered to collect the compensation of the damage caused by the households that caused harm. The sewerage charges were collected from those households. The National Green Tribunal Act, 2010⁸¹ in Section 24 clearly mentions that the deposit amount payable for environment, whatever amount collected as fine will be used for the environment. This Act has comprehensively laid rules towards sustainable development. The Tribunal shall be guided on the principles of natural justice and shall not be bound by the procedure laid down by the Code of Civil Procedure(1908)⁸² is a good step in the process of justice delivery.

The National Green Tribunal is a step towards fast and steady sustainable development, protection of the environment. NGT in its order dated December 6, 2019, directed local bodies and concerned departments to ensure 100 percent treatment of sewage drinking water across the country.⁸³

The Ganga Council meeting held in 2019 and chaired by Prime Minister Narendra Modi discussed about the concept of 'River Cities' and sustainable use of agricultural water. In this meeting the focus shifted from 'Namami Ganga' to 'Arth Ganga,' so that Ganga can pose as a site of sustainable economic development.⁸⁴ The meeting changed the focus of Government on three important issues like, 'Swachchta'⁸⁵, 'Nirmalta'⁸⁶ and 'Aviralta'⁸⁷ of

⁸⁰ (2019) 10 SCC 104

⁸¹ Section 20, National Green Tribunal, 2010

⁸² Section 19, National Green Tribunal, 2010

⁸³ 10 Critical Steps for Ganga Revival, Available at: <https://www.downtoearth.org.in/blog/water/10-critical-steps-for-ganga-revival-68482>, (Accessed on 23.05.2020, 2:30 pm)

⁸⁴ Ibid

⁸⁵ Swachta refers to the status of the river where it is free of all types of pollution.

Ganga.⁸⁸ But, till today the policies and the ideas talked about in the meeting could not be implemented even in their initial phases. This meeting paved a way to new beginning because now Government for the very first time in history thought of involving people in cleaning the river Ganga. This might prove to be a milestone in accomplishing the objective of clean Ganga.

The environmentalist M.C. Mehta filed a writ petition of Mandamus in Supreme Court to stop the tanneries from discharging their waste and trade effluent into the river. The Court referred to ‘an Action Plan for Prevention of Pollution of the Ganga’ prepared by the Department of Environment, Government of India which stated that the main sources of pollution in the Ganga are sewage, industrial run-off of cultivated land, where cultivators use chemical fertilizers and pesticides and industrial solid wastes.⁸⁹

This decision clearly explores the idea that judiciary is restricted in its approach to clean Ganga and to an extent, and can only pass judgements and penalise to clean Ganga, but the main action of implementation lies in the hands of executive. The executive wing of the government can implement decision of the judiciary and legislations of the legislature. However, the slow and sluggish attitude of the executive has always posed a problem for the cleanliness drive of the Ganga. However, with certain changes in the functioning of the judiciary the cleanliness drive can yield a better result.

⁸⁶ Nirmalta refers to the state of a river where it is clean.

⁸⁷ Aviralta refers to the phase when the river will flow throughout, without any impediment.

⁸⁸ Prime Minister Chairs First Meeting of Ganga National Council, Available at: <https://pib.gov.in/PressReleasePage.aspx?PRID=1596482#:~:text=Prime%20Minister%20Shri%20Narendra%20Modi,including%20Ganga%20and%20its%20tributaries>, (Accessed on 12.09.2020, 11:30 pm)

⁸⁹ *M.C. Mehta v. Union of India and others*, (1987) 4 SCC 463

This judgement affixed the duty of the industries to treat their effluent before discharging in to the river. Thus, the profit-making industrialist should be responsible to an extent.

REFORMS TO CLEAN GANGA

Till now, the problems of Ganga have been highlighted, extent of pollution, governmental initiatives and Ganga Action Plans taken at different levels, their effectiveness and various legislations. Despite, so many steps taken at various levels, hardly any effects can be visualised in today's environment. Hence, the need for suggestions and changes increases.

The reformation has to start at a very initial level. The change has to take place from villages. Decentralisation of the schemes is a necessity. The focus of the schemes has to be on villages, small settlements and districts, instead of the whole state. A committee should be set up under the chairmanship of Gram Pradhan, consisting of 5 progressive villagers, which has to scrutinize the waste collection techniques and treatment of sewage water. Many such committees can form a cluster and must be directed by the District Collector of the district. The collector of the district has to come forward to take responsibility and promote executive awareness in his district and State.

The pioneer of Sulabh International Bindeshwar Pathak came up with a great methodology to treat waste and ensure judicious use of the unused waste. He has established more than 6000 toilets all over India and makes use of the Sulabh Thermophilic Aerobic Composting (STAC) technology. This technology helps in the biodegradation of any organic matter within ten days. Through these inventions and smart moves, Sulabh is working as the pioneer of biogas generation from the public toilet complexes.⁹⁰ The human excreta are used to produce biogas

⁹⁰ Dr. Bindeshwar Pathak, *Sulabh Sanitation Technologies to achieve Millennium Development Goals on Sanitation Delhi Sustainable Development Summit 1,5* (2004)

and the leftover material is used as manure. They treat water used in toilet and then it is used in the fields. Thus, this is a complete action plan which leads to no waste generation, at all.

This is an emulative plan for all the districts and villages. It is cost- effective as well as suited for environment. The villages should work on the Sulabh model. It will not only help in cleaning the rivers and water bodies but will also help in achieving the ultimate aim of Swachh Bharat Mission.

To ensure proper sewage treatment, we need to work on our drainage system. This will ensure proper disposal and quantity of water for fields as suggested by Mulayam Singh Yadav.⁹¹ Thus, to follow these steps of transformation we have to start with primary accomplishments like a proper drainage system in city and villages, separating degradable and non-biodegradable waste and setting up sewage treatment plants.

There are a number of more suggestions which if implemented will enhance the cleanliness drive for Ganga. The immersion of deities in river after Durga Puja or Ganesh Chaturthi should be completely banned. Moreover, Hindu temples and societies immersing the temple waste into the river must be stopped. There needs to be stringent laws for the same and deterrence effects like penalisation should be adopted, to set up precedents for posterity to follow.

Besides, this the tress should be planted near the banks of the river and in the catchment areas to ensure prevention of floods during rainy season and retention of water during summer season. All the industries should be shifted away from the areas near Ganga. A certain distance must be prescribed by the legislature to ensure that no industries are functioning near Ganga. The ghats of Ganga that are decorated and are home to number of temples and

⁹¹ Supra note 62

pilgrims must be declared as plastic free zones. No shops should be allowed to sell anything made up of plastics, for example plastic bottles or plastic packets containing eatables. The District Collector of Haridwar Deepak Rawat has launched a cleanliness drive in Harki Paudi Ghat, Haridwar and has banned all the plastics in the nearby area. Thus, local administration has to come forward for Green Governance. The people should be stopped for using plastic bottles for filling Ganga water. The step launched by National Mission for Clean Ganga for supply of holy Ganga water is an important step towards this change.

The waste which is dumped in the rivers during Chath Puja, Kumbh, Ardh Kumbh, Ekadashi Snan etc., must be stopped and awareness should be spread. The Ganga Volunteers should be appointed in all the towns near the river, to stop the people by promoting awareness. Swayam Sevaks for Ganga is the need of the hour.

The construction of canals and dams must also be restricted as they disrupt the natural flow and water carrying capacity of river. No doubt, these methods serve us in many ways but harm us in uncountable ways.

The use of water intensive crops will further help in preserving the flow of national river of India. These crops use very less water as compared to the water extensive crops, i.e., they use 2% of the total water used by normal crops. This will not only reduce the use of water, but will also decrease the burden of irrigation on farmers.

A lot of water is used in manufacturing of soft drinks, juices and other beverages, which ultimately reduces the supply of fresh water available to the needy ones. Hence, a limit should be made for ensuring the judicious use of water.

The concept of rain water harvesting has to take shape in the real world. India needs rain water harvesting plants. We have to shift our dependency from rivers to purest form of water

which is wasted. The rainwater can help in providing drinking water, water for irrigation, etc. for the large part of our population.

The idea of Dhobi Ghats on the bank of river Ganga has to be halted without further delay because the chemicals increase toxicity in the water of the river and disturb aquatic life. Thus, washer men should be penalised for all unwanted activities carried along the river.

Ashes of the burnt corpses deposited in the river are another major source of pollution for Ganga, so government should promote use of Electric Crematorium. The half burnt dead bodies are a common sight in the river. Thus, with changing time we have to change our methodologies and religious practices. The carcasses of animals must be buried, instead of throwing them in the river. For all these suggestions to be implemented a proper guideline shall be framed by the Government and Local Administration has to come at front stage, to deal with the issues.

The problems of Ganga from being polluted to being dry emerge from the increased load of population. The recent trends depict that India will soar new heights of population growth in coming years. So, instead of lamenting over the issue of increasing population we can use it for the river which has been polluted, knowingly or unknowingly. We are the nation having a large number of youth populations. So, in the drive to clean Ganga contribution of reliable and energetic hands is needed, just like the people of Mauritius who have come forward to clean the ship wreck that is destroying their marine. We have to come together to take a number of steps and involve mass contribution for the national cause. We have to ensure public participation through Ganga Panchayats⁹² in all the wards and villages once in a year.

⁹² Pranav Awasthi, *Conservation of River Ganga – Is Public Participation the Key?* 5 Environmental Law & Practice Review 107, 109 (2016)

The National Green Tribunal Chief Justice Adarsh Kumar Goel said that, “It is a pity that even after constant monitoring by the Supreme Court for 34 years and by this tribunal for 6 years, 46 years after enactment of the Water Act, making discharge of pollutants in water bodies is a criminal offence-pollutants continue to be discharged in the most holy river.”⁹³ This statement highlights the need of new legislation and guidelines. We need a separate Act and a body to monitor the cleanliness drive for river Ganga.

CONCLUSION

Ganga: the bliss turned into tragedy, Ganga: the lost glory, Ganga the inseparable part of our soul. Ganga is this very important to all of us, then why do we degrade it? Ganga is suffering from millions of problems; hardly any could have been mentioned above. The problems are looking for one solution that is sustainable use of the resources. The human greed should be curtailed, since it has been years that we are increasing our selfishness. Mahatma Gandhi rightly said “*there is enough for everybody's need and not for everybody's greed.*” The human race should understand how important it is to conserve Ganga and make repeated efforts to clean it. The arrival of the COVID -19 pandemic in India marked nation-wide lockdown. This is the time when humans intervened with Mother Nature the least. The water of Ganga became less polluted and more transparent making a safe way for aquatic life during this period. Imprisoned humans marked free Ganga.

This is a clear indication that now is the time we shall stop polluting Ganga, whether knowingly or unknowingly. India will have to produce more Mahesh Chandra Mehta, Guru Das Agrawal again who will fight and urge to clean our environment. In future these feats look impossible. However, we need to individually make collective efforts to clean our Ganga, to give recognition to the significance it holds. It is very difficult, but we must begin

⁹³ NGT tells States to monitor Ganga Rejuvenation, The Hindu, 18.08.2020

somewhere. It will be Long struggle for Ganga but ultimately either we will lose Human Race or Ganga. In the words of Indira Babellapati:

“Ganga Mai who sustains and devours Maa Ganga I approach you a child hungry and forlorn longing to retreat into your womb to be nurtured and to be re-born”

Now it is the time to do justice to our environment and river Ganga and in the words of renowned Environmentalist Wendell Berry, “Whether we and our politicians know it or not, nature is party to all our deals and decisions and it has, more votes, a longer memory, and a sterner sense of Justice than we do.”

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