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Non-Refoulement of Refugees in India- A Human Rights Perspective

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Introduction

Delving into the words of Auguste Comte, *'demography is destiny',* invokes an understanding that the *'associated strands'* of political discourse (political framework of actions & inactions respectively), people and migration remain inherently inclusive in perspective.[2] This means that, with the very existence of population within a nation-state comes the inevitable interplay of policy framework as a natural denouement, along with the added vigour of cross-border migration standards. India has remained susceptible to varied perspective of cross border movements within South Asia for the longest time. For instance, the interrelations between India-Pakistan, India-Afghanistan, India-Sri Lanka, India-Bangladesh, among the others, are trapped in a quagmire of cross-border movements vis-a-vis policy framework (legal stipulations). Therefore, it would be pertinent to infer that the Indian foreign policy in particular, succumbs to the politics of cross-national ethnic issues pertaining to the concerned nation-state. On the other hand, when the issue of granting refugee status come to the fore, India's position remains prone to objective interpretation. Objective in the sense that, India has always scrutinised the same (granting refugee status) on an ad hoc basis. The reasons for it germane from the lack of any substantial legal mandate in delineating the issues of refugees' or migrants' or asylum seekers on one side and the absence of a concrete/recognised refugee policy in consonance with international instruments on the other. Refugees and migrants are legally distinct. On one hand, owing to the 1951 Convention Relating to the Status of Refugees ('Refugee Convention') and the 1967 Protocol Relating to the Status of Refugees ('Protocol'), a refugee is a person *"who flees across an international border because of a well-founded fear of being persecuted in her country of origin on account of her race, religion, nationality, membership of a particular social group, or political opinion".*[3]

On the other hand, Migrants are a much wider group of people who move away from their usual residence to live somewhere else. Since it is an umbrella term, there is no legal definition of a migrant; The phrases refers to high-wage labour travelling between developed economies, people fleeing destitute countries, and those fleeing persecution. As a result, while all refugees are migrants in the sense that they leave their usual home, not all migrants are refugees. The extensive powers granted exclusively to the Centre to act with unconstrained discretion in regard to foreigners enable India's ad-hoc refugee system. The Foreigners Act of 1864, passed by India's colonial government in the nineteenth century, was the first law to restrict, arrest, and expel foreigners. The law was harsh since it was meant to consolidate imperial dominance and retain social control. The colonial government considered the 1864 legislation to be too lenient for the absolute powers it requested, thus the Foreigners Act of 1940 was enacted to replace it. The 1940 wartime legislation was further consolidated as the Foreigners Act, 1946 ('Foreigners Act') following the war's end and the ensuing large-scale displacement.

Delineating Refugees

Refugees

At its Thirtieth Plenary Meeting on 12 February 1946, the United Nations General Assembly adopted Resolution A/8(l)[4] that recognized the problem of refugees and displaced persons *of all categories was one of im-*

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[2] Bill Bonner, *Destiny is Demography,* Business Insider(17th Sept,2011,12.46 am) https://www.businessinsider.com/destiny-is-demography-2011-9?IR=T

[3] Convention Related to Status of Refugees,1951, Art.1

[4] United Nations Resolutions, I (Dusan J. Djanovich ed),8 (1946).

mediate urgency. Importantly, the resolution was specific to delineate between *genuine refugees* and *displaced persons*, on the one hand, and *war criminals* and *other criminals* on the other side who may claim to be refugees. Recognizing that the problem of refugees and displaced persons was an international one, the General Assembly recommended to the *UN Economic and Social Council* (ECOSOC) that the Council recognizes the principle that *"no refugees or displaced persons who have finally and definitely, in complete freedom, and after receiving full knowledge and facts, including adequate information from the governments of their countries of origin, expressed those who have valid objections to returning to their countries of origin will be forced to do so".*[5] Through this recommendations, resolution A/8(l) thereby became the first official international recognition that a genuine refugee could not be compelled to return to his or her country of origin.

An analysis of the determinants of refugee flows by Myron Weiner reveals those internal conflicts rather than wars between states are the principal generators of population flight.[6] These conflicts include wars of secession by territorially based ethnic groups or wars of central or local governments against such groups[7] and political persecution by authoritarian regimes such as Iran, Iraq, China among the others.

However, problem arises the moment when the distinction in identifying case studies wherein, an individual or mass population facing persecution not 'on the basis of one of the protected grounds. In this situation, he may not be counted as a *refugee*. Further, they would also not be counted as refugees, when they face persecution on the basis of a protected ground, but who are not outside their country of citizenship. Interestingly, there may arise situations wherein they would be classified as Internally Displaced Persons (IDPs) involving individuals/groups who have not crossed international borders, albeit having all the characteristics of a refugee *except that they have not crossed an international border.*[8]

The office of the UNHCR, therefore, should adapt itself and reinvigorate its legal mandates as well as administrative procedures to understand the problem of refugees as a facet of the human displacement within the broader framework of security concerns, involving the security of refugees and humanitarian workers as well as states.[9]

India's Position with Respect to Refugees

India is a non-signatory to both, the 1951 Refugee Convention and the 1967 Protocol on status of Refugees. However, it has acceded to other international instruments whose provisions are relevant to the rights of refugees. For instance, in 1979 India acceded to the *"1966 International Covenant on Civil and Political Rights" (ICCPR)*[10] respectively. Further, in 1992 India acceded to the *"1989 Conventions on the Rights of the Child"* (CRC), wherein, the incorporation of Article 22 dealing with refugee children and refugee family reunification[11] remain vital.

The Factor of *"Well-Founded Fear of Persecution"*

The refugee framework in India is not well equipped to attend to situations of mass influx. While the framework sometimes succeeds in dealing with *individual claimants*, but it would still succumb to failure when large numbers of people flee persecution. Further, the

[5] *Id.*

[6] Weiner, M. *"Bad neighbours, Bad neighbourhoods: an inquiry in the causes of refugee flows"* 21 International Security, 36-39(1996).

[7] *Id.* For instance, such groups against which there was wars of central or local government may include notably, Chechens, Kurds, Eritreans, Southern Sudanese, Sri Lankan Tamils, Serbs, Croats, Bosnian Muslims.

[8] Lister, M, *who are Refugees?* 32 LAW AND PHILOSOPHY, 645-667 (2013).

[9] S. Ogata, *"Statement, UNHCR, to the Third Committee of the General Assembly of the United Nations,"* November 12, (1999).

[10] Article 13 ofthe ICCPR deals with the expulsion of a person lawfully present in the territory of the state. India hasreserved itsright under this Article to applyits municipal lawrelating to aliens

[11] Article 10 dealing generally with family reunification and Article 38 dealing with children in situations of armed conflict are also relevant.

refugee system affords substantially more protection to people who have crossed an international border than to those who have not. While this distinction makes sense in some cases, in others, particularly in situations of mass influx as a result of persecution by the state, it creates a large gap in the international protections.[12]

In incorporating the Convention definition into a domestic statute, *"nation-states decided to recognize refugee status when one is outside the country of origin because of persecution or a well-founded fear of persecution"*.[13] The central question in the Convention definition and in most countries' refugee law, however, relates to the fear of future persecution. Decision makers thus focus on trying to determine what is likely to happen to the individual in the future if she returns to the home country.

In India, the general laws that regulate outsiders apply to refugees. These rules, however, do not ensure that refugees receive the treatment that they are entitled to.[14] More Importantly, both the Supreme Court and High Courts have on several occasions, provided a liberal interpretation of rights of refugees in specific cases dealing with *specific refugees.*[15] It is Important to note that, the Madras High Court has on various occasions prevented *forced repatriations* and upheld *non-refoulement.*[16]

Therefore, it could be said that the Indian Judiciary's stand on refugees are far from uniform. The reason being not the conflicting judicial decisions rather, *"the lack of legal recognition of rights and a separate framework for refugees versus Ordinary Foreigners"*.[17]

Judicial Expansion of Rights to Refugees

The Constitution of India is dogged of notable provisions[18] wherein, the refugees are given protections. In general, the rights granted to refugees in India are the same as those granted to all foreigners under the Indian Constitution, that is, under Art.14: the right to equality before the law; under Art. 21: the right to have unrestricted access to the courts for the protection of one's life and personal liberty, which may not be taken away except in procedure established by law; Art 25: the right to freedom to practice and propagate one's own religion. Further, Art.51 states that– *"The State [India] shall endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another"*[19]

However, it is important to ask whether the Indian Courts are empowered enough to intervene and enforce any international instruments or not, especially when the same has not been incorporated into the Municipal law.

On one side, it could be argued that *"the Indian courts do not have the authority to enforce the provisions of the above international human rights instruments unless these provisions are incorporated into municipal law by legislation"*.[20] The reasons for the same may be attributed to the fact that the Indian Parliament is under no responsibility to establish laws to give effect to a treaty unless there are compelling reasons to do so, and the judiciary is not competent to enforce the Ex-

[12] Arulanantham, T., *Restructured Safe Havens: A Proposal for Reform of the Refugee Protection System,* HUMAN RIGHTS QUARTERLY 22 ,1-56 (2000).

[13] *Id.*

[14] RAJEEV DHAVAN, "REFUGEE LAW, POLICY AND PRACTICE IN INDIA" 81-83 (2004).

[15] Dr. Malvika Karlekar v Union of India Crl. W.P. No.243 of 1988 (unreported, available on file with PILSARC), wherein, the Supreme Court stopped deportation of twenty-one Burmese refugees from the Andaman Islands whose applications of refugee status were pending and gave them the right to have their refugee status determined.

[16] Gurunathan v. Government of India, W.P. 6708 and 7196 of 1992 (unreported, available on file with PILSARC).

[17] *Supra note 12.*

[18] INDIAN CONST. art. 13, 14, 15, 20, 21, 22, 23, 24, 25, 27, 32 and 51.

[19] INDIAN CONST.art.51

[20] State of Gujarat v. Vora Fiddali A.I.R. 1964, SC 1043. Here, the Court observed that, the well-established position that *"the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action"*

[21] CHANDRASEKHARA RAO, THE INDIAN CONSTITUTION AND INTERNATIONAL LAW, 130 (Taxman Publica-

ecutive's compliance with treaty commitments in the absence of such enactment.[21] Therefore, It might be claimed that each nation-state has a responsibility to observe its respective duties arising from international law, and that they cannot blame their failure to do so on their legislative or executive apparatus.[22] Moreover, In the event of failure of a state to bring its municipal law in line with its international obligations, *"International Law does not render such conflicting municipal law null and void and which"*[23] On the other hand, various court decisions in the absence of a concrete legislative structure *"have tried to provide humane solutions to the problems of refugees, primarily with regard to the principles on non-refoulement, right to seek asylum, and voluntary repatriation"*.[24] By implementing the same, the Indian courts gave their own interpretation by-passing a deliberation on the principles of international refugee law.[25] Meanwhile, it is observed that in certain circumstances the courts *can* take the treaty provisions into account. In the case of Vishaka,[26] the Supreme Court of India stated that the *"contents of international conventions and norms consistent with the fundamental rights must be reflected in safeguarding gender equality and right to work with human dignity that lacks in municipal law"*.

The Indian perspective is often deluged with the debate concerning as to whether the constitutional protection afforded to the refugees and asylum seekers protects them from refoulement or not.[27] *"Majority is of the opinion that the right to non-refoulement has neither been read into Indian constitutional jurisprudence, nor can be extrapolated"*.[28] In the case of *Ktaer Abbas Habib Al Qutaifi v. Union of India*,[29] the issue pertaining to whether Article 21 of the Constitution encompasses non-refoulement or not was raised. Here, the learned justice did not rule out refoulement, but instead ordered the government to reconsider its deportation order based on humanitarian concerns. Habib. J., categorically invalidated the principle of non-refoulement by reasoning that:

"It expressly permits deportations on the basis of public order and national security, and it is powerless against the Supreme Court's confirmation of the Centre's unrestricted right to expel".[30]

Understanding National Security and Individual Liberty with Respect to Right of Non-Refoulement

India though not bound by any of the major international agreements protecting the rights of refugees, has largely followed international norms.[31] But, in cases involving matters of *'national security'*, India preferred to deviate from its conventional mode of hospitality. For instance, asylum seekers from

tion) (1993).

[22] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949, p.174, at p. 180.

[23] "Standards Dealing with Specific Human Rights of Refugees adumbrated in Declaration on Territorial Asylum" 18 (1967).

[24] Ahmad.N., *The Constitution-Based Approach of Indian Judiciary to The Refugee Rights and Global Standards of the UN Convention,* 8 THE KING'S STUDENT LAW REVIEW, 30-55 (2018).

[25] T. Ananthachari, *Refugees in India: Legal Framework, Law Enforcement and Security,* ISIL Year Book of International Humanitarian and Refugee Law, `www.worldii.org/int/journals IS1LYB1HRL7 2001.`

[26] Vishaka Vs. State of Rajasthan (1997) 6 SCC 241.

[27] *Supra* note at 35.

[28] The term *'foreigner's issue'* was first used in the "Memorandum of Understanding signed between the Central Government and the All-Assam Students Union." (Assam Accord,1985). `http://www.assam.gov.in/documents/1631171/0/Annexure_10.pdf?version=1.0.` Subsequently, the same term found its way into the Statement of Object and Reasons of The Citizenship (Amendment) Act 1986.

[29] Ktaer Abbas Habib Al Qutaifi v. Union of India, 1999 Cri LJ 919. The hon'ble court here observed that "Article 21 of the Constitution encompasses the principle of non-refoulement that is subject to *"law and order and security of India"*.

[30] Hans Muller v. Supt., Presidency Jail, AIR 1955 SC 367.

[31] *Supra* note 22

[32] TAPAN K BOSE, PROTECTION OF REFUGEES IN SOUTH ASIA: THE NEED FOR A LEGAL FRAMEWORK

Burma were jailed and approximately 5,000 Burmese refugees were pushed back home from 1995 to 1997.[32] Therefore, it would be inferred that for a nation-state with no refugee laws in position till date, its general practice as regards to refugee remains a case study to pursue.

The right of non-refoulement in the Indian context remains a debatable topic to ponder. A facet of the perceptive observers tends to affiliate the contention that "the right of *non-refoulement* is very much operational in India even without having signed any related international agreements."[33] Moreover, the prevention of refoulement generally, includes *"both the rejection of refugees at the border as well as the deportation of refugees from inside India"*.[34] More importantly, *non-refoulement* prevents nation-states from returning a refugee to persecution in one's country of origin. *Non-refoulement* operates as the first and most basic right of the refugee. Moreover, there exists several rights in the host country which are generally called as *"secondary rights"* in form of the right to education, the right to hold property among the others. However, it could be argued that these secondary rights exist, *generally* relative to citizens in the host country.

Although, the very existence of international as well as national in form of current legal institutions like UNHCR and the NHRC prevent the return of valid refugees to their country of origin.[35] They contend that, *non-refoulement* is granted as part of a broader constitutional and statutory structure. To substantiate the same, two main arguments emerge in support of *non-refoulement.*

□ First, the very enshrinement under Article 21 of the Constitution that promises *"non-refoulement* as a fundamental, substantive right."

□ Second, the very incorporation of the "international rule of *non-refoulement* into India's domestic laws" owing to Article 51 of the constitution.

Moreover, the difference between the legal and literal/colloquial definitions of 'refugee' is causing impediments in evaluating refugee outcomes and its subsequent considerations.[36] The fact remains that, while many of those fleeing danger in the developed world would fit the legal definition, the same cannot be said for the least developing states and majority of the developing nation-states. Say for instance, the areas of *Latin American* and *sub-Saharan African* regions are particularly prone to mass-migrations situations due to famine, natural disaster or economic collapse.[37] On the other hand, although the Convention implies an *individualised determination of refugee status* (RSD) in a court of law, the same procedure for status determination may borne futile when considerations of mass influx situations remain at stake at the border of the receiving nation-state. Interestingly, albeit these, the existing predicaments, the advent of the 21st century bears testimony to mass influxes of people that fit the legal definition of refugee.

Non-Refoulement Under Article 21

Art 21 of the Constitution of India aims at placing a striking balance between the competing interests of governmental power and individual right. Article 21's right to life *"is the most fundamental of all ... [but] is also the most difficult to define."*[38]

(2000).

[33] The two main proponents of this theory include of Saxena and of Veerabhadran Vijayakumar respectively. Importantly, Saxena's argument is summarised in Tapan K Bose, Protection of Refugees in South Asia: The Need for a Legal Framework (2000), while Vijayakumar's argument can be found in Veerabhadran Vijayakumar, 'Judicial Responses to Refugee Protection in India', 12 International Journal of Refugee Law 238 (2000).

[34] The principle of non-refoulement constitutes a fundamental aspect of the 1951 Refugee Convention. Article 33 states that *"[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories."*

[35] Ahmad. N., 23 *Refugee Constitutionalism In India: Measuring Supremacy of Judicial Sovereignty Against Global Human Rights Standards,* RELIGION AND LAW REVIEW, 37-118(2014)

[36] Ranee K L Panabi, *International Politics in the 1990s: Some Implications for Human Rights and the Refugee Crisis,* DICKINSON JOURNAL OF INTERNATIONAL LAW, 11 (1991)

[37] *Id.*

[38] Technically speaking, non-refoulement is a duty of the host country, not a right of the refugee. However, the *"duty of*

Delving through the initial vision of Article 21, the state could deprive someone of life or personal liberty if the state has followed a *valid procedure* established by parliament.[39] Importantly, in case of deprivation of one's life or personal liberty, the test for compliance with Article 21 encompass broadly of three steps.

□ First, there had to be a law justifying interference with the person's life or personal liberty.

□ Second, the law had to be a *valid law* in consideratio

□ Third, the procedure laid down by the law should have strictly adhered to. Here, the state could justify serious infringements on life or personal liberty. For instance, the state could create a law allowing indefinite detention of suspected murderers, so long as the three procedural steps were followed in its creation and enforcement.

Further, as jurisprudence developed in the area of fundamental rights, the test for compliance with Article 21 *became entangled* with the standards for Article 14. The reason being, though the two articles comprise 'fundamental rights' of the Constitution that apply to non-citizens. The ensuing effect was that the Indian courts started implementing and adopting *similar tests* to gauge whether or not a particular law/(s) have complied to the pre-requisites of the said articles. The Indian courts have always maintained a position wherein, Article 14 is being viewed from a 'reasonableness' analysis, that is, if a law discriminated between two groups, that discrimination would have to be *'reasonable in character.'*

Most importantly, the scope of Articles 14 and 21 remain predominantly *procedural* in character. That is, while Article 14 protects people from disparate treatment by the courts and police. 'Reasonableness' therefore referred to the validity of a given procedure for both Articles 14 and 21. Here it would be pertinent to note that article 21 adopted substantive connotations when the 'reasonableness' test for Articles 21 and 14 were further entangled with the test for Article 19 compliance.

Interestingly, the co-relation of these rights (with the rights of Articles 14, 19 and 21 were seen as overlapping) act differently in its operation pertaining to citizens & non-citizens respectively. For instance, Articles 14 and 21 apply to citizens and non-citizens alike, whereas, Article 19 applies only to citizens. Further, while the former provisions were intended to confer procedural rights and the latter attempts to confer substantive rights. The Indian courts since *early stages* maintained that the *'personal liberties'* described in Article 21 were mutually exclusive from those described in Article 19. However, the courts took a broader interpretation of Article 21, due to its all-encompassing interpretation as inferred from various notable judgments. Although Article 21 was never seen as completely subsuming the rights of Article 19, Amidst such developments, it would be garnered that since the interpretation of Article 19 extends solely to the citizens, then in that circumstance, any influence it had on Article 21 should probably be limited to citizens. Interestingly, delving into the Indian context there is no express mandate till date that *unwaveringly* confirms nor denies the hypothesis that only citizens receive substantive rights under Article 21.

In a notable case of *Railway Board V. Das,*[40] involving a tourist's (non-citizen's) right to 'life and personal liberty', the Supreme Court of India categorically stated the following:

"The primacy of the interest of the nation and the security of the State will have to be read into every article dealing with Fundamental Rights including Article 21 of the Indian Constitution".

non-refoulement," for all practical purposes, creates in the refugee a right to prevent return

[39] The term *'foreigner's issue'* was first used in the "Memorandum of Understanding signed between the Central Government and the All Assam Students Union." (Assam Accord, 1985). Available at `http://www.assam.gov.in/documents/1631171/0/Annexure_10.pdf?version=1.0.` Subsequently, the same term found its way into the Statement of Object and Reasons of The Citizenship (Amendment) Act 1986.

[40] Railway Board V. Das, 2 SCC 465 (2002). The case involved a Bangladeshi woman visiting India. Several employees of the Indian railways raped her at a station and subsequently the hon'ble court upheld her claim that the state-run Railway Board breached her fundamental rights.

Here, the present case involved a situation wherein, the individual's right is being deprived, and since the state has no interest, the individual's right to personal liberty should therefore prevail. It would therefore be analysed that when the state's interest is weighed against the interest in individual rights, the interests of the nation and security assume the highest priorities. Therefore, it can be argued that the interests of refugees have rarely overcome the primacy of state interest in refoulement in India till date.

Further, with respect to the concerns of sovereignty that implies broad control over immigration and other matters of foreign affairs, the Indian courts have always opted for a perspective wherein, the same must be read into the constitution without an express constitutional provision. As stated by the hon'ble court in *Railway Board vs Das*.

"The primacy of the nation's interest and security must be 'read into' other parts of the Constitution. Other nations, including the US, have based their broad immigration powers on the sovereignty of the nation. Those countries argue, like India, that the very essence of statehood involves federal control over immigration, which must be implied throughout one's constitution".[41]

More importance must be given where matters pertaining to citizenship and foreign affairs come to the fore, the Constitution grants broad powers to parliament to develop laws and regulate thereby. In particular, art. 11 of the Constitution read as follows: *"Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship"*[42] Further, the Indian Parliament also retains full control over India's international obligations, with the sole authority to have a discretion to *create* and *maintain* international treaties on behalf of the nation.[43]

However, on the other hand, the arguments put forth by *Saxena* and *Vijayakumar* tend to imply a perspective that rely heavily upon a 1996 court case in the form of NHRC *vs State of Arunachal Pradesh.*[44] They argue that through the judgment the hon'ble court establishes a more assertive right of non-refoulement for refugees.

Albeit aforesaid perspectives, the insights that would be gleaned remains that the principle of *non-refoulement* retains a rather arcane status under the Indian legal paraphernalia. The present case is dogged of a dispute involving between Chakma refugees residing in Arunachal Pradesh and a group of hostile locals, the All-Arunachal Pradesh Students Union (AAPSU). Delving into the historical context, the Chakma people were subjected mass displacement in 1964 from the erstwhile East Pakistan (now Bangladesh) and subsequently migrating from Assam to the current state of Arunachal Pradesh. However, the problem ensued when majority of them applied for citizenship and got rejected by the orders of the local officials from reaching the federal government.

However, as the Chakma population proliferated, the AAPSU issued 'quit orders', demanding that the Chakma leave or suffer severe harm. Meanwhile, the Arunachal Pradesh government formulated plans to move the Chakma's to another state. On the other hand, the Ministry of Home Affairs (MHA) was furthering its attempt in according *"blanket citizenship"* and ordered the state government to provide security. Finally, the NHRC filed a writ petition in the court demanding the state government to stop the Chakma's forced migration from the state.

Importantly, the Supreme Court upheld that notices that were given to the Chakma's to quit the state as amounting to a violation of *"Article 21 under the Indian Constitution, and categorically observed that no*

[41] *Id.*
[42] INDIAN CONST. Art.11.
[43] INDIAN CONST, Art. 253
[44] (1996) 1 SCC 742
[45] Importantly, the hon'ble court in its interim order on November 2, 1995 directed the state government to ensure that the "Chakmas situated in its territory are not ousted by any coercive action not in accordance with the law. The court further directed the state government to ensure that the life and personal liberty of each and every Chakma residing within the

person can be deprived of his/her right to life and liberty except in accordance to the procedure established by law".[45] Emphasising the role of the state government herewith, the Hon'ble court was decisive in observing that it remains the imperative of the state government to protect the Chakma's from such threats accruing to their respective lives and liberty. The hon'ble Court was upright in holding the observation that the Union government by not forwarding the Chakma's citizenship applications to the concerned department is flagrantly impinging upon the rights of the Chakma's, especially of their constitutional and statutory right in form of citizenship.

The temporal impact of the said judgment bore nuanced interventions that had telling effect with respect to the Chakmas in particular and refugees/asylum seekers in general. For the reason being, aftermath the judgment *periodic* interventions through the NGOs, the NHRC and the Supreme Court of India, enabled around 65,000 Chakmas (approx.) residing in Arunachal to the citizenship status by the Government of India.[46]

Pervading through the interpretation forwarded by the Hon'ble court, Saxena and Vijayakumar herewith opines the case to be a *"landmark decision by the Supreme Court with regard to refugee protection"* that in turn be read into the court's decision a right of non-refoulement under Article 21 of the Constitution.

Non-Refoulement Under Article 51

Article 51 enshrined in the Constitution of India talks about the prospect of the *imperativeness* of national and international law respectively by mandating the Union government to *'maintain respect'* for international law. It reads as follows:

"The State shall endeavour to ... foster respect for international and treaty obligations in the dealings of organised people with one another."

The Indian Courts have interpreted Article 51 to demand adherence to international law when there is no clear conflict with domestic law. While recognising the supremacy of domestic over international law, the Constitution's drafters thus realised the importance of fulfilling international obligation. On the other hand, when India has a clear international obligation but an unclear domestic obligation in a particular area, it should follow international law. Article 51 refers to both 'treaty obligations' and 'international law', some have interpreted the latter term as referring to *'customary international law'*.[47]

Non-Refoulement as International Customary Law

Non-refoulement, as a principle invokes a rather feeble version of customary international law, for it to qualify as customary international law, the same must be widely incorporated to be morphed into *an international custom, as evidence of a general practice accepted as law".*[48] However, the normative practice prevalent in most of the least developing nation-states including India remains that though they instil a framework protecting the refugees, the same remains subject to discretionary mechanisms outmanoeuvring the protectionary standard at any point.[49] Against this background, it would be pertinent to insinuate an observation that *"[i]nsofar as there is legal consensus on an expanded conceptualisation of refugee status based on custom, it sure is... 'at a relatively low level of commitment."*[50]

Inapplicability of Customary International Law to Nonrefoulement

There remain concerns that even if customary international law become acceptable and being incorporated into the Indian domestic law, the same would remain a futile effort when interpreted in the refugee context.

state should be protected."

[46] Mahanirban Calcutta Research Group, *The State of being Stateless: A Case Study on Chakmas in Arunachal Pradesh* (2009). Retrieved from `http://www.mcrg.ac.in/Statelessness/Statelessness_Concept.asp.`

[47] Statute of the International Court of Justice, Article 38(1) (b).

[48] *Id.*

[49] Kannan. A., & Supratim Guha. S., 3 *Humanising the Indian Refugee Policy: A case for the Refugees' Right to Work,* NLUJ LAW REVIEW 150 (2015)

[50] *Id.*

There remain three (3) notable problems for the same.

- First, the existing statutes pertaining to immigration aspect 'already occupy the field' of refugee law.
- Second, the existing statutes offers an interpretation that sits directly in contrast with principle of non-refoulement.
- Third, India's insistence to be not be legally governed by any the Refugee Convention.

Here, it would be inferred that the domestic legislation in India *'occupies the field'* of immigration and refugee law completely, thus leaving out any hope of incorporating new rules into the domestic sphere. The incorporation of customary international law is not permitted when parliament 'occupies the field' of a given area.[51] Parliament is said to 'occupy the field' when it legislates in such a broad and comprehensive manner.

Importantly, India has effectively passed several laws governing immigration, notably, the *Passport (Entry into India) Act,1920, the Foreigners Act, 1946, the Foreigners Order, 1948 and the Citizenship Act,1957.*[52] Further, the Foreigners Act and the Foreigners Order respectively empowers the Union government to restrict movement of aliens inside the territory of India, subsequently mandating the likes of *medical examinations,* limiting employment opportunities thereby, and limiting opportunity to associate, among others. Therefore, the broad ambit of India's immigration stipulations indicates that the legislation *'occupies the field'*.

However, it remains to be analysed that the Indian courts only incorporate international law through Article 51 only when the ambiguity in the domestic law and policy framework ensues.[53] Therefore, it would be safe to conclude that the Indian courts powers remain *circumscribed* rather, inhibite to enforce a customary international norm that clearly impinges the policy framework. Finally, it would be argued that Article 51 is enshrined as a 'Directive Policy' and likewise cannot be enforced in the court of law. This remains a pertinent reason as to why the Indian courts remain hesitant to interpret the wordings enshrined under Article 51 of the Constitution of India.

Conclusion

The Indian history is usually replete with instances where human rights jurisprudence has always occupied a place of *primacy* amidst other considerations at stake.[54] Looking closely, we cannot underestimate the affinity between the refugee problem and broader issues of human rights. The ensuing realities of these flagrant violations of human rights may tend to proliferate instances of *mass exodus and non-voluntary repatriation* among the others that has grappled the imaginations of most of the nation-states of the 21st century.[55] The introductory part primarily concerns itself with the position of the refugee within the Indian periphery and also identifies the problems, research questions and the methodology to tackle those issues. So, differentiating the intrinsically associated features of the said category of persons through the help of varied international instruments and though the perspective of various political theorists. Therefore, it would be argued that delineation of *refugees* from the *other categories of foreigners* remains an important step in ameliorating the present situation of mass influxes in India.

[51] Vishaka vs State of Rajasthan, AIR SC 3011 (1997).

[52] P. CHANDRASEKHARA RAO, THE INDIAN CONSTITUTION AND INTERNATIONAL LAW, 130 (Taxman publication) (1993).

[53] Chadrahasan. N., 16 *Access to Justice and Aliens: Some Insight into Refugee Groups in India,* Windsor Y B Access to Justice 135, 139 (1998).

[54] RATIN BANDYOPADHYAY, HUMAN RIGHTS OF THE NON-CITIZEN: LAW AND REALITY, 217 (Deep & Deep Publications Pvt. Ltd., New Delhi).

[55] S.N. Bhargava, "The Relationship Between National Human Rights Institutions and the Judiciary in Protecting Refugees", Report on Judicial Symposium on Refugee Protection, 92 (13-14 Nov.1999, New Delhi).

Further, It with the scope of constitutional provisions (right to equality before law, protection of life and liberty and the right to fair trial respectively. In this context, several judicial precedents, involving the decisions of Hon'ble High Courts and Hon'ble Supreme Court respectively. Here, it would be important to state that moreover, there is no specific provision in the Indian Constitution that requires the state to enforce or implement treaties and agreements. A joint reading of all the provisions as well as an analysis of the case law on the subject shows international treaties, covenants, conventions and agreements Only if they are specifically incorporated in the law of the country can they become part of Indian domestic law. Typical understanding persists that the Indian Courts *generally* apply norms of Only when there is a clear agreement between international law and domestic law should international law be applied, and the principles of international law should not be in conflict with domestic legislation.

Perceptive observers state that there is a blessing in disguise for not having in place a legal framework that may be prone to aspects involving *political character.* For they believe it would impose certain liabilities and obligations which may have political dimensions. But the same may suffer from misconception, as absence of laws pertaining to the refugees may not only affect the refugees, rather the broader framework of mass influx situations involving illegal migrants and asylum seekers respectively. Gradually, it diminishes the accountability factor of the Union government in terms of *affording* refugee protection and *observing* human rights. Therefore, by referring to the United Nations Charter and the Universal Declaration of Human Rights in its preamble, as well as efforts such as ensuring that refugees have the broadest possible exercise of these fundamental rights and freedoms, the document must be evaluated and given a rights-based approach to the issue.

Recommendations

Therefore, the following points must be considered in any future administrative, executive and legislative exercise by the national governments in this part of the globe, especially in case of India are as follows-

- In the case of countries hosting large refugee populations, states should also provide bilateral assistance both financial and technical support, depending on the host country's needs to enable the host state to provide support to refugees and asylumseekers, including ensuring access to adequate shelter, food, health care and education. Further, the extent of such bilateral assistance should also be published annually. However, such aids & support (financial) should not be considered as a substitute for, or come at the expense of, programmes to accept people in need of protection.
- Proper stratification of refugees on terms of economic, climate, humanitarian and political factors must be carved out while re-defining the *'refugee'*.
- The principles of *non-refoulement* must be enforced effectively into the administrative as well as legislative practice.
- In India's legal system, the principle of non-refoulement must be made a nonnegotiable human right for refugees.
- Importantly, carving out necessary provisions to individuals who fail to refugee status, but whose return would be in breach of international human rights obligations. The instances of the same are replete in the Indian scenario. Therefore, the Union government should embark upon facilitating *appropriate status* in consonance with their fundamental human rights.

Right to Education in India - A Dream or a Reality?

Francis Assisi Almeida[1]

Introduction

The Annual Status of The Education Report of 2018,[2] having conducted a survey on 546,527 children aged between 3 to 16, who were chosen from 354,944 households of 596 districts in rural India, presents a positive picture of the situation. The statistics of the report unravel that a proportion of children between the age group of 3 to 16, not enrolled in the school, had fallen from 3% to 2.8% in 2018. The survey also showed that girls between the age group of 11 to 14 who were absent from the school has fallen to 4.1% from 10.3% in the year 2006. However, an upward trajectory reflected in the status report of 2018 purports to be a positive growth but practically failed to reach the expected growth both in enrolment ratio and quality education to all. Universal quality education is the primordial importance of the state machinery. Inadequate ratio between teacher and pupil, low budget allocation by the Government towards strengthening the education, poor implementation of the Education Policies, high taboo system towards female education in the remote areas, lack of skill and job-oriented education in the schools, illiteracy and lack of motivation by the parents towards education etc. are some of the reasons for slow progress of right to education in India. Gradual downward move in the public expenditure by converting education to be a private sector could also be one of the reasons for its downfall. The governments, ever since the introduction of Liberalization, Globalization and Privatization (LPG) in 1991, have failed to accomplish the goal of right to education with suitable provisions of free education under its fiscal policies. In this research article, while elucidating the system of education developed through the centuries beginning from ancient times till date, analysis will be done on how far the right to education to all has fulfilled its dream.

Historical Development of Education System in India

Ever since its inception, the Indian education system is centred around culture and traditions of man and not merely on a technical education, so called a 'Liberal or Modern Education'. Since from the Early Vedic period, there was a tradition of learning and generally the aim of ancient education system was the formation of character, personality, preservation of ancient culture and training in the spheres of social and religious duties.[3] In ancient India, the training centres were normally 'Gurukuls', where all were considered to be equal and Guru (teacher) and Shishya (students) lived in the same house or nearby places. The subjects of study centred on techniques of worship and sacrifice and teachers were mostly Brahmins who succeeded from the priestly class.[4] It is noteworthy that education, in ancient India, was considered not merely a mechanical process of imparting information from outside, rather it was considered a biological process, a process of growth from within and considered something which depends on caryã - practice or realization, and not on mere theory or intellectual apprehension of truth.[5] The ultimate end of the highest education is thus expressed in Manu's Book of Laws; "To learn and to understand the Vedas, to practise pious mor-

[1] Ph.D. Research Scholar, Alliance School of Law, Alliance University, Bengaluru

[2] Annual Status of Education Report (Rural) 2018, *ASER Centre,* 41, New Delhi, (2019) http://img.asercentre.org/docs/ASER%202018/Release%20Material/aserreport2018.pdf

[3] Altekar, A. S. Ideals, Merits and defects of Ancient Indian Educational System, (15), *Annals of the Bhandarkar Oriental Research Institute,* 137,138 (1933), JSTOR, www.jstor.org/stable/41694847.

[4] Choudhary, Sujit Kumar., Higher Education in India: A Socio-Historical Journey from Ancient Period to 2006-07, (8) *Journal of Educational Enquiry,* 50, 52 (2008)

[5] Mookerji, Radha Kumud. Glimpses of Education in Ancient India, 25, *Annals of the Bhandarkar Oriental Research Institute* 63, 66 (1944) http://www.jstor.org/stable/41688549.

tifications, to acquire divine knowledge of the Law and of Philosophy, to treat with veneration his natural and his spiritual Father (The Priest) - these are the chief duties by means of which endless felicity is attained".[6] The Laws which were collected and written under the name of Manu were of great antiquity, but their formulation does not date back prior to 600 B.C.[7] The oldest and famous university among existing universities in India was the Banaras Hindu University[8] and Taxila, the Buddhist learning centre was prominent for the Medicine, Law and Military Science which attracted scholars from distant parts of India.[9] The Sarnath Monastery under Ashok's reign became famous as a centre of learning captivating large number of Buddhist monks.[10]

During the medieval period, Sanskrit language was prominent, and the literature was mostly in the form of metaphor, imagery, adjectives and adverbs. Since it was difficult for simple people to understand, it widened the gap between the landlords and the peasants. The literature became the asset of elitist class which led to have an authoritarian trend in intellectual life.[11] During the Mughal period education was considered to be an important asset and under Akbar's rule the mode of education (madrasas) was brought under state purview. A comprehensive education, stressing on branches of sciences along with religious learning, was prevalent. During the reign of Humayun, some schools were constructed. References also can be found for the existence of medical sciences, even though not like those of Aleppo, Egypt or Iran, but some students were sent to other countries for further studies.[12]

British period saw a rapid progress in western science and literature through the medium of English. Various Christian missionaries along with religious teachings made remarkable contributions in the spheres of education for all, women education, and adult literacy etc. The British education reformation unified all the states and regional kingdoms removing gender and caste bias despite virtually banishing the traditional gurukul system and other religious holistic ancient schools that were prevalent in the country.[13] After the conquest of Bengal in 1757, the history unravels, the education became a profitable venture and schools came up like mushrooms. Advertisements were given on the school curriculum, facilities and fee structure. Under these schemes, prominence was given for girls' education including new subjects like dancing skills, embroidery, stitching, etc., and boys were offered with special subjects like accountancy, mathematics along with traditional subjects.[14]

The Charter Act of 1813 rejuvenated the education system by providing financial assistance to revive and improve the literature among the intellectuals of native Indians and employed various methods to promote sciences among the inhabitants of British territories.[15] Despite methodological drawbacks in implementation of given objects, the Charter Act of 1813 was consid-

[6] Laurie, S.S. The History of Early Education. III. The Aryan or Indo-European Races, 1, *The School Review,* 668, 676 (1893) http://www.jstor.org/stable/1074070,

[7] *Id,* at 676.

[8] GUPTA, AMITA, 'EARLY CHILDHOOD EDUCATION, POSTCOLONIAL THEORY, AND TEACHING PRACTICES IN INDIA' BALANCING VYGOTSKY AND THE VEDA', 41 (Palgrave Macmillan, New York, and Hound mills, Basingstoke, Hampshire, England, 2006)

[9] S. R. DONGERKERY, UNIVERSITY EDUCATION IN INDIA, 1-2 (Manaktalas, Mumbai. 1997)

[10] Choudhary, *supra note* 4, at 53

[11] SHARMA, R.S., INDIA'S ANCIENT PAST, 293-294 (Oxford University Press, 2005)

[12] Rezavi, Syed Ali Nadeem, The organization of Education in Mughal India, 69, *Proceedings of the India History Congress,* 389-397 (2007), https://www.jstor.org/stable/i40173377

[13] Krishnamoorthy A, Srimathi H. Education of India In Pre-Independent Yore , 9, *International Journal of Scientific & Technology Research*, 2251 (2020)

[14] Manzar, Nishat, European Education in Indian Environment: Early History of Western Educational Institutions in India (17th and 18th Century), 75, *Proceedings of Indian History Congress,* 1389 (2014), www.jstor.org/stable/44158542

[15] H. Sharp, Ed., Selections from Educational Records, Part I (1781- 1839), 22 (Bureau of Education, Superintendent Government Printing, Calcutta, 1920. (Reprint) Delhi: National Archives of India, (1965)

ered to be a remarkable legislature and a great initiative of British rulers in the field of education.[16] Subsequent developments in education reforms came from Lord Macaulay (Minutes of 1835), Wood's despatch 1854 famously known as Magna Carta of English Education in India, The Indian Education Commission of 1882, The Shimla Conference in September 1901, The Government Resolution on Educational Policy of 1913, and finally The Calcutta University commission of 1917-19 are some of the important developments in education under British India. The Montague - Chelmsford Reforms of 1919 has transferred the education department under provincial control.

Constitutional Provisions on Education

The issue of education was primordial in the minds of the framers of the Constitution and it was even discussed in the Constituent Assembly Debates during the deliberations on Part III and IV of the Constitution of India. Right to education did not find a place under the fundamental rights (Part III) of the Constitution despite strong discussions on other related issues of education like language, age of the child, minority rights etc. It was placed under article 45 (Directive Principles of State Policy) of the Indian Constitution which provided, "the State shall endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of 14 years".[17] Even though Article 29 of the Constitution provides, "no citizen shall be denied admission into any educational institutions maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste or language",[18] but it failed to place the right to education under the fundamental rights of the Constitution and provide guarantee to the foundational or elementary education to all irrespective of their social and economic background. Finally, the amendment to the Constitution was made to amalgamate the educational right as a fundamental right at the instance of Supreme Court's decisions. The most significant amendment to the constitution for the inclusion of education as a fundamental right was 86th amendment in the year 2002. The said amendment included Article 21A within Part III of the Constitution 'considering right to Education as a fundamental right and children aging from 6 to 14 are provided with free and compulsory education'.[19]

National Education Polices

The extensive debates on free and compulsory education up to the age of 14 years in the Constituent Assembly ultimately took shelter under the Directive Principles of State Policy. The goal set for the country's educational policy was to work out a system of universal elementary education by 1960. Necessary changes were also affected in the system of secondary and higher education in keeping with the needs of the country.[20] Much deliberation on the topic of education and reporting has also taken place. The country observed several commissions like the Radha Krishnan Commission on university education (1948-49), the Kher Committee on primary education (1948), the Mudaliar Commission on secondary education (1953), and the last and the most comprehensive effort on education came in the form of the Kothari Commission (1964-66). These commissions have considered almost every aspect of the education.[21]

Radhakrishnan Commission of 1948 saw the academic issue in a larger perspective as universities come under its preview.[22] Subsequently, the Kothari Commission of 1968, while reiterating the constitutional injunctions about free and compulsory education up to the age of 14, laid emphasis on advanced outlays for education and advised the curtailment of higher education. The Gajendragadkar Commission that followed on the

[16] S. NURURLLAH & J. P. NAIK, HISTORY OF EDUCATION IN INDIA DURING THE BRITISH PERIOD, 68 (The MacMillan Company, New York, 1943)
[17] INDIA CONST. art. 45
[18] INDIA CONST. art. 29
[19] INDIA CONST. art. 21A
[20] SAIKIA, S. HISTORY OF EDUCATION IN INDIA (Mani Manik Prakash Publishers, 1998)
[21] Kamat, A. R. Educational Policy in India: Critical Issues, 29, *Sociological Bulletin*, 189, (1980)
[22] Government of India, Report of University Education Commission. (1950)

path of the Kothari Commission dwelt on the governance of universities that gave the State greater control on higher education. Such authoritarian structure took a great importance during the emergency when education was transferred from the State to the Concurrent list.[23]

In response to the Kothari Commission, the Government of India formulated the 'National Policy on Education 1968' (NPE).[24] Compulsory education for the children between the age group of 6-14 years, adequate emoluments, opportunities of training and freedom to improve the teaching capacities of teachers; three language formula; equal opportunities of education irrespective of physical, social and economic background; prominence to tribal and backward areas; inclusion of local community to build national integration; importance to science, mathematics, agriculture, and technical education to improve the economy; assessment to identify the talents of students; availability of books at the reasonable rate; comprehensive examination pattern; extension of secondary education to the remote areas and importance to technical and vocational training at the secondary education level; considerable importance to university education; establishment of part time courses in large scale; special emphasis on adult education; incorporation of sports and games within the education curriculum; protection of the minority educational interests; uniform educational system throughout the country on 10+2+3 pattern; and review of policy on every 5 years interval are some of the important provisions of NPE 1968.

The NPE, 1986[25] was the successive effort to bring changes in the education system. Under this policy, the role of education was seen to be manifold and considered to be essential for all with the aim of all-round development including material and spiritual. Further it brings about changes in the thought patterns and contributes to the national solidarity grounded on socialistic, secular, and democratic values which are enshrined in our constitution. Education was considered to be providing manpower, stimulus to research and development in economy leading to national self-reliance. A unique investment both in the present and future was the key principle of National Policy on Education.[26] It aims to foster equality and motivation to the young minds to move towards international cooperation, peaceful co-existence and fraternity despite their socio- cultural diversities.[27] To rectify the drawbacks of NPE 1986, a commission was appointed which came up with several important suggestions and they were incorporated in the NPE, 1992.

The Concept of Right to Education in India

Right to education, of course, does not mean the right to same kind or same degree of education for all individuals but it means the minimum standard or basis of quality education to all, be it an elementary, basic or foundational education. Article 26 of the Universal Declaration on Human Rights mentions, "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit".[28] Further it says, "Parents have a prior right to choose the kind of education that shall be given to their children".[29] The Convention on the Rights of the Child demands the States Parties to recognise the right of the child to education in a progressive manner particularly making primary education compulsory and available free to all with the mea-

[23] Raina, Badri. Education Old and New: A Perspective, 17, *Social Scientist*, 7-8 (1989)
[24] National Policy on Education, 1968, Government of India (1968)
[25] National Policy on Education 1986, Government of India (1986)
[26] Sen, Rahul & Bhattacharya, D. K. Education in India, 21, *Indian Anthropologist* 68 (1991)
[27] GHOSH, S. C. THE HISTORY OF EDUCATION IN MODERN INDIA, 184 (Orient Longman Limited, New Delhi, 2000)
[28] Article 26 Clause (1) of Universal Declaration of Human Rights, United Nations Organisation, https://www.un.org/en/about-us/universal-declaration-of-human-rights
[29] *Id,* Clause (3)
[30] Article 28 Clauses (a) and (e) of Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance

sures like encouraging regular attendance at schools and reduction of the dropout rates.[30] These international conventions inadvertently focus on the compulsory and free education to all and further the obligation to impart education is on both the State as well as parents and guardians.

It was aptly admitted that right to education, in India, is a fundamental right coupled with right to quality education. The Constitution of India, by inserting article 21A, made it obligatory on the part of the state, parents and society at large to play a vital role to create education as a fundamental human right to all, irrespective of their social and economic background. The Supreme Court and High Courts have upheld the right to free and compulsory education through their various landmark judgments. The Parliament subsequently enacted the Right to Education Act in the year 2009 and implemented in 2010. Following the 1986 education policy, changes have been taken place to a great extent. Several mission mode programmes like "District Primary Education Programme (DPEP) followed by the Sarva Shiksha Abhiyan (SSA), Rashtriya Madhyamik Shiksha Abhiyan (RMSA), Rashtriya Uchchatar Shiksha Abhiyan (RUSA), the Constitution (Eighty- sixth) Amendment Act (2002) and the Right of Children to Free and Compulsory Education (2009), acceptance of external aid for education programmes in the early 1990s and the mobilisation of additional domestic finances through the levy of an education cess, restructuring of teacher education programmes, and expansion of both government and private education institutions at all levels of education".[31]

Right to Education act

It is an axiomatic truth that an individual obtains equal opportunities under right to education in order to develop his faculties to the fullest to become a complete human being. To accomplish the goal of right to universal education, article 21A of the constitution obligates the State to provide education to all. It says, "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine".[32] In pursuance of this article the Right of Children to Free and Compulsory Education Act, 2009 (RTE)[33] was enacted and it came into effect from April 1, 2010.

The RTE Act, 2009 is a child-centric and proposes the re-orientation of the teacher to accommodate himself to the situations of the child. It aims to provide the primary education to all children aged between 6 to 14 years as a fundamental right. The act also mandates 25 per cent reservation for disadvantaged sections of the society which include SCs and STs, Socially Backward Class, and Differently abled children. It makes provision to include drop out and other children to the classes appropriate to their age. Sharing of the responsibilities between central and state governments towards the financial and other educational assistance to the children, prohibition of deployment of teachers for non-educational work except specified under the Act, and providing safety and security by eradicating fear, trauma and anxiety through establishing a child-friendly and child-centred learning are some of the important features of the Act

Judicial Response on Right to Education

Originally, article referring to the right to education was incorporated under the Directive Principles of State Policy rather than placing under the Fundamental Rights. Assumptions could be made that the framers of the Constitution were intended to make the State responsible in providing quality education to its citizens without differentiating on social or economic

with article 49, United Nations Human Rights, https://www.ohchr.org/en/professionalinterest/pages/crc.aspx, It provides, "States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all.... (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates..."

[31] Dewan, Hridaykant, and Archana Mehendale. Towards a New Education Policy: Directions and Considerations. 50, *Economic and Political Weekly,* 15, 16, (2015), www.jstor.org/stable/44002890

[32] INDIA CONST, art. 21A

[33] Right of children to Free and Compulsory Education Act, 2009, No. 35, Acts of Parliament, 2009 (India)

background. When the right to education was denied, the Supreme Court time and again has interfered to assert the right in a fair way. While upholding the right to education as a fundamental right under Article 21 of the Constitution, the Supreme Court in *Mohini Jain v. State of Karnataka*,[34] observed that a citizen cannot be denied the right to education by charging exorbitant fee in the form of capitation fee. Proceeding in this line, the Supreme Court in *Unni Krishnan v. State of TN*,[35] reiterated the same and further held that every citizen has a right to education until the age of 14 years at free of cost and thereafter it is subjected to the economic and capacity and development of the State.

Basing on these judgments, the Constitution was amended and inserted three new provisions to the Constitution; They were Articles 21A, 45 and 51A. Article 21A which says, "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine".[36] Article 45 provides, "The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years".[37] Article 51A says, "Who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years".[38] The above-mentioned articles clearly elucidate that the state along with the parents or guardians of the child have an obligation to provide education at free of cost up till the age of 14 and early childhood care of children below 6 years. While observing the responsibilities of state, the Supreme Court in *Avinash Melhrotra v. Union of India & Others*[39] held that there is a fundamental right to get education free from the panic of safety and donation, and the educational right incorporates the provision of secure schools pursuant to Articles 21 and 21A of the Constitution of India. No issue where a family seeks to educate its children (i.e., including private schools), the State must make sure that children suffer no damage in practicing their fundamental educational right.

Right to Education in India- a Dream or a Reality?

In India, assessing the situation in general, the enrolment figures show an upward trend at all levels. Statistics of 2018 mention that 1291 lakh students for the primary have been enrolled in 2015-16 and 676 lakhs for the upper primary, 391 lakhs for the secondary, and 247 lakhs for the senior secondary have enrolled in 2014-15.[40] The status of education in India, however, has acquired a steady but gradual growth since its independence, yet not satisfactory as it ought to be. Inadequate ratio between teacher and pupil, low budget allocation by the Government for the education, entry of private sector into education due to investment of FDI, poor implementation of the Education Policies, high taboo system towards female education in the remote areas, lack of skill and job-oriented education in the schools, illiteracy and lack of motivation by the parents towards education etc. are some of the reasons for slow progress of education in India. Largely, on the one hand children belong to remote and socio-economic backward areas failed to enrol themselves into secondary education and on the other urban children failed to get into some professional courses due to unreasonable fee structure. Right to education has become a dream to many rather than a reality. Overall data of Indian education reveals that the right to education has not been effectively accomplished despite the efforts of State and non-state entities. The budget allocations hardly reached to their purpose, and it is observed that public expenditure on education de-

[34] AIR 1992 SC 1858
[35] 1993 AIR 217; 1993 SCC (1) 645
[36] INDIA CONST. art. 21A
[37] INDIA CONST. art.45
[38] INDIA CONST. art.51A
[39] WRIT PETITION (CIVIL) NO.483 OF 2004
[40] Children in India, 2018: A Statistical Appraisal, Social Statistical Division, Central Statistical Office Ministry of Statistics and Programme Implementation, Government of India, 41 (2018) http://mospi.nic.in/sites/default/files/publication_reports/Children%20in%20India%202018%20%E2%80%93%20A%20Statistical%20Appraisal_26oct18.pdf

clined by 4 per cent in 1990 and 3.5 per cent by 2000. Increasing fee hikes, withdrawal of stipends is the inevitable fallout of the austerity measures of the global capital.[41]

The framers of the constitution felt the need of right to education and made provision under the Directive Principles of State Policy to make the State to shoulder the responsibility of education. The successive governments, though enacted policies one after the other, failed to accomplish the intention of the framers of the constitution due to lack of commitment and widespread corruption in the system. Right to education implies the right to compulsory and free education at the elementary or foundational level and higher education depending on the calibre of the students and their economic status. While upholding the right to education various International Conventions, Agreements, Protocols and Declarations mention that the essential components of education are availability, accessibility, acceptability and adaptability.[42] At the national level, the Constitution, the Right to Education Act and Judicial pronouncements assume that right to education is a fundamental right. The national policies on education have been drafted by taking into consideration the above assumptions. But due to their poor implementation and moreover the lack of will of the policy makers the universal right to education remained far from the reality. Among them, ineffectiveness of Right Education Act and desire towards Privatisation are important one.

Poor Performance of RTE Act 2009

RTE Act 2009 is an attempt to serve the purpose of education to all. Expectations to reap the fruits of the Act were very high but it failed to render the desired results due to its poor execution. Though there was an effort to enact a bill in the year 2006, due to lack of funds, the then Finance Committee and Planning Commission rejected the proposal. In the year 2009, when the bill became an Act and implemented on April 1, 2010, it raised a great deal of expectations in the minds of general public. It was considered a great step towards education for all and of national importance. "In principle, the RTE Act 2009, with appropriate modifications and financial provisioning, offers a great opportunity to correct the anomaly of poor education outcomes, and can deliver on the long-standing commitment of providing basic and quality education to the so called 'demographic dividend' of the country".[43]

The Act had an aspiration to fulfil the aim of Sustainable Development Goal 4 which speaks about education for all by the end of 2015 along with Millennium Development Goal. But it faced several challenges in the wake of its implementation. Certain challenges which the Act faced during its initial stage are mainly the shortage of funds, lack of proper infrastructure, the accountability of the schools mentioned under the Act, shortage of human resources in the form of teachers, the implementation of public- private partnerships, etc. Giving a death blow to the implementation of the Act at the initial stage, various states raised their contention against the financial burden that they had to bear for the 25 per cent children from disadvantaged groups who seek education under the Act.[44] A civil society survey at the nationwide shows that lack of proper infrastructure and human resource in the form of teachers had equally a great set back to the Act for its effective implementation. While exhibiting the eligibility of qualified teachers and the availability of infrastructure, the report observes, "...a shockingly high percentage, 93, of teacher candidates failed in the National Teacher Eligibility Test conducted by the Central Board of Secondary Education in 2010-11. In 2009-10, the failure was 91 per cent in the national

[41] Bej, Sourina. How government is planning to put India's education sector on sale, dailyo, (11-12-2015) https://www.dailyo.in/politics/occupy-ugc-smriti-irani-higher-education-modi-government-wto-gats-chennaihrd-ministry-digital-india/story/1/7891.html

[42] General Comment no. 13, para. 6. https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d)GeneralCommentNo13Therighttoed ucation(article13)(1999).aspx

[43] Jha, Praveen and Parvati, Pooja. "Right to Education Act 2009: Critical Gaps and Challenges", XLV, *Economic and Political Weekly,* 20, 23, (2010)

[44] Deccan Herald, No Funds for RTE, says Maya, (2010) https://www.deccanherald.com/content/62144/nofunds-rte-maya-pm.html,

examination, meant to test the candidates' teaching aptitude and a prerequisite for appointment of .95.2 per cent of schools are not yet compliant with the complete set of RTE infrastructure indicators".[45] Even the "bureaucratic apathy and weak institutional mechanisms are some factors that have contributed to this"[46] While delving on the accountability of the schools are concerned, it is not clear the reason behind exempting or leaving out the accountability of unaided schools under the Act.[47] The concept of admission of a child of any age to the appropriate class under section 4 of the Act is absurd and impractical in its very notion of implementation.[48] These above-mentioned issues have made the poor implementation of the Right to Education Act in its entirety. Adding to that the litigations in the various High Courts regarding fixing the age limit for admission to a particular class, denial of admission, issues concerning inter-school transfers, and admission procedures, are some of them.

Privatization of Education

Right to education is not restricted to basic or elementary education but it includes right to have quality education towards a child's holistic growth. High fee structure and over competitiveness is prone to commercialisation of education rather than providing quality education to all. In the bargain, merit-based education and education to the deserving children will be at stake. Privatisation of education has hampered the growth of right to education to all. The governments, since the introduction of Liberalization, Globalisation and Privatization (LPG) in 1991, has failed to accomplish the goals of education for all by making suitable provisions of free education under its fiscal policies. An analysis of the National Sample Survey Organisation (NSSO) data for two time periods-1995-96 and 2014-15, unravel the fact that the enrolment of the student ratio in both urban and rural areas has remained either static, or it has reduced in both public and aided institutions, and has increased almost universally in private unaided institutions.[49] India being one of the largest education system and highest number of education institutions in terms of enrolment, provides ample opportunities for the investment and "the higher education sector of India is considered as the 'sunrise sector' for investment as it is a market worth US$15 billion"[50]

Suggestions and Recommendations

Taking into consideration above mentioned drawbacks, suggestions for the effective implementation of the right to education policy would be -

- Strengthening the provisions of RTE, 2009 and measures to implement it at any cost. Certain rectifications need to be brought in both willingness on the part of State to execute the Act in its entirety and to amend some provisions for the effective implementation of the said Act.
- Primarily, the State should allocate funds for the same. It should allocate a substantial amount, not less than 6 per cent of the total budget, for the cause of education and must spend the whole allocated amount for the purpose without making any deviations. There must be a strict regulatory body to implement the same.
- Well qualified teaching faculty at all levels of education must be promoted by selecting qualified teachers and further providing avenues for them to have ongoing formation as years go by. The incentives of promotion must be given

[45] The Hindu, Lack of school infrastructure makes a mockery of RTE, (April 05, 2012) https://www.thehindu.com/news/national/lack-of-school-infrastructure-makes-a-mockery-ofrte/article3281720.ece

[46] Business Line, Courting justice for the right to education, (Jan. 13, 2018) https://www.thehindubusinessline.com/opinion/courting-justice-for-the-right-to-education/article9557598.ece

[47] RTE *supra note*, 33, Sec. 21

[48] Id, sec. 4

[49] Jha, Jyotsna, Education India Private Limited, 42, *India International Centre*, 39, 40 (2015), *JSTOR*, www.jstor.org/stable/26316574.

[50] Singh, Vikram. Higher Education of India on the Way to Nairobi for GATS, *People's Democracy* (2015), https://peoplesdemocracy.in/2015/0816_pd/higher-education-india-way-nairobi-gats.

basing on their proficiency in teaching and not merely on the age factor.

- The amendments to be made to the RTE Act in the spheres of funds allocation to bear the expenditure of the 25 per cent children from disadvantaged groups who seek education under the Act. Present system of allocation would certainly bring dilemma between Centre and the States. Therefore, the responsibility must be given strictly either to State or Centre to avoid unnecessary confusions unlike the present system of sharing the responsibility between the Centre and the States.
- The entire mode of education should be directed towards the holistic growth of a child rather than rote learning. A comprehensive learning process including extracurricular activities with the academic subjects should be introduced. Technical, vocational and other life-oriented subjects should be introduced to lead a child towards the mainstream of the society both in the spheres of knowledge and status.
- Commercialisation of education should be brought under the strict regulatory control and all the education institutions must follow the general fee structure decided by the state authority. All the States must encourage the state-sponsored schools or aided schools in the remote and socio-economically backward areas instead of allowing the profiteering private entities.
- Parameter of discrimination should be merit oriented and not socio-economic oriented. Elementary and Secondary quality education should be provided to all without any discrimination and talented children of tribal and backward areas must be given scholarship on the basis of merit for their higher education.
- A full-fledged education policy to implement the right to education, in an effective manner, without discriminating either on socio-economic background or urban-rural basis, is expected from the state as a welfare state.

Conclusion

Since India is dominated by villages, it is relevant that State imparts education to all without discrimination on the basis of social and economic backwardness of a child. Private sectors or non-state entities may provide education at the cost of high fee structure and it could hardly be accessed by poor and backward categories children. Lack of good infrastructure and qualified dedicated teachers in the remote areas fails to provide quality education to the children, even at the foundational or elementary level. Government, due to its failure to upgrade public schools and colleges with the state aid, failed to compete with the private entities with good infrastructure and dedicated team of experts to raise the standard of education. National Policy on Education 1986 provides for the Universal Elementary Education to all but the upgradation and privatisation of education sector became a road block for its implementation. Even the RTE, 2009 failed to accomplish the expected rate of growth. It is also noteworthy that quality education can only be considered if the holistic growth of a child is taken care. Literacy alone would never suffice the growth of a child but a comprehensive quality education which takes care of the development of a child is necessary. Due to lack of effective implementation of Constitutional provisions on education through National Education Policies and RTE, the education for many has become a dream especially the socially and economically backward section of the children. Being a fundamental and human right, the State is obliged to implement the right to education on a war footing to render justice to all without discriminating on the basis of socio-economic considerations.

The Implementation of the Concept and Provisions of Copyright Legislation in the Indian Film Industry

Paramita Choudhury[1]

Introduction

When consumers enter "digital version", "free download", "Torrent" or "Pirated Install" on their web browsers, malware assaults and cyber vulnerabilities are two of the top result that appear. As a result of digitalization, traffic to pirated websites has surged, and so has online video consumption. According to many, digital piracy authority, piracy in India increased by 62 percent due to this development of internet and cyberspace. Stremio, Popcorn Time, Solarmovies, 123Movies, and Tamil Rockers are some of the most popular pirated sites.

The cyberspace is amongst the most crucial innovations that humanity has produced until time. The mode of communication that is increasing at the highest rate is conversational. The volume of internet traffic continues to increase by one-hundred-fold every 100 days. There is little doubt that its influence on the spread of knowledge is significant. The introduction of the internet has transformed the mode, quality, and speed of information transfer. Information is distributed globally via this medium, and it is possible to assess, read, print, and download information from all around the world. No single individual or entity is able to exercise absolute control over the internet. This is referred to as the information technology communications anarchy since there is no centralised authority for information technology communications.

While the internet and the expansion of knowledge-based enterprises have resulted in the creation of a new type of property, this new property is the result of human intellect and effort. This newly devised type of property is known as intellectual property. This type of property is derived from the product of the intellect of human, such as fictional works, paintings, artistic designs, and other forms of creativity in the fields of practical or fine arts. The set of rights includes the right to buy, sell, or lease. This class of things also includes copyrights, patents, trademarks, and designs. Intellectual property differs from traditional of asset as its worth and applications of such asset are very unclear. Because it is easily and freely available to the general public, it is also more likely to be stolen. Intellect is a primary contributor to the making of these goods. It is tough to preserve, which makes it an important area to safeguard.

Origin of Copyright Law

Although it was originally implemented during colonial occupation, copyright legislation in India has gone a long road ahead ever since. One of the very first laws regarding copyright was passed in India in 1847 by the then Governor General of the country. When the Copyright Act of 1911 came into effect in England, it become inherently enforceable to India because India was then an intrinsic part of the British Raj. The copyright act (the Act of 1957) was in effect for the entire country from when it was enacted until independence in 1958, after a fresh copyright law (the Act of 1957) went into effect. Following the enactment of the Act, several revisions have been made to it.[2]

According to the 2012 changes, Indian Copyright Law is now in accordance with the Internet Treaties and accords namely the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Additionally, by including technological protection mechanisms in the legislation, the new law assures that fair use of copyrighted materials does not

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[2] *Study on Copyright Piracy in India*, sponsored by Ministry of Human Resource Development Government of India, (Jan.29, 2018, 10:04 AM) http://copyright.gov.in/Documents/STUDY%20ON%20COPYRIGHT%20PIRACY%20IN%20INDIA.pdf.

suffer in the digital era because of specific fair use rules. A large number of revisions have been added to the bill to facilitate accessibility for handicapped individuals, making the bill friendlier to authors, special provisions for people with disabilities, and streamlining copyright management.

To categorise revisions made via The Copyright (Amendment) Act 2012, one can think of them as

- Including changes to privileges in works of art, cinematograph movies, and audio recordings.
- Right related amendments included in the WCT and WPPT.
- Additional author-friendly modifications, about the manner of Assignment and Licenses.
- Measures to improve access to copyrighted works.
- Strengthening enforcement of online piracy while safeguarding against it.
- Minor adjustments, like the Reform of the Copyright Board, should be made to our copyright system.[3]

The Indian Copyright Act provides protection to original literary, dramatic, musical, and artistic works, cinematic films, and sound recordings. It is important to recognise that when you say anything is unique, you imply it is not a rip-off of someone else's work or idea. This Act grants copyright holders the power to carry out a range of actions or authorise others to do so. Prominent amongst these are:

- to reproduce the work in material form;
- to publish the work;
- to perform the work in public or communicate it to the public;
- to produce, reproduce, perform or publish any translation of the work;
- to create a cinematic film or a recording in connection with the work;
- to make any necessary changes to the work; and
- to perform any of the acts in regard to a translation or adaptation of the work listed in sub clauses to (a) to (f))[4]

Cinematography in the Realm of Copyright Law

The copyright sector, throughout the globe, in general and film business in particular supports not just to cash creation for its rightful owners but also safeguards the labour that is dedicated to it. Aside from this, the government's exchequer also obtains cash through a revenue collected by the entertainment tax. India is home to one of the biggest movie industries in the world, with around one thousand movies made every year.

Cinematograph Film

In the case of a cinematograph film, the soundtrack is present, even if it is silent. In addition, it encompasses any cinematography-style work done by any procedure similar to cinematography. A film believed to be an activity undertaken by a methodology akin to photography is defined as a video film. An unedited performance of a live event such as a sporting event, or a theatrical or musical performance, may be filmed for use in a movie.

In association with the film, the music used in the film involves coordination of the film's cinematographic film and is therefore protected by copyright. In *Balwinder Singh v. Delhi Administration,*[5] and *Tulsidas v. Vasantha Kumari*,[6] Video and television is also cinematographic works, according to the argument in both the judgments.

[3] *Inside Views: Development In Indian IP Law: The Copyright (Amendment) Act 2012,* (Jan. 29,2018, 10:20 AM) https://www.ip-watch.org/2013/01/22/development-in-indian-ip-law-the-copyright-amendment-act-2012/.

[4] Chapter-III Legislative Provisions in India, (Jan. 29, 2018, 11:23 AM) https://shodhganga.inflibnet.ac.in/bitstream/10603/128961/16/09_chapter%203.pdf.

[5] AIR 1984 Delhi 379.

[6] (1991) 1 LW (Mad) 220 (229)

Copyright relates to the right to authorise most filmed performances in cinematography and especially in the following events:

- to make a duplicate of the movie;
- to permit the film to be seen and heard in public in the case of visual pictures, and in the case of audio, to be audible in public in the case of sound.;
- to use such sound track to produce any record containing the audio in the segment of the musical score connected with the film;
- to disseminate the film via television.

In general, copyright protects two types of rights: exploitable and moral rights. Exploitable rights (sometimes known as "economic rights") are those that the work's owner can use to make money. The sole freedom to make copies, adaptations, or images of copyrighted content, as well as the right to licence these rights to others, belongs to the copyright owner.[7] In addition to his ownership of his own creation, the author of a work is always guaranteed to maintain his or her moral rights. Moral rights are rights attached to an individual's identity as an author. Authors have the right to select when and if their work will be published, as well as the right to retain authorship and the responsibility to protect their reputation. The fact that many instances both India and the U.K. preserve the author's unique entitlement to derivative works supports the author's distinct claim to derivative works. The idea itself (form, style, and arrangement), but not the representation of that idea, is copyrightable. This means that even though two authors separately conceive the same idea, they are not blocked from publishing their work as long as they use distinct materials.

A revolution in the motion picture industry has occurred across the world during the last several years. A new trend has emerged in the world of entertainment, particularly in the area of digital media. Thanks to the broadband networks made possible by broadband networks, users can now freely download unauthorised copies of pre-recorded media files, referred to as "pre-cords," over P2P networks. Consumers who have downloaded a song or other file are able to transmit it to other users in digital format using the P2P software. The precipitous decrease in the growth of the recording industry over the last few years is attributable to file sharing. While online piracy could lead to the loss of intellectual property rights in digital goods, that doesn't mean all piracy leads to copyright infringement. With the introduction of the internet, new methods of copyright infringement have emerged, which makes it much more difficult to combat the damage caused to copyright-based companies. In today's music market, both online piracy and illicit downloads have diminished sales of genuine CDs and lawful digital distribution are becoming a replacement for legitimate CD purchases.

Digitalization has posed a serious threat to entertainment industry. It is manifested from scheme of Digital Literacy Scheme for rural India. The widespread adoption of these approaches has the potential to create more sustainable and successful business models across several media sectors. Cable television officially became digital in 2012, marking the beginning of a long process of digitization. In various phases, initiatives have been undertaken.

A substantial amount of progress was made during the first phase of implementation in the four metros. Industry is now working to realise short-term benefits that include the potential to commercialise content, greater transparency, and fairer revenue distribution throughout the value chain. These short-term benefits are achieved by a reduction in the costs of content delivery and by making more money available for investment in distinguishable and classy content.

Even when projected timelines are accounted for, it is likely that the implementation of Phase 2 digitization will happen on a similar timeframe to what has been

[7] Copyright Act of 1957.

[8] Report published by Delliote International, April 2015, (Jan. 30, 2018, 11:00 AM) https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-mediatelecommunications/IMI%20report_singlePage.pdf.

envisaged so far, but with a delay. The entertainment industry is almost 77% digitized. Indian digital industry is expected to cross 3100 crores by 2020.[8]

The growth of India in 2014 ranked it as the world's fastest-growing smart phone market.[9] This growth was achieved due to the implementation of the Digital India project. India was the first country in 2014 to be placed on the United States' International pirate watch list, which included countries like Nigeria, Bangladesh, Somalia, and others where piracy is a problem.[10] India has negotiated co-production agreements with China and Canada.[11] Such Treaties not only allow Indian filmmakers to benefit from tax breaks, but also from reduced visa requirements in partner nations.

While India is appreciated for its efforts in the past decades to fight piracy in terms of the impacts of it was, the raid on criminal camcorder pirate cartels Yamraj and NiCkkk DON has been certainly one of the main effects that came from that.[12] While the multiplex tickets of a legitimate recently released movies cost INR 150-200, the pirated DVD costs INR 30-40.[13]

Meaning of the Term Piracy

Piracy is an unlawful duplication of content and is then offered on the open market at a significantly cheaper price. It is one of the prevailing threats for entertainment. Facilitated usage of technology has become a cause for wild piracy. Piracy is now a straightforward business. At a relatively modest price, CD authors are available on their own. Wherever there is a doubt about penalising wealthy countries, the penalty of pirating connected issues is quite serious, whereas the government has not paid adequate attention in Asiatic countries and particularly in India owing to more interesting issues.

After being overtaken by China, India became the second-largest country with respect to the number of internet users.[14] In India more than millions of mobile internet users have been identified by January 2016.[15] Wireless modems, notably 4G, sustained robust increase in the number of 3G subscribers, while at the same time, significant amounts of 2G coverage in rural India as well as through other digital ecosystem participants in support of Digital India Program had contributed to making this possible. The availability of inexpensive smartphone and tablet devices has fuelled the growth of mobile screen sizes. The number of smartphone users in India is estimated to be 10%.[16]

Types of Piracy

1. ***Internet Piracy:*** Illegal downloading is the downloading and dissemination of unauthorised copies of intellectual property, such as films, shows, songs, games, and software programmes, via the online file sharing network, rogue server, websites, and hacked computers. Black market pirates are also known to

[9] E Marketer newsletter, 29 December 2014,KPMG Report 2014, (Jan. 30,2018, 11:35 AM) https://assets.kpmg/content/dam/kpmg/pdf/2014/03/FICCI-Frames-2014-The-stage-is-set-Report-2014.pdf.

[10] The Hollywood Reporter *"India join China, Russia, Switzerland on Piracy watch list",* 24 June 2014, (Feb. 12, 2018, 11:50 AM) https://www.hollywoodreporter.com/news/general-news/india-joins-china-russiaswitzerland-714572/.

[11] The Hollywood reporter, *"India, china sign film co production,"* 18th September 2014, (Jan. 29, 2018, 12:30 PM) https://assets.kpmg/content/dam/kpmg/pdf/2015/03/FICCI-KPMG_2015.pdf.

[12] The Hollywood Reporter, *"China Asia-India the problem areas in camcorder piracy cases"* 8th December 2014, page 10, (Jan.30,2018, 01:05 PM) https://www.hollywoodreporter.com/movies/movie-news/cineasiaindia-china-problem-areas-755349/.

[13] *Id.*

[14] AMAI-IMRB Internet in India Report,2014, (Jan. 30,2018, 01:45 PM) https://cms.iamai.in/Content/ResearchPapers/e7cb87e7-74b3-4c2f-8bfc-09ccfd7fb265.pdf.

[15] Economic Times, Sunday, January 10,2016.

[16] KPCB Internet Trend Report,2014, (Jan. 30,2018, 03:10 PM), https://www.kleinerperkins.com/perspectives/2014-internet-trends/.

[17] LuigieProserpio, Severino Salvemini and Valerio Ghirnghelli, *Management Entertainment Pirates Determinants of*

utilise the online platform to sell unlawfully replicated DVDs through online auctions.[17]

2. *Peer-To-Peer Piracy :* One of the greatest threats to the current revenue model of the media industry is the illicit sharing of files over peer-to-peer networks. This section serves to provide a guide for media industry experts on the construction of P2P database networks, particularly with respect to their capacity to assess responsibility and the abilities of media companies to litigate and press charges against P2P software designers and consumers. When everyone on the network has equal participation in the resources and direct peer-to-peer communication does not require a centralised server or gateman, then this is considered a P2P model. In typical client-server systems, the IP of the server is fixed. However, in P2P systems, a search mechanism is activated that can locate the right node in real-time. Several different approaches to peer-to-peer systems have evolved, some differing greatly with respect to their search and storage strategies.

While Napster, as one of the young crops of P2P file-sharing websites, initially employed a centralised index to keep and browse for items on the network, the development of another network, Bit-Torrent, introduced decentralised searching and content distribution. The Napster approach has participants connecting to a central database, where they publicly stated the content, they intend to distribute. The user seeks certain material in the database, and so acquires IP addresses of the servers where the content is located. Once they have this information, they are able to immediately download the content from one of the nodes they have discovered. Discovery and tracking of developers becomes easier with this centralised system since it enables easy identification of all the files, and it is therefore straightforward to trace who is providing and who is receiving data.[18]

3. *Theatrical camcorder piracy:* Filmmaker Cam cording or infringement copies of new release films that emanate from cinema halls are quickly posted online following the premiere of the film.[19] This has a significant impact on distribution cycle, performance, and jobs. When someone arrives to the cinema hall through any form of recording device, such as a camcorder, a voice recorder, or any other kind of equipment, they are known as camcording.

4. *Cable piracy :* The term "cable piracy" denotes to the illicit broadcasting of movies over cable network. It is not unusual for films, specifically the most recent releases, to be shown on cable with no permission from the copyright holder. Piracy is an uncommon occurrence with satellite channels due to the fact that these are usually organised and are largely used for distributing films without having paid for the necessary copyright permissions.

5. *Software Piracy :* The software piracy consists of first of all, using the software illegally, and then disseminating it without authorization. While both small and large businesses are plagued by software piracy, the degree to which this issue plagues them varies greatly.

6. *Optical Disc Piracy :* When optical disc piracy takes place, this activity refers to illegal manufacturing, selling, distribution, or trading of discs in optical disc formats with motion pictures on them, and the illegal fabrication and transmission of feature films.

7. *Internet and Mobile Piracy :* The further advancement of technology is definitely going to lead to an increase in piracy, as the enforcement methods are presently so feeble. There are very high hopes for the growth of the Indian mobile phone market, and it's one of the fastest growing in the globe. There are many other methods of getting pirated materials, such as accessing the Internet, downloading material from peer-to-peer websites, and torrenting. Files like these can be significantly compressed and then transferred to a

Piracy in the software, music and movie Industries, p 34-36, 2015.

[18] Sanjay Goel, Paul Miesing & Uday Chandra, *The Impact of Illegal Peer-to-Peer File Sharing on the Media Industry,* (Jan. 30, 2018, 03:45 PM) https://www.researchgate.net/publication/259729302_The_Impact_of_Illegal_Peer-to-Peer_File_Sharing_on_the_Media_Industry/link/5c701aa9299bf1268d1df998/download.

[19] FICCI-KPMG REPORT 2015, (Jan. 30, 2018, 04:30 PM), https://ficci.in/spdocument/20723/Executivesummary-FICCI_KPMG-report-2016.pdf.

[20] *Id.*

Smartphone or obtained from the internet without further processing.[20]

2016 National Policy on Intellectual Property Rights

A huge step in the country's strong protections and promotion of the Intellectual Property Rights (IPRs) was taken with the launch of the National IPR Policy in 2016, which entailed significant and revolutionary reforms on the board. To aid in fostering creativity and innovation while also acknowledging the importance of intellectual property in the development of the economy, the GOI approved a new policy. The Action plan for India's quest to increase creativity and stimulate innovation details the various aspects involved in the pursuit of such goals, including a well-informed public about intellectual property, an expanding ecosystem for creating, commercialising, and enforcing IP, and policies and practises that encourage innovation.

The first objective of the policy is to increase public knowledge of the fiscal, societal, and cultural values of intellectual property rights. In order to facilitate this goal, additional IPR educational initiatives will be implemented, such as the incorporation of IPR lessons in the education system. Although school-age children are a substantial portion of the piracy market, both in terms of films and of downloading copyrighted music, the students' demand for stolen materials isn't strong. It is intended that adding IPR studies in their coursework will assist students comprehend the value of Intellectual Property rights as well as how infringement of those interests results in financial loss to not just the rights holder, but also seems to have a large impact on the country's economy. Additionally, IPR studies would emphasize to at minimum a significant portion of the population who are not aware that they may be inadvertently aiding piracy that the intermediaries for illicit items are not equal to legitimate ones.

The second objective of the policy suggested that relevant revisions be made to the Cinematograph Act, 1952 in order to include criminal penalties for the unlawful duplicating of films and the fourth objective in the policy emphasises the importance of media and public consciousness along with strict regulation procedures to prevent both physical and virtual piracy.

The process of implementing guidelines and procedures as well as augmented cooperation between many organisations and giving vision and direction on enforcing anti-piracy metrics; integration and communicating of competence and best practises at the global level; study of the scope of IP infringements in different sectors; analysis of regulatory issues and obstacles in enforcing anti-piracy regulations; and introduction of suitable innovation remedies for suppressing online piracy.

By working with partners to conduct fact-finding investigations to determine the degree of piracy and also the causes for it as well as ways to counteract it, we will set the stage for initiatives to prevent piracy.

Strategies for Combating Piracy

1. ***The Legal Framework :*** The first step in combating piracy is the implementation of legislation to protect copyrights, as described in the start of this essay. The Statute of Anne, which is most commonly known as the beginning of modern copyright law, has led to the formation of a multitude of domestic and international law and agreements that help to keep copyright protection and pirate prevention simple worldwide. One way to think of Berne Convention for the Protection of Literary and Artistic Works (1886), Universal Copyright Convention (1952) and World Intellectual Property Rights Copyright Treaty (1996) is as accords designed to protect copyright. Regardless of the fact that the online is a worldwide instrument, the value of these accords cannot be overestimated.

2. ***Network Administration :*** Additionally, with regard to the legal aspects, the question of network administration is significant. Additionally, if a user cannot be induced to refrain from downloading by the prospect of punishment, another alternative is to restrict the authorized users from accessing the resources that they would use to download the application. In the most prevalent circumstances, publishing companies obtain ISPs (also known as Internet Service Providers, or ISPs) to block access to certain sites and Web addresses to restrict customers from accessing certain sites. Some governments undertake these activities by creating their own country-wide internet filters. As of April 2013, 29,000 websites are inac-

cessible in Turkey due to a blockade imposed by the Turkish government. The filtration is used to ban a list of websites, such as news sources, which contain pornography, other contentious material, and websites that are known to have illegally copied another site's content.

3. ***Anti-Counterfeiting and Piracy Initiative (APEC) :*** APEC was enacted in 2005 and dealt with minimising the spread of fake goods, as well as cracking down on the selling of fraudulent products over the internet, while also raising awareness on IPR security and border enforcement measures.[21]

4. ***Anton Pillar Injunction :*** To receive the order, the claimant must establish the satisfaction of the Court that the following requirements are fulfilled:

a) the harm is extremely serious.

b) evidence exists to prove that this individual has evidence in his possession that will most likely be demolished before any application can be made; and

c) there is a probability that incriminating evidence will be wrecked before an application can be made.

In Anton Pillar v. Manufacturing processes,[22] The court agreed to implement a mechanism of substantial relevance to some intellectual property rights, one that had previously been submitted for approval. In these kinds of proceedings, the plaintiff appeared before the High Court or Patents County court in Camera unaccompanied by any notice to the defendant for an order that the defendant allow him with his solicitor to inspect the defendant's premises and to seize copy of photograph material related to the infringement. It is also possible for the defendant to be forced to provide the infringed items, keep infringing stock, or reveal incriminating documentation. He may also be asked to provide information, for instance regarding his supplier or the whereabouts of the infringing items that have transited through his hands.

5. ***John Doe Order :*** Before a defendant's infringing activities result in harm to the intellectual property protection of the artist, who created artistic works such as movies, songs, and so on, the rights of the inventor are preserved by granting a John Doe Order. Also, it is likely that many people will identify John Doe's identity as Rolling Anton Pillar, Anton Pillar, or Ashok Kumar. The long-established and wellrespected British Queen's Bench created the concept of a John Doe Order, a complex equitable remedy that grants the plaintiff the right to seek and obtain an injunction order from a hypothetical defendant; thus, it gives the plaintiff the opportunity to prevent any evidence of their wrongdoing from being destroyed.[23]

John Doe orders were first passed in Indian Courts in a case by the Delhi High Court,[24] which relied on the judicial systems of developed nations like Canada, the United States, England, and Australia.

As detailed processes for checking websites' listings are implemented with standardised norms, judicial clarity and predictability to copyright holders and website users are provided.

Some good practises could be adopted from jurisdictions like Singapore, where courts have also come to rely on testimony that the internet sites that were targeted were obstructed in other jurisdictions, or that a large amount of traffic was generated, or that the web pages did not agree with takedown notices that were served by the plaintiffs, or that the websites included instructions for circumventing measures to disable access.[25]

Besides the aforementioned ways to prevent online piracy of movies and additional tactics, such soft legislation and technological techniques, are also accessible in this high-tech era. As technology like watermarking and block-chain technology continue to evolve, new developing technologies to combat un-

[21] See; *APEC Anti-Counterfeiting and Piracy Initiative,* (Feb. 10, 2018, 11:15 AM), `http://www.wcl.american.edu/pijip/go/research-and-advocacy/enforcement/anti-counterfeiting.`

[22] (1976) Ch. 55; R.P.C. 719.

[23] Ajay Sharma, *John Doe Orders in Indian Context* (Feb. 12, 2018, 03:05 PM), `https://rmlnlulawreview.com/2017/10/25/john-doe-orders-in-indian-context/.`

[24] Taj Television Ltd. & Anr. vs. Rajan Mandal & Ors, [2003] F.S.R. 22

[25] Disney Enterprises Inc, and Others vs. M1 Ltd and Others, [2018] SGHC 206.

lawful material consumption, such as digital media, are becoming possible. Additionally, the extent to which other soft legal enforcement measures, such as public-private partnerships and infringing website listings, may be made public will be revealed.

Best Practices

All copyright infringement deterrence strategies and regulations must be built on an in-depth analysis of the reasons for copyright infringement.

In India, laws governing copyright infringement do not equate to piracy, even if the legal system is much weaker and the literacy and affluence in the country is lower. The same is true of locations with varied histories and greater regulatory authority.

Furthermore, the new National IPR Policy aims to fuel additional alterations to India's IPR framework, especially with regard to the streamlining of laws and regulations in order to improve their efficiency and the stimulation of additional research in order to guide legislative policymaking. Additionally, it ought to help make alterations to the Copyright Act, which is often pushed to fit the pace of media convergence, the constantly changing content landscape, and the advancement of technology. In addition, another area of reform involves making the adjudicatory and redress mechanisms function more effectively, with the aim of putting these mechanisms to the test to date. With regards to this, there is the further challenge of reform for the functioning of the adjudication and redressal mechanisms, and how they may perform and more effective which led the Delhi High Court releasing notice to the Department for Promotion of Industry and Internal Trade (DIPP) and requesting a status report.

It is also possible that India might examine additional strategies to pool resources and deal with the pending cases by, for example, creating up expert IP forums and other bureaucratic frameworks with protections to help the courts. In order to safeguard civil liberties, it is necessary to guarantee that any administrative framework has been clearly defined; features clear legal authority and are subject to scrutiny by the courts. In addition to serving as an IP arbitrator, an IP ombudsman might also be established to aid injunctions, and additionally verify the data made by both the litigants in such matters.

Parliamentary Privileges in Indian Governance System: Role of Free Speech in Promoting Transparency

Dr. Prashna Samaddar[1] *and Victor Nayak*[2]

Introduction

Parliamentary privilege as a concept can be defined in various manners and has been done so by various eminent jurists. May defines the privileges as,

> *"The sum of peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions and which exceed those possessed by other bodies or individuals. Thus, privilege though part of the law of the land, is to a certain extent an exception from the ordinary law."*[3]

The legal concept regarding parliamentary privileges is laid down under Article 105 and Article 194 of the Indian Constitution. As per these provisions the members of Parliament have been given protection from being tried or prosecuted under any civil or criminal proceeding with regards to anything that they might say or approve or disprove by casting their vote in the parliament or any committee as has been exclusively provided in the constitution.[4] The advantages are sure rights having a place with Parliament aggregately and some others having a place with the Members of Parliament individually, without which it would be inconceivable for the House to keep up with its autonomy of activity or the pride of position or for the individuals to release their capacities.[5]

While providing the explanations behind leaving the parliamentary privileges vague in the Indian Constitution, Dr. B R Ambedkar, while chairing the Constituent Assembly which drafted the Indian Constitution, brought up that aside from the advantage of the right to speak freely of discourse and resistance from capture, the advantages of parliament were a lot more extensive and amazingly hard to characterize. Thus, according to him it was not workable to *create a complete code on the above subject matter and incorporate the same as a part of Indian* Constitution. So, it was thought best to leave it to the Parliament to define and limit its privileges whereas the Indian Parliament was vested with the same set of privileges that were enjoyed by the England House of Commons.[6]

The Constitution specifies some of the privileges. They are:

- the right to speak freely of discourse in Parliament;[7]
- not liable to any procedures in any court in regard of anything said or any vote given by him in Parliament or any board of trustees thereof;[8]
- resistance to an individual from procedures in any court in regard of the distribution by or under the authority of one or the other Place of Parliament of any report, paper, votes or procedures.[9]

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[3] Hajare, Shashikant *The law of parliamentary privileges in India: problems and prospects,* Sodhganga (Oct. 30, 2018 10:04 AM) shodhganga. inflibnet.ac.in/bitstream/10603/52360/12/12_chapter%205.pdf.
[4] V Razdan, *Parliamentary privileges in India: separation of powers, Sodhganga* (Oct. 30, 2018 10:04 AM) www.shodhganga.inflibnet.ac.in/bitstream/10603/8783/4/04_preface.pdf
[5] DALIP SINGH, *Parliamentary Privileges In India,* 26 IJPS, No. 1 76, 75-85 (1965).
[6] *Id* at 78.
[7] INDIA CONST. art. 105, cl. 1.
[8] INDIA CONST. art. 105.
[9] *Id.*

- Courts are disallowed from questioning the legitimacy of any procedures in Parliament on the ground of a supposed abnormality of strategy.[10]
- No official or individual from Parliament enabled to control technique or direct of business or to keep control in Parliament can be dependent upon a court's locale in regard of the activity by him of those forces.[11]
- No individual can be at risk to any considerate or criminal procedures in any court for distribution in a paper of a generously obvious report of procedures of one or the other place of Parliament except if the distribution is demonstrated to have been made with perniciousness. This invulnerability is additionally accessible for reports or matters broadcast through remote telecommunication.[12] This immunity, however, is not available to publication of proceedings of a secret sitting of the House.[13]

Aside from the advantages indicated in the Constitution, the Code of Common System, 1908, accommodates independence from capture and confinement of individuals under common interaction during the duration of the gathering of the House or of a board thereof and forty days before its initiation and forty days after its decision.[14]

Different advantages, as provided under the Rules of Procedure and Conduct of Business in Lok Sabha[15] by specific legislative inputs have been discussed hereunder:

- Exclusion of Individuals from responsibility to fill in as legal hearers.[16]
- Right of the Parliament to get quick data with regards to capture, confinement, detainment as well as arrival regarding the Part.[17]
- Prohibition with respect to capture and administration of lawful interaction inside the Parliament premises without acquiring authorization of the House Speaker.[18]
- Restriction regarding exposure to the procedures or choices of a mysterious sitting of the House.[19]
- All legislative Councils can send people, documents, and accounts important with the end goal of the request by an advisory group.[20]
- A Parliamentary Panel might direct promise or insistence to an observer (witness) analyzed before it.[21]
- The proof offered in front of the Panel of Parliamentarians and its statement and procedures can't be revealed or distributed by anybody unless it comes to the Parliament.[22]
- Option to deny the distribution of its discussions and procedures.[23]
- Privilege to leave out outsider from the House.[24]

[10] INDIA CONST. art. 105, cl. 1.
[11] INDIA CONST. art. 105, cl. 2.
[12] INDIA CONST. art. 361A.
[13] INDIA CONST. art.361A, cl. 1, proviso.
[14] §135A of Code Of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908 (India).
[15] Rules of Procedure and Conduct of Business in Lok Sabha, 1952 (Aug. 13, 2021, 02:05 PM) http://164.100.47.194 RULES-2010-P-FINAL_1
[16] SUBHASH C. KASHYAP, OUR PARLIAMENT 234-36 (National Book Trust 1995).
[17] §§ 229 and 230 of Rules of procedure and conduct of Business in Lok Sabha, 1952
[18] Kashyap, *supra* note 15 at 236
[19] *supra* note 16, §§ 232 and 233.
[20] *Id* § 252
[21] *Id* §§ Rules 269 and 270
[22] *Id* § 272
[23] *Id* § 275
[24] *Id* § 249

- Right to punish individuals in case if any breach of privilege or contempt of the House, whether they are members of the House or not.[25]

Contempt and Free Speech: Conflicts

As a rule, any demonstration or oversight which deters or blocks either Place of Parliament in the exhibition of its capacities, or which hinders or obstructs any Part or official of such House in the release of his obligation, or which has a propensity, straightforwardly or by implication, to deliver such outcomes might be treated as a hatred despite the fact that there is no point of reference of the offense.[26]

At the point when one looks at the connection between the courts also, lawmaking bodies, the inquiries with respect to the position to choose the presence of an advantage and with regards to whether the courts could look at the legitimacy of committal by a lawmaking body for its hatred or break of advantage and so forth have to be tended to.[27] Indeed, the circumstances under which the lawmaking bodies guarantee advantages in India get the courts the field regularly. In India, the lawmaking bodies might guarantee the advantages under three circumstances and where the courts can't be allowed to have any part to play:

- at the point where the Constitution provides the same explicitly;
- the council has made the legislation;
- a privilege that has been provided to by the House under the Indian Constitution[28]

A portion of the above-expressed issues were analyzed by the Apex Court in Kesava Singh In re[29] and the greater part assessment for this judgment is provided regarding a constitutional interpretation as upheld by 6:1 majority:

- The manner of interpreting Article 194 (as well as Article 105) concerning the nature, degree and impact of the autonomy of the House rests with the legal executive of the country.
- As per powers provided under Article 226, the High Court can investigate the orders given by the law makers with regards to the articulation "any position" as mentioned under Article 226 which encompasses the latter too.
- Article 211 provides clearly that the behaviour of a judicial member in the release of his obligations cannot be the topic of any activity which can be tabled by the House while exercising its functions or advantages presented by Article 194(3).
- Article 212 prevents the Court from regulating the procedure that is to be followed inside the House but does not prevent it from checking the validity of any action that has been taken in connection to the same.
- The first part of Article 194(3) when read with the last part of Article 194(4) ensures that the future laws define the privileges which should be in conformity to the fundamental rights and thus such enactment would be "law" as per Article 13 of the Indian Constitution which thus gives the Court the competency to check the sanctity of action in light of the existing fundamental rights.

[25] *Id* § 248
[26] ERSKINE MAY, PARLIAMENTARY PRACTICE 115 (21st ed., 1989).
[27] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 66 (8th ed. 2018).
[28] *Id* at 68.
[29] AIR 1965 SC 745; This reference was a continuation of the death of a request by a phenomenal Full Seat of 28 Appointed authorities, remaining, under Article 226, the execution of the U.P. Gathering Goal requesting two Appointed authorities of the Allahabad High Court to be brought into care before the Bar of the House to clarify why they ought not be rebuffed for the scorn of the House. The two Appointed authorities had conceded the habeas corpus request and allowed bail to Mr. Kesava Singh who was going through detainment in compatibility of the Gathering Goal pronouncing him blameworthy of the break of advantage. The goal of the Get together and the stay request gave by the Full Seat brought about an established impasse. Therefore, the President alluded the matter under Article 143 to the High Court for its viewpoint.

Free Speech and Parliamentary Privileges: Relationship and Issues

The ability to speak freely is dependent upon different arrangements of the Constitution and subject to the principles outlined by the House under its ability to control its own procedures.[30] Indian Parliament's upper and lower house both have outlined certain guidelines and have approved their directing officials to apply and authorize them. For instance, the guidelines of the strategy of the lower chamber enforce various impediments upon the right to speak freely of its individuals and enable the speaker to make a fitting move guiding the individuals to pull out from the House;[31] on requesting his suspension;[32] or ordering the ban of offensive words from the proceedings of the House.[33]

Besides the Constitution forces another constraint upon the the right to speak freely of discourse whereby in the Parliament that no conversation will happen concerning the direct of any appointed authority of the High Court or a High Court in the release of the obligations besides upon a movement for introducing a location to the President appealing to God for the evacuation of the adjudicator.[34]

The expression "powers, privileges and immunity" as provided in the Constitution have evoked sharp contention in the country since the initiation of the Constitution. This is perhaps the most disputable provision in the Constitution which looks to connect and equalise, the advantages and immunity accessible to the individuals from Parliaments in the two nations.[35]

The House of the People (Lower House) of the Indian Parliament made history on August 29, 1961, by reprimanding a journalist at the Bar of the House and in that context functioning as the High Court of Parliament for the first time. It was a unique event and has set in motion the discussion which actually proceeds unabated. The individual to whom the censure was controlled was the supervisor of Barrage, a Bombay liberal diary. His offense was the distribution of an article in the diary entitled "The Kripaloony Impeachment"[36] which, as per the Privileges Committee of the Lower House of Indian Parliament, "in its tenor and substance criticized a fair individual from this House (J. B. Kripalani) and cast reflections on him by virtue of his discourse and direct in the House and alluded to him in a derisive and offending way."[37]

The Parliamentary Proceedings (Protection of Publication) Act, 1956 states that no criminal or civil proceedings may be initiated before any judicial forum against any individual in matters related to the distribution of a fundamentally correct report which deals with the Parliament proceedings unless it can be shown with reasonable conviction that it was specifically instructed by the Speaker of the House to obliterate the same.[38] This position was strengthened after the insertion of Article 361-A brought about by the 44th Constitutional Amendment Act of 1978.[39]

In Alagaapuram R. Mohanraj and Ors vs Tamil Nadu Legislative Assembly[40] Justice Chelameswar has given a decision in this regard in recent times whereby the Court made the following issues:

1. When an individual from a State Assembly takes part in the House proceedings, does it come under the purview of freedom of speech and expression as guaranteed under Article 19(1)(a) of Indian Constitution?

[30] INDIA CONST. art. 118, cl. 1.
[31] § 373, Rules of procedure and conduct of Business in Lok Sabha, 1952.
[32] *Id.* § 374.
[33] *Id.* § 380.
[34] INDIA CONST. art. 121.
[35] Singh, *supra* note 5.
[36] Gunupaty Keshavram Reddy v. Nafisul Hassan AIR 1954 SC 636; MSM Sharma v. Shri Krishna AIR 1959, SC 365.
[37] M. V. Pylee, *Free Speech and Parliamentary Privileges in India,* 35 Pacific Affairs, 13, 11-23 (1962).
[38] Dr K. Madhusudhana Rao, *Codification of Parliamentary Privileges in India - Some Suggestions,* (2001) 7 SCC (Jour) 21.
[39] *Id.*
[40] WRIT PETITION (CIVIL) NO. 455 OF 2015.

2. Whether any act of anybody or authority empowered by any law hinders any individual from taking part in the discussions held at any sessions being conducted by the body or authority in question and that hindrance leads to preventing that individual from exercising his fundamental right to speech and expression as provided under Article 19(1)(a) of Indian Constitution?

Upon examination of the above issues in context of the mandate provided under the constitution, it was decided by the Apex authority that the scope of freedom of speech and expression as guaranteed under Article 19(1)(a) is quite distinct and holds a higher position as compared to the same right when provided as a privilege under Article 105 or Article 194 of Indian Constitution. There are 4 major factors which go on to highlight the mentioned distinction:

- The former is wider in scope as its available to every citizen of India, whereas the latter is applicable and enjoyed only by the legislators;
- whereas the former is unassailable, the latter is applicable only while individual remains as a member of the Parliament;
- more importantly Article 19(1)(a) has not confinement issues unlike the other set of provisions i.e. Article 105 and 194 which are restricted to the legislative premises
- though both the sets of provisions provide for some restrictions upon the enjoyment of the rights, but the freedom of speech in as a part of parliamentary privileges are regulated by legislative bodies or as imposed by the Indian constitution as under Article 121 and 211 of Indian constitution.

Codification and Parliamentary Privileges: Concluding Remarks

There is an indisputable difference in the position regarding the supremacy of all rights and advantages and the privileges that are present under Indian legal framework. In India the legislative bodies decide about the privileges in context of its scope, violation and punishment for any such violation with regards to their speech in the Parliament which is somewhat unsettling and raises some grave questions regarding the unrestricted power that is available and somehow its undermines the principles of Indian constitutional and democratic framework.[41]

It is the utmost responsibility of the authorities to maintain the balance between the privileges and the rights so that it does not affect the constitutional framework. Though in many judicial opinions judiciary has respected the privileges of the members of Parliament and State Assemblies but later even they also felt that the privileges should be restricted in such a way that it does not damage the fabric of Indian democracy. It has been seen that on many occasions the freedom of press have been curtailed in the garb of these privileges. Paying heed to the Constitution of various countries, the Apex Court in case M.P.V. Sundaramier and Co. v. Territory of Andhra Pradesh advised:[42]

> *"The strings of our Constitution were no vulnerability taken from other Government Constitution yet when they were woven into the surface of our Constitution their compass and their structure experienced changes. Thusly, critical as the American decisions are as demonstrating how the request is overseen in the Government Constitution exceptional thought should be taken in applying them in the comprehension of our Indian Constitution."*

The National Commission to Review the Working of the Constitution (NCRWC) in its report has mentioned that:[43]

> *"the advantages of lawmaking bodies should be portrayed and delimited for the free and independent working of Parliament and State Councils."*

Thus, it needs to be understood that the process of codification has its advantages and establishes the princi-

[41] Subodh Asthana, *Parliamentary Privileges in India,* iPleaders (Jul. 23, 2018, 02:05 PM) `https://blog.ipleaders.in/parliamentary-priviledges/#Misuse_of_Parliamentary_Privileges.`
[42] AIR 1958 SC 468.
[43] NCRWC Report, 2002 (Jul. 23, 2018, 02:05 PM) `https://legalaffairs.gov.in/ncrwc-report`

ples of Rule of Law. It thus goes without saying that the advantages of the Parliamentarians need to be systematized by removing penal provisions for any violations of the privileges by any common man. Parliamentarians and the greater part of the Presiding Officials have gone against the transition to classify them on the ground that as the legal understanding of the law is the obligation of none else except for the legal executive. Article 105 clause (3) and Article 194 clause (4) of the Constitution of India, 1950 are provision which enable for characterizing the forces, advantages and insusceptibilities of Indian Parliament just as its individuals and committees. The un-codified and characterize corrective forces of authoritative bodies in India lead to legitimate polemics between assemblies, court and resident in India. As rightly put by Justice Iyer *"Parliament of India is not and can never be a court and we have separate judiciary"*.[44]

[44] Dr. Jyoti Dharm and Mr. Gaurav Deswal, *Parliamentary Privileges In India: A Comprehensive Study,* 3 BLR 177, 172-177 (2016).

The Arbitration Amendment Act, 2019 and the Changing Arbitration Eco-System in India: Needs a Re-Look?

Dr. Rohit Moonka[1] and Dr. Silky Mukherjee[2]

Introduction

Arbitration has always been a preferred mode of dispute resolution especially in commercial matters. For long, India has been striving to become a preferred seat of arbitration not only for domestic arbitration but also for international commercial arbitration since the enactment of Arbitration and Conciliation Act, 1996.[3] In this endeavour, there have been several ups and downs noticed by the observers which were either due to certain judicial pronouncements or fallacies in the drafting of the Arbitration and Conciliation Act, 1996 itself.[4] Soon it was realized both by the judiciary as well as by the legislature that they need to change the approach, if India has to become a preferred seat of arbitration. In this context, after various failed attempt to amend the Arbitration and Conciliation Act, 1996, major changes were introduced though the Arbitration and Conciliation Amendment Act, 2015. Immediately after this amendment, new problems were faced by the parties and need was felt to bring another amendment in the existing law.

In this backdrop, in order to overcome the existing lacunae and to boost the confidence of commercial entities to make India an international hub of arbitration, an expert committee headed by the Supreme Court judge (Retd.), Justice B. N. Srikrishna, which was assigned the charge to suggest improvement in the existing arbitration law. The committee submitted its report in July 2017[5] suggestive of numerous actions for revamping the arbitration law in India. Its suggestion were mainly focused on facilitating the working of the institutional arbitration in India and removing few ambiguities in the Arbitration Amendment Act 2015. It is largely on the basis of Justice B. N. Srikrishna Committee report, the Central Government brought the Arbitration and Conciliation (Amendment) Act Bill, 2018 which was regarded as a noteworthy attempt by the Central Government to facilitate and streamline the working of Institutional Arbitration in India and also to make India a preferred seat of arbitration both for domestic as well as international commercial arbitration. This Bill subsequently received the assent of the President on 9th August 2019 and became the part of the statue. The Central Government exercising its powers provided under section 1(2) of the Arbitration Amendment Act, 2019, appointed 30th August 2019 for the enforcement of different sections under the Arbitration Amendment Act 2019.

Key Features

There is no doubt that the Amendment Act, 2019 has been brought with the intention to refine and strengthen the existing Arbitration Law. In this regard, there are many new and innovative features that have been added to this which was demanded by several quarters. A few of the key changes are discussed below.

• Arbitration Council of India (ACI):

ACI is a statutory body sought to be established by the Amendment Act, 2019 which is given the mandate to grade arbitrary institutions and also to accredit Arbitrators by laying down the guidelines and rules in this regard. ACI is also entrusted with the task to recognise professional institutes providing accredita-

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[3] The Arbitration and Conciliation Act, 1996, Act No.26 of 1996
[4] Sumeet Kachwaha, The Indian Arbitration Law: Towards a New Jurisprudence, 10 INT. A.L.R. 13, 17 (2007)
[5] Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (October 28, 2019 10:04 AM), http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf
[6] Section 43 D (2) b

tion of arbitrators.[6] In addition to this, ACI is entrusted with the task to conduct training, workshops and different courses in the field of arbitration in association with law institutions/universities, law firms and arbitrary institutes.[7] It is also mandated to establish and maintain a depository of arbitral awards made both in India and abroad.[8] It will also work towards promotion and encouragement of arbitration and other ADR mechanisms in India.[9] Since there was no such statutory body to regulate the conduct of arbitrary institutions and also for their accreditation, establishment of ACI is indeed a step in right direction.

• Application of Arbitration Amendment Act 2015:

To clarify on the application of the Arbitration Amendment Act 2015, a new provision by way of section 87 is incorporated to clarify that the Arbitration Amendment Act 2015 will apply to such arbitrary proceedings which were commenced after 23rd October 2015 or if parties explicitly approve the same. This section specifies that the courts can apply the provisions of the Arbitration Amendment Act 2015 only if the two situations as mentioned are attracted. However, this newly introduced section 87 did not take into account the latest judgment of the Hon'ble Supreme Court of India on this very point i.e. BCCI v. Kochi Cricket Pvt. Ltd[10] which decided otherwise on the point which is discussed in the latter part of this paper. This particular section has created more ambiguity then clarity on the point.

• High Court and Supreme Court recognized Arbitral Institutions:

The 2019 Amendment Act has provided that the arbitration institutions duly recognized by the High Court/Supreme Court can be approached by the parties directly for appointment of arbitrator and in such case, parties are not required to file petition in the High Court/Supreme Court under section 11 of the Arbitration Act 1996 as it was required earlier.[11] It is mandated that those Institution Arbitration houses will have the power to appoint the arbitrator in international commercial arbitration if they are duly recognized by the Supreme court and for domestic arbitration, if they are duly recognized by the respective High Court.[12] This provision is indeed a welcoming step as it will not only decrease the avoidable burden of the courts but will also be expedient for the parties. This amendment, however, is yet to be notified.

• Changes to the timelines provided under Section 29A:

The 2015 Amendment Act had brought in the timeline of twelve months for the completion of arbitration proceedings and declaration of an award.[13] It had also provided that the Arbitrator's mandate will come to an end automatically after twelve months are completed if the parties don't consent for the extension of arbitrator's mandate by another six months.[14] Further, after completion of eighteen months, if the time limit is not extended by the court, arbitrator's mandate will abruptly end. However, through the Arbitration Amendment Act 2018, it is provided that the authorization of the arbitrator will be extended even after eighteen months till the petition filed before the court in this regard is decided.[15] This provision is going to benefit all those arbitration proceedings which are going to be halted due to completion of eighteen months as now they can continue their proceedings during the pendency of the decision of the court in this regard.

In addition to this, The 2019 Amendment Act further provides for calculating the time's line of twelve months not from the date of appointment of the ar-

[7] Section 43 D (2) d
[8] Section 43 D (2) j
[9] Section 43D (1)
[10] 2018 (4) SCALE 502
[11] Section 11 *(3A)*
[12] Id
[13] Section 29A(1)
[14] Section 29A(4)
[15] Id

bitrators (unlike the 2015 Amendment Act) but from the date of end of the pleadings.[16] The Arbitration Amendment Act 2019 provides for six months for completion of the pleadings and twelve months for the delivery of the arbitral award in case of domestic Arbitrations. These timelines as introduced by the Arbitration Amendment Act 2019 are however, not made applicable to the international commercial arbitration in India.

• Confidentiality of the Arbitration Proceedings:

Confidentiality is one of the unique features of arbitration. Because of the fact that the arbitration proceedings are private and confidential, many parties resort to arbitration. However, the Arbitration and Conciliation Act, 1996 did not have adequate provision on this. The 2019 Amendment Act has introduced a new Section 42A, which will ensure the confidentiality of the arbitration proceedings except for arbitral award.[17] This step will strengthen the confidence of parties and encourage them to opt India as a seat of arbitration. This provision has safeguarded the arbitrator for any of his/her act done in good faith.[18] This was a much needed provision and has been rightly acknowledged and incorporated in the law.

• Reduced Scope of Section 17 interim injunction:

As per the provisions of Arbitration Amendment Act, 2015 a party can move to the arbitrary tribunal at any time during the pendency of the arbitrary proceeding or at any time after the delivery of the arbitral award but before it is enforced.[19] Through the Arbitration Amendment Act 2019, this power of arbitrary tribunal to entertain an application under section 17 of the Act has been confined to the date of the delivery of the final arbitral award.[20] As the mandate of the arbitrator automatically ends after the pronouncement of final award, through the Arbitration Amendment Act 2019, it is clarified that the arbitrary tribunal will not have any powers after the pronouncement of the award to grant any interim relief by making necessary amendments in section 17(1) of the Act. In such situation, after the award is delivered by the arbitrary tribunal, only the courts will have the powers to grant interim orders under Section 9 of the Arbitration Act.

• Qualifications and Experience of Arbitrator:

The 2019 Amendment Act has introduced a new schedule namely "Eighth Schedule" to the Arbitration Act, which provides exhaustive detail of qualifications required to become an arbitrator.[21] This Eighth Schedule provides for 10 years' experience as an advocate or an Officer of Indian Legal Service or a CA or an engineer who are eligible to become an arbitrator. It also provides the general standard applicable to the arbitrators. It however, failed to provide for law professor with considerable years of experience who could also be made eligible for becoming arbitrators. This would have increased a wide pool of professionals with varied experiences to be eligible for becoming arbitrator.

Problems with the Proposed Amendments

• Arbitration Council of India

With regard to the Arbitration Council of India, Justice B.N. Srikrishna Committee had provided for a statutory institution which will have its members nominated by the CJI, the Central Government and also a well-regarded foreign professional. But, the Central Government did not take into account this recommendation of the Justice B.N. Srikrishna Committee and provided that the Arbitration Council of India will be a body only of members nominated by the Central Government only. It will have the Secretary to the Central Government's two departments as ex officio members.[22] Since the role of the ACI is very wide and its

[16] Supra note 12
[17] Section 42A
[18] Section 42B
[19] Section 17(1)
[20] Id
[21] Section 43J
[22] Section 43C(1)

powers includes accreditation of the arbitrary institutions, it would have been better, had the involvement of the government official kept limited in the composition of ACI. This is all the more important when in a large volume of arbitration cases, government is a party to such matters.

• Applicability of the amendments

The question of applicability of the Arbitration Amendment Act, 2015 was subject to lots of deliberation amongst stakeholders and also several inconsistent views taken by various High Courts on this. But when the Supreme Court of India was seized with the issue of applicability of Arbitration Amendment Act, 2015 in the case of BCCI v. Kochi Cricket Pvt. Ltd[23] it held that the Arbitration Amendment Act 2015 is prospective in its nature. The implication of this judgment of the Supreme Court was that the 2015 amendments were applicable to arbitrary tribunal and court proceedings started subsequent after the Arbitration Amendment Act 2015 came into force. It was also held in this case by the Supreme Court that the Arbitration Amendment Act, 2015 will apply to pending proceedings that might have been instituted before the Arbitration Amendment Act, 2015 came into existence but were pending on the date of the amendments came into force i.e. 23rd October, 2015. This case also provided that section 36 of the Arbitration Act, 1996 after its amendment will apply to pending applications for setting aside of arbitral awards under section 34 of the Arbitration Act 1996. This was to remove the problem of automatic stay on enforcement of arbitral award upon the filing of a setting aside application under section 34 of the Arbitration Act, 1996

However, through the Arbitration Amendment Act 2019 it is provided that the Arbitration Amendment Act 2015 will apply only to 'arbitration proceedings started on or after the commencing of the Arbitration Amendment Act 2015 and to the court proceedings occurring out of such arbitration proceedings.'[24] It would have been wise on the part of the legislature that the law as stated in the above judgment of the Supreme Court is taken into account and the Arbitration Amendment Act 2019 should be amended in a manner that the judgment of the Supreme Court of India on this point is not negated and is retained.

• The issue with Confidentiality requirement

Through the Arbitration Amendment Act 2019, confidentiality has been made an essential feature of the Arbitration Act, 1996.[25] However, in other jurisdictions having provisions on confidentiality in their arbitration laws mostly provide for many exceptions in this regard. This aspect of the Arbitration Amendment Act 2019 should be re-looked as it should not bind the parties to arbitration to such broad confidentiality requirements where they can not disclose anything. It should be subjected to party autonomy wherein parties should have the autonomy to determine their limits of confidentiality. Party autonomy as explained by the Redfern and Hunter in the following words:

"Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitrary institutions and organisations. The legislative history of the Model Law shows that the principle was adopted without opposition..."[26] In the backdrop of the seminal principle of party autonomy, it is also for the legislature important to understand that such provision of confidentiality should not be made a mandatory provision.

Problem with the timeline under section 29A

In the Arbitration Amendment Act 2019, newly inserted provision of timeline for completion of pleadings within six months without any scope for an extension creates unnecessary limitation on the parties and the arbitrator to frame the arbitration proceedings as per their convenience. This is also against the sem-

[23] Supra note 9
[24] Section 87(b)
[25] Section 42A
[26] Redfern and Hunter, Law and Practice of International Commercial Arbitration, 315 (4th ed., 2004)
[27] Id

inal principle of party autonomy.[27] Further, it is also not clear from the provision that if the respondent who is also required to file a counter claim has to file it within these six months. Therefore, it is not clear as what could be the intention for providing six months' time for filing both statement of claim and its defence. It is therefore submitted that the pragmatic approach should have been in not dividing the time limits into different parts for different facets of the arbitrary proceeding. It would be pragmatic if simply an eighteen-month timeline for the completion of arbitrary proceeding is provided.

– **Qualification of Arbitrators** The Arbitration Amendment Act 2019 is not very clear as to the implication of the Eighth Schedule through which the qualifications of the Arbitrators have been introduced. It indicates that only such persons who satisfy those requirements as specified in the schedule are qualified to act as arbitrators. But, when the Eighth schedule is read along with Section 43D of the Arbitration Act, 1996 it implies that the requirements are pertinent at the phase of accreditation only.[28] This vagueness can make the arbitral award susceptible to challenge under section 34 of the Act which may be delivered by the arbitrators who do not meet these qualification as specified in the schedule. Therefore, this entire provision requires to be relooked and needs to be amended at the earliest to remove any complications to the parties in future.

– **Missed opportunity**

The Arbitration Amendment Act 2019 missed out to provide any provision for emergency arbitration. It is all the more important that despite an unambiguous recommendation in this regard by Justice B. N. Srikrishna Committee, the Central Government did not understand the veracity of its requirement under the Indian Arbitration Law. Provision for emergency arbitration is provided by almost all prominent jurisdictions abroad by introducing necessary amendments in their respective arbitration law.[29] It is therefore suggested, that if adequate provision with regard to emergency arbitration is incorporated in the Arbitration Act, 1996 it will raise its status and bring it at par with the International standards.

Concluding Remarks

Unquestionably, the Arbitration Amendment Act 2015 followed by the Arbitration Amendment Act 2019 aim at a more pragmatic and robust arbitration mechanism in India by overcoming the lacunae in the existing arbitration law. It is indeed laudable step towards achieving international standards of arbitration mechanism in India for domestic as well as international commercial arbitration and to make India a hub of international arbitration. It is also reflective of the willingness of the present government to rationalize the arbitration mechanism in India and make it at par with its other counterparts. However, to streamline the existing arbitration law and to minimize inconvenience to the future instigation which will be subjected to arbitration, certain loopholes as pointed out in this paper must be looked into to make the arbitration process in line with the international best practices.

In its existing form, the Arbitration Amendment Act 2019 creates more confusion then ironing out the discrepancies which is detrimental to the image of Indian arbitration law which already had a bad past no so long ago. By doing the necessary amendments as suggested in this paper, the government will further boost the confidence of the disputing parties to choose India as a preferred seat for arbitration. Any change made in the Arbitration Act 1996 is expected to build up the arbitration framework for the holistic development of the arbitration ecosystem in India and if the necessary changes as suggested in this paper are made, it will further strengthen the existing arbitration law in India.

[28] Section 43D(2)

[29] *See e.g.,* Singapore International Arbitration Center (SIAC) included the emergency arbitration provision in July 2010 only. The International Chamber of Commerce (ICC) included emergency arbitration provisions in the 2012 Rules through Article 29 and Appendix V. In the same manner, London Court of International Arbitration (LCIA) amended its Rules of 1988 in 2014 to provide provision for emergency arbitration through Article 9.

Right to Refuse Treatment Vis-À-Vis Passive Euthanasia: Judicial Approach

Sayan Das[1]

Introduction

The landmark judgment in *Aruna Ramchandra Shanbaug*[2] modified indefinitely India's controversial approach to euthanasia by authorizing perpetual life support, a method of passive euthanasia, life support system withdrawal only for patients in a permanent vegetative state (PVS). Passive euthanasia will or can "only be allowed in cases where the person is in a persistent vegetative state or terminally ill"[3] , according to the verdict. Under certain circumstances and conditions, the act of withdrawing or removing life-support medical treatment from a terminally ill or permanent vegetative patient state may be allowed. Another noteworthy court ruling followed after seven years of the Aruna Shanbaug case on 9th March, 2018 through *Common Cause (a reg. society) v. Union of India*[4] where the Supreme Court of India constituted with five judges has ruled that having the right to die with dignity is a fundamental and basic right. In seeking the solution or a way out, the issues which grappled the Hon'ble Court in *Common Cause* were: Is it unconstitutional for a person to refuse medical care, or is it illegal for them to refuse a certain sort of medical treatment? If this happens, can the individuals concerned make their own decisions about what steps can be taken in the future if they lose control of their faculties? To the question of whether an individual has a right and so imposes a duty on a medical professional who treats the individual, the answer is that this does lay an obligation on the doctor. To what extent, if any, does this obligation need qualifications is the next issue; Additionally, whether it is permissible for a medical practitioner to withhold or refuse medical treatment towards the end of an individual's life who has lost control of his or her faculties and this desire was expressed when he or she was able to make an informed decision and was able to think clearly. That individual's capacity to make an informed decision in a clear mind would likely allow them to make decision and decline medical treatment if there is no reasonable hope for recovery. The Bench went even further and found that the practice of passive euthanasia and advance medical directives are likewise legally acceptable. Also, there should be less unpleasantness in the process of dying for patients who are terminally sick or for patients who are in a vegetative state, because those individuals should be able to have an undisturbed, peaceful passing.

Consequently, passive euthanasia is now legal in India, despite the fact that granting sanction for passive euthanasia has triggered some substantial concerns in various legislation and conceptions of human dignity. According to the Supreme Court's ruling, the Indian Constitution in its Article 21 not only provides the right to life with dignity but on the other, a negative right such as the right to die with dignity (passive euthanasia by removal of life support) that is now allowed for those with a terminal illness and/or those in a persistent vegetative condition. The aim of the study is to analyze and critically examine the idea of the right to reject or refuse treatment and the admissibility to that right while considering legal and ethical concerns in congruence to passive euthanasia. As can be seen, legalization of passive euthanasia has important and dangerous implications, especially for the right to health. The approval of passive euthanasia in common law has at times been compared to active euthanasia; consequently, expanding the concept of passive euthanasia has severe implications in regard to the right to refuse treatment concept already prevailing, whereas passive euthanasia is seen by some exponents and rigorous supporters of active euthanasia as no form of euthanasia at all.

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[2] Aruna Ramchandra Shanbaug v Union of India and others, 2011 AIR SC 1290.
[3] Id.
[4] Common Cause v Union of India, (2018) SCC Online SC 208.

Patients hold the most crucial right of right to self-determination, which means they can decide for themselves whether their bodies will be treated medically or not. It is important to recognize that the aforementioned fundamental human rights inherent in informed consent also have a significant corollary: the ability to refuse treatment. To accept therapy, one has the freedom to object. However, when one "believes" they should be treated, then their selfdetermination has diminished to the point where it can be described as an "obligation" to follow one's doctor's orders. On the other hand, there are still reports of cases in which individuals are still being treated despite making intelligent objections or withdrawing consent, even though courts universally acknowledge patient's rights to refuse treatment, and although the methods for implementing this right are similar in all countries, there have been disparities in how these standards have been stated and implemented.[5]

Patients have the legal capacity to consent to medical treatment, or reject permission, if they are able to grasp and remember information and make a rational choice that considers the consequences of their treatment choices. In the medical field, all patients who are considered adults are presumed to be competent. This presumption can however be challenged. A competent individual refusing treatment can give rise to a lawsuit for battery; the doctor who takes the patient to the therapy regardless of their will is at fault (unlawful physical contact). Since it is possible to sue the doctor in civil courts, or even to prosecute him in criminal courts, he is vulnerable to claims in both courts. Patients who can make decisions regarding their treatment and well-being have absolute right to reject or to continue with treatment, where non-treatment leads to certain death. For example, Ms B is a patient being kept alive by artificial life support system, a ventilator which allows her to move and speak despite her paralysis. They refused to withdraw the ventilator, so she begged the physicians to do it. The court found that Ms B was competent, and that thus she had the right to refuse even lifesaving therapy, since she had the right to refuse treatment, her doctors acted unlawfully in prolonging her ventilation. Although the right to refuse treatment established by these instances appears to be absolute, as well as extending to requests for rejection that are manifestly suicidal, there appear to be no limitations. While it appears that people have the freedom to refuse medical interventions and at the same time, they do not possess the right to decide or consent to.[6]

Right to Refuse-Reject Treatment

Even if right of patients to refuse or reject treatment has already been widely recognised or what has been prevailing with or without any rule book, the acceptance of this even being represented in such official documents as the Patient's Charter is still in its early stages. While the ability to perform euthanasia on patients may be much anticipated, it must be acknowledged that allowing such euthanasia does not, in any way, give people permission to kill patients. One could justifiably consider it pointless to argue for such a seemingly apparent argument, but because many modern experts in medical law and medical ethics are appearing to presume the opposite.[7]

Article 21 of the Constitution of India guarantees that a person's right to life and personal liberty is guaranteed. Each citizen or individual has the right to live out one's life and to retain personal freedom unless those rights are taken away as part of a legal procedure defined or established by law. The phrase in grammatical form may appear negative but judicial interpretations have found that it is really a powerful expression of many of the positives in society. Many fun-

[5] *The Right to Refuse Treatment: A Model Act,* (May 18, 2018, 06:25 PM), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1651109/pdf/amjph00643-0086.pdf.

[6] John Keown, *Medical murder by omission? The law and ethics of withholding and withdrawing treatment and tube feeding,* (Jun. 05, 2018, 08:30 PM), https://pdfs.semanticscholar.org/2870/a75cb6a6c85bf46feb2f15d2669b2ddd35ac.pdf.

[7] Susan L Lowe, *The right to refuse treatment is not a right to be killed,* Journal of Medical Ethics, 1997 23: 154-158, (Mar. 28, 2018, 05:45 PM), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1377341/pdf/jmedeth00308-0028.pdf.

damental rights can be found under Article 21 of the Constitution, where they grow, flourish, and gain nutrition. One must see these fundamental human rights through the Indian constitutional provisions that advocates about preserving human dignity while choosing whether or not to accept treatment. Although there is a considerable body of law supporting this proposition, the understanding that any legislation that comes into conflict with or that does anything to limit the Constitutional Rights of India citizens is null and void has long been settled.[8]

A fundamental natural right is described in Article 21: to be given the opportunity to lead a peaceful and dignified life. For those who choose to end their lives, suicide is not a choice; it is a process, a cessation of life, an extinction of existence. While the "right to life" includes not allowing suicide, suicide is incompatible and contradictory with this idea in regard to the notion of dignity, and right to die concept along with dignity are pertinent principle. As healthcare advances, it is the responsibility of the state to safeguard the health of its citizens while also enhancing health care facilities. Physicians, on the other hand, have a duty to give good medical care, but not to harm or neglect patients. This is relevant in the context, and one of the pertinent rights of a patient is the right to discontinue or reject or refuse medical treatment. A right to reject or refuse medical treatment has been prevailing from a long time and is also well-established in law, especially in instances where life-sustaining or life-prolonging treatments are in question. An example of someone who refuses treatment is someone who has blood cancer, and who refuses to undergo chemotherapy or receive feeds via a nasogastric tube. By granting or allowing patients the right to refuse or reject medical treatment, a way to perform passive euthanasia has been ultimately given. Some people argue that the provision that allows for medical termination of pregnancy before 16 weeks into a pregnancy is also considered to be a form of active involuntary euthanasia.[9]

With the patients having the right to refuse-reject treatment, particularly when they are in a life-threatening scenario, they have the potential to refuse. It is essential to secure the patient's refusal in the event of a witness. The paper confirming the refusal must be signed by the witness. Due to the fact that a patient's refusal to consent to a life-saving procedure will invalidate the surgery or treatment, it is often in the patient's or authorized representative's best interest to inform the hospital administrator about the non-performance of the procedure and allow the administrator to take appropriate action. To prevent an adult patient from leaving a hospital against his will is against the law. If a patient demands that he be discharged from the hospital even if medical advice indicates otherwise, then this should be recorded, and his signature obtained.[10]

This is one of the crucial matters that shapes the delivery of medical treatments today, especially when it comes to permission. There is no further need except that the patient is able to make decisions, because his desires are all that is needed to give permission for medical treatment. He is able to give consent to medical treatment even if the therapy would save his life, as long as his preferences and his ability to make decisions are there. As the job description of today's medical lawyer plainly outlines, this includes a considerable deal of ethical consideration, and is central to modern medical legislation The Nuremberg Code of 1947 was a widely adopted declaration in which it was said that dignity is inherent to all human beings, and this is to be preserved. The Nuremberg Code was put in place following World War II to address the crimes that the Nazi administration committed against both humans and animals in their quest

[8] S Balakrishnan & RK Mani, *The constitutional and legal provisions in Indian law for limiting life support,* IJCCM 2005 Volume 9 (2) 108-114, (Apr. 01, 2018, 09:10 PM), http://www.ijccm.org/article.asp?issn=0972-5229;year=2005;volume=9;issue=2;spage=108;epage=114;aulast=Balakrishnan.

[9] Suresh Bada Math& Santosh K. Chaturvedi, *Euthanasia: Right to life vs right to die,* IJMR 2012 Dec; 136(6): 899–902, (Mar. 20, 2018, 07:00 PM), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3612319.

[10] Ajay Kumar et. al., *Consent and the Indian medical practitioner,* IJA 2015 Volume 59 (11) 695-700, (Apr. 01, 2018, 09:10 PM), http://www.ijaweb.org/article.asp?issn=0019- 5049;year=2015;volume=59;issue=11;spage=695;epage=700;aulast=Kumar.

for biological and medical knowledge. A way to assist or get voluntary and informed consent is to implement a policy that mandates involvement of human subjects in all research studies. In keeping with the Declaration of Helsinki, which is the ethical guideline of the World Medical Association, the Declaration of Helsinki which was adopted in 1964 stressed the importance of properly informing study subjects of the aims, methods, anticipated benefits, possible hazards, and any discomfort that may be associated with the research. Several international treaties and declarations, such as the declaration on human subjects and protection of human research participants, as well as the Nuremberg Code, support the requirement to get agreement from patients before conducting and/or providing medical treatments. This article deals with the entire spectrum of concerns related to consent in the existing legal context in India. Nowadays, it appears that the circle of legal development on consent has almost been completed in the relevant jurisdiction, as the Indian Supreme Court determined that it is not only "consent" or "informed consent" but prior informed consent must be required by law in every case, except in the limited circumstances of emergency. To be very frank, this puts the doctor in an awkward position. So, it is important to examine the notion of "consent and medical treatment" to gain a deeper grasp of its delicate and fundamental features.[11]

According to the 196th Report on Medical Treatment to Terminally Ill Patients (protection of patients and medical practitioners) of the Law Commission, the patient (competent) has the legal and constitutional right to refuse medical treatment that would result in a transient increase in life expectancy. In the patient's final moments, life hangs in the balance. There isn't even a glimmer of hope for recovery. When one is in incredible pain and in a state of mental agony, one wants to live out his life without the use of any artificial methods. She/he wants to avoid spending money on something that has no effect. One takes care of his or her well-being over that of suffering. If one must be kept in the critical care unit for a few days or months prior to dying, then he or she does not want to be treated like a "cabbage". His right to privacy must be maintained, which includes protection from unwanted interference and infringement of his bodily integrity. As in Gian Kaur's case, the natural process of his death has already begun, and he wishes to die peacefully and dignifiedly. No law can prevent him from taking this path. Leaving aside the argument for decriminalizing attempted suicide, this is not a situation comparable to suicide. One will not undergo invasive medical treatment, regardless of how his doctor or relatives try to compel him to do so.[12]

Furthermore, the best interest principle adopted by Lord Goff in Airedale when he placed the child's interests ahead of the mother's best interests is relevant here. This question to be considered in these situations is, therefore, whether it is in the child's best interests that treatment that causes him to live longer than his biological age should be continued. In the instance of Airedale, it was established that it was acceptable for doctors to stop treating patients who refuse therapy. The doctor's responsibility is to act in the patient's best interests if the patient is unable to communicate.[13]

Passive Euthanasia

Passive euthanasia is a more common occurrence in the majority of the hospitals in the county, where patients and their families are no longer willing or able to continue with life-prolonging treatment because of the price. If euthanasia is allowed, the Indian commercial health sector will make a killing off of the elderly and disabled citizens, many of whom would otherwise die waiting for expensive medical care.[14]

Euthanasia cannot be perceived to be passive unless one also has an understanding of active euthanasia, which was widely studied and discussed after the

[11] Omprakash V. Nandimath, *Consent and medical treatment: The legal paradigm in India,* Indian J Urol. 2009 Jul-Sep; 25(3): 343–347, (Mar. 21, 2018, 03:30 PM), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2779959.

[12] *The 196th Report on Medical Treatment to Terminally Ill Patients (protection of patients and medical practitioners),* The Law Commission of India, March 2006, www.lawcommissionofindia.nic.in/.

[13] Airedale N.H.S. Trust v. Bland, (1993) 2 WLR 316: (1993) 1 All ER 821, HL.

[14] *Supra* Note 10.

Aruna Shanbaug case through the Law Commission's *241st Report on Passive Euthanasia: A Relook.* It was made clear in the Supreme Court of India's ruling in Aruna Ramachandra Shanbaug v. Union of India, as to whether or not Aruna Shanbaug's identity had been stolen. Active euthanasia, alternatively, includes taking steps to end a patient's suffering, such as injecting them with a lethal substance like Sodium Pentothal, which causes the patient to fall into a deep sleep in a few seconds, and from there, death is painless and peaceful. Thus, the amount of good accomplished via ending a person's suffering by a positive deed is the same as murder. Euthanasia which includes active intervention to stop the agony and suffering of a patient about to die is an activity that is performed on that patient. A treatment approach that has had success in the field is the administration of a medication that allows the patient would go into deep sleep for a few seconds, and subsequently the patient passes away quietly and painlessly. Because in this case, it is defined as euthanasia to alleviate the sufferings of a person in the end phase of terminal illness, this qualifies as a sort of euthanasia. Penalizing patients for any part of their medical treatment, regardless of their expressed desires, is seen as a felony throughout the world, with the exception of where it is sanctioned by statute, as the Supreme Court of the United States demonstrated earlier. Legalization of euthanasia in India is prohibited under both Section 303 & Section 306 of Indian Penal Code. To commit suicide is a crime under Section 306 of IPC (abetment to suicide). In other words, negative euthanasia is generally known as passive euthanasia. This withholding of medical treatment, for example, the withdrawing of antibiotics if there is no rational reason to prescribe them, and the withholding of life support system when a patient is going to die and does not have a chance of survival unless it is provided, are all methods that are examples of covering something up. While there is no legal requirement for active euthanasia, passive euthanasia is permitted nonetheless, as long as the necessary conditions and precautions are in place. Active euthanasia, as defined by the Supreme Court, is most heavily weighted in terms of significance. Passive euthanasia is defined as the following: "Nothing is done to induce the patient's death in passive euthanasia, but in active euthanasia, something may be done to speed up or assist the patient's passing". In Aruna's case, Hon'ble Judges used the word above as a source of additional insight, stating "Passive euthanasia suggests that the doctors aren't actively killing him; they are simply passively allowing him to die." When asked about how people react when someone makes a life-saving manoeuvre, the court stated that although we generally applaud someone who saves another person, we do not commonly blame someone for failing to do so. The Supreme Court came to a definitive conclusion, stating that while the debate about whether or not active euthanasia should be allowed can be controversial, there is no room for uncertainty about passive euthanasia, the position which argues that passive euthanasia should be permitted no matter whether one does or does not take action. Voluntary euthanasia is further subdivided into voluntary and non-voluntary passive euthanasia. Voluntary euthanasia, in which the patient agrees to accept the procedure, is called by that name. Involuntary euthanasia is commonly referred to as non-voluntary euthanasia because the patient lacks the capacity to give consent, for example, if he is in a vegetative state. This is the moment when the Supreme Court issued an additional statement, saying: "In the former case, there are no issues; nevertheless, in the latter case, we will be discussing various questions raised by it." This was the first time the Supreme Court stepped in to regulate nonvoluntary passive euthanasia since the patient was in a vegetative condition.[15]

The inability to provide patients with instructions for discontinuing and withdrawing life support from a patient when their quality of life has deteriorated to an unacceptable level is seen as the greatest hindrance to competent end-of-life care in India. Additionally, it indicates that physicians are apprehensive about the possibility of facing civil or criminal culpability when they're compelled to make medical choices to limit life-sustaining measures. While the argument about

[15] *The 241st Report on Passive Euthanasia – A Relook,* The Law Commission of India, Report No. 241, August 2012, http://www.lawcommissionofindia.nic.in.

whether it is acceptable to apply a specific medical treatment to an individual and whether the individual has the right to refuse treatment rests on a broader question of which society and nation's interests come first, the dispute concerns which of the two treatment paths is best for the individual. As when it comes to public health, the claims of the society prevail. This is a great example, as it can be mandatory vaccination to prevent an epidemic from breaking out. But where treatment is designed for an individual and his immediate family member, individuals should be treated on an individual basis, even if that contradicts the claims of an organization. With regard to the people who have a demonstrated right to refuse treatment, they have an unquestionable right to say no. The right to freedom originates from the need of the community to respect, safeguard, and not encroach upon the individual's ability to have his own views and ideas when it comes to subjects relating to individual sovereignty, which is a clear indication of a free society.[16]

Prior to the judgment, in 2006, the Law Commission had laid down an act for *The Medical Treatment of Terminally Ill Patients (protection of patients, medical practitioners)*.[17] A 'competent' patient who is going through terminal illness has the right to discontinue or refuse treatment if the patient has been made aware of all of the facts concerning the disease and treatment, as well as the right to know the results of any medical tests. In that case, the doctor must respect the decision to withhold or withdraw treatment or life support system. But in cases where the patient is incompetent which includes those considered to be under the influence of others and those who are diagnosed with minor personality disorders and are unable to make decisions for themselves, the doctors will have to make the best decisions. As with other controversial medical treatments, the parent's and guardian's preferences may prevail in the event that the subject is allowed to live with medical treatment that will lead to his inevitable death. On the other hand, the health ministry decided not to pass any legislation on euthanasia at the time.

In Law Commission's *196th Report on Medical Treatment to Terminally Ill Patients (protection of patients and medical practitioners),* to summarize, the Commission explicitly states that they feel it necessary to say that the use of the terms 'assisted suicide' and 'euthanasia' as crime categories should continue. It has a specific objective, namely, to research a variety of legal issues and concept related to "withdrawal of life support measures" and to make recommendations to the medical profession regarding how to make decisions about withdrawing life support, which the inquiry will do solely on the matters of the conditions in which doctors should or should not withdraw support if they believe it is in the patient's best interests. Furthermore, there is debate on the circumstances in which a patient may refuse or reject treatment and seek a discontinuation or withholding of treatment or life support measures, if the patient has intentionally made a decision. Decades ago, when the science of medicine and health technology had not advanced to include artificial techniques of prolonging the life of patients who were dying from natural causes, including ventilators and feeding devices, such people perished of natural causes. Today, everyone agrees on this: While the general public considers this acceptable, an opposing theory describes it as dangerous and selfish, a dereliction of a patient's civil duty to reject contemporary medical treatment and let natural world do its thing since it has achieved in better times. Precise choices have been reached throughout the globe in regard to people who are both conscious and capable but who have cancer that has already spread. People who understand they may make an informed choice to die peacefully and who request that they need not be provided medical care which could only extend their life, are expected to have their wishes honoured. Although a substantial percentage of certain patients have reached a stage of their illness where doctors have determined that there are no realistic medical prospects for recovery, to date, many of these patients have been treated by renowned doctors, making their condition far more complicated than it may appear at first glance. While modern medicine

[16] *Supra* Note 7.

[17] *The 196th Report on Medical Treatment to Terminally Ill Patients (protection of patients and medical practitioners),* The Law Commission of India, March 2006, www.lawcommissionofindia.nic.in/.

and technology could provide people with the tools to extend their lives without providing any purpose for doing so, patients may have to go through pain and suffering in their extended lives. The majority of patients who get palliative care have done so to relieve the symptoms of pain and suffering, where some of these patients do not want to have any medical treatments that could extend life or delay death.[18]

Even in the *210th Report on Humanization and Decriminalization of Attempt to Suicide*[19] given by the Law Commission of India, it was stated that there was an undeniable obligation to provide every Indian with the option to live to the end of one's natural life with human dignity. The notion of right to live should include the right to die with dignity and comparing the right to end one's life prematurely through suicide to the right to die in a way that addresses misery or misery to one's body till the normal life span is attained is improper.

The Concern

Technological advancements in healthcare and health have led to improvements in life support mechanisms that have allowed for extended periods of time spent on life support, sometimes years long, for which the concept of the right to refuse treatment has become a talking point. Patients who are already terminally ill or in a persistent vegetative condition can pursue the right to refuse or reject treatment in order to extend their comfort, but also the right to be free from any kind of invasive procedures, including surgery, prescription medications, or life enhancing system of any form in order to prevent the lingering pain. A competent individual who is not experiencing medical condition that renders them unable to give informed consent is allowed to refuse medical treatment. Although the conservative viewpoint on these three diverse topics differs greatly from suicide, physician-assisted suicide and any form of euthanasia. The ethics of euthanasia and assisted suicide is put into question when a terminally sick patient refuses or rejects to undergo artificial life support system or any treatment. It is clear that this cannot be called either euthanasia or assisted suicide. Refusing treatment is synonymous with death for those suffering from a terminal illness. There is just one possible consequence when it comes to either killing oneself or refusing therapy. They all lead to death. However, refusing to accept therapy cannot be regarded to be suicide.

However, it may be argued that this problem in that there is a limitation of the patient's freedom to deny treatment, rather than just wanting to die, is less critical. By refusing medical treatment, patients who suffer from a disease that has not yet developed may die prematurely, due to their underlying illness. In this way, their deaths are mostly triggered by the illness, and not due to an action or inaction that they themselves chose to implement in the form of a self-inflicted passive euthanasia system. An inquiry into prevalent legislation and rules of terminally ill people would lead to the conclusion that all individuals who can give informed consent have always had the right to refuse healthcare and have the right to determine the circumstances of their own death, which is impervious to passive euthanasia, and is permitted in India.

While the question of whether a patient is allowed to refuse treatment seems affirmative, the question raises serious concerns about the refusal of the treatment and the life support system that involves passive euthanasia. Touched by the more complicated questions: Does the right to refuse to treat the system even in accordance with medical directives extend to denial of life-support? Affirmative errors in the law are the questions of the legality of an individual exercising his or her right with informed decision or through *parens patriae* as regards the law on suicide.

In Indian Law, none of these topics has explicitly established its view. It must be first established that a specific professional body has an opinion on the issue before the legislative regulation of life-support measures can be developed. As no pertinent case law exists in the country, this is essential.[20] Even the

[18] Id.

[19] *The 210th Report on Humanization and Decriminalization of Attempt to Suicide,* the Law Commission of India, Report No. 210, October 2008, `http://www.lawcommissionofindia.nic.in.`

[20] *Supra* Note 7.

landmark opinions in Aruna Shanbaug and Common Cause cases on the assimilation of Reports of Law Commission of India are not able to take care of the gaps in problems relating to passive Euthanasia and the right to reject processing to the present. Since time immemorial the right to refuse treatment is generally considered as an issue that hinders the state's health and health responsibility and is now a type of passive euthanasia which is allowed in the face of the right to reject treatment. The ruling appears to serve the elite strata of the society as a legal punishment to restrict finances, paying little mind to the society at a stage in which disabilities and the public health sector are being cared for in healthcare services. The impoverished people have always lived with the choice of right to refuse treatment and enable passive euthanasia to continue infringing their rights to improved healthcare in the nation.

Conclusion

Indian law neglects to emphasize the fields of medico-legal concerns even after the two key decisions towards the end of life. While suicide laws muddle this problem, since the latter concerns only a determined decision to harm ourselves in absence of any illness, there is no clarity if a patient is entitled to reject treatment. According to the interpretation of Article 21 and 14 by the Supreme Court, there is no moral distinction between rejecting or removing life-support. They both serve to stop counterproductive interventions, such as death due to allowing it to occur by way of treatment or through euthanasia using a new definition for the law on privacy in the perspective of terminal health and medical interventions. For the use of life support, receiving palliative care is absolutely necessary. Palliative care is the physician's major responsibility, and the main aim of any medical intervention is to relieve pain and suffering. It is relevant to add that the notion of the right to refusal and passive euthanasia authorized in India is the opposing side of a coin, yet it helps terminally ill patient's emotional and psychological pain as both stand for their right to self-determination.

The Judicial approach towards this controversial concern has walked through some steps in contrast to the regulations in developed nations towards a new age of healthcare and medicine for terminally ill patients, as the Supreme Court has established decisions to the decision by authorizing passive euthanasia on the difficult topic of euthanasia. In a society in front of a complicated medical, social and legal challenge in medico-legal ethics, the sentences put down are aimed at maintaining harmony. Legislation is required to safeguard end-use patients, as well as the care of physicians, according to the Law Commission Recommendation. Need for new legislations on these issues cannot be withheld as for the development and enhancement of the rights of the patients, laws need to be framed in the area of Right to Refuse Treatment or Informed Refusal of Treatment, Withdrawal or withholding of Life Sustaining Treatment, Right to Palliative Care and in absence the intervention of Judiciary to formulate guidelines for upholding the Basic Structure of the Constitution by allowing basic human right to life.

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