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BOOK REVIEW

Conservation of Forests in the State of Kerala with Special Reference to Community Forest Rights

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Abstract

The state of Kerala is the 21st largest state in terms of geographical[1] area and 12th largest state in terms of population[2]. The State officially came into existence on 1st November, 1956 through the unification of four Malayalam speaking regions such as Travancore, Kochi, South Canara and Malabar. It is the 9th largest economy in India which contributes more than 4% of GDP to India and is having a per capita income which is around 60% of the Indian average. There are many reasons for this growth including upliftment of different communities, land reforms, education, etc. The last few decades in Kerala have witnessed several changes in the activities such as transport, construction, tourism, trade, communication, development in different sectors, etc. These changes made it possible for the State of Kerala to achieve progress in the field of economy, health, education, housing etc. This pattern of development is considered as a model for other states and is referred as 'Kerala Model'. However, the Kerala Model for development is criticised due to the increasing pressure on the forest and its resources.

Keywords: Forest, Development, Conservation, Resources, Economic Growth.

Introduction

Being one of the densely populated State and a hotspot for rich biodiversity, it is the bounden duty of Kerala to ensure conservation and sustainable management of its forest. Moreover, the recent flood episodes and other natural disasters have also highlighted the ardent need for effective conservation and management of forest in the State. One of the prominent ways to deal with the issue of conservation and management of forests is the involvement of local communities and forest dwellers in it. Kerala, being a constituent part of India, is very keen in implementing the various legislations and policies framed by Government of India and

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[1]Total area of State of Kerala is 38,863 km^2

[2] As per the Census 2011, the total population of Kerala is 33,406,061.

moreover, Kerala has developed their own policies for the conservation and management of several components of forests. In tune with the national policies and legislations, in Kerala also the idea of Community Forest Rights (CFRs) were introduced. This paper will examine the scope of CFRs in the conservation and management of natural forests in Kerala.

State of Kerala: Forest Profile

Kerala's overall geographical area is around 1.18 percent of India's total area, and it can be divided into three zones: highlands, midlands, and coastal sections. As a result, Kerala features a variety of mountainous terrain, forests, marshes, mangroves, ponds, seashores, and deltas. It is to be noted that, about 450 kilometres of the Western Ghats, out of a total of 1800 kilometres, are located in Kerala. Therefore, Kerala's forest forms part of one of the world's 32 biodiversity hotspots. According to India State of Forest Report, 2021 (ISFR), the forest cover of State is 21253.49 Sq. Km forest area and which amounts to 54.70 % of total geographical area of the State[3]. It comprises of Very Dense Forest (VDF); Moderately Dense Forest (MDF) and Open Forests (OF).

Forest Cover of Kerala

No.	Type	Area	% of Geographical Area
1	Very Dense Forest	1944.32	5.00
2	Moderately Dense Forest	9472.00	24.38
3	Open Forests	9837.17	25.32
	Total	21243.49	54.70

District wise Forest Cover

Sl. No.	District	VDF	MDF	OF	Total	% of GA
1.	Wayanad	188.99	1204.61	186.91	1580.51	74.20
2.	Pathanamthitta	164.92	1229.12	554.88	1948.92	73.49
3.	Idukki	355.72	1783.33	1016.27	3153.32	72.44
4.	Kozhikode	70.77	409.94	967.11	1447.82	61.74

[3] See, https://fsi.nic.in/isfr-2021/chapter-13.pdf, visited on 12.12.2021.

5.	Thiruvanathapuram	59.12	702.42	555.50	1317.04	60.17
6.	Kannur	58.00	489.63	1121.23	1668.86	56.36
7.	Malappuram	142.67	424.68	1416.32	1983.67	55.82
8.	Kollam	104.40	656.88	572.50	1333.78	53.72
9.	Kottayam	11.31	525.73	562.01	1099.05	49.82
10.	Kasaragod	1.90	288.70	692.97	983.57	49.45
11.	Palakkad	402.14	637.77	1063.77	2103.68	46.94
12.	Ernakulam	165.52	614.40	604.56	1384.48	45.20
13.	Thrissur	218.86	477.79	469.60	1166.25	38.53
14.	Alappuzha	0.00	27.00	53.54	80.54	5.69
	Total	**38852**	**1944.32**	**9472.00**	**9837.17**	**21253.49**

Out of this total forest cover, 9679 sq. Km forest area is inside the recorded forest area and 11574 sq. Km are outside the recorded forest area. As per the Kerala Forest and Wildlife Department, the recorded forest area in Kerala is 11521.813 Sq. Km. Based on the legal status the forest area of the State can be classified into four categories, i.e. reserved forests; proposed reserve forests; vested forests and ecologically fragile lands; and other forests[4]. The reserved forests are those lands which are notified as 'reserve forests' under the Kerala Forest Act, 1961[5], whereas the vested forests are those forests whose ownership and possession is vested with eh State Government as per the provisions of Kerala Private Forest (Vesting & Assignment) Act, 1971[6]. Those lands which is lying contiguous or encircled by vested or reserve forests or any other forest lands owned by the State Government and it contains vast amount of natural vegetation and are held by any person can be declared as 'Ecological Fragile Land' as per the provision of Kerala Forest (Vesting & Management of Ecologically Fragile Lands) Act, 2003[7]. The extend of these forests are as follows;

[4]Ibid.
[5] See Sections 4-19,Kerala Forest Act, 1961
[6]See Sections 3 & 4,Kerala Forest Act, 1961
[7]See Section 4,Kerala Forest (Vesting & Management of Ecologically Fragile Lands) Act, 2003

Legal Classification

No.	Title	Extent (In Sq.Km)
1	Reserved Forests	9195.735
2	Proposed Reserve	291.575
3	Vested Forests and Ecologically Fragile Lands	1905.476
4	Other Forests	129.027
	Total	11521.813

The forest cover in the State of Kerala can be classified into 13 different types as per the Champion & Seth classification[8] which can be grouped into 7 different categories such as: tropical wet evergreen; tropical moist deciduous; semi evergreen; tropical dry deciduous; littoral & swamp; tropical thorn; and montane wet temperate[9]. Currently, there are 6 national parks viz. Eravikulam National Park[10], Periyar National Park[11], Silent Valley National Park[12], Mathikettan Shola National Park[13], Anamudi Shola National Park[14]; Pambadum Shola National Park[15]. The MoEFC has listed Karimpuzha as a proposed national parks in 2006[16]. Apart from this, there are 14 wildlife sanctuaries, two tiger reserves and two biosphere reserves[17]. The forests in Kerala is known for its contribution to the prosperity of people in Kerala. It provides several major produces such as timber, bamboos, fire wood, sandal wood, reeds as well as several other minor forest produces. So also the forest houses vast amount of biodiversity and ensures the sustenance and continuation of forest dwellers and livelihood of other forest fringe communities. The forests

[8] N. Senthilkumar, S. Prakash, C. Rajesh Kannan, A. Arun Prasath and N. Krishnakumar, "Revisiting Forest types of India (Champion and Seth, 1968): A Case Study on Myristica Swamp Forest in Kerala",Vol.2(2), International Journal of Advanced Research492-501(2014)

[9] See, https://fsi.nic.in/cover_2011/kerela.pdf, visited on 12.12.2021; Ellyn K. Damayanti & Masuda Misa, "Biodiversity: A Case of Kerala", available at http://lbprastdp.staff.ipb.ac.id/files/2011/12/09Ellyn.pdf, visited on 12.12.2021.

[10]Idukki District

[11]Ibid

[12]Palakkad District, 89.52 km^2

[13]Idukki District

[14]Ibid.

[15] Ibid.

[16] Malappuram District.

[17]List of protected areas of Kerala, https://en.wikipedia.org/wiki/List_of_protected_areas_of_Kerala, (last visited on 12.12.2021).

in Kerala, like any other forest also serves several ecological services like control of climate, watershed protection and control of soil erosion, etc.

Conservation of Forest: Initiatives in Kerala State

Before the advent of Europeans, there was a well-established trading practices of different forest produces with Arabs in Kerala[18]. During these period the forests areas were directly controlled by the Princely States ruling such areas. However, the Europeans displaced the Arabs and settled at the different parts of Kerala. Accordingly, the forests in the northern part was placed under the control of Madras Presidency. However, the forests in the southern part was continued under the control of Travancore and Cochin Princely States[19]. Different agencies and officers were appointed by the British government to take of the economic interests of Britishers in the Indian forests including the forest in Kerala region. Due to the introduction of Indian Forest Act in 1878, the Madras Forest Act in 1882; the Travancore Forest Act in 1887; and the Cochin Forest Act in 1905 were adopted. Several areas were declared as reserved forests and teak plantations, timber depos were also established during this period. In 1888, the Konni forest declared as a Reserve Forest in the Kerala region, which is the first among other reserve forests[20]. This system of management of forests in Kerala region was continued up to the independence.

The State of Kerala was formed in 1956 by merging the erstwhile Travancore, Kochi and Malabar region. The enactment of Kerala Forest Act, 1961 was one of the most important measure in the newly formed State of Kerala for the management of forests. The major aim of this Act was to amend and unify the existing laws relating to forest in the area of State of Kerala. The Act conferred the power to the State to declare any land as reserved forest as well as to regulate the rights of individuals over such reserved forests[21]. Through the enactment of Kerala Private Forests (Vesting and Assignment) Act in 1971, the ownership of all private forests were transferred to the Government and are deemed to be considered as reserved forest[22]. In 2003, the Kerala Forest (Vesting and Management of Ecologically Fragile Lands) Act was enacted with

[18] Mammen Chundamannil, "History of Forest Management in Kerala", KFRI Research Report 89, http://docs.kfri.res.in/KFRI-RR/KFRI-RR089.pdf,(last visited on 12.12.2021).
[19] Ibid.
[20] Id 18
[21] Sections 3 – 10, Kerala Forest Act, 1961
[22] Section 4,Kerala Private Forests (Vesting and Assignment) Act, 1971

the aim of vesting the ownership of ecologically fragile lands in the Government for the effective management of such lands to maintain ecological balance and conservation of bio-diversity.

The State Government had also enacted several legislations including Kerala Live-Stock Improvement Act, 1961; The Kerala Cattle Trespass Act, 1961; Kerala Land Reforms Act, 1963; Kerala Plant Diseases and Pests Act, 1972; Kerala Preservation of Trees Act, 1986; Kerala Panchayati Raj Act, 1994; Kerala Municipalities Act. 1994; Kerala Restriction on Transfer by and Restoration of Lands to Scheduled Tribes Act, 1999; The Kerala Tourism (Conservation and Preservation of Areas) Act, 2005; Kerala Promotion of Tree Growth in Non-Forest Areas Act, 2005; etc. The State Government has also framed several rules under different legislations for the purpose of conservation and management of different components of forests in the State. For example: The Forest Settlement Rules, 1965; The Kerala Restriction on Cutting and Destruction of Valuable Trees Rules, 1974; The Kerala Forest Produce Transit Rules, 1975; Kerala Panchayat Raj (Issue of License to Dangerous &Offensive Trades &Factories) Rules, 1996; The Kerala Forest (Vesting and Management of Ecologically Fragile Lands) Rules, 2007; Kerala Biological Diversity Rules, 2008; Kerala Rules and Regulations of the State Forest Development Agency[23]; Kerala Forest Subordinate Service Special Rules, 2010; Kerala Forest Service Special Rules, 2010; Kerala Forest (Regulation of Sawmills and Other Wood-based Industrial Units) Rules, 2021, etc.

Conservation of Forest: Key Institutions

The administration of forests in State of Kerala is controlled by the Ministry of Forests and Wildlife. The Kerala Forest Department is the body empowered with the implementation and enforcement of matters relating to forests and connected thereto. The forests in Kerala including all legally classified forests, national parks and sanctuaries are under the jurisdiction of Kerala Forest Department. The KFD is headed by the Principal Chief Conservator of Forests (Head of Forest Force) and he is assisted by the Principal Chief Conservator of Forests & Chief Wildlife Warden, and the Principal Chief Conservator of Forests (Social Forestry). There are five territorial, three wildlife, two vigilance, and three social forestry circles for the administration of

[23]Bye-Law Of State Forest Development Agency,https://forest.kerala.gov.in/images/abc/sfdarules.pdf, (last visited on 02.02.2022).

forest headed by Conservators. Under these circles 65 divisions and 149 ranges are functioning under the control of Divisional Forest Officers and Forest Rangers[24].

In 1975, the Kerala Forest Development Corporation Ltd (KFDC) was established as per the suggestion of National Commission of Agricultural. The KFDC involved in acquisition, purchase or takeover of reserved forests, unreserved forests or other areas; cultivation, buying, selling, exporting, importing, etc. Of cardamom, pepper, coco, cashew, rubber, etc.; to maximise production of timbers; and to conduct business, manufacture and dispose forest produces. To receive scientific assistance for forestry decision-making, with a focus on conservation, sustainable resource usage, and scientific management of natural resources, in 1975, the Kerala Forest Research Institute (KFRI) was created.

The State of Kerala has also established several authorities such as Pollution Control Boards under Water Act, Air Act and Environmental Protection Act. Under the Wildlife Protection Act, authorities including a Chief Wild Life Warden; Wild Life Wardens; Honorary Wild Warden[25]; and State Board for Wild Life[26], were constituted. Several other autonomous research and development centres such as the Centre for Earth; Science Studies (CESS); the Tropical Botanic Garden & Research Institute (TBGRI); the Centre for Water Resources Development and Management (CWRDM); the Rajiv Gandhi Centre for Biotechnology (RGCB); National Transportation Planning and Research Centre (NATPAC); Agency for Non-conventional Energy and Rural Technology (ANERT), etc. Were also established. Under the Biodiversity Act, the bodies like State Biodiversity Board and Biodiversity Management Committees were established. All these authorities/institutions have a huge impact on the conservation and management of several components of the forests in State of Kerala.

Community Participation in Forest Management: Kerala

The State of Kerala is home to many tribal communities. These tribals known as 'Adivasis' in the Malayalam language are officially recognized as Scheduled Tribes (STs). At present, there are 36 STs in Kerala as per the list of the Kerala Public Service Commission[27]. The

[24],https://forest.kerala.gov.in/index.php/party-symbols/topmenu/about-us, (last visited on 12.12.2021).
[25]Section 4, Wildlife Protection Act,1972
[26]Ibid,Section 6
[27]Kerala PSC, https://www.keralapsc.gov.in/list-scheduled-castes-kerala-state,(last visited on 12.12.2021).

population of Adivasis in Kerala amount to 1.5% of the total population[28]. The district-wise tribal population is estimated as:

No.	District	ST Population	Percentage
1.	Alappuzha	6574	0.3
2.	Ernakulam	16559	0.5
3.	Idukki	55815	5.0
4.	Kannur	41371	1.6
5.	Kasaragod	48857	3.8
6.	Kollam	10761	0.4
7.	Kottayam	21972	1.1
8.	Kozhikode	15228	0.5
9.	Malappuram	22990	0.6
10.	Palakkad	48972	1.7
11.	Pathanamthitta	8108	0.7
12.	Thiruvananthapuram	26759	0.8
13.	Thrissur	9430	0.3
14.	Wayanad	151443	18.5
	Total	**484839**	**1.5**

According to the Kerala Scheduled Tribes Development Department, tribals in Kerala are divided into three sub-groups: Particularly Vulnerable, Marginalised, and Minorities. There are many characteristics that identify tribal communities, such as primitive characteristics, distinct cultures, geographical isolation, shyness toward outsiders and backwardness. Some tribal groups also exhibit certain peculiar characteristics, such as hunting and gathering for food, pre-agriculture technology, zero or negative growth in population, and extremely low literacy levels. Such tribals are classified as Particularly Vulnerable Tribals (PVTs). The tribes such as Kadar (Thrissur, Palakkad); Kattunaikan (Wayanad, Kozhikode Palakkad, Malappuram); Koraga (Kasaragod); Kurumbar/Kurumbas (Palakkad); Cholanaikan (Malappuram) are the PVTs in Kerala. The tribal groups such as Adiyan (Wayanad); Eravalan, Mundugur, Malasar, Irula (Palakkad); Hill Pulaya (Idukki); Malayan (Ernakulam, Thrissur, Palakkad); and Paniyan

[28]See, 2011 Census Data.

(Wayanad, Kannur, Palakkad, Malappuram, Kozhikode) are classified as Marginalised tribal groups. The tribal groups such as Arandan/Aranadan (Malappuram); Wayanadankadar, ThachanadanMoopan (Wayanad); Kudiya, Melakudi (Kasargod); Mahamalasar (Palakkad); Palleyan/Palliyan/Paliyan (Idukki); Malapanickar (Malappuram); and Malampandaram (Kollam, Pathanamthitta) are considered as minority tribal groups in Kerala.

It is estimated that, only ten percent of the total tribal population in Kerala cultivates its own land, while forty percent is employed as agricultural wage labourers[29]. A rudimentary agrarian system feeds most of the tribal families, and also they exploit forest resources using their traditional skills. Along with tribal communities, there are large number of people living around the forest also depending on the forest resources for their livelihood and basic needs. The tribal communities and local people know the forest and its biodiversity, and the importance of its resources for a sustainable livelihood. Therefore, they can play a greater role in the conservation and management of natural forests. The idea of including tribal groups and other local people was first experimented with the Participatory Forest Management Programmes and through the process of recognising community forest rights.

Participatory Forest Management (PFM)

The success of joint forest management programmes in different States has triggered the Government of Kerala to introduce such programmes. As a result, the idea of JFM was introduced in Kerala under the title of Participatory Forest Management (PFM) in 1998. Like JFM, PFM programmes were introduced with a view to involve tribals and other forest dependent communities in the management of natural forests. The guidelines for implementation of PFM in Kerala were first issued in 1998 and subsequently, it was revised in 2006 & 2009. As per the PFM Guidelines, 2009, the objective of the PFM programme are two- fold: "a) To develop appropriate participatory approaches to forest management in different forestry and socio-economic contexts; and b) To introduce and sustain it in all such areas inside as well as outside forests"[30].

The State Government has also constituted Forest Development Agency (FDA) and a State Forest Development Agency (SFDA), to monitor and evaluate the functioning of FDA. The

[29] Damoradan Rajasenan, Rajeev Bhaksar, "Tribal Populations in Kerala's Development Process: An Impact Evaluation of Policies and Schemes"Vol. XXV (2) Revista Venezolana de Análisis de Coyuntura, 85-110 (2019)
[30]Participatory Forest management Guidelines 2009https://forest.kerala.gov.in/images/ecotourism/pfmnewguideline2009.pdf, (last visited on 12.12.2021)

SFDA is acting as the state nodal agency for PFM in Kerala. The FDA is charged with the functions like, providing technical assistance and grant funding, organizing a new PFM committee, assuring wage employment, and conducting entry point activities in villages. As per PFM Guidelines, the implementation of PFM programmes in the Territorial Divisions are entrusted with Vana Samrakshana Samithies (VSSs) and in the Wildlife Divisions, the Eco Development Committees (EDCs). It is to be noted that, there are different nomenclatures are being used for referring these bodies such as Tribal VSS; Fringe VSS; Cardamom for Rainforest Conservation Committee (CRC); Unit Level Organization (ULO); Fringe EDC; Tribal EDC; Village EDCs; Professional EDCs; User group EDCs; and Swamy Ayyappa Punkavana Punarudharana (SAPP) EDCs, etc. All these VSSs and EDCs together with FDA and SFDA can be termed as Participatory Forest Management Institutions (PFMIs) in Kerala.

Currently, 400 VSSs[31] and 190 EDCs[32] have been established at different areas for the implementation of PFM Programmes, and over 173 km2 of Kerala forests are covered by this program[33]. About 19,093 families of Scheduled Tribe i.e. more than 80,000 tribal people; about 10,645 Scheduled Caste families; and large number of local people connected with forest and its resources are also taking part in the PFMIs. The participation of large number of STs, SC's and other people is an indication of community participation in the protection and management of forests and its resources. The PFM programmes have provided an opportunity for these people and communities to be actively involved in the management and conservation of forest resources. The PFMI members were empowered to take lead role in dealing with afforestation, use of forest produces, cultivation, land use, use of water resources, sustainable management of resources, wildlife conservation, prevention of smuggling of forest produce, dealing with forest fire, and implementation of projects, etc. The process of preparation of micro plan and development of other programmes and projects has paved the way for ensuring active participation of tribal and other local people to get involved in the process of conservation and maintenance of forests along with forest officials.

[31]Division Wise Number Of Vana Samrakshana Samithies (VSS)https://forest.kerala.gov.in/images/pdf/vss.pdf, (last visited on 12.12.2021).

[32]Division Wise Number Of Eco-Development Committees (EDC)https://forest.kerala.gov.in/images/pdf/EDC.pdf, (last visited on 12.12.2021).

[33]http://www.kerenvis.nic.in/Database/FOREST_808.aspx, (last visited on 12.12.2021).

Several studies have identified different success stories of PFMIs in Kerala[34]. It is generally assessed that, the functioning of VSSs and EDCs have significant impact on the conservation of forest with the involvement of forest dwellers and local people. However, like JFM programmes in different states, PFM in Kerala was also found inadequate to ensure proper participation of tribal and other local communities in the conservation and management of forests in Kerala. There are several reasons including, the arbitrary constitution of PFMIs by the forest department; decision making by forest officials; less weightage to the opinion of tribal and local people; lack of interest among PFMI members; non–awareness; no or inadequate training; poor funding; and lack of coordination with Panchayat Raj and other Institutions; etc[35].

Community Forest Rights (CFR) and Community Participation in Kerala

The idea of CFR was introduced by the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 with a view to recognise the rights of and role of forest dwellers in the utilisation and management of forest resources. Through this, the Act acknowledges forest dwellers' rights to forest resources, on which these communities relied for a range of requirements, including subsistence, housing, and other socio-cultural needs and their role in the management and conservation of natural forests. The objective behind such recognition is to empower forest dwellers to manage and conserve the natural forests. By promoting local stewardship of forests, the CFR initiatives create a level playing field for collaboration between local people, state agencies, and other stakeholders. Thus it can be seen that, by recognising individual and community forest rights, the Act envisions the community participation in the management and conservation of forests.

The State of Kerala, like other States in India, has taken several steps to the implementation of the Forest Rights Act and to confer the individual and community forests. The Scheduled Tribe and Scheduled Caste Development Department is acting as the nodal agency for the implementation of the Act and to deal with the IFR & CFR. The Forest Department of the State also plays a key role in the implementation of FRA. As per the FRA, the most important institution that is charged with the function of identifying the forest rights under the Act is Gram

[34] Yuli Nugroho, "Community and Legislation of New Forest Management: A Case Study on Participatory Forest Management Program in Kerala, India", http://www.asianscholarship.org/asf/ejourn/articles/Nugroho.pdf, (last visited on 12.12.2021).
[35] TIES, Report on Participatory Forest Management (PFM) in Kerala,https://www.ties.org.in/ collection/reports/reports-140621162366372469.pdf, (last visited on 12.12.2021).

Sabha's. The Act mandates that, all the IFR and CFR claims has to be verified at the village level (FRC) and then it must be confirmed by the Sub-Divisional Level Committee (SDLC) and approved by the District Level Committee (DLC). The composition and functions of these different committees are given in the Act and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2008.

The Kerala Government through a government order in 2008, listed 510 Grama Sabha's under the FR Act[36]. The Grama Sabha's are entrusted with the task of determination of forests rights based on the claims they receive; to maintain the statistics and other details of claimants; to take a decision on the claim after giving an opportunity to different stakeholders; to forward the resolution about the claim to the SDLC; to deal with resettlement packages; to constitute committees for the purpose of protection of forest, biodiversity and wildlife; to prepare conservation and management plan for forest resources; etc[37]. As per the FRA Rules, 2008, the Grama Sabha's shall constitute a Forest Rights Committee (FRC) comprising of minimum 10 but not more than 15 members. In this FRC at least 2/3rd of the members shall be from ST's and 1/3rd members shall be women[38]. The main function of FRC's are to render assistance to the Grama Sabha's for the performance of their duties prescribed under the Act.

The Rules further states that, the state governments to constitute a sub-divisional Level Committee (SDLC) comprising of a Sub-Divisional Officer as its Chairperson; Forest Officer in charge of a Sub-division or equivalent officer as a member; 3 members of the Block or Tehsil level Panchayats or in areas covered under the 6th Schedule to the Constitution, 3 members nominated by the Autonomous District Council or Regional Council or another appropriate zonal level; and an officer of the Tribal Welfare Department in-charge of the Sub-division or where such officer is not available the officer in-charge of the tribal affairs[39]. The major functions of SDLC includes supplying necessary information to Grama Sabha's about their role in conservation and management of forests, biodiversity and wildlife; supplying revenue and forests maps; assemble resolutions received from the Gram Sabhas and scrutinise the claims; to deal with disputes between Gram Sabhas; to receive petitions against the resolutions of Gram Sabhas;

[36] See G.O.(Ms) No.74/2008/SCSTSS dated 07.07.2008
[37] Rule 4,Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2008.
[38] Rule 3,FRA Rules, 2008
[39] Rule 5,FRA Rules, 2008

to forward the approved claims to District Level Committee; and to create awareness about the FR A among the stakeholders[40].

The final decisions regarding the acceptance of IFR and CFR under the Act is to be made by the District Level Committee (DLC). Every state governments are supposed to constitute DLC consisting of District Collector or Deputy Commissioner as its Chairperson; Divisional Forest Officer or concerned Deputy Conservator of Forest as member; 3 members of the district panchayat or in areas covered under the Sixth Schedule to the Constitution, 3 members nominated by the Autonomous District Council or Regional Council; and an officer of the Tribal Welfare Department in-charge of the district or where such officer is not available, the officer in charge of the tribal affairs[41]. The major function of DLC is to evaluate the claims forwarded to it by the SDLC[42]. In order to monitor the progress of grant of community rights under the Act[43], the State Governments are required to constitute a State Level Monitoring Committee comprising of Chief Secretary as its Chairperson; Secretary, Revenue Department; Secretary, Tribal or Social Welfare Department; Secretary, Forest Department; Secretary, Panchayati Raj; Principal Chief Conservator of Forests; 3 ST members from Tribes Advisory Council, in case of absence of Tribes Advisory Council, State Government can nominate 3 ST members; and the Commissioner, Tribal Welfare or equivalent as the Member Secretary[44].

The State of Kerala, by following the FRA and its Rules have constituted all the relevant bodies at its appropriate levels. In most the places, Oorukoottam which is functioning under the leadership of Oorumooppan is included in the FRCs. Currently in State of Kerala, there are 510 FRC's, 14 SDLC's and 12 DLC's. The position of claims received by and approved by different bodies in State of Kerala as on 2020 are as follows:

Nature of Claims	**Claims Received**	**Distributed**	**Forest land distributed under titles**
Individuals Claims	43237	26256	34,696.66 acres
Community Claims	1012	174	……*

***** Official information is not available

[40] Rule 6,Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2008.
[41]Rule 7,FRA Rules,2008
[42] Rule 8, FRA Rules 2008
[43] Rule 10, FRA Rules 2008
[44] Rule 9, FRA Rules 2008

Claims Received at Garm Sabha

Nature of Claims	Claims filed at Gram Sabha	Claims Recommended to SDLC
Individuals Claims	43237	38945
Community Claims	1012	825

Out of a total 39770 claims were recommended to SDLC, 26894 (both individual and community) claims were recommended by SDLC for the consideration of DLC. Out of that, 25683 claims was approved by the DLC and based on it 26430 tittles were distributed (it includes 26256 individual titles and 174 community titles). These statistics shows that about 87 .07% of claims filed under the Act in State of Kerala are disposed off and the remaining are still pending with concerned bodies. It is to be noted that about 59.13% of claims were allowed out of the said 87.07%. Thus it can be seen that, more than fifty percent of claims found to be valid and allowed.

Community Participation under FRA

The grant of individual and community titles under the FRA is an effective mechanism to ensure the participation of forest dwellers and other local communities in the management and conservation of forests. It is to be noted here that FRA, through IFR or CFR, does not create anything new for the people. However, it 16ecognizes16 the activities and rights of the people and community to continue with their traditional practices without any adverse interference by law. It is well-known that allowing forest dwellers to continue with their traditional methods and no interference with the forest land by government officials and other people is the best strategy to conserve and maintain natural forests. Hence, the grant of IFR and CFR under the FRA 16ecognizes the role-playing by forest dwellers and other local communities in conserving and managing forests. To identify the scope of community participation with the help of IFR and CFR granted in Kerala under FRA, information was collected from randomly selected 100 VSS; 50 EDCs; 200 FRCs; 5 SDLCs and 2 DLCs based on the geographical distributions. So also the data are collected through discussions with officers of the Department of Forest and Wildlife; Members of FRCs; Members of SDLCs; Members of DLCs; Members of EDCs; VSS; NGOs; Experts from the different forest and triable related institutions. Based on the information collected through interviews, interactions and discussions, an understanding of the CFR and IFR

and their impact on the community participation was built. The important findings are as follows:

1) Constitution of FRCs: The State Government has notified the Oorukoottam and other gatherings of forest dwellers as Gram Sabha for the purpose of FRA. It is learned that the constitution of FRCs in certain Grama Sabha's was only in namesake and the members of such committees are unaware of its purpose and functioning.

2) Composition of FRCs: Though FRCs were constituted in every Gram Sabha, its design is not as per the FRA rules due to the non-availability of members. It is alleged that certain FRCs were formed in the presence of central implementing departments in a top-down manner, neglecting a democratic, participatory process as required by the Act.

3) Awareness Level of Members of FRCs: It is found that several members of FRC are unaware of their role as a member of FRC and the functioning of FRC, and the scope of FRA. Sometimes the lack of education among the forest dwellers can be attributed to such ignorance.

4) Ambiguity due to Multiple Bodies: It is found that there are several areas the members of VSS and EDC are also members of VSS. This creates confusion among the members and adversely affects the functioning of FRCs. The non-availability of members may be attributed to such a situation.

5) Lack of Training among Community Leaders: It is pointed out that there is an absence of training and other activities among the community leaders and other stakeholders of FRA.If there is a lack of proper training and awareness about the FRA and its process, the realisation of the goal of community participation has never become a reality.

6) Decision making of FRC: FRCs are interested in the conservation and management of forests, and hence always take proactive decisions. However, these decisions require ratification from government officials in certain cases. This will adversely affect the functioning of FRCs and also act as a hurdle to achieving its solemn objectives.

7) Indifferent Attitude of Members: It is reported that several members of FRCs and SDLCs are just for namesake and are not interested in attending meetings, and taking part in the activities of such committees. At present, there is no mechanism to remove such members. Since these members are the backbone for the successful functioning of such committees it is necessary to ensure that, the members are active and perform their role effectively.

7) Dormant FRCs: It is reported that, though a large number of FRCs are constituted in different forest areas all over the State, in most of the Districts, several FRCs are not active and have not taken the matter of CFR and IFR as a serious issue. Thus it can be seen that, though statutorily, the FRCs are constituted, the objective of community participation in the conservation and management of forests is not yet meted out.

8) Limited Interactions between Officials and Forest Dwellers: The forest dwellers and other local people though interested in the conservation and management of forest resources. However, they need adequate guidance in this regard so that, their traditional methods of conservation practices can be utilized effectively. For this purpose, the government officials belong to tribal departments and forest departments can play a key role. However, it is reported that there is very limited interaction between officials and FRCs or Oorukoottam in this regard.

9)Conflict between traditional methods of conservation and scientific methods of conservation: The forest dwellers and local people follow several traditional practices including worshipping certain trees and animals, demarcating certain areas as sacred land, food habit, farming, community living, and construction, etc. However, the traditional methods of conservation practiced by forest dwellers and other local people may conflict with scientific methods of conservation.

10) Apprehension of Misuse: The FRA confers community forest rights and individual forest rights to forest dwellers and local people. However, there is an apprehension shared by some of the officials is that it may lead to unnecessary claims and encroachment into forest lands by other people. This apprehension prevents them from taking necessary measures for the implementation of FRA in its true sense and encourages community participation in the conservation and management of forests.

11) Non-Access to PVTGs: There are several groups of forest dwellers belonging to Kadar, Kurumbas, Kattunayakan, Koraga, etc. were living in dense forests and physically isolated from other areas. Hence, reaching out to them and appraising them about the FRA and community participation in forest management is a herculean task.

12) Diversion of Forest Lands and Displacement of Forest Dwellers: Due to the implementation of developmental projects mainly hydel projects and plantations several forest areas were converted for non-forest purposes and it has displaced several forest dwellers. Such

displacements will adversely affect their livelihood and also destroy their traditional conservation and management practices.

13) False and Excess Claims: The FRC, SDLC and DLC members have opinioned that, though they have received several CFR and IFR claims, on verification it is found that most of the claims are false. In certain cases the extent of land claimed is in excess of what they are traditionally dealing with. Hence, FRCs and SDLCs are forced to reject several claims.

14) Committees for the Protection of Forest, Biodiversity and Wildlife: As per the rules of FRA, the FRCs can constitute several committees including the Committees for the Protection of Forest, Biodiversity and Wildlife. However, it is found that very few FRCs are heard about such a committee and such committees are not functioning in the State.

15) Wrong Rejections: It is alleged that several CFR and IFR were rejected without undertaking necessary enquiries and scrutiny to verify the veracity of such claims.

16) Rejection Procedure: As per the rules of FRA, in case of rejection of claims, claimants should be given a reasonable opportunity of being heard. However, it is alleged that such a hearing is not effectively undertaken in several cases. Moreover, the rejection of claims is not communicated in writing. In the absence of written communication, the claimants are not able to exercise their right to appeal against such rejections.

17)Appraisal of Committees Functioning: There is a mechanism for supervising the functioning of FRC, SDLC and DLC, however, there is no mechanism for appraisal of the functioning of such committees. This absence is a blessing for those committees that were in a dormant stage.

18) Exclusion of Non-Forest Dwellers: It is learned that the provisions of FRA and its rules do not adequately take care of the rights of local people who are not members of tribal communities.

The Forest Rights Act provides communities with enormous opportunities for taking measures for the conservation and management of forests as well as to receive recognition and approval for their traditional methods of conservation of forests. However, due to several factors highlighted above the actual encouragement of community participation in the conservation and management of forests as per the provisions of FRA is very limited. The Vazhachal Forest division of Kerala State has shown how effectively the FRA can be utilised for the purpose of conservation and management of forests with the active involvement local community.

Success Story Vazhachal Division

In the State of Kerala, community forest rights have been implemented for the first time in the Vazhachal forest division. This division is divided into 5 forest ranges such as Athirappalli, Charpa, Vazhachal, Kollathirumedu and Sholayar which are falls in Thrissur District (Mukundapuram Taluk) and Ernakulam District (Aluva Taluk). This division comprises more than 400 sq. Km of forest area, wherein nine tribal settlements are located[45]. This division is a biodiversity-rich area comprising more than 200 animal species and 139 bird species, evergreen forests and a beautiful century-old waterfall[46]. So also some part of this division falls within Parambikulam Tiger Reserve and certain other areas are acting as its buffer area[47].

The process of claiming CFR in Vazhachal was started in 2012 and finally, it was officially issued in 2014 recognising CFR under sections 3(1) (c), (d), (e), (i), and (k)[48]. It includes among other things right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use. Approximately 40000 hectares of forest area were covered under this CFR[49]. CFR management Committees were constituted in the tribals settlements and to coordinate the activities of these management committees, Vazhachal CFR Coordination Sangham was also created[50]. Due to the recognition of CFR, the forest dwellers of this division were actively involved in collective farming; and established a Non-Timber Forest Produce (NTFP) processing and marketing co-operative unit. They have also taken several measures for the conservation and management of forest resources including imposing a moratorium on the right of fishing during monsoon seas, etc. Most importantly, in order to protect the natural forest, the head of Ooru kootam and others were protested against the implementation of Anakayam hydel Project and has passed several resolutions against the project in their respective Committees[51]. So also the *ooru moopathi*

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[45]Birdlife International data Zone ,http://datazone.birdlife.org/site/factsheet/vazhachal-forest-division-iba-india, (last visited on 20.01.2022).

[46]Ibid

[47] See, https://www.wwfindia.org/?12761/Strengthening-Community-Forest-Resource-Use-Rights-in, visited on 20.01.2022

[48] See, https://www.fra.org.in/document/Anakkayam.pdf, (last visited on 20.01.2022)

[49]Ibid.

[50] Divya Kalathingal, "Conservation - A Contested Story: The State and the Kadar Adivasis, India", Vol 16 (1) Law, Environment and Development Journalp. 20,(2020), http://www.lead-journal.org/content/a1602.pdf, visited on 20.01.2022

[51]"Kerala Tribals Fight against cutting Trees in anakkayam", News Minute, Nov 6,2020, https://www.thenewsminute.com/article/kerala-tribals-fight-against-cutting-trees-anakkayam-hydel-project-138496, (last visited on 20.01.2022)

(Female Chief of tribal group)ofVazhachal area and *ooru moopan* (Male Chief of tribal group) of Polakappara have filed a petition before the Kerala High Court against the proposed Athirappalli hydro-electric project. Thus it can be seen that the recognition of CFR in the Vazhachal Forest Division encouraged the forest dwellers to take part in the conservation process of forests and to prevent those activities which adversely affect the continuance of natural forests.

Conclusion

Forest dwellers and other local people can play a significant role in the conservation and management of forests. This fact is statutorily accepted through the Forest Rights Act and the duty of taking measures for the conservation of forests is being officially assigned through CFR and IFR. Henceby granting CFR and IFR, community participation can be encouraged and forest dwellers can legally continue with their traditional practices for the protection and conservation of forests. However, several reasons such as the faulty composition of FRCs; attitude of members; non-awareness; the conflicting role of multiple committees; lack of adequate training; false claims; false scrutiny and rejections of claims etc. have adversely affected the granting of CFR and IFR. Therefore it can be seen that, the slow pace of grants of CFR and IFR in tribal areas have adversely affected the realization of the goal of community participation in the conservation and management of forests.

ROMANTIC RELATIONSHIPS INVOLVING CHILDREN AND THE POCSO ACT, 2012: A CRITICAL STUDY

Varadharajan Udayachandran*

Abstract

UNCRC, the basic international document concerned with the rights of children and their protection from various forms of abuse obliges State parties to take measures (legislative, administrative, social and educational) to protect children from sexual abuse and sexual exploitation[1]. India acceded to the UNCRC on 11 December 1992 and in 2012 enacted the POCSO Act, 2012 (lex specialis). The main objective of this legislation is to protect children from sexual assault, sexual harassment, child pornography, etc. Prior to the provisions only limited aspects of child sexual abuse was penalized under the general Criminal Law, the Indian Penal Code,1860. The POCSO Act, 2012, s.2(d) defines 'child' as a person 'below the age of 18 years' for purposes of criminalizing various sexual abuses carried upon by children and also makes them incompetent to give 'consent' . The IPC, 1860 (lex generalis) also penalizes sexual aggressiveness, however, 'age of consent' significantly varies under the IPC. This difference in 'age of consent' is the most debated aspect of the POCSO Act, 2012 and recent debates have called for 'tweaking' the age of consent particularly in the background of the rise of number of cases of 'romantic relationships'. The Courts in India, have recognized that 'romantic relationships between two minors as a 'gray area'. As stated above, the objective of the Act was to protect children from abuse. However, criminalizing minors (adolescents in particular) involved in 'consensual romantic relationships' has attracted the wrath of the judiciary. As between High Courts, there are diverse view pointson the topic. For e.g. While the Bombay High Court believed that criminalizing romantic relationships

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[1] (Article 19 and 34)

‘overburdens the criminal justice system, consuming significant time of the judiciary, police, and child protection system’, Madras High Court decides that‘it cannot traverse beyond the Statute (POCSO Act). Various stakeholders including the Courts have been advocating for ‘de-criminalizing consensual romantic relationships’. While this approach may appear to be logical this also goes against the aims and objects of the POCSO Act, 2012. It is in this light this paper critically analyses the problems with this approach of calling for decriminalizing ‘consensual romantic relationship of minors’ as this may lead to failure of protecting children whose protection is the prerogative of the legislation.

Introduction

The UN Convention on the Rights of the Child (*hereinafter referred to as* UNCRC), 1989[2] is the basic international document concerned with the rights of children. Article 2, UNCRC provides that "*without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status*". The UNCRC is fundamentally concerned with the rights of children and their protection from various forms of abuse and obliges State parties to take measures (legislative, administrative, social and educational) to protect children from sexual abuse and sexual exploitation. (Article 19 and 34). India *acceded* to the UNCRC on 11 December 1992 and in order to fulfill India's obligations under the UNCRC, the Indian Parliament after rigorous deliberations 2012 enacted the Protection of Children from Sexual Offences Act, 2012 (*hereinafter referred to as POCSO Act*).[3] The main objectives of the POCSO Act is to protect children from all forms of sexual abuse and violence, etc. Prior to the provisions only limited aspects of child sexual abuse was penalized under the general Criminal Law, the Indian Penal Code,1860. The POCSO Act, 2012, s.2(d) defines ‘child’ as a person ‘below the age of 18 years’ for purposes of criminalizing various sexual abuses carried upon by children.

[2] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: https://www.refworld.org/docid/3ae6b38f0.html [accessed 30 November 2023].
[3] Protection of Children from Sexual Offences Act, 2012 (Act No.32 of 2012).

The Act criminalizes serious offences of penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, penetrative sexual assault, sexual harassment, child pornography, attempts and abetment of the above offences with stringent punishments. The Act advocates a 'child-friendly' procedure in handling child victims and mandates that all decisions taken in accordance with the Act shall be taken keeping in mind the *best interests* of the child mandated under Article UNCRC Convention.

Of all discourse on offences under the POCSO Act, 'age of consent' is the most debated aspect and recent debates have called for 'tweaking' the age of consent particularly in the background of the rise of number of cases of 'romantic relationships'. The Courts in India and the Law Commission of India, have recognized that 'romantic relationships between two minors as a 'grey area'. As stated above, the objective of the Act was to protect children from abuse. However, criminalizing minors (adolescents in particular) involved in 'consensual romantic relationships' has attracted the wrath of the judiciary. In the jurisprudence regarding 'romantic relationships' there is a huge gap in difference of opinion in the Judiciary and it still remains an unsettled proposition. It gets even complex when we consider the decisions of the High Courts, where there are conflicting opinions on the issue. For e.g. the Bombay High Court believed that criminalizing romantic relationships 'overburdens the criminal justice system, consuming significant time of the judiciary, police, and child protection system'[4]. It is for this reason various stakeholders including the Courts have been advocating for 'de-criminalizing consensual romantic relationships'. It is also contended that it is in the aftermath of the POCSO Act only, the issue of 'romantic relationship involving minors' have garnered judicial attention. While the 'decriminalization' approach may appear to be logical this also goes against the aims and objects of the POCSO Act, 2012. It is in this light this paper critically analyses the problems associated with approach of calling for decriminalizing 'consensual romantic relationship of minors' as this may lead to failure of protecting children whose protection is the prerogative.

In this light, the paper is divided into six parts, where *firstly* this paper gives an overview of the POCSO Act, 2012; *secondly* deals with the age of consent and harm in romantic relationships involving children; *thirdly* discusses judicial approach towards romantic relationships; *fourthly* analyses the perils of decriminalizing romantic relationships involving children and the ensuing

[4] Ashik Ramjan Ansari vs. State of Mahrashtra & Anr 2023 LiveLaw (Bom) 336.

complexities; *fifthly* this paper deals with compounding of offences under the POCSO Act and Inherent powers of the High Courts and *sixthly* concludes with suggestions.

The POCSO Act: An Overview

The 2011 Census, found that there were more than 400 million persons below the age of 18 years constituting about 36.7% of the total Indian Population then.[5]It has been more than 10 years now since the POCSO Act became law, it was enacted by the Parliament in 2012 pursuant to India signing and ratifying the UN Convention on the Rights of the Child, 1982. Emphasizing the necessity of protecting this vulnerable population the Indian Constitution, 1950 also under Article 15 (3) empowers the Parliament to make special laws for children. The Part-IV of the Constitution (Directive Principles of State Policy) under Article 39 (1) provides that *"State shall frame its policy towards ensuring that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment*"

Prior to the POCSO Act, there were no explicit provisions dealing with sexual violence against children barring sections 375, 354, 377, 509, 511 (Attempt to commit any of these Offences) of the Indian Penal Code which led to several sexual offences go unnoticed and rendered offenders unaccountable. Moreover, there were no distinctions drawn between 'adult victims' and 'child victims'. Sexual offences brought serious physical and psychological harm to children and seriously impaired their overall development. This vulnerable group remained largely unprotected. The Law Commission of India had in its 156th Report had raised alarm regarding the issue of 'child rape'.[6] The Hon'ble Supreme Court in *Sakshi* vs. *Union of India*[7], expressed its serious concern over the issue and emphasized the need for 'an appropriate legislation' to deal with the surge in cases of sexual violence against children including child rape and sexual abuse of children. As the 156th Report of the Law Commission of India, was limited in its scope and

[5] Government of India, "Census of India 2011" Table C-13 (Office of the Registrar General & Census Commissioner, India, Ministry of Home Affairs, 2015) , available at https://censusindia.gov.in/nada/index.php/catalog/1436 [accessed 30 November, 2023].
[6] Law Commission of India, "144th Report on Indian Penal Code, 1860 (Vol.1 &2)" (August, 1992).
[7] 2004 SC 3566.

ambit, the Commission *vide* its 172nd Report recommended 'widening the scope of offences falling under Section 375 IPC by substituting "sexual assault" for "rape" and also making it gender neutral.[8]The issue of romantic relationship involving children which is currently in focus in this article was not seriously debated. POCSO Act saw the sprout of prosecutions of children, particularly male children involved in 'romantic relationship' with a minor of the same age or with an adult.

Age of Consent and Harm in Romantic Relationships Involving Children

Romantic relationship in minors often involve some form of sexual activity. Such relationship is subject to serious regulations in various jurisdictions because of the 'harm' such activities brings to children. In the Indian legal system, laws differ on the legal capacity of minors to enter into a legal transaction like a contract, a marriage, etc. According to Belinda *et al*, "since IX Century, our societies have become increasingly interested in normative development of children, the differences between children and adults, and have explored a variety of ways in which to demarcate childhood from adulthood.[9]According to G. Stanley Hall, Adolescence is a bridge between adulthood and childhood and is a crucial phase of an individual's life.[10] It is understood as a time of storm and strain, where childhood innocence is left behind but adult capacities are still developing. This article when it talks about 'romantic relationship' among children we are talking about the teenagers between 13-18 considered as immature and incapable of taking decisions. As will be seen below, the IPC for a long-time provided that the age of Consent is 16 and it was the POCSO Act, 2012 that had decreased the 'age of consent' to 18. The age group of 16-18 is the most contentious area and there is public sentiment to show leniency to adolescent individuals in this particular age group. The UNCRC and the POCSO Act both seek to protect children from harm and exploitation. Sexual abuse of children can bring in long-term physical, psychological and personality changes in children. Exposure to sexual violence in the early childhood causes *Rape Trauma Syndrome*, *loss ofself-esteem, depression, post-traumatic stress,*

[8] Law Commission of India, "172nd Report on Review of Rape Laws" (March, 2000).
[9] Belinda Carpenter, "Harm, Responsibility, Age and Consent" 17 New Criminal Law Review: An International and Interdisciplinary Journal 23-54 (2014).
[10] Gordon Tait, Youth Sex and Government 89-90 (2000) Cited in Supra note 8.

self-harm, substance abuse, etc.[11] As will be shown below, even in cases of children involving in so called 'consensual relationships' there are some adverse consequences which cannot be handled by children.

Therefore, in the present article, by 'age of consent' we refer to the legal age i.e., 18 at which children attain the legal capacity to consent to a 'sexual relationship'. By defining a 'child' as any person who is below the age of 18, he or she is considered to be legally incompetent by the POCSO Act to enter into 'sexual relationship' andthe POCSO Act by adopting a 'gender-neutral' approach criminalizes any person including a 'minor' for entering into a sexual relationship. The purpose of this article, is not to deal with predatory sexual violence, harassment or child pornography, which the POCSO Act penalizes with stringent punishments. Prior to the POCSO Act, 'age of consent' was limited only to section 375 of the IPC. The original 'age of consent' under section 375 of the IPC 1860 was 10 which was subsequently raised to 12 in 1891 after *Queen-Empress* vs. *Hurree Mohun Mythee* (*Phulmoni Case*).[12] The accused in this cases was, however acquitted. Thereafter, the 'age of consent' was raised to 14 in 1925 and subsequently to 16 in 1940. The 'age of consent' remained constant until the POCSO Act, 2012 while under section 375 IPC it remained 16 till the judgment of the Hon'ble Supreme Court's decision in *Independent Thought* vs. *Union of India*.[13]

Judicial Approach towards Romantic Relationships Involving Children

Since the enactment of the POCSO Act, several gruesome offences which earlier used to go unnoticed has come to the limelight. The legislation that was aimed at protecting children was able to achieve the success it was intended only because of the committed judiciary in protecting the interests of children. The Hon'ble Supreme Court in *Nawabuddin* vs. *State of Uttarakhand*[14], emphasized that "*Children are precious human resources of country; they are the country's*

[11] See generally Udayan Bhaumik, "Rape Trauma Syndrome: A Retrospective Study of Post-Traumatic Stress Disorder after Sexual Assault among Indian Women" 23 (3) ASEAN Journal of Psychiatry 1-9 (2022).
[12] (1891) ILR 18 Cal 49.
[13] AIR 2017 SC 4904.
[14]2022 SCC OnLine SC 161.

future". The recent judgment of the Kerala High Court in the *Aluva Rape Case*[15]and the public response to the judgment and several other judgments are testaments to this fact. While it comes to cases of sexual violence, abuse, harassment, etc. of children the Higher Judiciary in India and the Special Courts constituted under the POCSO Act, have been proactive. However, when it comes to the 'romantic relationship' between minor or involving a minor, there is a sea of difference in the approaches of the Courts. Some Courts have adopted a 'Conservative' approach while some Courts have adopted a 'Liberal' approach in cases of romantic relationships. There have been requests from the Courts to the Government, seeking its opinion to lower the 'age of consent' from 18 as it stands under the POCSO Act to 16 and do away with the anomaly caused by the POCSO Act.[16] Even the Justice J.S. Verma Committee Report had recommended the 'lowering of the age of consent under the POCSO Act to 16 in line with Section 375 of the Indian Penal Code.[17]Emphasizing that the UNCRC "aimed *inter alia to protect children from sexual assault and abuse and not to criminalize consensual sex between two individuals even if they are below eighteen years of age. That on the basis of the interpretation of Article 34 of the Convention along with the representation of various groups this Committee recommends that the age of consent be reduced to sixteen and necessary amendments be made in the Protection of Children from Sexual Offense Act, 2012 (No.32 of 2012), in order to avoid contradictions with the Indian Penal Code"*.[18]

It is therefore, understood that the main reason as suggested by the Justice J.S. Verma Committee to make changes to the POCSO Act was to remove the 'age anomaly' caused by the POCSO Act (*lex specialis)* and bring it in tandem with the IPC (*lex generalis)*. It is the author's contention that this line of thought is fundamentally erroneous as the POCSO Act was a special legislation enacted to deal with the social evil of child sexual abuse and cannot be equated with the IPC. The Recommendations of Justice J.S. Verma was however rejected and the 'age of consent' stands at 18 today.

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[15] The Hindu Bureau "Aluva child rape and murder |Accused deserves the death sentence, says judge" *The Hindu* November 14, 2023.
[16] LiveLaw News Network "CJI DY Chandrachud Urges Parliament To Consider Concerns About Age Of Consent Under POCSO Act" *Live Law* 10 Dec 2022 available at https://www.livelaw.in/top-stories/cji-dy-chandrachud-urges-parliament-to-consider-concerns-about-age-of-consent-under-pocso-act-216336 [accessed 30 November 2023]
[17] Justice JS Verma *et al* "Report of the Committee on Amendments to Criminal Law" January 23, 2013.
[18]*Ibid* at 444.

Due to the increase in the cases of adolescent children in romantic relationships being prosecuted in POCSO cases, some courts have developed a 'liberal' approach towards such children or even adults in some cases and have opined that 'POCSO Act was never meant to punish romantic relationships and have sought the 'decriminalization' of romantic relationships involving sexual activity. While other Courts have adopted a 'Conservative' approach and have left it to the legislature to bring in changes to the POCSO Act. Several High Courts and the Supreme Court have come across instances where adolescent children are involved in a romantic relationship and often it is the boy who is prosecuted under the POCSO Act, though the Act itself is gender-neutral. Such relationships result in elopement, continuous sexual cohabitation, marriage, child-bearing, etc. In certain cases, the boy refuses to marry the girl after making a 'promise to marry' thereby compelling the girl or her parents to file a case under the POCSO Act. The offender then moves the High Court for quashing of the FIR u/s.482 of the Cr. P.C.

Further, two references were also made by the Hon'ble High Court of Karnataka in *State of Karnataka* vs. *Basavaraj S/o Yellappa Madar*[19] and Hon'ble High Court of M.P. in *Veekesh Kalawat* vs. *State of M.P.*[20] to the Law Commission of India to consider and suggest an amendment to the POCSO Act. This has culminated into the 283rd Law Commission of India Report titled "Age of Consent Under The Protection of children From Sexual Offences Act, 2012".

The Court in *Veekesh Kalawat*has categorized consent in consensual romantic relationships as '*de facto* consent' and has suggested that in cases involving *de facto* consent, the accused shall not be granted a minimum sentence as stipulated in the POCSO Act, rather, the 'discretion shall be given to the Special Court to decide the case depending upon the individual facts and circumstances of the case and can grant a sentence up to 20 years. The Court had also opined that cases where such relationship has 'culminated in marriage (with or without children), there should not be any sentence of imprisonment and instead the Special Court be empowered to impose alternate correctional method like community sentence.The Court in *Basavaraj* case, also echoed the opinion of several High Courts that "*criminal prosecution of a minor girl and/or*

[19] (2023) 1 AIR Kant R 23.
[20] Misc. Criminal Case No.4521 of 2023.

minor boy and/or boy who as attained majority recently causes severe harm and injury to the concerned including the families."

Adopting a 'Conservative' approach in the case of *State of U.P.* vs. *Sonu Kushwaha*[21] the Supreme Court has observed that the "*POCSO Act was a stringent legislation with minimum punishments intended to address the malady of child abuse plaguing our society and the Courts were not empowered to award lesser punishments once a case was made out under the Act…The Courts are powerlessto do that unless there is a specific statutory provision enabling the Court to impose a lesser sentence. However, we find no such provision in the POCSO Act*."The Hon'ble High Court of Madras in *Ravi @Virumandi*vs. *State & Anr.*[22]also adopted a stringent view and observed that: "*Whereas the law defines that the person who has not completed the age of 18 years is a child. This Court, being an Appealant Court, is a final fact finding Court and cannot traverse beyond the statute*." The Court also expressed that it was 'waiting for the amendment in the Legislature'.

Perils of Decriminalizing Romantic Relationships Involving Children And The Ensuing Complexities

While there is a school of thought seeking decriminalization of consensual romantic relationships among minors or involving minor and adult, it invariably produces adverse consequences upon the minor involved. The POCSO Act, is considered as a 'protective' legislation to safeguard the vulnerable group namely, children and its in-built mechanisms are helpful in this purpose. Any question of decriminalization means that the POCSO Act ought to be amended to give an exception to the age group of 16-18 which has garnered the support of the Judiciary. Even the 283rd Report is in drafted in this light. But decriminalizing romantic relationships amongst children poses some serious perils to the children involved:

[21]Criminal Appeal No. 1633 OF 2023.
[22]2022 LiveLaw (Mad) 501.

1. Abortion And Teen Pregnancies

In the recent past, several cases have come up before the Indian Courts particularly by children (or their guardians) including rape survivors and victims of sexual abuse seeking abortion of their unborn child.Rule 3B of the MTP Rules, 2003[23] enable 'minors' to terminate their pregnancies upto 24 weeks in accordance with Section 3 (2) (b) of the Medical Termination of Pregnancy Act.[24]In cases involving POCSO Act, the Courts have permitted the child to abort even when the pregnancy has reached as long as 27 weeks.[25] While cases like *Ashik Ramjan Ansari* vs. *The State of Maharashtra*[26], where the Court has supported 'sexual autonomy' as amounting to the 'right to engage in wanted sexual activity', Courts have failed to see the further repercussions upon the physical health and mental health of the children who become pregnant as a consequence of such sexual activity. Teens who get pregnant are usually under the family pressure to abort the child. Also when the Courts have decided requests for abortions, it has not faced cases where the child has opted against the abortion while the parents want the pregnancy to be adopted. Such situations are possible in cases involving romantic relationships. Additionally in India, when we see not everyone has access to safe abortions or contraceptives as it is still a costly affair for many. Children whose family cannot afford a safe abortion, often end up with 'quacks' posing a serious health-risk to the child concerned. From a public health perspective, normalizing 'romantic relationship' eventually means indirect support for largely unsafe abortions or teen pregnancies which adds up to burden the public health system.

In *Ashik Ramjan Ansari* the Hon'ble High Court of Judicature at Bombay, has made a 'comparative study' of the age of consent for sexual relationship, the Court has noted that in countries like Japan, the age consent is as low as 13. The Courts could have studied the healthcare landscape of such countries including 'welfare programmes' for children who become pregnant at an early age. In none of the casesbarring *Probhat Purkait @ Provat* vs. *The State of West Bengal*[27]studied on the topic, for purposes of writing this article, the Courts have given due importance to the long-term health complications of teen abortions or teen pregnancies and have

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[23]G.S.R. 485(E) -In exercise of powers conferred by section 6 of the Medical Termination of Pregnancy Act, 1971 (34 of 1971),13thJune,2003.
[24]The Medical Termination of Pregnancy Act, 1971(Act No. 34 of 1971).
[25]Sudeep Lavania, "Gujarat High Court allows termination of minor rape survivor's 27-week pregnancy" *India Today* Nov 25, 2023.
[26]*Surpa* note 3.
[27]CRA (DB) 14 of 2023.

stopped with one aspect of romantic relationships i.e. 'sexual autonomy'. In *Probhat Purkait* the Calcutta High Court while seeking 'decriminalization' of sexual relationships by children above 16 years has called for "*access to sexual and reproductive health facilities*" for such children.[28]

The POCSO Act by criminalizing sexual activity, abuse or violence upon a 'child' has certain normative goals. It upholds the community's priorities, *viz* preventing teen pregnancies etc. In a US Supreme Court Case of *Michael M.* vs. *Sonoma Country Superior Court*, the Court categorically decided that "the State's interest in preventing out-of-wedlock teen pregnancy was now considered an important purpose of statutory rape law".[29] POCSO Act criminalizes sexual relationship with a child even though it is consensual. Hence, avoiding 'teen pregnancies' could also be seen as yet another purpose of POCSO Act and therefore, it is essential that it be maintained as it is. The Government has also categorically rejected the idea of reducing the 'age of consent' to 16, thereby reiterating its intention not to yield to the demands of the judiciary.[30]

2. Undesired Child Marriages

There is a correlation between 'age of consent' and 'age of marriage'. The age of marriage for a woman in India is 18 while for a man, it is 21. Any marriage below the permissible age attracts the Prohibition of Child Marriage Act, 2006.[31] The Courts while deciding POCSO Act cases, have shown leniency towards offenders who have eloped, in continuous cohabitation, married against parents' will and have involved in sexual activity (with or without children). In some cases, Courts have gone to the extent of seeking decriminalization to protect the institution of 'family'. This can be seen as an indirect method of the judiciary according recognition to child marriages that he PCMA seeks to prohibit. Such support from the judiciary will eventually be construed as a support to early pregnancies and unplanned parenthood. It is also to be reiterated that because the children have involved in sexual activity on account of their adolescence, it does not mean that they should be conferred with 'manhood' or 'womanhood', they are just boys and girls. In most of the cases of romantic relationship, the offender and victim marry against the

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[28]*Supra* note 26.
[29]450 U.S. 464.
[30]LiveLaw News Network "No Proposal To Reduce Age Of Consent Under POCSO Act : Centre Tells Rajya Sabha" *LiveLaw* 22 Dec 2022 available at: https://www.livelaw.in/top-stories/no-proposal-to-reduce-age-of-consent-under-pocso-act-centre-tells-rajya-sabha-217293 [accessed 30 November 2023].
[31]The Prohibition Of Child Marriage Act, 2006 (Act No.6 of 2007).

interest and approval of their parents. In such cases the future, education or occupation prospects of children become feeble. It is such a burden to be cast upon individuals in adolescence or early adulthood. In certain other cases, the parents get the victim married-off in order to save their reputation in the society and most likely to be prosecuted under the PCMA, 2006.

As far as early pregnancies are concerned, as pointed above, in a populous country like ours and crushed medical system, victims do not get adequate medical treatment and such pregnancies poses life-long complications for women without access to healthcare facilities. Early pregnancies and parenthood also casts doubt upon the future of children born out of young couple. In some cases, the boy or girl on attaining adulthood or much later abandons their love-interest and the child is left orphaned. The Courts approving romantic relationships do not adequately address these long-term consequences. According to the UN[32], "*one-third of the child brides in the world are in India. Child marriages bring unpleasant consequences to young girls who might at times give birth in their adolescence as well*." At present in India 27% of young women get married in their childhood. Another study finds that 23.3% of the women between the ages of 20-24 were married before the age of 18 years.[33] It must be borne in mind that premature pregnancy, motherhood, disruptions in education increased risk to violence and other health risks such as maternal mortality, child mortality often accompany as consequences of an early marriage.The 283rdLaw Commission Report also notes that such marriage could also be on the pretext for child trafficking and child prostitution, online grooming, etc.[34]

The POCSO Act, since its inception has been acting as a potent weapon in the fight against child-prostitution and child-trafficking. Therefore, any attempt at diluting the age of consent, even in case of romantic relationship in children will be detrimental to the objectives stated in the POCSO Act. It is noteworthy that several cases come to limelight only when the boy with whom a girl is in a romantic relationship abandons the girl. From the above cases, it is understood that Courts tend to acquit the offender as soon as it comes to a conclusion that the POCSO offender

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[32]United Nations Children's Fund (UNICEF), "Ending Child Marriage: A profile of progress in India 2023 update" 4 May 2023 available at https://www.unicef.org/india/reports/ending-child-marriage-profile-progress-india [accessed 30 November 2023].

[33]ET Online "Child marriage: 20% of women in 20-24 age group married before the age of 18, report finds" available at:
finds/articleshow/96416424.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cpps [accessed 30 November 2023).

[34]Law Commission of India, "283rdReport on Age of Consent under Protection of Children from Sexual Offences Act, 2012" (September, 2023).

and the victim have married or now that they have come to terms with each other. This in itself tantamount to violation of the Prevention of Child Marriage Act, 2006. At trial, the victim or the family members of the victim turn hostile thereby resulting in a wastage of the resources of the criminal justice system and rendering the POCSO Act redundant. The Hon'ble High Cort of Meghalaya at Shillong in *Pyniarlang Kurkalang & Anr.* vs, *State of Meghalaya& Anr.*[35]had requested the State's Chief Secretary and the Member Secretary of the Meghalaya State Legal Service Authority "*to conduct an extensive awareness programme to highlight the aspects of the danger of under aged marriage or cohabitation to avoid unnecessary conflict with the relevant provisions of law*".[36]

Compounding Of Offences under the POCSO ACT, 2012

Compounding in Criminal law means 'forbearance from prosecution because of an amicable settlement between the parties. Section 320 of the Cr.P.C. provides for "Compounding of Offences". Under the said provision Section 320, it is of two types: a) Simply Compoundable; and b) Compounding with the permission of the Court. Section 320 provides a comprehensive list of IPC offences which alone are compoundable which means in some cases, even if the victim and offender intend to arrive at a compromise, the law does not facilitate it. This position was altered after a series of judgments by the 3-Judge Bench of the Supreme Court in *Gian Singh* vs. *State of Punjab*[37], wherein the Court held that the High Courts have 'inherent powers under Section 482 with no statutory limitation, including Section 320, Cr.P.C'. Subsequently in *Narinder Singh and Others* vs. *State of Punjab*[38], the Court had laid down the elaborate principles on the 'inherent power' of the High court under S. 482. The Apex Court had clarified that these powers 'are to be exercised to secure the ends of justice or to prevent the abuse of process of any Court". The 'inherent power' under Section 482 has been used to quash criminal proceedings as well. However, the Court in the above said case, held that "*such power shall not extend to quashing heinous offences like murder, rape, dacoity, etc*." even if the offender and the victim arrive at a settlement.

[35]Crl.Petn. No. 28 of 2022.
[36]*Ibid* para 13.
[37]2012(4) R.C.R.(Criminal) 543.
[38](2014) 6 SCC 466.

When it comes to serious offences under the IPC like rape and other offences under the POCSO Act, the Hon'ble Supreme Court in *Shimbhu & Another* vs. *State of Haryana*[39]and *State of Madhya Pradesh* vs. *Madan Lal*[40], categorically ruled that "offences like rape under Section 376 IPC or sexual offences against children under the POCSO Act cannot be quashed on grounds of compromise" as these are 'offences against society' and is not available to parties to arrive at a settlement.

Even though the Supreme Court in *Shimbu* and *Madan Lal* has ruled out quashing criminal proceedings for sexual offences, several High Courts and including the Apex Court have subsequently ruled in favour of quashing criminal proceedings including those initiated for offences under the POCSO Act. For e.g. in *K. Dhandapani* vs. *The State by the Inspector of Police*[41], the Supreme Court the acquitted an accused who had raped his own niece and subsequently married her. Convicted for offences under the POCSO Act by the trial court and the High Court, the Supreme Court observed that "*this Court cannot shut its eyes to the ground reality and disturb the happy family life of the appellant and the prosecutrix*".

There are several instances of various High Courts, where the Courts have gone to the extent of using its inherent power for quashing criminal proceedings after the offender and the victim have entered into a compromise. Summarizing the law on "quashing criminal proceedings involving non-compoundable sexual offences based on compromise" is the judgment by Hon'ble Dr Justice Kauser Edappagath of the Kerala High Court in *Vishnu & Others* vs. *State of Kerala & Others*[42], wherein the Court has opined that the High Court though shall not normally interfere in the course of investigation/criminal proceedings whenever approached by the parties under Section 482, Cr.P.C or Article 227 for quashing of criminal proceedings, 'it is not completely foreclosed from exercising its extraordinary power' under the above said provisions'. The Court also emphasized that such power shall be used only in 'extraordinary circumstances'. Though what Court has not defined what amounts to 'extraordinary circumstances', the Court in the said case have clubbed several criminal proceedings that are factually similar and have provided clarity on the nature of cases that can be compounded and the cases that cannot be compromised

[39](2014) 13 SCC 318.
[40](2015) 7 SCC 681.
[41]2022 LiveLaw (SC) 477.
[42]Crl.M.C.No.5076/2018 & conn.cases.

even if the parties agree to a settlement. In the above judgment, the Court has categorically rejected such protection to 'incestuous sexual abuse or sexual assault involving children' involving a family member as the Court observed that there is a possibility of a manufactured consent.

From the above analysis it is a amply clear that several High Courts and the Supreme Court[43] itself have been making calls for decriminalization of 'romantic relationships' on the premise that the POCSO Act, 2012 was enacted for protecting children is *criminalizing children*. Despite such calls, the 'age of consent' remains to be 18 and it is not likely to be changed in the near future. Considering the complexities surrounding 'consensual romantic relationship involving children, the Special Courts play a crucial role in protecting the interest of the child offenders in genuine cases. There is some support in favour of trial courts being conferred with inherent powers similar to that of the inherent powers exercised by the High Courtunder Section 482 Cr.P.C. Such a power is conferred upon civil courts by Section 151 of the C.P.C. Conferring inherent powers upon subordinate criminal courts have also been recommended by the Law Commission of India in its 14th Report.[44] The Justice V.S. Malimath Committee on Criminal Justice Administration has also recommended conferring such inherent powers upon the trial courts "*that can be trusted to exercise inherent powers in accordance with settled principles*".[45] The Committee had also observed that "limited conferring of inherent powers to the High Court has contributed to unnecessary litigation and delay".[46] Therefore, in the context of the present article, it is emphasized that in POCSO cases, the hands of the Special Courts are tied by the 'strict application' of the provisions of the POCSO Act, and therefore has to convict the offences even in "consensual romantic relationships involving minors". In the light of the judicial precedents cited above and generally prevailing judicial trend, it is argued that Special Courts by themselves can come to rescue in cases involving a compromise.

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[43] *Supra* note 15.
[44] Law Commission of India, "14th Report Reform of Judicial Administration" (September, 1958).
[45] Justice VS Malimath *et al* "Committee on Reforms of Criminal Justice Administration" *Government of India, Ministry of Home Affairs*, (Volume 1, March 2003) (2.17.1-Inherent Powers).
[46] *Ibid*.

Conclusion

The Law Commission of India in its 283rd Report, had categorically rejected the idea of lowering the age of consent to 16 as it stood in the pre-POCSO era. This is in line with the Government's stand on the issue as well. However, the Commission has recommended amending the substantive penal provisions of the POCSO Act, in order to award a '*lesser sentence'* to offenders if: a) the child upon whom the offence is committed is 16 or above; b) the relationship between the accused and the child (victim) has been intimate. The Commission has also recommended certain 'Special Circumstances that has to be taken into account while convicting the offenders with a lesser sentence. The Commission has also made recommendations to amend Section 18 of the Juvenile Justice (Care and Protection of Children) Act, 2015 to this effect. This appears to be a problematic proposition because *firstly* like the Courts the Commission has kept its focus upon victims who are 16 or above while in reality there are child victims aged 13 or earlier into romantic relationships. The threshold age of 16 years that the Courts have been insisting upon for decriminalizing consensual romantic relationships is based upon the age that section 375 IPC erstwhile provided for. There is no rationale as to why it should be 16 or shouldn't be any lesser. *Secondly* when various legislations provide that a person below the age of 18 is 'legally incompetent' to give consent the Courts are carried away by the notion of consensual romantic relationship by adolescent children in the age group of 16 or above. Even the Commission meticulously uses the term 'tacit approval', which was never intended by the makers of the legislation and the current Central Government despite calls from the judiciary including the Apex Court itself, has expressed its unwillingness to change the 'age of consent'. *Thirdly* there is exists a legislation specifically designed to prevent child marriages and penalize anyone solemnizing such marriages.From plethora of cases involving romantic relationships, the Courts turn sympathetic and lean in favour of decriminalization of consensual romantic relationships once they notice that the accused and victim have entered into a compromise and are 'happily married' and have children. In such cases leniency is unwarranted as it is seen as a Court ratifying such marital relationships which the legislation seeks to abolish. As noted by the Bombay High Court, consensual romantic relationships in children is a 'grey area' and it is better kept that way as each and every case involving children needs a 'judicial scrutiny' and has to be decided upon the unique circumstances involved in that particular case. Further, so far the

Courts have expressed support in favour of decriminalization of romantic relationships that are heterosexual. Ambiguities still remain about children involved homosexual and other forms of sexual activities. Outright 'decriminalization' of consensual romantic relationships will undoubtedly lead to manipulation of consent and deny the children protection accorded by the POCSO Act. *Fourthly* cases of consensual romantic relationships are not only a legal issue but also involve a public health angle particularly when it involves matters of abortion, teen pregnancies, etc. In this light, there is a need for States to provide incentivized studies as suggested by the Calcutta High Court in *Probhat Purkait @ Provat* vs. *The State of West Bengal*[47], on the gravity of the issue at hand and also devise mechanisms for providing adequate sexual and reproductive healthcare facilities to children involved in such romantic relationships.

[47]*Supra* note 26.

The Hohfeldian Analysis of Jural Relations: The Contemporary Relevance

Ankita Kumar Gupta* & Avneek Kaur Sethi**

Abstract

It is very aptly asserted by Wesley Newcomb Hohfeld that "A power bears the same general contrast to an immunity that a right does to a privilege. A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative 'control' over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or 'control' of another as regards some legal relation." The present article tries the bring to the forefront the contemporary relevance of the theory on Jural Relations by Hohfeld. Though he gave this theory in 1913 but it still holds true and apt providing solutions to many legal problems in 2023,even after 110 years of its inception. The article provides conceptual framework, the scheme for understanding the Hohfeld' Analysis of Jural Relations and elucidates contemporary illustrations on the same.

Keywords: Jural relations, Jural correlatives, Jural opposites, Jural contradictories

Introduction

Wesley Newcomb Hohfeld was one of the greatest legal analysts of all the times. He contributed to provide an analysis of one of the most basic concepts of legal theory i.e the concept of 'Legal Right'.[1] His work holds relevance even today and many of the contemporary legal confusions can be solved by referring to his theory of Legal Right. The present article seeks to examine the postulates of Hohfeld's analysis of Jural relations and further examine the contemporary relevance of the same.

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[1] . Walter Wheeler Cook, "Hohfeld's Contributions to The Science of Law" XXVIII No. 8 *TheYale Law Journal*721-738 (1919)

Hohfeld was born on 9th August 1879 at Oakland, California and died a premature death at the age of 39 years on 21st October 1918. Some of his work was published while he was alive but a major part of his work was published after his premature death. His work holds a central place even after so many years in legal and moraltheory. "*One of the greatest messages which the late Wesley Newcomb Hohfeld during his all too short life gave to the legal profession was this, that an adequate analytical jurisprudence is an absolutely indispensable tool in the equipment of the properly trained lawyer or judge-indispensable, that is, for the highest efficiency in the discharge of the daily duties of his profession.*"[2]

Hohfeld believed in the merit of analytical jurisprudence. According to him the most important value of analytical jurisprudence was that it had the capability to not only provide the correct solution to the legal problem easily but to also make the solution certain. During the period of his illness, he made the most important contributions to the fundamentals of legal theory. Those were three articles the first one was "*Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*"[3] published in the year 1913, the second one was "*Fundamental Legal Conceptions as Applied in Judicial Reasoning*"[4] published in the year 1917 and the third one was "*The Relations Between Equity and Law*"[5] published in the year 1913. These three articles by Wesley Newcomb Hohfeld are the most important portions of his work establishing the very basis of legal concepts in legal theory. Like so many other relevant pieces of excellence these articles are also buried away in the Journals they were published. Indeed, it is required for persistent excellence in the field of law that these works are not forgotten by the learned Judges, Lawyers and the Law Teachers laying the foundation of the present legal fraternity. If the present article is able to bring even a little attention to these pieces of excellence, the purpose of the authors to this article would be served.

Hohfeld's Analysis

In the first two articles on "Fundamental Legal Conceptions as Applied in Judicial Reasoning" Hohfeld puts forth 'Eight Fundamental Concepts' involving which legal

[2]ibid
[3]Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" 23 No. 1*The Yale Law Journal* 16–59 (1913), *available at*JSTORhttps://doi.org/10.2307/785533 (last visited on 16th September 2023).
[4] Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning"26 No. 8 *The Yale Law Journal*710–770 (1917), *available at* JSTOR https://doi.org/10.2307/786270 (last visited on 17th September 2023).
[5] Wesley Newcomb Hohfeld, "The Relations between Equity and Law" 11 No. 8 *Michigan Law Review* 537-571 (1913), *available at* https://www.jstor.org/stable/pdf/1275798.pdf (last visited on 16th September 2023).

problems could exist. He aptly explained the relevance of these concepts as "*Eight conceptions of the law have been analyzed and compared in some detail, the purpose having been to exhibit not only their intrinsic meaning and scope, but also their relations to one another and the methods by which they are applied, in judicial reasoning, to the solution of concrete problems of litigation."*[6]

These 'Eight Fundamental Concepts' are popularly arranged and understood in the form of a Chart. (Chart 1.1)

Jural Correlatives

Right in strict sense/ Claim	Privilege	Power	Immunity
Duty	No-Right	Liability	Disability

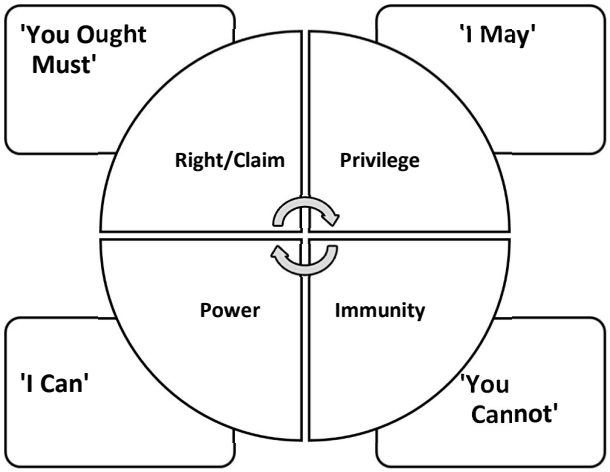
Jural Opposites

Right in strict sense/ Claim	Privilege	Power	Immunity
No Right	Duty	Disability	Liability

The terms found in Hohfeld's Analysis are frequently used by different writers who have preceded or succeeded him. These terms have not ordinarily been used with precision of meaning rather they have been given different meanings by different Jurists at different times. It is also true that the meaning given by Hohfeld to these terminologies is the most acceptable one and the same have been elaborated hereunder.

[6]Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" 23 No. 1*The Yale Law Journal*58 (1913), *available at*JSTORhttps://doi.org/10.2307/785533 (last visited on 16th September 2023).

Conceptual Analysis



Right & Duty

The term 'Right' is the most broadly and commonly used term in the legal fraternity. It is generally used to convey different types of legal relations such as the 'Right' of self-defence is different from the 'Right' not to be harmed by another. Also, we use the term 'Right' at different places like 'Right' to make a Will, 'Right' against anyone who harms your property or person, 'Right' of legislature to make laws for the citizen of the country; here the term 'Right' is being used to denote different concepts which might result in ambiguity. For accurate understanding of the legal theory, we need to discriminate between different types of 'Rights'. *"With the clear recognition of the fact that the same term is being used to represent four distinct legal conceptions comes the conviction that if we are to be sure of our logic we must adopt and consistently use an adequate terminology to express the distinctions involved. The great merit of the four terms selected by Hohfeld for this purpose-right, privilege, power and immunity-is that they are already familiar to lawyers and judges and are indeed at times used with accuracy to express precisely the concepts for which he wished always to use them."*[7]

[7]Walter Wheeler Cook, "Hohfeld's Contributions to The Science of Law" XXVIII No. 8 *TheYale Law Journal*724 (1919).

It is well established that ‘Right’ has a correlative ‘Duty’. The term ‘Duty’ here is not used by Hohfeld in the general sense. By using the term ‘Duty’ Hohfeld does not aim to mean moral duties like ‘duty of the son to obey his father’ or ‘duty of a person to be nice to others so that they are nice to him in return’. Rather Hohfeld is talking about ‘Legal Duties’. Further ‘Legal Duties’ can also be of different kinds corresponding to different kinds of ‘Legal Rights’. In the legal positivist view ‘Law’ is a body of rules or command therefore ‘Legal Duty’ is derived from these body of rules or command. However, in the legal socialistic view ‘Law’ is tied up to social welfare or social policy and ‘Legal Duty’ is a required parameter to achieve social welfare. “*A duty or a legal obligation is that which one ought or ought not to do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated*.”[8] Therefore, in all different meanings of the term ‘Duty’ what is common is that something bad would happen if the ‘Legal Duty’ is breached.

Privilege & No-Right

The second set of correlatives given by Hohfeld are ‘Privilege & No-Right’. ‘Privilege’ assumes absence of ‘Duty’ in himself and absence of ‘Right’ in others. Hohfeld devised the term ‘No-Right’ to express the correlative of ‘Privilege’, the term though connotes far more important a concept than the name itself. The phrases "Privilege" and "No-Right" signify that the holder of a privilege has no legal obligation to do so, while the holder of a no-right has no legal right. 'Right' denotes an affirmative claim made against another person, but 'Privilege' denotes immunity to such a claim.Under Defamatory Laws, Employer-Employee relationship and Witness testification the concept of ‘Privilege’ can be well understood. In defamation lawsuits, we may occasionally claim that the individual distributing the false information has the privilege to do so.Here the assertion is not that the one publishing the defamatory article has the ‘Right’ against another to do so rather that the one publishing the defamatory article has the no ‘Duty’ to refrain from doing so. Sometimes we use the term ‘Right’ and ‘Privilege’ interchangeably. Under the Employer-Employee relationship the employee may say that he has a ‘Right’ to go on strike but in the correct sense he has a ‘Privilege’ to go on strike. We can’t say that the employee has a ‘Right’ to go on strike as there is no correlative ‘Duty’ on someone that he strikes rather it is correct to say that the employee has a ‘Privilege’ to go on strike because he himself will not be liable to the employer for going on

[8]Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” 23 No. 1*The Yale Law Journal*32 (1913), *available at*JSTORhttps://doi.org/10.2307/785533 (last visited on 16th September 2023).

strike. *"This usage of the word 'right' for what Hohfeld calls a 'privilege' is quite common, so we should modify Hohfeld's'privilege' label to conform to general usage. Following this kind of argument several of Hohfeld's critics have chosen to discard his terminology as misleading. One alternative that has been used is to call Hohfeld's right a 'demand-right'and his privilege a 'privilege-right'."*[9] Under the Witness testification the witness has a 'Privilege' against testifying against himself i.e., 'Privilege' against self-incrimination.

Power & Liability

The third set of correlatives are 'Power' and 'Liability'. The term 'Power' is familiar to most lawyers. By the term 'Power' it is understood that there is a legal ability to do a certain act or to refrain from doing an act. A person is said to have 'Power' if he or she by their acts has a legal ability to produce a legal change in a legal relation. When someone is operating with "Power," the exercise of that "Power" will change the legal status of at least one other person. Here according to Hohfeld the person whose legal relations are altered due to the exercise of the 'Power' of one person, is under 'Liability'. The term 'Liability' is many times used vaguely, it is usually understood to mean something burdensome or disadvantageous. But is not so according to Hohfeld, for him 'Liability' may be a desirable thing. Such as, in a situation where an owner of a dog abandons it, there is a legal power upon the public at large to acquire the ownership of the dog by taking it under their possession. Before the dog is abandoned, the general public, aside from the owner, is legally obligated to gain control over something they previously lacked. Additionally, under the terms of a contract, the person making the offer to enter into a contract with another is giving the recipient of the offer the "Power" to do so, thereby establishing new legal relations between them. As a result, the general public is held "Liable" for the sudden grant of such a new power.

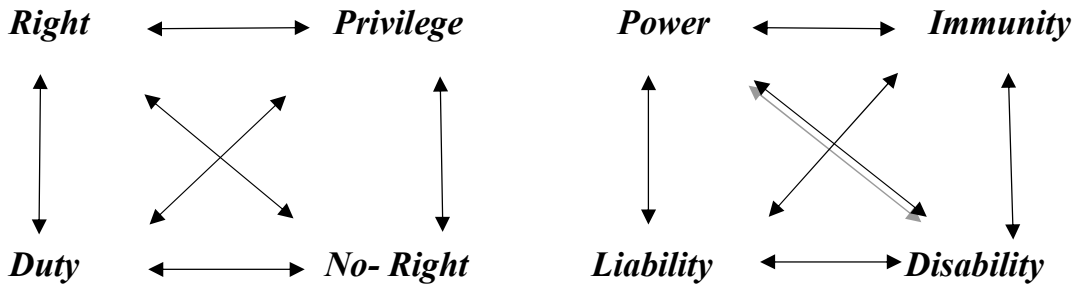
Immunity and disability

Another synonymous meaning given to the term 'Right' is when one person's rights are not subject to or are immune to the rights of another person. In the above situation the use of the term 'Immunity' would be more appropriate. Immunity denotes freedom from the power of another that is where one's legal relation is not under the control of or cannot be altered by any other person. Such as, when we say that the a "*person should not be deprived of his*

[9] Alan D. Cullison, "A Review of Hohfeld's Fundamental Legal Concepts"16 (3) *Cleveland State Law Review*567 (1967).

liberty or property without due process of law" we mean that the person has an exemption from been deprived of his liberty or property unless it is within the due process of law. Here the main underlying meaning of 'Right' is exemption from the legal power which can be better conveyed through the term 'Immunity'. In Hohfeld's system "*'Immunity' is the generic term to describe any legal situation in which a given legal relation vested in one person cannot be changed by the acts of another person.*"[10] The fourth and the last set of correlatives is 'Immunity & Disability'. It can be well understood that the person who does not have the power to alter the legal relation of another person is said to be under a 'Disability'.

Scheme for understanding Hohfeld's Analysis



Blue coloured vertical arrows exemplify the concept of 'Jural Correlatives.'Red coloured diagonal arrows exemplify the concept of 'Jural Negations or opposites.' Yellow coloured horizontal arrows exemplify the concept of 'Jural Contradictories.'In this part of the article an endeavour has been made to explain the concept of Jural relations pioneered by Hohfeld in succinct manner with the help of the following scheme.

Jural Correlatives (Vertical arrows and read both ways)

The concept of Jural correlatives signifies "Presence of one thing in A implies, presence of its correlative in another person B."

[10] Walter Wheeler Cook, "Hohfeld's Contributions to The Science of Law" XXVIII No. 8 *TheYale Law Journal*726 (1919).

- Jural Correlative of Right is Duty; however, the converse is not always true - Presence of Claim or right in strict sense in A implies, presence of its correlative i.e., duty in another person B.
- Jural Correlative of Privilege is No-Right & No-Right is Privilege - Presence of privilege in A implies, presence of its correlative i.e., No right in another person B. Presence of no-right in A implies, presence of privilege in B.
- Jural correlative of Power is Liability & Liability is Power - Presence of power in A implies, presence of its correlative i.e. liability in another person B. Presence of Liability in A implies, presence of its correlative i.e. power in another person B.
- Jural Correlative of Immunity is Disability & Disability is Immunity - Presence of immunity in A implies, presence of its correlative i.e. disability in another person B. Presence of disability in A implies, presence of its correlative i.e. immunity in another person B.

Jural Opposites / Negations (Diagonal arrows and read both ways)

The concept of Jural Opposites /Negations signifies that the "Presence of one thing in A himself, implies absence of its opposite in himself."

- Jural opposite of Right in strict sense / Claim is No-Right & No-Right is Right in strict sense/ Claim - Presence of in right in strict sense A, implies absence of its opposite i.e., no-right in himself. Presence of no-right in A implies absence of its opposite i.e., right in strict sense in himself.
- Jural opposite of Liberty/ Privilege is Duty & duty is privilege / Liberty - Presence of liberty in A, implies absence of its opposite i.e., duty in himself. Presence of Duty in B implies absence of its opposite i.e., privilege/ liberty in himself.
- Jural opposite of Power is disability & disability is power - Presence of Power in B implies absence of its opposite i.e., disability in himself. Presence of disability in B implies absence of its opposite i.e., power in himself.
- Jural opposite of Immunity is Liability & Liability is Immunity - Presence of Immunity in B implies absence of its opposite i.e., Liability in himself. Presence of liability in B implies absence of its opposite i.e., immunity in himself.

Jural Contradictories (Horizontal Arrows and read both ways)

Prof. Williamintroduced a *"third set of jural relations not mentioned by Hohfeld"*.[11] It states that "Presence of one thing in 'A' implies, absence of its contradictory in another person 'B'."

- Jural contradictory of Right is Privilege & Privilege is right - Presence of Right in strict sense or claim in A implies, absence of Privilege in B. Presence of Privilege in A implies, absence of Right in B.
- Jural Contradictory of Duty is No-Right & No-Right is Duty - Presence of duty in A implies, absence of No-right in B. Presence of No-right in A implies absence of duty B.
- Jural Contradictory of Power is Immunity & Immunity is power - Prescence of power in A implies, absence of Immunity in B. Presence of immunity in A implies absence of power in B.
- Jural Contradictory of Liability of disability & disability is liability - Prescence of Liability in A implies, absence of disability in B. Presence of disability in A implies absence of liability in B.

Contemporary Illustrations

Hohfeld gives a practical analysis for explaining the Jural Relation. The authors try to explain the contemporary relevance of the same through varied examples below.

A. Powers, privileges and immunities of Parliament and its members. – Article 105

Clause 1 enunciates parliamentary privilege and states that there shall be freedom of speech in Parliament subject to the provisions of this Constitution, rules and standing orders regulating the procedure of Parliament.[12] (Privilege)

Clause 2 envisages immunity and states that no member of Parliament shall be subject to any proceedings in any court regarding anything said or any vote given by him in Parliament or any committee thereof, and that no person shall be subject to such liability regarding the

[11]RWM Dias, *Jurisprudence* 25, (Lexis Nexis, Delhi, 5thedn., 2013).
[12]The Constitution of India, art. 105 (1)

publication of any report, paper, votes, or proceedings by or under the authority of either House of Parliament.[13] (Immunity)

Clause 3 empowers the Parliament enact to the law for defining the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House.[14] (Power) It imposes a corresponding liability on every person to abide by and respect the powers, privileges and immunities.

Further, it is pertinent to mention that Article 194 of the Indian Constitution envisages the *"powers, privileges and immunities"* of the State Legislatures and their members.

B. Immunity and Disability in the light of Article 14, 15 & 16 of the Indian Constitution

Every person is immune from discriminatory treatment from the state. The state is disabled from treating every person residing within the territory of India unequally. Similarly, Immunity under Article 15 (1) and 16(2) from being discriminated on the prohibited grounds and the state is under disability to discriminate on the said grounds. Immunity under Article 16 (2) from being discriminated on the prohibited grounds and the state is under disability to discriminate on the said grounds.[15]

C. Jural relations in the light of Indian Taxation system

An in-depth analysis of the legal relations involved in the field of taxation reveals the interplay of several hohfeldianjural relations. First, is the source of the legislature's authority to impose a tax, derived from Article 245 and Article 246 of the Indian Constitution. Since this authority includes the authority to place persons under new duties and create new claims it constitutes a Hohfeldian power i.e., the affirmative control over a legal relation as against another.

The taxing power conferred by the Indian Constitution[16], as Hohfeldian analysis would expect, results in a correlative liability on persons- the liability to pay taxes in accordance with the relevant legislation. On the enactment of a legislation, this 'power – liability 'relation is converted into the right of the State to collect taxes in accordance with the

[13] The Constitution of India, art. 105 (2)
[14] The Constitution of India, art. 105 (3)
[15]The Constitution of India, art. 15 (1) & art. 16 (2)
[16] The Constitution of India, art. 245 & art. 246

enactment and correlative duty of individuals to pay. Further, a distinct set of Hohfeldian interests is created when a statute grants an exemption from tax. Though often confused as right, an exemption provision creates only a Hohfeldian immunity from taxation of the assessed and the corelative disability on the Government to subject such exempt income to tax. If X is immune from paying taxes, the revenue authorities cannot make him duty bound to pay. A demand for payment is ineffective, but X has no recourse from making the demand against them.[17]

D. Jural conceptions of Immunity and Disability- Protection of President and Governors (Article 361)

Article 361 of the Indian Constitution articulates the concept of Hohfeldian immunity and disability. Clause (1) states that the President, the Governor and Rajpramukh of a State, from shall not be answerable to any court for the exercise and performance of the powers and duties of their office or for any act done or purporting to be done by them.[18] Clause (2) disables the State from initiating or continuing criminal proceedings whatsoever against the President, or the Governor of a State, in any court during the term of their office.[19] Further, clause (3) disables the state from issuing the process of arrest or imprisonment against them during the term of office.[20] Thus, it can be observed that under all the three circumstances the President of India and the Governor of States are conferred with immunity and the State has been placed under disability,

E. Jural relations and the Patents

Section 48 of the Patents Act, 1970 enunciates the rights of the patentees under two circumstances i.e., where the subject matter of the patent is a product and where the same is a process. In the terms of Hohfeldian's jural relations patentee gets exclusive rights[21] to prevent third parties from making, using, offering for sale, selling or importing the product or the process in India and simultaneously it imposes duty on the third party not to make, use, sell etc. without the consent of the patentee. Further, the patentee enjoys a privilege to grant

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[17] Arvind P. Datar,"Hohfeldian analysis- Application of by the Indian Judiciary: A lawyer's perspective", 10 *SCC (J)* 30(2012).
[18] The Constitution of India, art. 361 (1)
[19] The Constitution of India, art. 361 (2)
[20] The Constitution of India, art. 361 (3)
[21] The Patents Act, 1970 (Act 39. of 1970) s.47 &s. 48- The rights conferred upon the patentee under Section 48 are subject to the fulfilment of the conditions mentioned under Section 47.

licence, assignment etc. i.e., he may or may not grant exercise his privilege and no person can claim as matter of right.[22]

Subsection (1) of Section 142 of the Patents Act, 1970 illustrates Hohfeldian jural relations of right and duty. It states that in respect of the grant of patents, other applications and in respect of other matters in relation to the grant of patents the fees prescribed by central government shall mandatorily be paid. The applicant has a duty to pay the requisite fees and the Government has a right to collect the same.[23]

Conclusion

It is very aptly asserted by Wesley Newcomb Hohfeld that "*A power bears the same general contrast to an immunity that a right does to a privilege. A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative 'control' over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or 'control' of another as regards some legal relation*."[24] Though he gave this theory in 1913 but it still holds contemporary relevance in the current year of 2022. When we see the brightness and sharpness of Jurisprudence as a subject of law fading away because many of the theories propounded by many eminent jurists does not hold relevance in the current times; Hohfeld's analysis of Rights and Duties is ray of light which keeps the relevancy of the subject in tacked.

He tried to explain the 'Eight Fundamental Concepts' in terms of a 'Eight Atomic Particles'. *"If a homely metaphor be permitted, these eight conceptions,rights and duties, privileges and no-rights, powers and liabilities, immunities and disabilities,seem to be what may be called "the lowest common denominators of the law."*[25] By calling them as "*the lowest common denominators of law*" he wanted to give a mathematical explanation of his theory. According to him just as a complicated mathematical problem becomes easy and solvable by decreasing it to lowest common denominator similarly any legal problem would become easy by comparing it with fundamentally similar problems. Through this process it would be possible

[22] Subject to Section 84 of the Patents Act, 1970 which makes the provision for Compulsory licencing.
[23] The Patents Act, 1970 (Act 39. of 1970) s.142
[24] Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" 23 No. 1*The Yale Law Journal*55 (1913), *available at*JSTORhttps://doi.org/10.2307/785533 (last visited on 16th September 2023).
[25]*Id.* at 58.

to discover essential similarities involved in various jural problems and also to use those judicial precedents which otherwise would have been seen as irrelevant.

Hohfeld was and continues to be the most ‘practical’ theorist. He very well recognized the fact that a theory which doesn’t have a practical implication will soon become redundant. Hohfeld’s Analysis of Rights and Duties was based on the same notion and have respectfully passed the test of times. His theory is a means to an end and provides solutions to legal problems. The authors in the present article try to exemplify the contemporary relevance of the Hohfeld’s analysis of Jural Relations and try to retreat some of his work in the hope that his theory will be brought to a wider circle of readers.

Legal Regulation of Crypto currencies in India

Samrat Bandhopadhyay*

Abstract

Cryptocurrencies are a form of digital asset which can be used for legitimate purposes including online purchase, investments or other transactions, and it may also be used for illegal purposes like money laundering, cyber conflicts, pornographic content, hate speech, incitement to violence etc. It is important for digital currency platforms and its users to be aware of the laws and regulations and to comply with them in order to avoid legal and reputational risks.Also, the companies should be strict with the KYC (Know Your Customer) Policy, as to who are becoming the members of such a platform as it would be easier to track them down in case of any unlawful activity, and moreover it will be helpful to stop them at the initial stage so that such activities does not happen. To substantiate the line of thought, in this article, a scenario is being instantiated where the posting of a political video on intermediary platform, having the potential to stoke emotions, to rake up tensions and conflicts leading to violence between sections of population, then a solution in the realm of extant legal rules, regulation by appropriate government or court may take action against the person liable of creating or posting such objectionable content, or the organisation or the platform if it has not performed 'due diligence', or itself initiated the circulation of content or in any manner created or modified the content, is being analysed in detail.It is pertinent to note that any tokens are in the form of cryptocurrency that were created by any stakeholder, which are recognized in some jurisdictions. For simplicity of understanding, it can be initiated by an intermediary, a foreign head-quartered Multinational Company. The legality and validity of these cryptocurrencies is a vital test has to be undertaken in the yardstick of law. This article is an endeavour to delve upon the varied facets of Cryptocurrencies from the touchstone of constitutionality and extant laws of the land, pertinently for India. Moreover in India, the usage of these cryptocurrency or crypto-assets has not be supported by any crucial decision and the approach has been to look at the scenario with a 'close monitoring' approach. Therefore, *prima facie* relying upon the latest cases in this nascent field where the jurisprudence is still evolving, the crypto assets in the form of tokens or cryptocurrencies is yet banned or barred from usage *per se* and whether legality cannot be questioned or not.

Keywords:*Cryptocurrency; Blockchain Technology; Crypto Assets; Distributed Ledger System; 5G Network;*

Introduction

In an international parlance, news are abuzz with the mast head of popular dailies that so and so global information technology infrastructure has been misused and illegal used to communicate mis-information and disinformation causing harm or injury, loss or mismanagement using crypto assets in the form of tokens or cryptocurrenciescrypto assets. The scenario becomes more complex and warrants an immediate attention from any administration or Government to look at issues emanating from the usage of such currencies which may not be 'legal tenders' for business and trade.[1] This article is an attempt to look at varied facets of the usage and its ramification from possible adaptation of the 'cryptocurrency' in a consumption driven economy. The technological push factors and the market pull factors acting in tandem has brought the focus on the vital question of whether the crypto assets are 'assets' which could meet the yardsticks for it be considered as 'assets' and subject to financial and accounting practices as globally recognised[2]. Though the technology plays a crucial and a vital role in this process of crypto asset usage or its eventual effect on the health of the economy. The macro-factors of the economy has neither been shaped by their usage nor by their possible effects or ramification on 'employment', 'consumption' or 'infrastructure spending' decision so to say. Be that as it may, the adoption of the 'cryptocurrency' is yet to be taking shape or solidify as a concrete step in the economic or trade and commerce parlance of country like India.

Deployment of 5G Network

Cryptocurrency has to be seen in the prism of technological development in communicational arena. The underlying technology of 5G Network is taking center stage as 'Game Changer' in the domain of cyberspace and networking.With the advent of new technologies aided by high-speed internet and low latency rates, the technologies related to 5G technology holds

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[1] Recently, the buzz around the cryptocurrency has assumed new vigour with its popularity across varied jurisdiction and its 'legality, necessity and adequacy' being studied from the prism of law and its efficacy from the perspective of trade and commerce.

[2]Generally accepted accounting principles as per US SEC (Securities and Exchange Commission) and the accounting standards of Financial Accounting Standard Board (FASB)

tremendous promise in terms of adding value for end user or consumers. The 5G technology related to the telecom when seen in the prism of technological advancement and in the realm of emerging technologies such as Internet of Things (IoT), autonomous vehicles including drones, advancement in the field of Artificial Intelligence and Telemedicine have brought about a 'radical change' and to some extent disruptive in nature. In spite of many use cases, the rollout of spectrum related to 5G spectrum allocation has to be augmented with timely and systematic regulatory compliances, ensuring capacity development and skill set being honed and dovetailed to business strategy of a company with better workforce availability and a 'resilient, robust and reliable' infrastructure bolstered by a strong 'critical information infrastructure' being put in place. Pertinently the Government of India through its 'National Digital Communication Policy' has endeavored to put in place a roadmap for technological development in line with emerging technologies and their usage in communication considering the 'high-speed internet connectivity' and a reliable application of Internet of Things (IoT) by rolling out its 5G networks. The broader objectives are aimed at identifying and making optimal usage of new 'spectrum bands' for efficacious and effective as well as timely deployment of such aforesaid 5G networks.

Disadvantages Going Forward

There are some scenarios which warrant for greater responsibility not only from critical security perspective but also from Intermediary Liability and Content Moderation, Take-down request through Government Order, the'legality' of such Tokens in distributed environment are some aspects which have to be stringently adhered to. The vital Issues which potentially could be listed are *firstly,* Whether the Intermediary liable for sharing a video leading to violent clashes between some members of the society?*Secondly, Whe*thersuch an intermediary[3]is eligible to seek safe harbour provision u/s 79 subject to S. 79(2)(b) of Information Technology Act, 2000 and *thirdly,*Whether it is liable to for 'Content Moderation' as an Intermediary? Pertinently, the intermediary cannot seek safe harbour protection u/s 79 of Information Technology Act, 2000, hereinafter referred as IT Act, 2000[4].

[3]An Intermediary is defined in Section 2(1)(w) of Information Technology Act, 2000 as, "intermediary, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes…"

[4]Moreover, with extant legal laws of the India in force, "Intermediary is supposed to exercise 'due diligence' on its part as per extant laws and rules enunciated in Information Technology Act, 2000 along with Rule 3(1)(b)(ii) and Rule 3(1)(b)(viii) of Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021."

In this context, rreliance is being placed on the Hon'ble Delhi High Court case of Myspace Inc. v. Super Cassettes Industries Ltd.[5], where it was held that the *Safe haven provision vide S.79[3][b] in IT Act 2000 has to be seen from the parameters such as: Does Intermediary modify/change content, is it a transient data, does it select the receiver or the sender- no knowledge and profit made with 'due diligence' of the intermediary.* In the instant case, a vital piece of advice to client as lawyer would be to do 'content moderation' as to inform the alleged or purported 'intermediary' as it is within its knowledge that any objectionable video uploaded in its platform is in contravention of laws of the land and it cannot seek safe habour protection making the intermediary liable. On the front of issue pertaining to as to whether the intermediary is liable to act upon the "Take-down Request" based on Central Government calls for the video to be removed from distributed ledger platform and for the cryptocurrencies or the tokens collected by say an intermediary (X) to be discontinued? It is vital to analysis, at the outset the intermediary using the cyber infrastructure, computer network in distributed ledger platform for floating cryptocurrencies is supposed to be duty bound to maintain KYC (Know your customer) by internet or social media intermediary and since, the stakeholders including the intermediary is aware of the issue, having public order implication, because of ramification that the video could cause in society during the electoral process, makes it incumbent and quintessential on the part of company to comply with Central Government's request/notice of 'take down' of the video uploaded in such distributed online and internet enabled platform, even though such distributed network platform is restricted to limited few users.

Perspective of Constitutional Fundamental Rights

It is vital to note that even the fundamental right of freedom of speech and expression (Article 19(1)(a) of Indian Constitution) is 'not' absolute and subject to reasonable restriction under Article 19(2) of the Constitution including for public order necessity. Business and commerce in the form of cryptocurrency in a blockchain based 'distributed ledger technology' would also call into question looking at Article 19(1)(g) of Constitution of India. The intermediaries are duty bound where they have to remove or disable access within strict timelines including acknowledgement of the receipt within 24 hours of receipt of compliant. In this context, reliance is being places on catena of cases, including *Sabu Mathew George v. Union of*

[5]Myspace Inc. v. Super Cassettes Industries Ltd., SCC Online Del 6382 (2016)

India[6]*; In Re: Prajwala Letter Dated 18.2.2015 Videos of Sexual Violence and Recommendations*[7]*; and Shreya Singhal v. Union Of India*[8]**,** the vital aspect relates to compliance with regulatory guidelines and to 'comply by the take down notice' as sent by Central Government directive. Further, as per Rule 3(1)(j), provide assistance to Central Government within 72 hours of the receipt of the order as per Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. This is line even with respect to 'Manila Principles of Intermediary Guidelines'.

Legality of Cryptocurrency

A germane question as to Whether the "Legality of any form of Tokens or cryptocurrencies" is sustainable or not is always a dubitable one as per extant laws and legal provisions of Hon'ble Courts of Law in India?As delved in the latest case of 2020 in *Internet and Mobile Association of India (IAMAI)* v. *RBI*[9], Hon'ble Supreme Court of India observed that though the cryptocurrency are not legal tender, still RBI has the jurisdiction to regulate or prohibit dealing with the cryptocurrency. It is vital to note that 'Beta tokens' has no statutory recognition as well as not regulated by any law within the legal framework of India. Moreover, the legality of 'cryptocurrency or any form of likewise tokens' is not ascertainable as concrete decision is yet to be taken so as its legality or necessity is considered. Consider the judicial precedent, even in B.V. Harish & Ors. v State of Karnataka[10], makes it clear with lack of regulatory framework in place, the Karnataka Cyber Crime Police could not perform its investigation on a criminal complaint filed against the cryptocurrency exchange under the Indian Penal Code 1860 (IPC) or Information Technology, Act 2000.As per the aforementioned legal stand, blockchain-based virtual tokens holding real value, may not be sustainable in the eyes of law. Moreover, if Central Government calls for the removal of any video which has the potential to create law and order issues has to complied with; however, legality of the cryptocurrency and its continuation or discontinuity, are some of the pertinent questions which are 'not settled' yet from the legal perspective. A legaland judicious perspective to tackle and address the instant scenario would be to do a SWOT analysis,

[6]Sabu Mathew George v. Union of India, (2018) 3 SCC 229
[7]In Re: Prajwala Letter Dated 18.2.2015 Videos of Sexual Violence and Recommendations (2019) SC
[8]Shreya Singhal v. Union Of India AIR 2015 SC 1523
[9]Internet and Mobile Association of India (IAMAI) v. RBI (2020) 10 SCC 274
[10]B.V. Harish & Ors. v State of Karnataka, Karnataka High Court Writ Petition 18910/2019 (Judgment dated 8 February, 2021)

abbreviated as Strength, Weakness, Opportunity and Threator a risk analysis, considering its market potential and even its long term relationship with a vital stakeholder 'Government', as non-compliance would not send a 'positive message' and considering, the critical scenario of such videos uploaded during the times of election with crypto-assets or in any form of tokens whatsoever, it may attract the provisions of Article 19(2) of Indian Constitution with regard to 'reasonable restriction' imposed for the fundamental right enshrined under Article 19(1)(a) for freedom of speech and expression.

Calibrated Steps- The Need of the Hour

Implementation of the following enumerated steps and procedures, *firstly*,is to develop and implement clear guidelines as to what content is acceptable and unacceptable on the Platform, and such guidelines should be easily accessible by the users and must be regularly reviewed and updated whenever necessary.*Secondly,* there should be Automated Content Moderation Tools which would detect and remove any content which is unlawful, harmful and violative of the applicable laws and guidelines. It would also lessen the burden of human moderators and save them from the trauma they had to go through reviewing all the harmful, violent content, if there are any. *Thirdly,* also, since Artificial Intelligence (AI) tools are not fully capable of understanding the harm that a post is capable of making, for instance, a seemingly innocuous post intended to incite violence against a particular community in neighbouring country, claimed that "Cockroaches need to be trampled". Here the AI system would not be able to understand a mere expression of dislike to an insect as a "harmful content", but only a human moderator with an adequate understanding of the socio-political volatility surrounding such minority community would be able to discern the harm that the post was capable of causing. Hence, the vital quintessence of establishing a Content Moderation Team and appoint human moderators in proportion to their user base in a jurisdiction or locality, and this team be delegated the responsible for reviewing and removing content, if in contravention of extant laws of the law is of vital significance. This team should be trained on applicable laws and should have the authority to remove content that violates community guidelines, in a timely fashion before the issue garners traction among netizens is of quintessential importance. By implementing these steps and procedures, intermediaries can mitigate the risk of unlawful content being uploaded to the platform and reduce the likelihood of similar situations arising in the future.

Intermediary's Growing Responsibility

In the case of *Vyakti Vikas Kendra India Public v. Jitendra Bagga*[11]*, 2012,* wherein the relevant fact pointed to the fact that, an intermediary web hosting platform, hosted certain defamatory content against Sri Sri Ravishankar. The Hon'ble Delhi High Court held that, "the intermediary is obligated to remove unlawful content within 36 hrs if it receives actual notice from the affected party of any illegal content being circulated through its service". Such an action was warranted because of Rule 3(1)(d)[12], wherein"an intermediary upon intimated of actual knowledge in the form of a Court Order or on being notified by the Appropriate Government, under Section 79(3)(b) of the IT Act shall not host, store or publish any unlawful information which is prohibited under any law for the time being in force in relation to the interest of the sovereignty and integrity of India, security of the state, public order, incitement to an offence etc., and therefore the intermediary is liable to take down the video within 36 hrs of the receipt of the Notification by the Central Government…"

The Supreme Court has clarified in catena of cases that, "such timeframe of 36 hrs has to be followed only when the Intermediary receives 'actual knowledge' through court order or being notified by appropriate government or its agency, that unlawful acts relatable to Article 19(2) of the Constitution of India is going to be committed. Moreover, as per Rule 3(1)(g) of the IG Rules 2021, any information which has been removed or access to which has been disabled, the intermediary shall without vitiating the evidence in any manner, preserve such information and associated records for 180 days for investigation process, or for such longer period as may be required by the Court or by Government Agencies…"

In case of non-observance and non-compliance of the aforesaid 2021 Rules, the intermediary as a law-abiding stakeholder may be liable under Rule 7 of the Intermediary Guideline Rules 2021, for punishment under any law for the time being in force including provisions of the IT Act and Indian Penal Code.

To instantiate a video on intermediaries' platform uploaded in any part of the globe[13] and creating violenceor promoting enmity between two groups, which is "a punishable offence in India under Section 153A of Indian Penal Code, and is punishable with imprisonment which may extend to 3 years, or with fine, or both), and therefore it is

[11]Vyakti Vikas Kendra, India Public Charitable Trust Through Trustee Mahesh Gupta & Ors vs. Jitender Bagga &Anr. CS(OS) No. 1340/2012. Decided On: 09.05.2012

[12]Rule 3(1)(d) of the IG Rules 2021

[13] Information Technology Act, 2000 jurisdiction is extra-territorial when Section 1(2) and Section 75 is being read together its applicability extends beyond the territorial boundaries of India.

necessary for any intermediary to follow the law of the land and is liable to take down the content in the interest of Sovereignty and Integrity of India, Security of the State, Public Order and Incitement to an offence under Article 19(2) of the Constitution of India". The interplay between and among varied laws of the law have to seen in 'harmonious fashion' and scope of applicability extends beyond the territorial limits of India, of the cyber offence or contravention has effect within India.

Leveraging Blockchain Technology

Blockchain technology has ushered a systematic peer to peer transactions with 'due importance' accorded to recording of the data and information in a manner which promotes disintermediation, thereby ensuring that it reduces any scope for 'compromising' or 'tampering' with the in-built security system. Such a resilient security brings forth the advantage of avoiding any kind of 'single point of failure' as essentially the technology is based on 'digital ledger system' in a distributed environment or a 'decentralized' or distributed network architecture providing for minimal scope for editing or any form of tampering with the inherent data encapsulated with 'encryption technology', adding to the security feature of such emerging and fast-growing technology. The transactions though could be mined with enhanced business analytical tools can be seen from the prism of enhanced security being in-built with 'Blocks' with hash technology and encryption being the 'basic feature' being incorporated in such network enabled distributed system. The wide application of Blockchain technology even in areas such as non-fungible token and Cryptocurrency have opened the vistas of its applicability adding to its 'viability' and 'efficacy' in a novel but yet the most advanced and technologically innovated manner than ever imagined. Though the blockchain technology is at its nascent stage of development, pertinently in India, still because of 'lack of regulatory framework' in which it has to operate have added an air of uncertainty and unpredictability in the prism of legal and regulatory system yet to be put in place in India. With the inception of 'Bitcoin' and its increasing clamor in the digital world of todays, being the first and most popular use case without a 'clear, specific and distinct' regulation in place, would be dissuading the investors investing and looking at green field investment projects, be it in the form of *inter alia* 'Startups in online space', Angel investment, Venture Capital Investment and Crowd funding, among others.

Business Models spread across Jurisdiction

With Multinational companies transacting and building business relations via Joint Ventures, Trans-boundary companies, trans-national companies and Strategic Alliances with Head Quarters located in varied geographies and companies registered in the multiple locations, offering a range of communication and entertainment services to users across the world, including India. These services include content creation and sharing (photos and videos), online chatting, entertainment streaming such as web TV series and films, as well as buying and selling blockchain-based virtual tokens holding real value and exchangeable with local currencies and forex-based currency portfolio, challenges are immense when seen in the realm of Cryptocurrency and other non-fungible tokens, among others. Users may the option to give other users tokens or cryptocurrency for any content they create, if they like such content. The positive mindset along with robust, resilient and responsive 'Knowledge Management' inbuilt in organisations would go a long way in defining the 'competitive edge' in todays world[14]among others. The age of knowledge[15] and insightful learning[16] has to be endeavour of transcendence and forging connection with organisations where 'sharing' and 'leveraging' via networking with each other is the buzz word of todays era.

Conclusion

It is *fait accompli* that cryptocurrency is one use case of blockchain, wherein blockchain refers to the underlying technology. Popular blockchain use-cases include a certificate verification system by the Maharashtra State Board of Skill Development and widely popular in the cyber space the usage of non-fungible tokens which allow creative professionals to monetise their work based on public blockchains like Ethereum, wherein 'Ether' is utilised as cryptocurrencies. Such digital files utilising blockchain technology to establish a verified and public proof of ownership. Pertinently, the applicability of such token extends to art, collectibles, video clippings, music and even real estate in some jurisdiction across the globe. However the vital question revolves on the 'pivotal' issue as to whether Indian laws provide legal recognition to crypto tokens or blockchain token as such or not. There are instances in

[14]Prahalad, C.K. and Hamel, G. (1990) The Core Competence of the Corporation. Harvard Business Review, pg79-91
[15]Hamel G. (1990), Competition for competence and interpartner learning within international strategic alliances, Strategic management journal 12 (S1), pg83-103
[16]G Hamel, YL Doz, CK Prahalad (1989), Collaborate with your Competitors and Win, Harvard business review 67 (1), pg133-139

India where some of the State Governments have proposed to adopt blockchain technology for land record management to prevent its tampering and to tackle the germane issues largely due to inconsistencies in land registration records in the hitherto unsystematic huge collections of data, information and records. To top it all, building on the "National Strategy on Artificial Intelligence", which is monitored closely in line with Blockchain and Cryptocurrency as emerging areas in the realm of NITI Aayog's endeavour to leverage technology for economic benefits in a "responsive" manner for its users, citizens and the society at large.The case of *Modern Dental College and Research Centre v State of Madhya Pradesh*[17], was relied upon in the 3 judge bench adjudicated case *Internet and Mobile Association of India (IAMAI) v Reserve Bank of India (RBI)*[18] reported in the year 2020 where the circular issued in 2018 by RBI was challenged by IAMAI and other petitioners on the twin grounds of lack of jurisdiction of RBI to delve into the contentious issue as to whether cryptocurrency could be equated to real money, likewise as a 'legal tender' or not? The contention was primarily on the ground that such cryptocurrencies are not currency in strict sense; while the other limb of the argument primarily centred on as to whether it could qualify the test of 'function of money', that is *firstly*, as a medium of exchange; *secondly,* as a unit of account; *thirdly,* as a measure or store of value and *fourthly,* as a valid alternative to settle as to final discharge of debt or standard of deferred payment, pertinently the Hon'ble top court of the country, the Supreme Court reasoned that though cryptocurrency are not legal tender, the RBI being a 'Central Bank' and 'Banker of the Banks' has jurisdiction to regulate or prohibit dealings in cryptocurrency. Based on a combined reading of Banking Regulation Act 1949; The Reserve Bank of India Act 1934; and Payment and Settlement Act 2007, RBI could assume jurisdiction being a regulator of monetary policy, financial stability and payment systems. The Apex Court held that the April 2018 circular has potentially and adversely affected the business of exchange that dealt in cryptocurrencies. It has reasoned that it has implication on trade and commerce fundamentally guaranteed by Article 19(1)(g)[19] and disproportionately affected the livelihood of people connected or dealing with cryptocurrencies. Moreover, the stance has been meticulous and much needed watchful 'approach' as India has neither banned, nor had taken a policy decision on cryptocurrencies. In a vital judgment of Hon'ble Karnataka High Court in *B.V. Harish and Ors. v State of*

[17]Modern Dental College and Research Centre v State of Madhya Pradesh AIR 2016 SC 2601
[18]Internet and Mobile Association of India (IAMAI) v Reserve Bank of India (RBI) reported as (2020) 10 SCC 274
[19] Article 19(1)(g) of Constitution of India 1950

Karnataka[20], in 2018 Karnataka Cyber Crime Police filed a criminal complaint as First Information Report (FIR) against Unocoin, a cryptocurrency exchange under the relevant sections of Indian Penal Code and IT Act, for alleged setting up of 'Bitcoin ATM/kiosk' in the central hubbub area of a mall in Bengaluru, without any regulatory permission. Placing reliance on the case of *IAMA v RBI*[21], the Court quashed the criminal petition against the cryptocurrency exchange in early February 2021. The Court had observed that given the current petition has been initiated against the petitioner based on same April 2018 notification/circular of RBI, the criminal proceedings ought to be quashed. Based on aforesaid judicial precedents, it is the most opportune time to delve into the varied facets of legality of cryptocurrency in the prism of legal laws including rules and regulatory looking into the tiple dimensions of 'validity', 'legality' and 'proportionality' with guidelines from the legislature to address the pertinent issues of Cryptocurrency and also at the same time, providing due credence and 'due diligence' in the touchstone of constitutionality and for sustainable economic growth and development of the society and country as a whole.

[20]B.V. Harish and Ors. v State of Karnataka, Karnataka High Court Writ Petition 18910/2019 (Judgment dated 8 February, 2021)

[21]Internet and Mobile Association of India (IAMAI) v Reserve Bank of India (RBI) reported as (2020) 10 SCC 274

Associational rights of government employees in India

Abhayachandran K*

Abstract

Transitioning to a welfare state from laissez fair required a large number of employees, even under the direct control of the government. And thus, the state became one of the largest employers in the welfare state. The management of all these welfare activities required many workers under the direct control of the government, and the state became one of the largest employers in the welfare state. However, in order to maintain high standards in the implementation of government policies, the political neutrality of government employees needs to be maintained. To maintain professional integrity and efficiency in public work, certain restrictions on freedom of political expression, the right to form an association, etc., are necessary. Conflicts may arise between employees and the government over the violation of the fundamental rights of public servants. Therefore, the following questions are relevant: Does a citizen have to surrender his fundamental rights while entering government service? If restrictions are necessary for government employees, what kind of restrictions are to be imposed? Are all services subject to restrictions? This article discusses associational rights of government employees in India on the basis of these questions.

Key words – Government employees, associations, service rules, demonstrations, strike

The executive power of the central government and state governments is vested with the President of India and the governors of the states, respectively. The President and the governors shall exercise the power directly or through officers subordinate to them by the Constitution[1]. India's existing civil service structure dates back to British rule, and even after independence, there have been no notable reforms in its policy and character. Government employees are the most skilled persons in their areas as the selection process are highly competitive and non-discriminatory. The two institutions through which the central government ensures recruitment of personnel for the government are the Union Public

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[1]Constitution of India, Articles 53 and 73

Service Commission (UPSC) and the Staff Selection Commission (SSC)[2]. The former is constituted under a provision of the Constitution and is responsible for conducting examinations for appointment to the higher civil services and civil posts under the Union Government; including recruitment to the All India Services. There is a mandatory provision for consulting the Commission on all matters relating to methods of recruitment, principles to be followed in making promotions and transfers from one service to another and on all disciplinary matters. The SSC is responsible for making recruitment to subordinate staff such as Assistants, Stenographers etc.[3]Selection agencies prepare a rank list after an extensive recruitment process, i.e. from issuing a notification for a particular job to advising the government of suitable persons for appointment, including reserved categories as per the Constitution. Once the suitable candidates are found and appointed from the rank list prepared in this way, he becomes a Government servant and after probation period as per the relevant rules, he gets permanent appointment. With that, he becomes bound to work under the service rules and becomes part of the government.

A person who holds a post or service under the central government or state government is generally termed a government employee. The Central Service Rule authoritatively define 'government servant' as a person who is a member of a Service or holds a civil post under the union, and includes any such person on foreign service or whose

[2] Constitution of India, art. 315. Public Service Commissions for the Union and for the States
(1) Subject to the provisions of this article, there shall be a Public Service commission for the Union and a Public Service Commission for each State.
(2) Two or more States may agree that there shall be one Public Service Commission for that group of States, and if a resolution to that effect is passed by the House or, where there are two Houses, by each House of the Legislature of each of those States, Parliament may by law provide for the appointment of a Joint Commission to serve the needs of those States.
(3) Any such law as aforesaid may contain such incidental and consequential provisions as may be necessary or desirable for giving effect to the purposes of the law.
(4) The Public Service Commission for the Union, if requested so to do by the Governor of a State, may, with the approval of the President, agree to serve all or any of the needs of the State.
(5) References in this Constitution to the Union Public Service Commission or a State Public Service Commission shall, unless the context otherwise requires, be construed as references to the Commission serving the needs of the Union or, as the case may be, the State as respects the particular matter in question. Staff Selection Commission - The Government of India, in the Department of Personnel and Administrative Reforms vide its Resolution No. 46/1(S)/74-Estt.(B) dated the 4th November, 1975 constituted a Commission called the Subordinate Services Commission which has subsequently been re-designated as Staff Selection Commission effective from the 26th September, 1977 to make recruitment to various Class III (now Group "C") (non-technical) posts in the various Ministries/Departments of the Govt. of India and in Subordinate Offices. The functions of the Staff Selection Commission have been enlarged from time to time and now it carries out the recruitment also to all Group "B" posts in the pay scale of Rs 9300 to 34800 with a grade pay of Rs 42000 The functions of the Staff Selection Commission were redefined by the Government of India, Ministry of Personnel, Public Grievances and Pensions vide its Resolution No.39018/1/98-Estt.(B) dated 21st May 1999 (may be seen under the heading Resolution). The new constitution and functions of the Staff Selection Commission came into effect from 1st June 1999.

[3] https://dopt.gov.in/about-us/functions/roles-responsibilities-0, accessed on 27/01/2023

services are temporarily placed at the disposal of a state government, or local or other authority; a person who is a member of a service or holds a civil post under a state government and whose services are temporarily placed at the disposal of the central government; and finally a person who is in the service of a local or other authority and whose services are temporarily placed at the disposal of the central government[4]. The Prevention of Corruption Act, 1988, and the Indian Penal Code define a public servant with very wide terms which covers all the persons who perform public duty under any authority created by statues.[5] The legislature enacts these Acts to purify public administration and comprehensively define the term public servants. However, under the Prevention of Corruption Act, 1988, a broad definition has been given to include all members performing public duties as public servants even if that person is not directly subject to the regulation of service rules made under Article 309 of the Constitution of India. But as this article examines the right of association of government servants, such a broad definition does not need to be considered.

Central Civil Services (Classification, Control and Appeal) Rules, 1965 provides a inclusive definition of government employees under central government, state governments, and local bodies. The expression of government employees is also susceptible to ambiguity since employee includes within its ambit, permanent, temporary, regular, short-term, *ad hoc,* and contractual employees[6],but the Supreme Court has given a restrictive interpretation to the term public servants that the term "government servant" did not include contractual employee[7]. However, it is of utmost importance to define precisely who government employees are because more statutory restrictions are permitted on exercising fundamental rights over government employees. For instance, the armed forces are government employees, but they are treated as a particular categoryand subject to more restrictions. Parliament is empowered to make laws to restrict or prohibit the rights conferred by Part III

[4]Rule 2(h) of Central Civil Services (Classification, Control and Appeal) Rules, 1965. The Rule was promulgated by the President of Indian in exercise of the powers conferred by proviso to Article 309 and Clause (5) of Article 148 of the Constitution and after consultation with the Comptroller and Auditor-General in relation to persons serving in the Indian Audit and Accounts Department.

[5]*Manish Trivedi* v. *State of Rajasthan* (2014) 14 SCC 420, 428; *See also*Section 2 (c) of the Prevention of Corruption Act, 1988 has define public servants. In *Central Bureau of Investigation* v *Ramesh Gelli*(2016) 3 SCC 788 the Supreme Court expands the definition of public servant. The managing director and chair of a private banking company were held to be public servants for the purposes of prosecution under the Prevention of Corruption Act 1988. In *State of Maharashtra* v. *Prabhakar Rao*, (2002) 7 SCC 636, the Supreme Court held that the definition of Public Servant under section 21 of IPC is of no relevance under the Prevention of Corruption Act, 1988.

[6] Sararaditya Pal, *Law Relating to Public Service*, 3 (2011)

[7]*UPSC* v. *Girish Jayantilal,* AIR 2006 SC 1165

to members of the armed forces or members of the forces maintaining public order[8]. This kind of restrictions is in addition to reasonable restrictions under Article 19 (2) to (6) of the Constitution to maintain and strengthen the morale and discipline of the soldiers[9].

Political neutrality

The political executive performs its functions through politically neutral civil servants, and implementing the policies of the duly elected government is a core function of civil servants. Every government servant shall at all times maintain political neutrality.[10] Civil servants have to be accountable to their political executive, but they have to function under the Constitution[11]. The roles and responsibilities of the political executive and civil servants are defined by the Constitution under which various rules were framed by the President and Governors for the conduct of business. Therefore, an impartial civil service is responsible to the Constitution and in that way to the respective governments to which they have taken an oath of loyalty. The Second Administrative Council stressed the concept of political neutrality and loyalty to the elected government[12], so a healthy working relationship between ministers and civil servants is critical for good governance. Principle of political neutrality is generally accepted in order to maintain professional integrity and efficiency in public employment, certain restrictions are, therefore, required on freedom of political opinion, the right to form an association or unions etc. Naturally, there may be conflicts between employees and the government over the restrictions of the fundamental rights.

A government servant cannot remain a member of political parties or participate in party events. Central Civil Service (Conduct) Rules 1964 and All India Service (Conduct) Rules 1968 are significant regulations intended to conduct and regulate government servants under the Government of India. Political affiliation or political activities of employees under all India services is banned under rule 5 of the All India Services (Conduct) Rules, 1968[13]. Right of association conferred by Part III of the Constitution cannot be used by government employees to become a member of an association of government servants affiliated with any

[8] Constitution of India, art. 33
[9] *R. Viswan* v. *Union of India* (1983) SCC 401
[10] Central Civil Service (Conduct) Rules 1964, rule 3 (1) (vii)
[11] *T.S.R. Subramanian* v. *Union of India*, (2013) 15 SCC 732, 752
[12] Report of the Second Administrative Reforms Committee (2008), Para 15.1.3
[13] All India Services (Conduct) Rules, 1968, rule 5. Taking part in politics and elections.— 5(1) No member of the Service shall be a member of, or be otherwise associated with, any political party or any organization which takes part in politics, nor shall he take part in, or subscribe in aid of, or assist in any other manner, any political movement or political activity.

political party[14]. The rule strictly prohibits a government employee from engaging in any form of political activity[15]. It requires that not only government employees but also his family members obey the rule. If he is unable to stop them, he should inform the government[16]. Government employees should not have any personal relationship with any member or office bearer or any political organization or religious organization. No government servant shall canvas or otherwise interfere with or participate in any election to an assembly in the state of Kerala or elsewhere[17]. Suppose any question arises as to whether there is any movement or activity within the ambit of political activity, the decision of the government shall be final[18]. The rules prohibit shouting slogans or performing irregular demonstrations in office premises while on duty[19].

Service associations

State governments have brought plethora of rules of conduct to regulate the employees under the government services. As it is not possible to check all the statutes and rules of conducts of all the states, only the rules and regulations of Kerala are examined here. In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and in supersession of all previous rules on the subject, the Governor of Kerala promulgated Government Servants Conduct Rules 1960 for the purpose of regulating the conduct of government servants in Kerala, however, the provisions relating to associations of government servants and the conditions of its recognitions would not be applied to employees in subordinate service in government owned industrial concerns[20].Every government employee is free to form associations or unions for the purpose of employees' welfare and participate in activities for more favourable working conditions subject to certain restrictions. A government servant shall not join or continue to be a member of an association the objects or activities of which are prejudicial to the interests of the sovereignty and integrity of India or public order or morality[21]. A condition for recognition of government employees association states that no association of Government servants or association purporting to represent Government servants or any class thereof shall be recognized unless it satisfies the

[14]*Id.* rule 5 (1)
[15]*Id.* rule 67 (1)
[16]*Id.* rule 67 (2)
[17] Government Servants Conduct Rules 1960,rule 69
[18]*Id.* rule 67 (3)
[19]*Id.* rule 60 (c)
[20] Government Servants Conduct Rules 1960, rule 1 (iii) the provisions in rules 76 to 79 of these rules shall not apply to employees in subordinate service in Government owned industrial concerns.
[21]Government Servants Conduct Rules, 1960, rule 76

following conditions[22]. Other conditions for such associations are that the association should consist of a specific class of government employees and represent 25 percent of the total strength of that class or 50 persons, whichever is higher[23]. This means that class I and class II officers will not be allowed to become members of the class III officers association and vice versa. Every government employee of the same class must be eligible for membership in the association[24]. Persons who are not in the service of government shall not be office-bearers of the association[25]. The association must not be formed on a territorial or communal basis[26]. The association shall not be, in any way, connected with any political party or organization[27].

Any government servant who wishes to organize himself into an association of government servants to advocate for favourable conditions of service and interact with the government on service matters for the purpose of safeguarding the welfare of the government servants shall apply to the government through the Head of the Department along with a copy of the draft rules for approval of the association.The draft service rule must comply with the provisions of the service rules and specifically stipulate that the association shall not adopt any strike or other action that would amount to paralyze or embarrass government[28]. Recognition granted by the government shall be revoked if it violates any of the conditions prescribed for the recognition of any association or adopts any strike or action intended to discourage or embarrass the government[29]. The rule empowers the government to revoke the approval of any association if it violates any relevant service rule[30].

Government employees are free to form associations, but the statute stipulates that they must operate under certain conditions. The association shall not seek the assistance of any political party or organization to represent the grievances of its members or indulge in any seditious propaganda or expression of disloyal sentiments.[31]It should not be engaged in any political activities[32]. However, a government servant has the right to participate in a private meeting of government employees and he may be participating discussions of a

[22]Government Servants Conduct Rules, 1960, rule 77 (a)
[23] Government Servants Conduct Rules, 1960, rule 77 (a) (1) (i)
[24]*Id.* rule 77 (a) (1) (ii)
[25]*Id.* rule 77 (a) (1) (iii)
[26]*Id.* rule 77 (a) (1) (iv)
[27]*Id.* rule 77 (a) (2)
[28]*Id.* rule 78
[29]*Id.* rule 79
[30]*Id* rule 77 (b)
[31]*Id.* rule 77 (b) (1)
[32]*Id.* rule 77 (b) (5)

recognized association of government employees, expressing his views on matters that affect the personal interests of such employees[33]. Organisations can publish periodicals to express their opinions and their issues. Prior approval from the government should be obtained for periodical publications. In addition, no commercial advertisements will be contained in any publication issued by the association[34].

Some relevant questions need to be answered at this point: Can a citizen be denied the right to freedom guaranteed by the Constitution upon entering government service? Is the ban on all forms of demonstration, including peaceful and silent assembly, is unjustified encroachment on the constitutional rights of government employees? Does the Constitution exclude government employees as a class from protecting the rights guaranteed by Part III of the Constitution? Are reasonable restrictions imposed on service conditions invoking article 309 outside the scope of test of reasonableness, and is it not possible to test such restrictions only by referring to the criteria laid down in (2), (3), or (4) of article 19?One view is that the right to form an association or union includes joining a political party that is an integral part of rights available to citizens hence no law or regulation can curtail the fundamental rights unless it is protected by the reasonable restrictions contained in article 19 (4) of the Constitution.Courts had in many cases examined the validity of service laws that prohibit the political activities of government employees and their association with political parties.

The Supreme Court in *State ofMadhya Pradesh* v. *Ramashanker Raghuvanshi*[35] has observed that once a person becomes a government servant, he becomes subject to the various rules regulating his conduct and his activities and must naturally be subject to all rules made in conformity with the Constitution.[36]In *Ravindra Kumar Dutta* v. *Union of India*[37]the Supreme Court opposed the right of a government employee in engaging political activities and observed that if the contention is accepted it would lead to a complete revision of the accepted civil service philosophy. The court, however, referred the matter before the Constitution bench where the Court has clarified that the service rule prohibiting government employees from participating in any form of political activity was very relevant. Therefore, before entering any service, a particular candidate may not lose his job in the government service if he was in politics, but at the same time, once he becomes such a government

[33]*Id* rule 60 (a) (i)
[34]*Id.* rule 77 (b) (4)
[35](1983) 2 SCC 145
[36]*Id.* at 153
[37](1986) 3 SCC 587

servant, enjoy the fundamental rights guaranteed by article 19 (1) (a), (c) of the Constitution, subject to the restrictions imposed by the service rules.

In *Balakotaiah v. Union of India*[38], the Supreme Court ruled that government servants could not claim the right to form an association or union if they were members of a communist party-sponsored trade union. The appellants were railway servants who were terminated from the service for reasons of national security under section 3 of the Railway Services (Safeguarding of National Security) Rules, 1949. Notices served them under the section to show cause charged them that they were reasonably suspected to be a member and office secretary of communist party sponsored trade union engaged in subversive activities, and carried on agitation amongst the railway workers for a general strike from November 1948 to January 1949. Order of suspension was issued to them, and a committee of advisers was constituted by the authority to conduct an enquiry into the matter. The committee refused the representation of petitioners against the suspension order and concluded that the charges against them were accurate. The general manager dismissed the workers upon the report of the committee. The appellants moved the high court under article 226 of the Constitution and contended that the impugned rules contravened article 14, 19 (1) (c) and 311 of the Constitution. The court, however, dismissed the petition on other grounds that action was taken against the appellants not because they were communists or trade unionists but were engaged in subversive activities. The court did not consider the legal validity of joining the trade unions for the welfare of the employees but is had been observed that the employees were dismissed because they were the members of a communist party-sponsored trade union. The court observed as follows:

> *We do not see how any right of the appellants under Article 19 (1) (c) has been infringed. The orders do not prevent them from continuing to be Communists or trade unionists. Their rights in that behalf remain after the impugned orders precisely what they were before. The real complaint of the appellants is that their services have been terminated; but that involves, apart from Art. 311, no infringement of any of their Constitutional rights. The appellants have no doubt a fundamental right to form associations under Article 19 (1) (c), but they have no fundamental right to continue in the employment by the State, and when their services are terminated by the State*

[38] AIR 1958 SC 232

they cannot complain of the infringement of any of their Constitutional rights when no question of violation of Art. 311 arise[39].

The court echoed the words of Justice Holmes that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"[40]. The decision was made in reference of the U. S. Supreme Court but there was a factual difference between the two. The law is intended to impose restrictions on government employees, not police officers. The second objection is that the passage quoted above by Justice Holmes was about the political speech and activities of the police person, but here government employees have statutory right to become a member of service associations and were participating in demonstrations for the welfare of their services. These were not a part of political activities or had any affiliation with political parties. Finally, this judgment deter government employees from organizing their service association activities without fear.

Another important decision from the Supreme Court was *Kameshwar Prasad*v. *State of Bihar*[41] in 1966. Questions before the Constitution bench[42] was that whether government servants could claim all the fundamental rights guaranteed by the Constitution of India?[43] Would banning the demonstration of Government servants for the welfare of them amount to interference with Article 10 (a), (b) and (c) of the Constitution? The constitutional validity of rule 4-A of Bihar Government Servants' Conduct Rules, 1956 which says that no government servant shall participate in any demonstration or resort to any form of strike in connection with any matter about his conditions of service was challenged. The Supreme Court has previously ruled that the right to strike is not protected under article 19 (1) (c) of the Constitution in *All India Bank Employees' Association* v. *National Industrial Tribunal*[44].

A demonstration may be defined as an expression of one's feelings by outward signs by way of a most innocent type without any kind of violation of public order. It may be wearing a badge and conducted outside the working house. However, from the very nature of things a demonstration may take various forms; it may be noisy and disorderly, for instance stone-throwing by a crowd may be cited as an example of a violent and disorderly

[39]*Id.* at para 17
[40]*Mc Auliffe v. New Bedford* (1892)
[41] AIR 1962 SC 1166
[42]A.K. Sarkar, K.C. Das Gupta, K.N. Wanchoo, N. Rajagopala Ayyangar and P.B. Gajendragadkar, JJ.
[43]AIR1962SC1166
[44] AIR 1962 SC 171

demonstration and this would not obviously be within articles 19(1) (a) or (b). So the court pointed out that all kind of demonstrations are not protected. It necessarily follows that there are forms of demonstration which would fall within the freedoms guaranteed by articles 19(1) (a) and 19(1) (b). It can equally be peaceful and orderly the members of the group merely wear some badge drawing attention to their grievances. It was observed that violent demonstrations under article 19 could not hide the umbrella of freedom but peaceful demonstrations by government employees would be protected. The court declared that the peaceful demonstration of government employees is their fundamental right and that the law prohibiting it is unconstitutional.

In *O.K Ghosh* v. *E.X.Joseph*[45], the Constitution bench of Supreme Court of India considered associational rights of government employees[46]. The respondent was a civil servant in the Audit and Accounts Department at Bombay. He was the Secretary of the Civil Accounts Association, consisting of non-gazetted employees of the Accountant-General's Office. The association was initially approved by the government of India but later the approval was withdrawn. But the appellant refused to sever ties with the association, remained secretary, and actively participated in various demonstrations and preparations organized in connection with the Central Government employees' strike. As a result, the government of India served a charge-sheet for having deliberately committed breach of rule 4(b) of the Central Civil Services (Conduct) Rules, 1955. The government issued him a memo for intentionally violating rule 4 (A). Rule 4-A prohibits demonstrations or strikes of any kind in connection with the terms of service of government employees. Rule 4-B prohibits government servants to join or continue to be a member of any service association of government servants if such organization has not obtained recognition from the government within the period of six months from its formation; recognition in respect of which has been refused or withdrawn by the government under the said rules. The court observed as follows:

> *It is clear that Rule 4-B imposes a restriction on this right. It virtually compels a government servant to withdraw his membership of the service association of government servants as soon as recognition accorded to the said association is withdrawn or if, after the association is formed; no recognition is accorded to it*

[45] AIR 1963 SC 812

[46] *B.P. Sinha, C.J., J.C. Shah, K.C. Das Gupta, K.N. Wanchoo and P.B. Gajendragadkar, JJ.*

within six months. In other words, the right to form an association is conditioned by the existence of the recognition of the said association by the government. If the association obtains the recognition and continues to enjoy it, government servants can become members of the said association[47].

It suggests that government employees should only work in government-recognized associations. In *M. H. Devendrappa v. Karnataka State Small Industries Development Corporation*[48], the appellant was the assistant manager of the Karnataka State Small Industries Development Corporation (KSSIDC), Bangalore. He was also the President of the Karnataka State Small Industries Development Corporation Employees' Welfare Association. He had sent a letter to the governor on behalf of the association stating that the corporation was incurring huge losses due to the abuse of power by the management and requested that the corporation be terminated. The corporation asked him for confirmation of the letter's authorship and asked for an explanation as to why no disciplinary action should be taken against him. He was fired after an unsatisfactory reply to the show-cause notice. The action taken against him was in accordance with rule 22 of the service rules of the corporation. The rule stated that an employee who knowingly does anything detrimental to the interests or prestige of the corporation or in conflict with official instructions or guilty of any acts of misconduct or misbehavior should be liable to penalties prescribed by the rule[49]. Rule 19 prohibits employees from participating in politics or assist in any political movement or activity[50]. The appellant contended that he exercised his fundamental right to freedom of association or union under article 19 (1) (c) of the Constitution. He could not be dismissed from service when he had exercised his fundamental rights. Court, however, observed that rule 22 of the service rules is not meant to curtail freedom of speech or expression or the freedom to form associations or unions. It is clearly meant to maintain discipline within the service, ensure efficient performance of duty by the corporation's employees, and protect the interests and prestige of the corporation. The court observed that the appellant had made a direct public attack on the head of his organization. In the letter to the Governor, he also had

[47] *Supra* n. 46 at para 10

[48] AIR 1998 SC 1064

[49] Central Civil Services (Conduct) Rules, 1955, rule 22 of the Service Rules of the Corporation "An employee, who commits a breach of these rules or displays negligence, inefficiency or in-subordination, who knowing does anything detrimental to the interests or prestige of the Corporation or in conflict with official instructions or is quality of any instructions or is guilty of any activity of misconduct or misbehavior shall be liable to one or more of the following penalties".

[50] *Id.* rule 19. Participation in Politics: "No employee shall be a member of or otherwise associate with any political party in politics nor shall he take part in, subscribe in aid of, or assist in any political movement or activity".

made allegations against various officers of the corporation with whom he had to work. His conduct was detrimental to the proper functioning of the organization or its internal discipline. Making public statements against the head of the organization on a political issue also lowered the prestige of the organization he worked. Therefore, on the proper balancing of individual freedom of the appellant and proper functioning of the government organization which had employed him, this was a fit case where the employer was entitled to take disciplinary action under rule 22[51].

It is submitted that both these decisions directly affected their fundamental right to freedom of association or union[52] . Both employees were fired for performing certain functions in the capacity of members in service association or trade union. Although the rules allow organising activities for the betterment of government servants, some issues raised by the organisation leadership were considered as violation of the code of conduct, even if they were not participate any political activities.

Labour Relations (Public Service) Convention, 1978

The Freedom of Association and Protection of the Right to Organise Convention, 1948, the Right to Organize and Collective Bargaining Convention, 1949, are the ILO conventions that guaranteed freedom to form associations globally. However, the ILO understood that these conventions do not cover specific categories of employees under public authority. As a result, the Labour Relations (Public Service) Convention, 1978 was passed by the ILO, which protectsthe rights of government employees to organise and negotiate collectively. This Convention applies to all persons employed by the public authorities[53], however, it is up to the respective national laws or regulations to determine whether this Convention applies to high-level employees like policymakers and the employees engaged in confidential matters[54]. The Convention provides that disputes related to the determination of the terms and conditions ofemployment should be resolved through negotiations or impartial and independent machinery. The Convention guaranteed the right of a public servant to participate in the activities of an organisation to protect their interests. Article 4 of the convention provides adequate protection to public employees against acts of anti-union discrimination in respect of their employment. No public employer may impose conditions

[51]*M. H. Devendrappa v. Karnataka State Small Industries Development Corporation,* AIR 1998 SC 1064
[52]*See P. Balakotaiah vs. The Union of India*, AIR 1958 SC 232; *M. H. Devendrappa v. Karnataka State Small Industries Development Corporation,* AIR 1998 SC 1064
[53]Labour Relations (Public Service) Convention, 1978. art. 1 (1)
[54]*Id.* at art. 1 (2)

such as not joining a service association or relinquishing membership in such an organisation to obtain employment. Public authoritiesare not interfered with the freedom of association of public servants. Any form of financial assistance aimed at bringing the employee organisation under the control of a public authority will be considered an intervention measure[55].In the above-discussed cases, the Indian courts did not consider this relevant ILO Convention while associational rights of government employees were discussed. The government of India had yet to ratify the relevant two conventions namely Freedom of Association and Protection of the Right to Organise Convention, 1948 and the Right to Organize and Collective Bargaining Convention, 1949.

Conclusion

The outcome of these Indian cases can be questioned with the established principles of employees' right to form association and the ILO convention on Labour Relations Public Service. In exercising the freedom of speech and associational rights the government employees may divide into two categories like the employees hold confidential posts and the employees without hold any confidential posts. Associational rights with freedom of speech and expression must to given the second categories of employees. In 1976, in *Elrod* v *Burns*[56]the American Supreme Court pointed out that dismissal of a non-policy-making and non-confidential government employee on the ground of his political affiliation was declared unconstitutional. Therefore, confidential or policy-making government employees may be dismissed because of their political beliefs or affiliation in order to the need of ensuring effective governance.This decision was reaffirmed in *Branti* v *Finkel*[57] where it was stated that the proper test to determine whether political affiliation is a legitimate factor to be considered in the dismissal of an employee.

A well-known jurisprudence had long recognized that a public employee could not be fired or otherwise retaliated against him for exercising his or her constitutional rights of freedom of association[58]. The government has a legitimate interest in controlling employees' activities to maintain workplace discipline, unity, and productivity goals. Once a person enters into civil service, he is subject to some restrictions which are promulgated by the

[55]*Id.* at art. 5
[56] 427 US 347 (1976)
[57] 445 US 507 (1980)
[58] Mark Strauss, *Public Employee's Freedom of Association: Should Connick v. Myers' Speech-Based Public-Concern Rule Apply*, 61 Fordham L. Rev. 473 (1992).

President of India and other executive bodies to ensure efficiency and maintain discipline in service. A person, however, does not cease to be a citizen for the enjoyment of associational freedom nor is disentitled to claim the freedoms guaranteed under article 19 (1) (c) of the Constitution for the reason that he has entered government services.[59]In many instances, the Apex Court had undoubtedly held that the fundamental rights guaranteed by article 19 can be claimed by government servants. Government employees are not a special class to usurp the fundamental rights guaranteed by article 19 of the Constitution of India except the members of the armed forces and other services as described in article 33 of the Constitution of India. Government employees, as a group, have the right to organize themselves and to organize welfare activities for their members but they do not have the freedom to organize politically or politically backing activities against the government and its policies. The right to form an association for the welfare of government employees is a fundamental right and therefore bargains effectively with the employer for better working conditions and their welfare.

[59] Constitution of India, art. 33 says that the Parliament may, by law, determine to what extent any of the rights conferred by Part III of Constitution shall, in their application to the members of force charged with the maintenance of public order, person employed in any bureau or other organization established by the State for purposes of intelligence or counter intelligence; or persons employed in , or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organization as above mentioned, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

Draping the Religious Denominations By The Umbrella Of Religious Juridical Person Status

Ajitha Nair L. *

Abstract

India is a country which is having rainbow like various religious sects which makes the nonpareil in the world among other nations with the feature of this medley. The nation is equipped with the secular doctrine, which is a neutral approach because of this heterogeneity in religion instead of the western secular thought of non interference.Religion is an artistic system of savoir-fair and practices, world contours, sacred texts, holy places, ethics and societal organisation that relate humanity to what an anthropologist has called "symmetry of real world". Various religions may or may not contain multitudinal elements, ranging from the 'angelic', 'solemn things', 'faith', a celestial being or celestial beings', or ' some kind of ultimacy and transcendence that will render norms and power for the rest of vigor'.[1]Religious freedom actually transcends the human conscience and affects the public sphere of freedom granted by religion, as clearly stated in Article 25 (1) of the Constitution, quoted above, no matter how limited "social order, morality, or social order, morality, or social order" is consider and health " which is of a common provision in the international instruments. Religious communities are also recognized in Article 26 of the Constitution under the label "religious denomination".

Keywords: Religion, Denomination, social order, morality, freedom

Introductory Passage

Religion, which is not defined by the constitution, is also incapable of accurately defining legal status. After the provisions of the constitution and the light shed by the pre-judgment, it can best be said that religion is a matter of faith. It is a matter of belief and doctrine.The term "religious denomination" in Article 26 of the Constitution should remove its color from the word 'religion' and in this case, the term "sect" should also meet three criteria: It must be a group of friendly people. a set of beliefs or doctrines that they consider to be appropriate for their spiritual life, that is, the same faith; Ordinary organization: and appointment by a different name. In the case of Budhan Chowdhury v. The State of Bihar[2] Constitutional Bench of Seven Judges of this Court explained the true meaning and scope of Article 14 as follows:"It has now become clear that although Article 14 prohibits the enactment of sectional laws, it does not preclude rational separation for legal purposes. However, in order

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[1]See Dr. Neeraj Malik, An Insight Into The Law Relating To Religion, p. 2 (2017)

[2] 1955 SCR 1045

to be successful an examination of the permissible two conditions must be fulfilled, namely (i) that the separation must be based on an understandable division that separates people or objects collected from others excluded from the group and, “This comment was quoted with the approval of this Court in the case of Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors.[3] The tendency to judge on the right to freedom of religion has developed over time in terms of its meaning and significance as it always depends on the legal definition. In the case of Ananda Margi,[4] the court distinguished religion from religion in support of S.P Mittal case. In Bijoe Emmanuel's case,[5] the Supreme Court ruled that religion must be followed by a religious order to protect Article 25 of the Constitution of India.

Religious Denomination test

One would expect the content of the Supreme Court's religious cases to reflect the extent of their social and political consequences. In view of this, why would courts decide whether a certain clergyman was a philosopher or theologian, or whether the denomination was really different from other Hindus? How is it that such debate which seem so insignificant in judicial matters are so commonplace in the country's highest court, and how do they affect the interpretation of the law? The answer lies in the language of Article 26 of the Constitution of India, which deals with religious rights. By giving denominations the crown of independence in their religious affairs, Article 26 provides religious groups with legal protection from state interference. Warning is that system status claims are rarely taken literally. Religious groups have struggled to prove that they formed a religious denomination, in order to formally ask for the protection of Article 26.Conflicts between the articles arise on the bridge of the proposition that Article 26 rights may also be revoked if they are found to be in conflict with other constitutional rights. For example, Article 25 (2) (b) protects the legitimacy of the rules for the “opening of Hindu institutions… in all Hindu divisions and classes”; If a particular use of a religious system violates a provision of this Article, the courts may decide to place Article 25 (2) (b) in addition to the religious rights guaranteed by Article 26,the text does not define or explain what constitutes religious matters as referred to in subsection (b). Courts have considered Article 26 (b) and Article 25 (2) (a) ,considering “economic, financial, political or other… activities related to religious practice” ,to conclude that non-religious matters involve religious communities they are subject to government

[3] AIR 1958 SC 538

[4] Acharya Jagadiswaranand v. Commissioner of Police, Calcutta, AIR 1984 SC 512.

[5] AIR 1987 SC 748

regulations. Thus, in its definition, Article 26 (b) protects only religious matters. Article 26 (b) is undoubtedly the most complex of all clauses; therefore, religious groups have requested it in a variety of contexts. The issue of religion is said to include the right to administer and administer religious institutions, to control access to places of worship, the right to expel dissidents and so on.

The term ‘religious denomination’ is not defined in the constitution. The term ‘denomination’ was considered by the Supreme Court in the case of the Commissioner, Hindu Religious endowment Madras v. Shri Laxmindra Thirtha Swamiar of Shri Shirur Mutt. [6]In this case, the definition of 'denomination' is derived from the Oxford Dictionary, "A group of people divided together under the same name, denomination or body of the same faith and organization chosen by a different name". Article 26 also includes the term “denomination” that includes a sect or denomination. Thus, Brahmo Samaj will be a religious cult for the purposes of this article although it is not a religion in itself. The term religious denomination in Article 26 differs from that in Article 30 which includes minority religions and languages. The level of the system is invalid to apply the protection under Article 26.

Hence the three cubes of tests to determine religious denominations are the following:

1. Having a common faith.
2. Of that a common organisation.
3. Having a distinctive name.

The Court reserves only the right to determine which religious group is right denomination and non-denominations. In some cases, a variety of alternatives must be considered conflicting evidence to reach a conclusion. The findings appear to be somewhat standard based on information. While some groups should justify their ownership as a religious denomination. The court considers the status of the other parties to be very obvious. Because of a special situation given religious denominations under Article 26, religious groups are encouraged to present themselves so in Court. Shirur Mutt's case is also important because it supported the idea of the sect rights and explained the purpose of Article 26. The Court declared that freedom of the religion enshrined in the Constitution extends to both beliefs and practices as a result of pursuit of religious beliefs. It went on to say that the sects themselves were the only ones with authority in determining which processes are considered essential to

[6] AIR 1954 SC 282,290

their faith, It can be said that this creates an additional incentive for religious groups to appear as sects. Another case from the same year, Ratilal Panachand Gandhi v. The State Of Bombay And Others[7], reaffirmed rights religious denominations, though unlike Shirur Mutt's case did not consider the meaning of the word itself. This is a union, which underpins the broader definition of sectarian or denominational rights that means covering both beliefs and practices and giving denominations the freedom to determine their own scope these rights , which give considerable power to religious groups. Although the Court later accepted a in a more restrictive manner, this decision greatly encouraged religious sects. And introduces the basic methods that have described the examination of the religious system in the current arena.

Compared with Hinduism and Islam in general, the smaller sects or sects of these religions enjoy more freedom to decide what is important to them, and therefore legally protected, habits. The Court has freely explained Hindu principles, supporting a continuous and universal moral character. Islam has been widely translated by the Court self-study of the Quran, which is often governed by the style of writing. Especially for the denomination communities on the other hand, are in a better position to debate what their practices are it is important according to their beliefs. In the cases of . Noorjehan Safia Niaz And Anr v. State Of Maharashtra And Ors[8] and Indian Young Lawyers Association v. State of Kerala, the religious groups involved were they were denied the position of sect, and the appropriate courts continued to assume that they were they represented Muslims and Hindus in a general sense. No team was able to prove successful courts that the opposed practices were important to Hinduism or Islam, respectively. Denominations do not always enjoy this benefit. The groups also identified themselves as religious denominations and used Article 26 (b) to challenge the law governing religious institutions. [9]Although Article 26 confirms denominations have the right to manage their own institutions, a variety of places of worship, especially Hindu temples, governed by provincial governments. Less than- shame on corruption, provincial governments across the country have set up religion grants under the control of statutory boards, and appoint government-appointed officials in charge to manage religious institutions.

[7] (1954) SCR 1055

[8] 2016 SCC OnLine Bom 5394

[9] See , Rajeev Dhavan and Fali S. Nariman, "The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities," in Supreme But Not Infallible: Essays in Honour of the Supreme Court of India, ed. B. N. Kirpal (New York, Oxford University Press, 2000), 263.

Similarly, Article 25 (2) (b) protects the law enacted on the grounds of social change and in some cases, that law conflicts with the rights demanded by the religious community under the Article 26 (b). This is especially true in Hindu societies, as Article 25 (2) (b) directly protects a law that provides for "the opening of Hindu religious institutions of public character in every Hindu category." To oppose the law enacted in the name of social change in contravention of Article 26 (b), it is necessary for the collection in question to prove that It is indeed a religious sect, so it can rightly appeal to the subject and an important legal tool for determining which parties may seek protection under Article 26. Although this study will be held in the Supreme Court, the high courts throughout India use it and religious system testing. Often, the status of the group system is questioned in conjunction with other legal inquiries. If the party satisfies the system test, the Court said he goes on to consider the scope of their rights under Article 26. The three conditions of assessment were taken directly from the Oxford English Dictionary: common faith, common denomination, and a different name. These conditions were further explained in the following cases, as well as testing always based on these test methods today. When religious groups do not meet the Court's conditions they qualify as a religious denomination, with little chance of winning the case. When he believed groups satisfied religious system tests, the results are highly mixed, and highly dependent in large cases around the case. It is not at all a denominational state alone a determining factor in the outcome of a case. In some cases, however, the group the nature of the system has a profound effect on the perception of the Court.

Here it is to be noted that in connecting Article 26 and Article 25(2)(b), the court can justify only in taking into consideration the Hindu religious institutions of public nature, in India only the Hindu community is there, so many other religious communities are existing, so this can be said as conflict within the Constitution of India or against the ;silence of the constitution, which can be better titled as 'constitutional morality'[10].This can be illustrated by the case of Sardar Syedna Tahir Saifuden Saheb v. State of Bombay [11](Saifuddin case), here the situation was that, the validity of the Bombay Expulsion Prevention Act, 1949, which prohibits the dismissal of any member of the public and declares it a criminal offense. According to the applicant, the law violates his or her rights and powers as a religious leader in his or her community, and is equivalent to a violation of Articles 25 and 26 of the Constitution. The Court's public opinion agreed with the applicant that the right to dismiss is

[10] ibid
[11] AIR 1962 SC 853

a religious matter under the meaning of Article 26 (b), that the power to expel dissent is necessary to support the nature and unity of the religious system, and that the antitrust law is not protected by Article 25 (2) (b).

The religious denomination examination has been used to determine the character of the group in two ways: that the group is a religious or national entity, as in the case of Auroville and Devaru; and whether it is a denomination or a religion in the general sense. In the Auroville case or S P Mittal's case[12],The facts of the case are as follows: Sri Aurobindo was one of the Indian philosophers and philosophers. After his career in politics and administration, he decided to turn his life into yoga and meditation in Pondicherry, Tamil Nadu. A French woman named Madam M. Alfassa became her student, and later became known as Mother. Soon people from all over India and abroad joined Sri Aurobindo and formed the Sri Aurobindo Society in 1960 under the West Bengal Registration of Societies Act 1961. A few years later a new township known as AUROVILLE was established where people were educated the teachings of Sri Aurobindo. Recognizing the unique nature of the work and the central government they decided to provide funding for the township. As a result UNESCO has also decided to assist the township in its development as it is conducive to international relations.In 1970, after the death of Mama Alfassa, there were a number of registered cases of mismanagement of funds in the township. Recognizing such conflicts, the Central Government decided to take control of the country, through which the law passed the Presidential Ordinance. Sometime later in writing, that law was changed to the Auroville Emergency Provision Act 1980. The same was challenged before the Supreme Court of India.

Concept of Religious Juridical Person

The words "religion" and "belief" should be interpreted in a broader sense. The beginning of the definition aspect of these two terms are like that of to define the exercise of religious or religious freedom must be a religious expression or belief, although the authorities have a certain ability to use a particular purpose, a legal way to determine if these principles apply to a particular issue. Here it is great diversity of religions and beliefs. Therefore freedom of religion or belief does not exist and limited to its application to traditional religions and superstitions or to religions and superstitions by institutional features or practices similar to those traditional ideas. Freedom of religion or belief defends belief in God, atheism and atheism, and the right not to do so which means any religion or belief. Freedom of religion or

[12] 1983 SCR(1) 729

belief is closely related to other human rights as well as basic freedoms, such as, in particular, freedom of speech, freedom of association and association and the right not to be discriminated against. Freedom of choice or to accept one's religion or belief, including the right to change one's religion or belief,may not be subject to any limitations. Freedom of expression or religion may be limited only if the following measures are applicable: The limit is set by law; The limit is intended to protect public safety, order or public, health or character,or the fundamental rights and freedoms of others; A limit is required to achieve one of these goals once in accordance with the intended purpose; and The limit is not set for discriminatory purposes or is applied to a method of discrimination. Restrictions should not be used in a manner that would undermine religious freedom or belief. In interpreting the scope of the permissible boundary clauses, regions must continue on the need to protect guaranteed rights under international instruments. For a limit to be 'determined by law', a provision of the law specifies the limit and it should be both sufficiently accessible and predictable. This needs to be the case of that be built with sufficient accuracy to allow for individuals or communities, if necessary a proper advice in order to control their behavior. For local law to meet these requirements, must provide some measure of legal protection from unlawful interference by government officials on human rights and fundamental freedoms. In matters relating to fundamental rights, it would be unlawful for such a legal decision to be made by an official which is expressed in terms of unconditional power. Therefore, the law must indicate with sufficient clarification of the scope of any choice provided by competent authorities as well as method of operation. It also requires that the limitations not be reversed either improperly placed on certain persons or groups; nor should laws be enacted what is intended to be rules, but so vague that it does not give proper notice of that the law requires or permits improper use.

Restrictions can only be used for those purposes for which it has been determined and provisions relating to freedom of religion or belief, and are not permitted for any reason not specified in international instruments, although these reasons will be allowed as restrictions on other human rights or fundamental freedoms. Restrictions should be required in accordance with the stated prohibition grounds on the principles of freedom of religion or belief. For there to be a limit, it has to be is directly related to the specific need predicted, while in the intervention should be in line with the pressing need for welfare and equally legitimate the goal to be pursued. The concept of "oppressive social need" should be interpreted lightly which means that limitations should not only be useful or desirable, but

should be necessary interference for equality, there must be effective communication within public policy and the purpose and methods used to achieve it. In addition, there should be a proper balance between normal profit requirements and individual protection requirements basic rights, reasons for reduction should be appropriate and sufficient as well the less disruptive existing methods should be used. Consent may not be conditional on the use of liberty, religion or belief. Freedom of religion or belief, whether in private or in public and others, publicly or privately, may not be performed under a pre-registration or otherwise the same procedures, as they belong to individuals and communities as right holders and it does not depend on legal authorization.

Community or Collective Rights Manifestation

The individuals enjoy freedom of religion or belief alone or working in society with others to exercise their religious or religious freedom 'as religious or religious communities'(In Indian perspective, they can be categorised as religious denominations under Article 26 of The Constitution of India).It will refer to those religious or religious communities recognized as legal persons in national law as 'religious or religious organizations'. International human rights law protects a wide range of public disclosures of religions and beliefs. Freedom of expression or belief includes freedom worship and freedom to teach, practice and observe one's religion or beliefs. It is possible there has been a great conflict between these forms of manifestation. Freedom of worship includes, but is not limited to, freedom of association interaction with religion or belief and the freedom of communities to practice culture and ceremonial acts that directly express their religion or beliefs, and variety processes associated with these freedoms, which include the creation and maintenance of free care easily accessible places of worship, the use of formulas and traditional objects and the expression of symptoms. Freedom of sight and action includes, but is not limited to, ceremonial acts, but also customs such as the observance of food laws, different dress clothing or head gear, to participate in practices that are relevant to certain stages of life and the use of a particular language commonly used by the team in practice religion, and the freedom to establish and maintain appropriate charitable donations or charities and reservations for holidays and vacations.[13] Freedom to practice and teach religion or belief includes, but is not limited to,

[13] See , In the United States, individuals or "collections of individuals purpose, and permitted to do business under a certain name "may qualify as" person " under the law (Pembina Consol. Silver Mining & Milling Co. v. Com. Of Pennsylvania, 125 The U.S. 181, 189, 8 S. Ct. 737, 741, 31 L. Ed. 650 (1888)). Thus, legal personality is possible and connect with people, organizations or trade associations. Thus, religious communities may establish commercial organizations (such as companies, sole proprietorships, in general partnerships, limited

actions which are essential to the conduct of religious groups in their fundamental issues, such as the right to organize themselves according to their rank structures and institutions and the right to this to select, appoint and replace their employees according to their needs and the values, as well as any freely accepted arrangement between them and their status quo and the freedom to establish seminars or religious schools; freedom of training religious workers in appropriate institutions; the right to make, receive and use of the adequate level of resources and resources related to customs or traditions and religion or belief; the right of religious communities, institutions and organizations to produce, import and distribute religious books and resources; each right and each person to provide and receive religious education in the language of their choice, however individually or in partnership with others, in areas appropriate to these purposes, including the freedom of parents to ensure the religious and moral education of their children in accordance about their beliefs; the right to voluntarily solicit and receive funds and so on donations from individuals and institutions; and the freedom to establish and maintain and in interacting with individuals and communities on issues of religion and belief and national and international standards, including travel, pilgrimage and participation and the conventions and other religious events.

It is important to underline that the autonomous existence of religious or belief communities is essential for plurality in a democratic society, and it is an issue that is at the heart of the protection that religious or belief freedom provides. It directly affects not only the structure of these communities as a whole, but also the successful exercise of their right to religious liberty by all of their active members. When the freedom of religion or belief does not preserve the community's organisational life, all other components of an individual's freedom of religion become susceptible. .Under international human rights law, a state's reluctance to grant legal personality status to an organisation of individuals based on a religion or belief is an infringement of the right to freedom of religion or belief, read in conjunction with the right to freedom of association. The rejection of authorities to register a group or revoke its legal

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credit union and limited credit companies) or nonprofits organizations (usually organized as companies) to gain legal status. Commercial companies and non-profit companies are governed by the laws of the land and where they are built. Most religious groups in the United States are listed as non-profit companies in accordance with applicable country law and Internal Revenue Organization Code (for example, 26 U.S.C. § 501 (c)) to protect the ideal tax exemption status once treatment. In Estonia, at the constitutional level, the legal status of religions and beliefs communities are governed by the Non-Profit Organizations and Churches Act as well as Churches Law (CCA). According to the CCA, a religious organization is a legal entity civil law. It is a non-profit organization. The CCA consists of five different types of religion organizations: (1) churches; (2) congregations; (3) church organizations; (4) monks; and (5) religious organizations. Congregation (or congregation organization) it can be an organization of natural people who profess Christianity or any other religion (or belief). The same thing applies with convent. There are no major religious restrictions communities to choose the appropriate form of their work.

identity has been found to have immediate consequences for the group as well as its presidents, founders, and individual members. The reluctance to acknowledge religious or belief communities' legal persons status has thus been found to be an infringement on the right to freedom of religion or belief as exercised by both the community and its individual members.The right to legal individuality is essential for the full implementation of the right to religious or belief freedom. Without legal individuality, a number of fundamental features of organised community life in this area become impossible or highly difficult. Having bank accounts and ensuring judicial protection of the community, its members, and its assets; maintaining the continuity of ownership of religious edifices; the construction of new religious edifices; establishing and operating schools and institutes of higher learning; facilitating larger-scale production of items used in religious customs and rites; the employment of staff; and the establishment and operation of media operations are among these.[14]Police control, surveillance, and restrictive measures such as the closure of places of worship, confiscation of property, financial sanctions, imprisonment, blocking access to chaplaincy services, restricting the dissemination or ownership of religious literature, and restricting the freedom to persuade others of one's religion or belief have all been developed by states. Obviously, if these and comparable sanctions are enforced solely because a religious or belief group has failed to seek or gain legal personality status, they are in violation of international standards.

[14] See, In Italy, the religious community may constitute itself as unrecognizedAssociation based on Article 3638 of the Civil Code (associazione non riconosciuta). This is the simplest model and is also used by political parties and trade unions. NeverthelessThe community does not get legal personality like this, but the religious community does.Acquire legal capacity (including independence and ability to receive in property issues).Donations and legal action) Completely free, without any constitutional or enactmentIt is under the control of all forms of government. Creating an unrecognized association is very simple: Requires at least 3 members, statutes and notaries. In Estonia, the law does not prohibit the activities of religious groups that do not Registered. Rather, the main drawback of unregistered companies is that this is not possible.You cannot exercise your rights to show your status as a corporation.Protection granted to religious corporations. Still, they are enjoying themConstitutionally protected collective freedom of religion as a religious community. There is noneRestrictions or restrictions on unregistered religious groups to hold religious meetings Ceremony at someone's house or rental property. Collectively by lawFreedom of religion or religion can only be restricted if it is harmful to public order and morals, health or health.Morality, and when it violates the rights and freedoms of others. In Germany, religious groups not registered as associations or others Certain legal entities have an unregistered association (unregistered) statusClubs are regulated by S.54 BGB), and other legitimate onesentity. Such companies enjoy the same rights as partnerships(Civil Law Partnership) And has partial legal capacity. Actually the courtWe make extensive use of similarities with the rules of registered companies. Religious or philosophical groups and communities are usually active in Ireland Voluntary organization without legal personality. An unincorporated association is an association of peopleThey are linked by identifiable rules and have identifiable membership. ruleHow to join and leave the association and with the person who manages the associationIts meaning and conditions (see O`Keefev. Cullen (1873) IR 7 CL319 and The State) (Colquhoun) v. D'Arcyet al [1936] IR 641). Generally, the property of the association It is held jointly by members, not the association itself. UnregisteredThe association may not be sued or sued in its own name. No registration requirements For unincorporated organizations.

There are a variety of ways to ensure that the community of religion or belief wants thisIt is possible to work towards a legal personality. Legal systems of some countries has done this Proceedings of the court, and the other through the government of the application process agency. Legal personality of different forms depending on the federal statesTrust, there are times when a company, the religion or belief of the community such as the association of availableand the foundation, as well as the types of various specific religious Suijenerisu corporationor the faith of the community. Regardless of the regulation of access to the corporate status,certain terms that may be used to describe the form of a legal entity open to religious or faith community, national legislation in this area must comply with international human rights various legal actions and think that you can only actor to performIt was recognized as a corporation, access to the legal personality of religious or philosophical communityFast, transparent, fair, comprehensive, it must be those that are not discriminatory. The process of acquiring corporation status should be open many Community as much as possible, without a community where it is not Traditionally or recognized religious or excessively narrow interpretation and definition Religion and faith Religious or belief community with excessive minimum number of members conditions The concerned should ensure that you take into account the needs of small religion and faith and need to be careful about the community and high minimum necessary terms number of members New established religious operation activities communities are unnecessary.[15] Special, because there is a status of legal individuality of a particular religion and belief community, corporate status of religious or belief community corporation should depend on the approval or active council of other religious or faith communities It is not and regardless of the community of other religious or faith. Request one or more opinions religious or conviction community related to application for such position Another religious or belief community or organization affects neutrality related state orbit or official fairness.

To meet these requirements, the state must respect the autonomy of religious or idealistic communities.Obligation to give them access to legal personality. In the governance systemAccess to legal personality, states should fulfil their obligations by ensuring that they are nationalsthe law leaves it to the religious or ideological community itself, its internal leadership.Rules, content of his beliefs, community structure and how appointment of priests and their names and other symbols. Especially in the state from the substantive, as opposed to

[15] See for more details, European Commission for democracy through law (Venice Commission), OSCE office for democratic institutions and Human rights, Strasbourg, 16 June, 2014, Opinion No:673/2012

a formal review of the Constitution and personalityReligious organization. Considering various organizational forms .In fact, a community of religions and beliefs can adopt a high degree of national flexibility.Law is needed in this area

The Suggestion for an Administrative policy for Religious denominations

'Religious organization' means an organization whose main purpose is to disseminate religious teachings, conduct ceremonies and events, and educate and train believers. A religious corporation is a religious organization that obtains legal status with the approval of the prefectural governor or the Minister of Education, Culture, Sports, Science and Technology. There are two categories of religious corporations. It can be classified in two categories, the first one is a single religious corporation with worship facilities such as shrines, temples and churches. The other is a comprehensive religious corporation that brings together shrines, mutts, or churches.. Individual religious corporations that are under the umbrella of a comprehensive religious corporation are called related religious corporations. Independent ones are called individual religious corporations. The matter of giving the title of 'religious juridical person' is to be determined by the concerned Governor of the State, and on application from the sect, he will forward the same to the Ministry of Cultural Affairs, there will be a miniature institutional set up to check whether this sect qualifies the features to constitute a religious denomination, in order to give to the same the status of a religious juridical personality.

Religious or idealistic organizations should not be deprived of legal personality and it does not mean that a related religion or belief group or its individual members be no longer enjoy the protection of religion, beliefs and other human rights freedoms or the basic freedoms. Sometimes it may deprive such a community of basic rights or even choose to do soand banning them can have serious consequences for the religious life of all its members,for this reason, care must be taken not to interfere with or terminate the activities of religious people.The community is only due to the misconduct of some of its individual members. It contains their own wills or desires in order to impose collective sanctions on the entire community for actions that are consistent with fairness and must be assigned to a specific person. Therefore, cheating by individual executives or the Members of religious groups need to contact the people involve .A criminal proceeding, an administrative proceeding, or a civil proceeding, not against the community or other people or its member.States can choose to grant certain privileges to communities of religion or belief or organization. Examples of this

are financial grants and settlement of financial contributions. A community of religions or beliefs through taxation or civilian membershiplike broadcasters. Additional requirements should only be complied with when granting such benefits As long as these conditions exist, they may be imposed on religious or philosophical communities that are[16]proportional and non-discriminatory.

It is in the power of the state of grant such privileges; make sure that they are not implemented in a horny way. This means this because it requires objective and appropriate justification.Pursuing a legitimate goal and a reasonable ratio of proportional ratioand signing or concluding contracts between the intended funding and intended funding, especially the state and one personspecial system to support special religious communities or lawsThe latter always consistently contradictory to the right of non-equilibration above the basis and if there is reasonable justification for the purpose of the religion and convictionThe difference in treatment and its similar contract can enter from other religions communities also. A community that wants to do this like an agreement and law can be recognized historically, the difference in role that played different religions in a particular country in a particular country. Difference in treatment of religious or faith communitywhich is leading a specific status to read to right-important privileges which is attached to this preferred treatment refuses other religious or belief communities .Those who have not resigned to this status are compatible with religious and faith in situ non-improper exploration. A legal character of a religious organization where a specific status was linked was awarded and allthe religious or belief community that this should have a fair opportunity to apply This status and the specified criteria are applied in a failed manner.

If with a genuine criteria and a strong administrative policy has been drawn by the concerned agency of administration at the executive level, in order to determine who all will constitute or come within the umbrella of religious denomination, the partial judgments like happened in Swaminaryana sect case and the Aurbindo case won't ever happen ever. Religion has very direct impacts and results in the life of every person. If the protection of Article 26, that is a collective right need to available for the particular section or sect or denomination that is called as the group right to function as an organised faith, if they are given the status of 'juridical person' , it will enhance the protection parable of them in a wide and elaborate

[16] In the Constitution of India, Article 26 prima facie states about the privileges of 'denominations', hence on administrative framework of the same, the authorities only need to consider this right alone. And the interference of judiciary in determining who all will constitute denominations and who all are not in a dynamic basis will curtail.

manner, so also the same is not an unlimited one, as Article 26 itself restricts the same with public order, morality and health.

Bottom Line

If the view of equality can be interpreted in a very different way from the other culture, then it can be the same with the same ideas of impartiality and tolerance. 'West' (for the sake of a better name) impartiality is often tested- well eaten.Religions should be judged by their results, not by predestination by a vague principle such as equality. Each group must be public has responded to the behavior of its followers. If one religion produces suicide bombings and terrorism than others, should and can be removed simply because it is a religion. Social equity or equality is not right. Respect should be earned, not guaranteed. Religious groups gained popularity over time, depending on themselves fruits and that their actions agree with their words. If the denomination is cruel and their beliefs are dangerous, so society needs to be protected, legal and informal. It would be irresponsible to make a vow of impartiality forever. Pedestal there is no place to fight. When the idea arises back or against the public, then the State must exercise its right to oppose those views, which are not marred by the previous commitment to 'social equality' of belief. Instead of presenting Britain as an invisible, uninhabited place for all equally, it would be better to acknowledge the history of the world culture as an active part of its future.

Defanging Restrictive Bail Legislation: A Constitutional Critique of State of Mauritius v. Khoyratty

Shukr Usgaokar*

Abstract

In this article, the author undertakes a study of statutes which whittle down the right of an arrestee to be released on bail pending the conclusion of his trial by predicating it on the existence of reasonable grounds to believe the commission of a suspected offence as well as recidivist tendencies, regarding which a definitive finding must be recorded by the Magistrate. Upon chronicling the constitutional challenges such provisions have faced in Indian courts, the author argues that the validity of such laws can no longer be upheld in view of the decision of the Judicial Committee of the Privy Council in *State of Mauritius v. Khoyratty*[1] which undergirds the right to be considered for grant of bail in the doctrines of separation of powers and the independence of the judiciary, both of which constitute the very foundations of a democratic State.

Keywords: Bail, separation of powers, independence of judiciary, basic structure doctrine, judicial review, presumption of innocence

Introduction

"Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day, the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves." [2]

- Marshall J in *United States v. Salerno*[3]

One of the first lessons taught in law school when dealing with the topic of personal liberty under Article 21[4] of the Constitution[5] is that bail is a rule and jail an exception. This

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[1](2007) 1 AC 80 [Hereinafter, "*Khoyratty"*].
[2]United States v. Anthony Salerno, 1987 SCC OnLine US SC 93 [Hereinafter, *"Salerno"*], para. 53.
[3] *Salerno, id.*
[4] The Constitution of India, 1950, art. 21 [Hereinafter, *"Art. 21"*].
[5] The Constitution of India, 1950, [Hereinafter, "*India Const."*].

principle, first enunciated by Justice Mukherji in the *Meerut Conspiracy Case*,[6] although ceaselessly repeated in the past few decades has become an elusive goal, with a transition being witnessed from a liberal attitude towards bail to judicial conservatism,[7] accompanied by a risein the enactment of lawswhich obligate an accused to show that he is not guilty of the offence before the possibility of release on bail can even be considered.

Such provisions which exist in multiple post-colonial statutes[8] such as the Criminal Procedure Code of 1973,[9]the Narcotic Drugs and Psychotropic Substances Act,[10] and the Unlawful Activities Prevention Act,[11] effectively prohibit a judge from granting bail to an accused unless there exist reasonable grounds to believe that the suspect has not committed the alleged crime and that he is not likely to contravene the law if bail is granted to him. Challenges to the constitutional validity of such provisionson the ground of alleged violation of Article 21[12] and Article 14[13] of the Constitution have been dismissed by Indian courts by holding that neither is the presumption of innocence a fundamental right nor do these restrictions curtail, in absolute terms, the power to order the release of the accused pending conclusion of the trial.[14]

Although it may appear that the doors forassailing such provisions are no longer ajar, the decision of the Privy Council in *State of Mauritius v. Khoyratty*[15] unravels new dimensions of bail law by grounding it in the doctrine of separation of powers and by extension the inalienable power of a court to grant bail, which has hitherto remained uncharted territory in Indian constitutional history. In this article, the author attempts to fit the doctrinal underpinnings of this ruling in the country's existing legal framework with the fervent hope that it would open up new vistas for bail jurisprudence and disallow any executive inroads into the judicial domain in matters concerning individual freedom.

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[6]Emperor v. H. L Hutchinson, 1931 SCC OnLine All 14.
[7] Sidharth Luthra and Ketaki Goswami, "Why Aryan's case highlights aberrations",Hindustan Times, (Last modified October 29, 2021)available at:https://www.hindustantimes.com/india-news/why-aryan-s-case-highlights-aberrations-101635444288123.html.
[8]*See* Abhinav Sekhri, Bail Provisions of Section 45 PMLA Struck Down - Some Hits and Misses,(Last modified November 25, 2017)available at:https://theproofofguilt.blogspot.com/2017/11/bail-provisions-of-section-45-pmla.html, for a non-exhaustive list of such statutory provisions.
[9] The Code of Criminal Procedure, 1973 (Act No. 2 of 1974), s. 437(1)(i) [Hereinafter, *"Cr.P.C."*].
[10] The Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No. 61 of 1985),s. 37(1)(b) [Hereinafter, *"NDPS Act"*].
[11] The Unlawful Activities (Prevention) Act, 1967, (Act No. 37 of 1967), s. 43D(5).
[12]*Art. 21, supra* note 4.
[13]*India const., supra* note 5, art. 14.
[14]*See e.g.*Sosar v. State of Rajasthan, 1994 SCC OnLine Raj 661.
[15]*Khoytratty, supra* note 1.

Revisiting the Basics: Bail and the Presumption of Innocence

In principle, a bail application is not about truth or falsehood. Since the criminal justice system is premised upon the idea of an accused being innocent until proven guilty, it is presumptively wrong to keep a person in jail until the outcome of his trial when a definitive finding has been returned on his guilt or innocence.[16] Hence, the traditional considerations that were supposed to weigh with a court in deciding to grant bail are the potential harms that might accrue from letting an accused out pending trial such as fleeing from the jurisdiction of the court, or intimidating witnesses and tampering with the evidence,[17] principles governing adjudication of bail applications have been watered down substantially over the years, with factors such as the nature of the offence, existence of a prima facie against the accused, and the antecedents of the detenu playing a dispositive role in courts' decisions whether or not to grant bail.[18]

From a theoretical point of view, negating the grant of bail by making it conditional on the satisfaction of a court about the existence of reasonable grounds for believing that an offence has been committed ormight be committed by the accused if bail is granted, suffers from multiple logical infirmities. Firstly, an adversarial legal system is based on the assumption that in the case of competing narratives, the truth can be known only when both sides have had a chance to contest each other's versions.[19] The law of evidence, with its focus on cross-examination, is geared towards achieving this through a detailed set of rules – it affords to both, the Prosecution and the Defence, an opportunity to test each other's cases, bring out contradictions and conflicts, and shake the credibility of witnesses.[20]

The result of prohibiting a judge from granting bail unless he is reasonably convinced that the accused did not commit the alleged crime would be, to borrow A. G. Noorani's phrase, with reckless speed run a coach and four through the criminal justice process.[21] It requires a judge to take a call on guilt or innocence at the beginning of, or in the middle of, the trial process without all the information that is required to do so. From a practical perspective, it is bound to benefit the Prosecution since restrictive bail provisions require a judge to arrive at a

[16] Gautam Bhatia, NDPS and the Rise of Punitive Constitutionalism, (Last modified January 25, 2020), available at:https://indconlawphil.wordpress.com/2020/01/25/ndps-and-the-rise-of-punitive-constitutionalism/ [Hereinafter, *"Bhatia"*].
[17]Bhagirathsinh v. State of Gujarat, (1984) 1 SCC 284, para. 7.
[18]*See* Arnab Manoranjan Goswami v. State of Maharashtra, (2021) 2 SCC 427, para. 64.
[19]Iain Morley, The Devil's Advocate 16 (Sweet & Maxwell, South Asian Edition., 2019).
[20]*Bhatia, supra* note 16.
[21]A. G. Noorani, "Habeas corpus law: A sorry decline",Frontline, (Last modified October 11, 2019), available at:https://frontline.thehindu.com/cover-story/a-sorry-decline/article29604480.ece.

conclusion that there is a reasonable likelihood that the accused did not commit the crime as opposed to a finding that he did, and it is a truism that proving a negative is always substantially more difficult than its opposite.[22] Secondly, at the time of bail applications, the judge, ordinarily, has before him only the Prosecution's version such as the first information report, an affidavit filed by the Station House Officer of the concerned Police Station, or perhaps the chargesheet.[23] The Defence may controvert it but without the opportunity to attack the prosecution's case in the course of the trial, it will simply be a clash of two rival versions with the accused fighting with his hands tied behind his back, given that there is no legal requirement in the Cr.P.C. for the accused to be given any material which is sought to be relied upon by the Prosecution, before filing of the charge-sheet during a pending investigation.[24]

The difficulty of getting bail when a person is charged for offences that forbid the grant of bail unless "reasonable grounds" exist for believing that the accused is not guilty is exacerbated by the decision of the Supreme Court in *State of Kerala v. Rajesh.*[25] Hammering home the point that in such circumstances a liberal approachis uncalled for,[26] it added that the expression "reasonable grounds" means something more than prima facie grounds.[27] According to the Court, it contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence which should manifest themselves in the form of facts and evidentiary material which are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.[28]

Such an interpretation could have haven rationally justified had it been made applicable after the conclusion of a full-fledged trial. However, at the stage of a bail application, before the Defence Counsel has even had a chance to completely controvert the evidence against the accused, the Court holds that there must be a finding of "substantial probable cause" that the accused is innocent, which, to all effects and purposes, must be made primarily based on material adduced by the Prosecution.[29] However, as advocates who have practised on the criminal side would have experienced, unless the witnesses who are supposed to have seen

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[22]New India Assurance Co. v. Nusli Neville Wadia, (2008) 3 SCC 279, para. 55.
[23]Abhinav Sekhri, Reversing the Presumption of Innocence - Part III (Last modified May 9, 2015), available at:https://theproofofguilt.blogspot.com/2015/05/reversing-presumption-of-innocence-part_9.html.
[24]*Ibid.*
[25] (2020) 12 SCC 122,[Hereinafter, *'Rajesh'*].
[26]*Id*., para. 20.
[27]*Rajesh, supra* note 26, para. 12.
[28]*Ibid.*
[29]*Bhatia, supra* note 16.

the accused commit a crime are cross-examined and the inconsistencies in their testimonies brought out, which ordinarily happens at an advanced stage, requiring the establishment of a "substantial probable cause" from which a belief of innocence can be proved effectively reduces the likelihood of securing bail to an impossibility.

Such provisions, as Gautam Bhatia puts it, might arguably be defensible in a legal system where trials are completed expeditiously.[30] However, when coupled with the pending workload and massive dockets of Indian courts, they enable incarceration of undertrials for years on end without any judicial finding of guilt.[31]

Additionally, at the stage of bail applications, it is legitimate for the Prosecution to rely on material that is either inadmissible,[32] such as confessions made before police officers,[33] or which has very little probative value such as confessions of the co-accused.[34] Resultantly, it becomes surprisingly easy to detain the accused because though there may not be sufficient evidence to prove his guilt, the matter on record, although may not strictly qualify as evidence, is enough to prove that there are reasonable grounds to establish his guilt which is the sum and substance of an inquiry under such laws.[35] That apart, once a court rejects a bail application after harbouring a reasonable belief about his guilt, it is unlikely that a judge can come to a finding against the Prosecution unless its case is so riddled with inconsistencies that it collapses under its own weight.[36]

Constitutional Experiments with Bail Legislation: A Downward Roller Coaster Ride

As stated, one of the twin requirements frequently engrafted inrestrictive bail legislation is the entertainment of a belief by the judge about the potential good behavior of an accused.[37]

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[30] *Ibid.*

[31] *Bhatia, supra* note 16.

[32] Kalyan Chandra Sarkar v. Rajesh Ranjan, (2004) 7 SCC 528, para. 19; National Investigation Agency v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1, paras. 27, 33, 52; Sudha Bharadwaj v. State of Maharashtra, para. 48 (2019) SCC OnLine Bom 2722, para. 48.*But see* Colin Gonsalves, "It is unjust that refusal of bail to Sudha Bharadwaj is based on inadmissible evidence", The Indian Express (Last modified July 20, 2020), available at: https://indianexpress.com/article/opinion/columns/sudha-bharadwaj-bail-rejection-uapa-6513800/.

[33] The Indian Evidence Act, 1872, (Act no. 1 of 1872), s. 25. [Hereinafter, *"Evidence Act"*].

[34] Although the confession of a co-accused is admissible as evidence under section 30 of the Evidence Act, it is a very weak type of evidence. *See*Bhuboni Sahu v. The King, (1948-49) 76 IA 147, pgs. 155 – 156; Kashmira Singh v. State of Madhya Pradesh, 1952 SCC OnLine SC 19, paras 7 – 12; Haricharan Kurmi v. State of Bihar, AIR 1964 SC 1184, paras 13, 15.

[35] Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798, para. 11.

[36] *Bhatia, supra* note 16.

[37] *But see* Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294, paras. 38, 44, [Hereinafter, *"Ranjitsing"*] where section 21(4)(b) of the Maharashtra Control of Organised Crime Act, 1999 which mandated that no person accused of any offence under the Act shall be released on bail if there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any

Given that the science of predicting recidivism and future dangerousness is, at the very least, a somewhat inexact process,[38] a Full Bench of the Punjab High Court in *Bimal Kaur Khalsa v. Union of India*[39] struck down section 20(8)(b)[40] of the Terrorist and Disruptive Activities (Prevention) Act, 1987[41] to the extent that no accused was entitled to bail if he was likely to commit any offence upon release, in line with Irish jurisprudence which treats such forms of preventive justice as incongruous with the underlying purpose of bail and the country's legal system.[42] Although its ratio was applied by the Allahabad High Court[43] to an analogous section 37[44] of the Narcotic Drugs and Psychotropic Substances Act, the victory was short-lived inasmuch as a Constitution Bench of the Supreme Court in *Kartar Singh v. Union of India*[45]overruled *Bimal Kaur Khalsa*[46] on the sole ground that a similar provision exists in the form of section 437(1)[47] of the Cr.P.C., and hence, there is no infringement of Article 21 of the Constitution,[48] a position which was reaffirmed by a coordinate Bench in *Sanjay Dutt v. State.*[49]

Although a court is expected to scrutinize the constitutionality of each provision when called upon and required to do so on its own merits and the mere existence of similar provisions in other legislations is not a tenable defence to its validity,[50] the reasoning in *Kartar Singh*[51], otherwise, did not operate in an intellectual vacuum. The prescient requirement of Section 20(8)(b) of T.A.D.A[52]which obligates courts to carry out an exercise in guesswork in relation to future criminality has withstood constitutional scrutiny in every common law jurisdiction

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offence while on bail, was read down to mean to refer to the satisfaction of the Court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence.

[38]*See* John F. Edens et. al., 'Predictions of future dangerousness in capital murder trials: is it time to "disinvent the wheel"?' Law and Human Behavior, Vol. 29, No. 1, 55 (Feb. 2005) at 81; Mayra Reyes, 'Danger! The Defendant is "Disturbed." Risks of Using Psychiatric Assessments to Predict Future Dangerousness'Connecticut Public Interest Law JournalVol 17 No. 2, 141 (2017) at 158 – 160;Ankush Kumar v. State of Punjab, 2018 SCC OnLine P&H 1259 [Hereinafter, *'Ankush'*], para. 44; *Ranjitsing, id.*at para.44.

[39] 1987 SCC OnLine P&H 918 [Hereinafter, "*Bimal'*"].

[40] Terrorist and Disruptive Activities (Prevention) Act, 1987, (Act No. 28 of 1987) [Hereinafter, *'T.A.D.A.'*], s. 20, cl. (8), subcl. (b).

[41]*T.A.D.A., id.*

[42]*See* People (at the suit of Attorney General) v. Roger O'Callaghan, [1966] IR 501 at 516 – 517; Gordon Ryan v. The Director of Public Prosecution, [1988] IR 399 at 406 – 408.

[43]Ram Charan v. Union of India, MANU/UP/1528/1991, paras.34 – 35.

[44]*NDPS Act, supra* note 10, s. 37, subsec. (1), cl. (b), subcl. (ii).

[45] (1994) 3 SCC 569 [Hereinafter, *'Kartar Singh'*].

[46]*Bimal, supra* note 40.

[47]*Cr.P.C., supra* note 9.

[48]*Kartar Singh, supra* note 46, paras. 342, 345, 347, 349, 368 (16).

[49] (1994) 5 SCC 410, paras. 50, 51, 53(3).

[50]Subramanian Swamy v. Director, Central Bureau of Investigation, (2014) 8 SCC 682, para. 96.

[51]*Kartar Singh, supra* note 46.

[52]*T.A.D.A., supra* note 41.

other than Ireland,[53] though in *Ankush Kumar v. State of Punjab*,[54] the Punjab and Haryana High Court stopped short of striking down section 37(1)(b)(ii)[55] of the Narcotic Drugs and Psychotropic Substances Act, despite referring to it as "irrational", "discriminatory", and "defying human logic",[56] since the issue of constitutional validity was not in issue before it,[57] preferring instead to read it down in a manner which permitted it to enlarge the accused on bail.[58]

Curiously, undeterred by the refusal of the Supreme Court to recognize the presumption of innocence as a fundamental right while conceding to its status as a human right,[59] in *Nikesh Tarachand Shah v. Union of India*,[60] the dual conditions in section 45[61] of the Prevention of Money Laundering Act, 2002,[62] which were nearly verbatim to those upheld in *Kartar Singh*[63] were struck down by a two-Judge Bench of the Supreme Court as violative of Article 14 and Article 21 of the Constitution. The Courtdistinguished*Kartar Singh*[64]on the footing that section 20(8) of T.A.D.A. was upheld because it was necessary for the State to deal with terrorist activities which are a greater menace to modern society than any other,[65]instead relying on the minority dissenting opinion of Justice Marshall in *United States v. Salerno,*[66]wherein the Bail Reform Act of 1984,[67] which permitted pre-trial detention on the ground that the person arrested is likely to commit future crimes,[68] was held to be violating the due process clause[69] and the Eighth Amendment to the American Constitution.[70] However, with a three-Judge Bench of the Supreme Court in *Vijay Madanlal Choudhary v.*

[53] Una Ni Raifeartaigh, 'Reconciling Bail Law with the Presumption of Innocence',17(1) Oxford Journal of legal studies1 – 21 at 2 (Spring 1997).
[54]*Ankush, supra* note 39. An appeal against this decision was summarily dismissed in The State of Punjab v. Ankush Kumar, Special Leave Petition (Criminal) Diary No(s). 42609/2018, Order dated 7 January 2019, (Supreme Court of India).
[55]*N.D.P.S. Act, supra* note 45.
[56]*Id.,* para. 46.
[57]*Ankush, supra* note 39, paras. 10, 46.
[58]*Ankush, supra* note 39, paras. 46 – 51.
[59]*Noor Aga v. State of Punjab*, (2008) 16 SCC 417, para. 33.
[60](2018) 11 SCC 1 [Hereinafter, *'Nikesh'*].
[61] The Prevention of Money-Laundering Act, 2002, (Act No. 15 of 2003) [Hereinafter, *'P.M.L.A.'*].
[62]*Id,* s. 45.
[63]*Kartar Singh, supra* note 46.
[64]*Kartar Singh, supra* note 46.
[65]*Nikesh, supra* note 61, para. 47.
[66]*Salerno, supra* note 1.
[67] Bail Reform Act of 1984, 18 USC 3141 (12 October 1984).
[68] Bail Reform Act of 1984, 18 USC 3142 (12 October 1984).
[69]*Salerno, supra* note 1, paras. 15 – 17.*See also* The Constitution of the United States of America, (Act 1 of 1789) amend. V (Hereinafter, *"U.S. Const."*); *U.S. Const.,* amend. XIV, sec. 1.
[70]*Salerno, supra* note 1, paras 17 – 20. *See also U.S. Const., id.,* amend. VIII.

Union of India[71]disapproving of the observations regarding the inapplicability of *Kartar Singh*[72]and the varying degrees of severity of the offences ofterrorism and money laundering,[73]*Nikesh Tarachand Shah*[74]no longer serves as a potential window of opportunity for future constitutional challenges on the bedrock of infraction of fundamental rights, and arrestees detained under such special criminal laws might have resigned themselves to several years in custody awaiting the conclusion of their trials, had there not been a flicker of comfort emanating from a tiny island country off the southeast coast of Africa.

Grounding Bail Jurisprudence in the Separation of Powers

In 1986, the Supreme Court of Mauritiusstruck down[75] section 46(2)[76] of the Dangerous Drugs Act, 1986,[77] which stripped courts of their powers to grant bail to any person arrested for certain drug-related offences, forasmuch as its existence was contrary to the Constitution of Mauritius[78]which explicitly conferred the right to life and personal liberty[79] as well as the right of an arrested person to be released if he could not be tried within a reasonable time.[80] Having none of it, the Parliament amended the Constitution and inserted section 5(3A)[81] which made it impossible for a person to obtain bail if he had been previously convicted for a drug or terrorism-related offence or if he was arrested subsequently for such offences after being so charged. The Act of 1986 was repealed[82] and the Dangerous Drugs Act, 2000[83] was enacted, section 32[84] of which spelt out the offences which would attract the bar under section 5(3A) of the Constitution.

Unfortunately, the attention of the Parliament had not been drawn to the Supreme Court's observations in *Noordally*[85]to the effect that criminal trials and all incidental or preliminary matters pertaining thereto must be dealt with by an independent Judiciary.[86] The National Assembly ignored the Court's dicta that it is irreconcilable with the letter or spirit of the

[71] 2022 SCC OnLine SC 929 [Hereinafter, '*Vijay'*].
[72]*Kartar Singh, supra* note 46.
[73]*Vijay, supra* note 72, paras. 392, 395 – 399, 467(xiii)(b).
[74]*Nikesh, supra* note 61, para. 47.
[75]Noordally v. Attorney-General and Director of Public Prosecutions,1986 MR 2204 [Hereinafter, *'Noordally'*].
[76] The Dangerous Drugs Act, 1986, (Act No 32 of 1986), [Hereinafter, *'Act of 1986'*]., s. 46, cl. (2).
[77]*Act of 1986, id.*
[78] The Constitution of Mauritius, Order 1968 in GN 54 of 1968, s. 3 [Hereinafter, *'Constitution of Mauritius'*]
[79]*Id.,* sec. 3.
[80]*Constitution of Mauritius, supra* note 79, sec. 5, subsec. (3).
[81]*Constitution of Mauritius, supra* note 79, sec. 5, subsec. (3A).
[82] The Dangerous Drugs Act 2000 (Act No. 41 of 2000) s. 61, subsec. (a).
[83]The Dangerous Drugs Act 2000 (Act No. 41 of 2000).
[84]*Id.,* s. 32.
[85]*Noordally, supra* note 75.
[86]*See Constitution of Mauritius, supra* note 79, s. 10, subsec. (1).

Constitution to legislate in order to enable the executive to overstep or bypass the judiciary in its essential roles, namely those of affording to the citizen the protection of the law and,as the guardian of the Constitution, to ensure that no person's human rights or fundamental freedoms are placed in jeopardy.[87] As it turned out, it would prove very costly for the Government.

In 2003, when Abdul Rachid Khoyratty was arrested for possessing three grams of heroin and denied bail in accordance with the new regime set up by the amendments to the Constitution and the Act of 2000, on a reference made to it by the Magistrate, the Supreme Court struck down section 32 of the Act as well as section 5(3A) of the Constitution.[88] Undaunted, the State of Mauritius preferred an appeal to the Judicial Committee of the Privy Council. Impressed with the Supreme Court's analysis, the Board did not require too many words to put its seal of approval on the impugned decision and dismiss the appeal.[89]

The Achilles Heel of the Government's case was the 1991 Constitutional Amendment[90] which deeply entrenched section 1[91] of the Mauritian Constitution. It made the opening provision, which declared Mauritius as a sovereign, democratic State, virtually immune to the tinkering power of majoritarian governments by introducing an additional two-pronged restriction on the Parliament's amending power. To wit, before the proposed Amendment to section 1 could be introduced in the Central Legislature, approval by at least three-quarters of the electorate of Mauritius was necessary.[92] Additionally, at the stage of final voting in the National Assembly, it had to be passed unanimously by all the members. Admittedly, section 5(3A) of the Constitution as well as the Dangerous Drugs Act, 2000 had not been subjected to a referendum and were struck down as running afoul of the procedural safeguards which were required to be followed by section 47 of the Constitution.[93]

However, it might be tempting to ask: what do curbs on the jurisdiction of courts to grant bail have to do with democracy and sovereignty? If the elected representatives of a democratic nation themselves have amended the Constitution and enacted a certain law in pursuance of the Amendment to deprive liberty to suspected drug offenders until the conclusion of the trial,

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[87] *Noordally, supra* note 76.
[88] Police v. Abdool Rashid Khoyratty, 2004 SCJ 138.
[89] *See Khoyratty, supra* note 1.
[90] The Constitution of Mauritius (Amendment No. 2) Act 1991, (Act No. 38 of 1991).
[91] *Constitution of Mauritius, supra* note 79, s. 1.
[92] *Constitution of Mauritius, supra* note 79, s. 47, subsec. (3), cl. (a).
[93] *See* Independent Jamaica Council for Human Rights (1998) Ltd v. Marshall-Burnett, [2005] 2 AC 356, paras. 21 – 24;Mohamed Samsudeen Kariapper v S. S. Wijesinham, [1968] A.C. 717 at 743; The Bribery Commissioner v. Pedrick Ranasinghe [1965] A.C. 172 at 197 – 198.

shouldn't the wishes of the people be honoured as required by section 1 of the Constitution itself? This was precisely the argument of the State before the Privy Council.[94]

However, the Board approved the view of the Supreme Court that historically, in Mauritius, the power to decide on matters involving bail had always been within the domain of the judiciary,[95]thusconstituting an intrinsic element of a democratic nation which is founded on the doctrine of separation of powers.[96] Consequently, to eviscerate the country's courts of this function, it was imperative to follow the procedure necessary for amending section 1 and failure to do so was fatal to the no-bail provisions.[97]

Deep Foundations, Wide Implications

The decision in *Khoyratty*[98] is jurisprudentially significant on multiple accounts. Although other constitutional courts had in the past expressed displeasure at statutory prohibitions on the grant of bail,[99] the foundation for doing so had been an express provision in the Constitution guaranteeing a right to bail unless the arrestee is assured of a trial within a reasonable period of time. A similar safeguard also existed in the Mauritian Constitution in the form of section 5(3) until it was rendered a dead letter for certain offences by the insertion of section 5(3A) in 1994. By building on the South African Constitutional Court's ruling in *Dlamini v. State*[100]wherein Kriegler J had highlighted the necessity of preserving judicial independence in decisions regarding the grant or refusal of bail,[101] the Privy Council struck down not only a statute but also theenabling constitutional amendment which had clipped the wings of judicial officers to exercise the power to grant bail depending upon the circumstances of a particular case.

Khoyratty[102] also serves as a paradigm shift in judicial review inasmuch the law as it prevailed till then was that an amendment to the Mauritian Constitution could be struck down

[94]*Khoyratty, supra* note 1 at p.no. 83.
[95]*Khoyratty, supra* note 1 at paras. 14, 25.
[96]*Khoyratty, supra* note 1 at paras. 28 - 31, 36.
[97]*Khoyratty, supra* note 1 at paras. 18 – 21, 31 – 31, 36.
[98]*Khoyratty, supra* note 1.
[99]Caballero v. The United Kingdom, Application no. 32819/96, Order dated 8 February 2000, European Court of Human Rights,para. 27; S.B.C. v. The United Kingdom, Application no. 39360/98, Order dated 19 June 2001,European Court of Human Rights, paras. 16 – 24; C.C. v. United Kingdom, Application No. 32819/96, Report dated 30 June 1998, European Commission of Human Rights,paras. 50 – 51; Regina (O) v. Crown Court at Harrow, [2003] 1 WLR 2756, paras. 32, 98 – 99; Ilijkov v. Bulgaria, Application no. 33977/96, Order dated 26 July 2001, European Court of Human Rights,para. 84; Margaret Magiri Ngui v. Republic of Kenya, Criminal Application No. 59 of 1985, Order dated 21 March 1985, High Court of Kenya.
[100][2000] 2 LRC 639.
[101]*Id.,* para. 74.
[102]*Khoyratty, supra* note 1.

only onprocedural grounds.[103]In other words, so long as the National Assembly had followed the prescribed procedure, a constitutional amendment, no matter how seemingly unjust or arbitrary, could not be nullified by a court of law, precisely because the Constitution itself permitted such a course of action.

A question might then arise: was the majority opinion in *Khoyratty*[104] justified in berating the legislature for failing to comply with the due procedure for amending section 1, since there had been no insertion, deletion, or modification as far as theplain text of the provision was concerned, and hence, no amendment of section 1 *stricto sensu*? An affirmative answer would require attributing ethicalism[105] to the Judicial Committee's analysis, not unlike the decision of the Supreme Court of Pakistan in *Fazlul Quader Chowdhry v. Muhammed Abdul Haque*[106] where Justice A. R. Cornelius opined that there exist certain fundamental features in every Constitution, which if altered would amount to bringing into effect a different Constitution altogether.[107]To put it differently, while the term "democracy" featuring in section 1 was left untouched by the National Assembly, its values pervaded the entire Constitution and an amendment to any other provision which had the effect of robbing the Constitution of its democratic spirit had to comply with the same procedural requirements as the deeply entrenched section 1 which made Mauritius a democratic State. Essentially, the Privy Council overruled the decision of the Supreme Court of Mauritius in *Berenger v. Governor General*[108] which had restricted judicial review of constitutional amendments to formal procedural defects in the amending process, thereby allowing constitutional courts to embrace within their ambit substantivism, remarkably similar to the basic structure theory which prevents the legislature from impinging on the fundamental features of the Constitution and in the process changing its very identity,[109] heralding the transition from isolationistinterpretations to a holistic perspective[110] in Mauritian constitutionalism.

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[103]*See* Berenger v. Governor General of Mauritius, 1973 MR 215 [Hereinafter, *'Berenger'*].
[104]*Khoyratty, supra* note 1.
[105] Congressional Research. Service, Moral Reasoning and Constitutional Interpretation, available at: https://constitution.congress.gov/browse/essay/intro.8-6/ALDE_00001307/ (last visited on 9 July 2023).
[106] LEX/SCPK/0110/1963.
[107]*Id.,* para. 26.
[108]*Berenger, supra* note 104.
[109]A. K. Patnaik, II Durga Das Basu's Shorter Constitution of India 1920 – 1921 (LexisNexis, Gurgaon, Fifteenth Edition, 2018).
[110]S*ee generally* District Bar Association, Rawalpindi v. Federation of Pakistan, 2015 SCC OnLine Pak SC 2, paras. 12 – 16; Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1, paras. 216 – 217.

However, it would be utopian to expect *Khoyratty*[111] to be a panacea for all laws which run roughshod over safeguards against arbitrary deprivation of individual liberty. It was rendered in the context of an absolute statutory setup which completely obliterated thepower of judges to consider the question of bail, however compelling the circumstances of a particular case might be. Lord Rodger, in his concurring opinion, unequivocally states that contrastingly, a provision stipulating that the accused should not be admitted to bail unless exceptional circumstances exist would be constitutionally saved because the judges would still have a significant, even if more restricted role in deciding questions of bail and of the freedom of the individual.[112] It is the respectful submission of the author that these observations, with which Lord Mance agreed,[113] should be treated as obiter and not reflecting the opinion of the Board since the majority did not express any view on this aspect.[114] Indian jurisprudence requires courts while exercising their power of judicial review to test the validity of legislation on the basis of its implications and effects on the fundamental rights rather than the form in which it is couched,[115] and as stated earlier, restrictive bail provisions, for all practical purposes, denude courtsof their courts to release the suspected offender on bail until the conclusion of the trial.

A Signpost to a Road not yet taken

Constitutional courts have largely ignored *Khoyratty*[116] – the Supreme Court of India has made passing references to it occasionally[117] whereas Longley J was in the minority when he relied upon it in *Attorney General v. Bradley*[118]to declareas unconstitutional section 4(2)(a)[119] of the Bail Act of the Bahamas[120] which took away the judiciary's power to grant bail for certain offences.[121] The Judicial Committee of the Privy Council itself seems to have had a change of heart and refused to follow it in subsequent decisions, on the ground that separation

[111]*Khoyratty, supra* note 1.
[112]*Khoyratty, supra* note 1, para. 30.
[113]*Khoyratty, supra* note 1, para. 33.
[114]*See*Rupert Cross & J. W. Harris, Precedent in English Law 86 (Clarendon Press, Oxford, First Edition, 2007 Reprint); Harper v. National Coal Board, (1973) 2 All ER 441 at 446; Commissioner of Wealth Tax v. Dr. Karan Singh, (1993) Supp (4) SCC 500, paras. 10 - 11, 15, 18; Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1 paras. 163 – 164.
[115]Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, para. 428; In Re The Kerala Education Bill, 1957, AIR 1958 SC 956, para. 26; R. C. Cooper v. Union of India, (1970) 1 SCC 248, paras. 43, 49; Maneka Gandhi v. Union of India, (1978) 1 SCC 248, para. 19.
[116]*Khoyratty, supra* note 1.
[117]Noor Aga v. State of Punjab, (2008) 16 SCC 417, para. 52; Sami Ullaha v. Narcotic Control Bureau, (2008) 11 SCC 471, para. 17; Harendra Sarkar v. State of Assam, (2008) 9 SCC 204, para. 52.
[118] BS 2009 CA 34 [Hereinafter, *'Bradley'*].
[119] The Bail Act, (Acts No. 20 of 1994), [Hereinafter, *'Bail Act'*], s. (4), subsec.(2), cl. (a).
[120]*Bail Act, id.*
[121]*Bradley, supra* note 119, paras. 16 – 122.

of powersis not a free-standing, legally enforceable principle that exists independently of and above a Constitution, and although relevant for constitutional interpretation, it provides no independent basis for invalidating legislation.[122]

It may be so that separation of powers has long been recognized as a part of the basic structure of the Indian Constitution,[123]but had the issue arisen a few years ago, it would not have been entirely free from difficulty on account of conflicting judicial as well as academic opinions regarding the basic structure doctrine, with some courts and jurists proscribing its use as a weapon to annul laws other than constitutional amendments[124] while others prescribing it as a tool which can be unhesitatingly utilized for rescinding ordinary legislation.[125] However, a recent three-judge Bench decision of the Supreme Court in *Madras Bar Association v. Union of India*[126]makes it possible to skirt the entire controversy in view of the majority holding that any attempt to interfere with the independence of the judiciary and resultantly, the separation of powers violates not only the basic structure of the Constitution but also Article 14, thus providing the basis for invalidating the impugned legislation.[127]

It is the submission of the author that adoption of the jurisprudence expounded by the Judicial Committee in *Khoyratty*[128] will not merely tantamount to adherence to the rule of law according towhich the power to determine responsibility for a crime and punishment for its

[122]Chandler v State of Trinidad and Tobago [2023] AC 285, para. 81; Attorney General of Trinidad and Tobago v Akili Charles [2022] UKPC 31, para. 89. *But see* Moses Hinds v. The Queen, [1977] AC 195 at 212, 226 – 228, 238 – 239. *See also* P. J. Fitzgerald, Salmond on Jurisprudence 174 (Universal Law Publishing Co., Delhi, Twelfth Edition, 2002) for the view that the Privy Council, being an advisory body rather than a court, is not bound by its own decisions.

[123]State of Bihar v. Bal Mukund Sah, (2000) 4 SCC 640, para. 32; I. R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1, para. 63; Union of India v. R. Gandhi, (2010) 11 SCC 1, paras. 53 – 57 [Hereinafter, *'R. Gandhi'*].

[124]Raju Ramachandran, "The Supreme Court and the Basic Structure Doctrine", in B. N. Kirpal et. al. (eds.),Supreme but not Infallible: Essays in Honour of the Supreme Court of India 107, 123 – 124 (Oxford University Press, New Delhi, 2000); Madhav Khosla, Oxford India Short Introductions: The Indian Constitution153 – 155 (Oxford University Press, New Delhi, First Edition, 2012); Kuldip Nayar v. Union of India, (2006) 7 SCC 1, paras. 90 – 108; Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1, para. 116; *R. Gandhi*, *id.*, paras. 99 – 102, Indira Nehru Gandhi v. Raj Narain, (1975) Supp SCC 1, paras. 691, 132 – 136, 356 – 357 [Hereinafter, *'Indira Nehru Gandhi'*]; State of Karnataka v. Union of India, (1977) 4 SCC 608, paras. 236 – 238 [Hereinafter, *'State of Karnataka'*]; Supreme Court Advocates-on-Record Association v. Union of India, (2016) 5 SCC 1, paras. 790 – 795.

[125]Arvind P. Datar,"The Basic Structure Doctrine – A 37 year journey", in Sanjay S. Jain & Sathya Narayan (eds.), Basic Structure Constitutionalism: Revisiting Kesavananda Bharati 167 (Eastern Book Company, Lucknow, 2011); *Madras Bar Association v. Union of India*, (2014) 10 SCC 1, para. 109; *Supreme Court Advocates-on-Record Association v. Union of India,* (2016) 5 SCC 1, para. 381; *Indira Nehru Gandhi*, *id.,* para. 549, 622; *State of Karnataka, id.,* para. 125. *See generally* Ismail Faruqui v. Union of India, (1994) 6 SCC 360, para. 134; G. C. Kanungo v. State of Orissa, (1995) 5 SCC 96, paras. 18, 28; Indra Sawhney v. Union of India, (2000) 1 SCC 168, paras. 64 – 66; L. Chandra Kumar v. Union of India, (1997) 3 SCC 261 para. 99.

[126] (2022) 12 SCC 455.

[127]*Id.,* paras. 20 – 27.

[128]*Khoyratty, supra* note 1.

commission is a function which belongs exclusively to the courts,[129] but also serve as an opportunity for the judiciary to reiterate that withholding bail merely as a form of punishment is anathematic to its raison d'etre, which is to secure the attendance of the accused at the trial.[130] However, as practitioners who observe the actual functioning of criminal courts on a daily basis will vouch, a low conviction rate on account of suboptimal investigation and insufficient evidence weigh on the mind of magistrates while deciding bail applications in a negative sense – strictly, and contrary to established legal principles.[131] Such punitive treatment also becomes an easy route for law enforcement agencies to not create a water-tight case against the accused in order to secure a conviction and treat pre-trial custody as substitute punishment, given the protracted nature of trials in India with pre-sentencing detention sometimes exceeding the maximum punishment for the charges invoked.[132]

This is not to say that the apprehension of the State about the possibility of the suspect absconding, threatening the witnesses, or destroying incriminating material can be sidelined. However, as Lord Diplock memorably said, "You must not use a steam hammer if a nutcracker will do."[133] Understandable though these concerns are, they can be addressed by a variety of less restrictive measures such as approaching the competent court for cancelling bail if the accused violates any of the conditions imposed[134] or adopting modern technologies which are used in Western countries such as ankle bracelets for real-time monitoring to avert such eventualities,[135] thereby dovetailing the two conflicting demands, namely, on one hand, shielding society from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence which is the presumption of innocence of an accused person till he is found guilty.[136] But legislatively steamrolling any realistic chances of an undertrial securing bail would mean

[129]Regina (Anderson) v Secretary of State for the Home Department, [2003] 1 AC 837 at 891.
[130]Nagendra Nath Chakravarti, in the matter of, ILR (1924) 51 Cal 402 at 415.
[131]Satender Kumar Antil v. Central Bureau of Investigation, (2022) 10 SCC 51, para. 93; Bibek Debroy & Aditya Sinha, "The misconception about bail-jail", The Times of India, (last modified 15 April 2023), available at: https://timesofindia.indiatimes.com/blogs/toi-editorials/the-misconception-about-bail-jail-we-must-not-expect-hcs-to-follow-sc-observations-on-bail-or-anything-else-because-they-are-not-subordinate-to-the-apex-court-the-key-to-bail-reform-is-that-hcs-su/.
[132] Swati Deshpande, 'Bail, not jail, the norm, says SC, but the reality is opposite',The Times of India, (Last modified 8 September 2013), available at:https://timesofindia.indiatimes.com/india/bail-not-jail-the-norm-says-sc-but-the-reality-is-opposite/articleshow/22408614.cms.
[133]R v. Goldstein, (1983) 1 W.L.R. 151 at 155.
[134]Zahur Haider Zaidi v. Central Bureau of Investigation, (2019) 20 SCC 404, paras. 3 – 5.
[135]Editorial, 'Arrest dysfunction: Bail should be the norm, not jail. Factors dissuading lower courts from giving bail must be addressed', The Times of India,(Last modified 21 November 2022), available at: https://timesofindia.indiatimes.com/blogs/toi-editorials/arrest-dysfunction-bail-should-be-the-norm-not-jail-factors-dissuading-lower-courts-from-giving-bail-must-be-addressed/.
[136]K. N. Chandrasekharan Pillai, R. V. Kelkar's lectures on Criminal Procedure including Probation and Juvenile Justice 136 (Eastern Book Company, Lucknow, Fourth Edition, 2006).

subjecting him to the psychological and physical deprivations of jail life, which by themselves have substantial punitive content,[137] preventing him from contributing to his defence, and casting the burden of pre-trial detention on the innocent members of his family.[138] For courts which owe more than verbal respect to the principle that punishment begins after conviction,[139] laws which deprive a person of his liberty as a mark of disapproval of unproven former conduct and give him a taste of imprisonment as a lesson cannot be countenanced, being incompatible with a modern legal system and a State which values humanitarian justice.

Nevertheless, one cannot lose sight of the obstacles in the path toward rooting *Khoyratty*[140] in Indianjurisprudence. Precedential consensus militates against agitating the issue of the constitutionality validity of a statute which has already been upheld by merely raising grounds not raised previously.[141] Consequently, the ratio of *Khoyratty*[142]will have to be applied to a factual matrix involving a restrictive bail law whose vires has not yet been tested and sustained. Thus, it may be a while before the judicial prerogative to grant bail is regarded as an inextricable facet of the doctrine of separation of powers in India and the right to be considered for grant of bail recognized as a constitutional right, a step the country's judiciary has hesitated to take in the past,[143] and *Khoyratty*[144] might be the only implement left in the survival kit of those behind bars, awaiting trial in India's sclerotic courts, providing at least a flicker of hope: that there might be glimpses of light at the end of the tunnel into which they have been plunged by the decisions in *Kartar Singh*[145] and *Vijay Madanlal Chowdhury*,[146] and that at long last the pendulum of the right to bail might begin to swing the other way.

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[137] Sanjay Chandra v. CBI, (2012) 1 SCC 40, para. 23 [Hereinafter, *'Sanjay Chandra'*].
[138]Moti Ram v. State of Madhya Pradesh, (1978) 4 SCC 47, para. 14.
[139]*Sanjay Chandra, supra* note 138, para. 21.
[140]*Khoyratty, supra* note 1.
[141] See Somawanti v. State of Punjab, AIR 1963 SC 151, para. 22; Delhi Cloth and General Mills Ltd. v. Shambhu Nath Mukherji, (1977) 4 SCC 415, para. 11; Anil Kumar Neotia v. Union of India, (1988) 2 SCC 587, para. 18;T. Govindaraja Mudaliar v. State of Tamil Nadu, (1973) 1 SCC 336, para. 10; Mohd. Ayub Khan v. Commissioner of Police, AIR 1965 SC 1623, para 7; Shri Krishna Investment v. Union of India, AIR 1976 Cal 333, para 5; Minoo Framroze Balsara v. Union of India, AIR 1992 Bom 375, para. 13 – 17. *But see* Dr. Vasudeo Rajendra Deshprabhu v. State of Goa, Writ Petition 86 of 1996, paras. 6, 16, Order dated 16 December 2003, High Court of Bombay at Goa.
[142]*Khoyratty, supra* note 1.
[143]*See generally* T. N. Singh, "Is the Right to Bail a Constitutional Right?",Cochin University Law Review88 (1979).
[144]*Khoyratty, supra* note 1.
[145]*Kartar Singh, supra* note 46.
[146]*Vijay, supra* note 72.

Exploring Parallel Importation and The Doctrine Of Territorial Exhaustion In Trademark Law

Muskan Pipania*

ABSTRACT

Exploring parallel importation and the doctrine of territorial exhaustion in trademark law reveals a complex interplay between protecting intellectual property rights and promoting free trade. With different jurisdictions adopting varied approaches, the legality of parallel importation is a multifaceted challenge. Proponents argue for enhanced consumer choice and competition, while opponents stress on the potential harm to brand image and distribution control. Additionally, the international landscape adds intricacy, requiring trademark owners to navigate legal disparities; due to which the courts face the delicate task of balancing competition and brand protection, crucial for a fair legal framework.

The evolving legal landscape, intertwined with e-commerce, emphasizes the need for adaptive frameworks to balance intellectual property protection and global trade intricacies, wherein the ongoing debates underscore the delicate equilibrium required between trademark owner prerogatives and principles of free trade, reflecting the complexities of brand protection in a globalized marketplace.

Key Words: Parallel Importation, Territorial Exhaustion, Trademark Law, International Trade, Intellectual Property Rights

Introduction

'Parallel Importation' refers to the import of non-counterfeit or genuine goods without the permission of the Intellectual Property Owner [1]. In other words, it refers to the import of genuine goods that are legitimately acquired from the IP rights holder and subsequently sold at lower prices through unauthorized trade channels in the same or a different market.

Therefore, in the context of trademark laws, it means the procurement of goods from the trademark owners or their authorized personnel through legitimate trade channels in a different market (mostly in

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[1] herein under, referred to as 'IP Owners'

a different country) and thereafter importation of such goods without the knowledge of the trademark owners of such products for sale to the general public in a different market.[2]

Such import market is commonly referred to "**Grey Market**", wherein the products are not counterfeit, pirated or duplicate, however, they are offered for sale in a market place through channels that are not authorized by the trademark rights holder or owner.[3]

The concept arises when there are price differentials between markets, and businesses or individuals seek to take advantage of these differences by importing and selling products in a market where they are priced higher.

Therefore, to contemplate the legal aspects surrounding the permissibility or legality of parallel imports under the trademark laws in India, it is paramount to analyze the 'Doctrine of Territorial Exhaustion of Rights or the Doctrine of First Sale' from the perspective of sale of products by a trademark owner or rights holder in a particular territory.

Doctrine of Territorial Exhaustion of Rights And Its Applicability

Doctrine of Exhaustion, also known as the '*Doctrine of first sale'* can be understood as –

"Once the goods are in the first instance, LEGITIMATELY purchased by another person in a particular territory or market from a trademark rights owner or his authorized person, the rights of the trademark owner to prevent further sale of such goods is exhausted after such first sale."[4] Consequently, the title in the goods passes on to the purchaser and the title of the trademark owner in such goods exhausts after the first sale.Moreover, as per *Article 6 of the Trade Related Aspects of Intellectual Property Rights (TRIPS),* the issue of exhaustion of Intellectual Property Rights is a matter of national discretion and each member country is entitled to prohibit or allow parallel imports within its own legal framework.[5]

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[2]Concept of Parallel Imports and the Principle of Territorial Exhaustion of Rights under the Indian Trademarks Act, 1999, available at: https://www.lexology.com/library/detail.aspx?g=7c49f769-c8f9-49fa-beb3-778c7af78add. (last visited on October 27, 2023).

[3]Ibid.

[4] India: Parallel Imports and International Exhaustion, available at:https://www.mondaq.com/india/international-trade-amp-investment/703104/parallel-imports-and-international-exhaustion(last visited on October 31, 2023).

[5][The Viewpoint] The Doctrine of Exhaustion of IPRs in India, available at:https://www.barandbench.com/law-firms/view-point/the-doctrine-of-exhaustion-of-iprs-in-india(last visited on November 01, 2023).

Accordingly, the doctrine of Exhaustion has been divided into three types –

1. **International Exhaustion** - Under this, once a product is put in the market anywhere in the world by the IP owner himself or authorized licensee[6], such sale leads to an exhaustion of the rights of the trademark owner to prevent further sale of such goods anywhere internationally, in order words, One World, One Market.

   The European Union (EU) generally follows the principle of international exhaustion, allowing parallel importation of genuine goods once they have been placed on the market anywhere within the EU.
2. **National Exhaustion** - Under this, an authorized sale of a good incorporating the protected IP will exhaust the right to use and resale the product in question within the domestic market and hence will prevent the IP owner's domestic enforcement of the related IPRs against those possessing, using or redistributing the particular good.[7]

   In contrast to the EU, the United States follows the principle of national exhaustion, meaning that the exhaustion of trademark rights occurs only upon the first sale of the goods within the United States.
3. **Regional Exhaustion** - Under this, once the IP protected goods have been put in the market in any part of that particular region, then the right of the IP owner is exhausted and the IPR protected product can move freely within that region.[8] For example, UK follows the Doctrine of regional, where the goods that are marketed in the European Economic Area (EEA) cannot be prevented from being resold across the Member States on the basis of IPRs however, the rights holders have the ability to control imports from outside the EEA.[9]

India follows the*Doctrine of International Exhaustion*. This was established in 2012, in the case of *Kapil Wadhwa & Ors vs. Samsung Electronics Co. Ltd.*[10]Wherein the Supreme Court of India tackled the issue of parallel importation and the Doctrine of International Exhaustion.

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[6] India: Parallel Imports and International Exhaustion, available at:https://www.mondaq.com/india/international-trade-amp-investment/703104/parallel-imports-and-international-exhaustion(last available on November 06, 2023).

[7] Doctrine of Exhaustion of IPR through Indian Lens, IP & Legal Filings, available at: https://www.ipandlegalfilings.com/doctrine-of-exhaustion-of-ipr-through-indian-lens/(last visited on October 28, 2023).

[8]Supra Note 5.

[9]Supra Note 6.

[10]2006 (33) PTC 425

The dispute revolved around the import and sale of Samsung smartphones in India by parallel importers without Samsung's authorization. The central legal question was whether Samsung could restrict the parallel importation of genuine products from other countries into the Indian market. The Supreme Court, in its landmark decision, supported the Doctrine of International Exhaustion, stating that:

'Once the sale takes place by the IP Owner or with his express permission in any area of the world, the IP Rights are depleted and therefore, the parallel importing of goods without prior permission of the registered proprietor DOES NOT amount to infringement of trademark rights.'

i.e., once a trademark owner sells a product abroad, they cannot prevent its importation and sale in India.

This decision clarified the legal landscape in India, aligning it with countries that endorse the international exhaustion doctrine, allowing for greater freedom in parallel importation and trade, while also raising questions about the broader implications for intellectual property rights and global commerce.

However, the court constituted a condition with the further sale of such grey imports, i.e., the conditions of the goods must not be changed or impaired after they are put in the market.

Furthermore, in 2014 in the case of *Philip Morris Products S.A vs. Sameer &Ors.*.The case revolved around whether the doctrine of international exhaustion applied, allowing the parallel importation of genuine Philip Morris products originally sold in another region. Therefore, the Delhi High Court, while upholding the applicability of Doctrine of International Exhaustion in India, observed that – *"The importer/defendant has to prove that the impugned goods, bearing a particular trademark were places in any market worldwide by the registered proprietor of the said trademark or with its consent and thereafter, the importer/ defendant lawfully acquired them therefrom"*[11]And laid down that the onus of proving that the initial purchase of the trademarked goods was lawfully acquired is on the 'Importer'.[12]

This case significantly unfolded thelegal battle over the doctrine of international exhaustion. By underscoring the nuanced application of the doctrine of international exhaustion in different

[11] Ibid.

[12] Trademark Parallel Imports: Delhi HC on the Marlboro Trademark Case, available at: https://spicyip.com/2014/03/trademark-parallel-imports-delhi-hc-on-the-marlboro-trademark-case.html(last visited on October 28, 2023),

jurisdictions, it highlighted the ongoing legal battles between intellectual property rights holders and those involved in parallel importation.

To sum up what has been stated above, the right to distribute objects means that such objects are released by or with the consent of the owner as a result of the transfer of ownership[13] (in according with the Doctrine of International exhaustion).

Hence, once any good is placed on the market, any proper use of the goods thereafter the first sale of the product would NOT amount to infringement.[14]However, it is pertinent to note that the trademark owners' rights are still infringed if the goods which are being imported are counterfeit and not genuine goods.

Customs Circular No- 17/2012 dated 05.7.2012

In order to provide a comprehensive understanding of the position regarding 'parallel imports', an official Customs circular was issued on May 8, 2012 subsequent to extensive consultations with the administrative Ministry. This circular aimed to clarify and outline the regulatory framework pertaining to the importation of goods under the concept of parallel imports.

Moreover, as delineated in the circular, the export of specific goods designated by notifications, which lack appropriate indications of their origin or manufacturer, is strictly prohibited. This regulation ensures that exported goods accurately convey their origin or source, contributing to transparency in international trade.

Furthermore, the circular highlights the prohibition on the export of goods that are required to bear specific markings or stamps in accordance with the Trade Marks Act. The absence of such mandated markings renders the export of these goods impermissible, aligning with the legal requirements set forth by the Trade Marks Act. This measure aims to safeguard intellectual property rights and ensure compliance with the legal obligations regarding trademarks.

[13] Exhaustion of Trademark Rights: A Transformation, available at:https://www.irglobal.com/article/exhaustion-of-trademark-rights-a-transformation-1862/(last visited on October 29, 2023),

[14]Ibid.

The issuance of this Customs circular and the subsequent regulations regarding both the import and export of goods, thus, serves to maintain compliance with legal frameworks, promote fair trade practices, and protect intellectual property rights within the scope of international commerce.

Practical Implications in Parallel Importation

The issue of parallel importation and the doctrine of territorial exhaustion within the framework of intellectual property rights present a complex interplay between protecting these rights and facilitating global trade.

The crux of the debate lies in striking a balance between protecting intellectual property and ensuring consumer access to genuine products at fair prices. The principles of territorial exhaustion and parallel importation offer opportunities for consumers to access goods at potentially lower prices, but they pose challenges to the control of brand integrity and quality. This balance continues to be a subject of significant legal and policy debate, especially in the wake of e-commerce globalization.

Price Discrepancies

In the realm of intellectual property rights, parallel importation can give rise to substantial price discrepancies for identical products in different markets. This scenario exemplifies a captivating and multifaceted facet of international trade. While it ostensibly operates in accordance with market dynamics, parallel importation isn't solely dictated by market principles.

For example, in the pharmaceutical industry, there is a notable case of price discrepancies and parallel importation. As noted by Pfizer's former CEO, Ian Read, "In the United States, the price of patented drugs is higher because it funds the R&D investment necessary for innovation. In contrast, many other countries have price controls on pharmaceuticals. This difference in pricing creates an incentive for parallel importation, which can impact our ability to invest in developing new drugs."

This situation underscores the complex balance between intellectual property rights and public access to essential goods, where pharmaceutical companies argue the necessity of high prices for innovation, while consumers in lower-income countries may see parallel importation as a means to access more

affordable medicines. Therefore, as international trade becomes increasingly interconnected, such dilemmas persist, and finding a straightforward solution remains a challenge.[15]

Brand integrity and Consumer Trust

Brand integrity is a critical aspect of any business, and it is particularly crucial for intellectual property (IP) rights holders who must maintain control over product quality. Parallel importation is a major concern for these rights holders as it can potentially compromise their ability to maintain brand integrity.

Apple's CEO, Tim Cook, once emphasized the importance of brand integrity when he stated, "*We want the customer to have a great experience with our products, and we work hard to prevent the sale of counterfeit Apple products, which can compromise the integrity of our brand*."

This quote illustrates how brand integrity can be threatened by parallel importation, especially when counterfeit or subpar products flood the market, eroding trust in the original brand.

Legal Uncertainty and the e-commerce impact

The legal landscape surrounding parallel importation and territorial exhaustion varies from country to country. This issue has been a contentious and confusing topic in the legal landscape of many jurisdictions. The courts and legislatures have been struggling to strike the right balance between the protection of intellectual property and consumer access. The complexity of the issue has only escalated with the rise of e-commerce and online marketplaces.This evolution has not only made it easier for parallel importers to access a global customer base but has also introduced new dimensions to the ongoing debates, complicating the enforcement of territorial restrictions and sparking legal disputes between manufacturers and parallel importers.

Online marketplaces, such as Amazon and eBay, have made it easier for parallel importers to reach a global customer base, challenging the enforcement of territorial restrictions. This has led to a rise in legal disputes between manufacturers and parallel importers.

With technology constantly evolving, there is a pressing need for adaptive and flexible legal frameworks to strike a balance between intellectual property protection and consumer access, and, that can

[15] Parallel Imports and International Trade, World Intellectual Property Organization, available at: https://www.wipo.int/edocs/mdocs/sme/en/atrip_gva_99/atrip_gva_99_6.pdf (last visited on October 30, 2023).

effectively address the complexities arising from cross-border trade in the modern era of global commerce.

Conclusively, the ongoing debates and evolving legal landscape reflect the complex interplay between the protection of intellectual property, the promotion of free trade, as well as the desire to balance the interests of rights holders and consumers. However, with the evolving nature of international trade, globalcommerce, and technological advancements, the issues surrounding parallel importation and the doctrine of territorial exhaustion will tend to remain a subject of significant legal and policy debate.

PROTECTING THE BRAND

Parallel Importation and the Doctrine of Territorial Exhaustion are interconnected concepts that involve the importation and distribution of trademarked goods. In cases of parallel exportation, IP right holders have several remedies to protect their brand. Some of the remedies includes, but not limited to:

- Implementing stricter distribution agreements with authorized distributors, by explicitly stating geographical limitations, thus, prohibiting the export of their products.
- Implementing unique product packaging, labeling, or manufacturing variations for different markets. This can make it easier to identify parallel-imported goods.
- Customs regulations play a vital role in regulating parallel imports. Trade circulars and regulations issued by administrative bodies help define and regulate the importation of goods under the concept of parallel imports, ensuring transparency in international trade and compliance with intellectual property laws. Therefore, collaborating with customs authorities is necessary to monitor and restrict the entry of unauthorized products into specific regions.
- Educating consumers about the risks associated with parallel-imported products can help raise awareness and discourage the purchase of such goods, ultimately safeguarding the brand's reputation and ensuring product quality in local markets.

Additionally, IP right holders can also engage in legal actions, pursuing cases against parallel importers for trademark infringement. However, this is only applicable when the parallel-imported goods have been physically tampered with.[16]Defective or deteriorated goods are some obvious examples.[17]

[16]Protecting your brand from parallel imports in Hong Kong, available at: https://oln-law.com/protecting-your-brand-from-parallel-imports-in-hong-kong/ (last visited on November 10, 2023).
[17] Ibid.

Since Trademark law's fundamental objective revolves around empowering consumers to distinguish the origins of goods, it tends to adopt a more lenient stance towards parallel importation, provided that such practices don't confuse the consumers in the process.

Taking the protection of Copyright Law

As trademark law primarily serves the function of enabling consumers to identify the origin or source of goods, emphasizing the importance of consumer clarity regarding product origins, it generally shows less concern towards parallel importation unless it results in consumer confusion.

In lieu of the same, brand owners often turn to copyright law for protection. Copyright law primarily protects creative works and original expressions rather than brand names or logos. Therefore, in certain situations where copyrighted works are integral to a brand's identity, copyright law can indirectly help protect your brand in cases of parallel importation and the doctrine of territorial exhaustion.

This shift is evident in Hong Kong's legal framework, where the Copyright Ordinance (Cap. 528) governs copyright-related matters. Following the 2007 amendments to the Copyright Ordinance (CO), which relaxed certain provisions on parallel imports, it remains an act of copyright infringement to import, sell, or distribute parallel goods protected by copyright without the explicit consent of the copyright owner, with the exception of computer software products.

Therefore, to strategically prevent the importation of such parallel goods, embedding even a small portion of copyrighted materials, such as artwork or designs, into the product or its packaging could be a prudent approach. This strategy aims to obstruct third parties from engaging in parallel imports, particularly in instances where the protection from registered trademarks is insufficient due to a more lenient approach under the Trademarks.

Furthermore, trademark owners in the United States, who have been unable to entirely prevent parallel imports through trademark law, have sought recourse in copyright law to broaden their protections. When products, their packaging, or labels include copyrighted materials, the copyright owner or exclusive licensee gains the exclusive rights to import and distribute these items within the United States. Embedding copyright-protected materials in goods is relatively feasible, encompassing copyrightable components within packaging, labels, instructions, and the products themselves. This incorporation ensures that removing or concealing the copyrighted element doesn't absolve liability for copyright infringement.

Copyright protection extends to a product's shape or appearance, provided it exhibits a degree of originality and possesses separable artistic features apart from its utilitarian function. For instance, a candy maker might secure federal copyright protection for a unique candy bar shape beyond the ordinary rectangular or cylindrical form, given it lacks an inseparable utilitarian purpose. Moreover, consumer products often include copyrighted software. Even a small software addition not vital for the product's operation can serve as a means for the trademark owner to block imports. Complex items like automobiles, office equipment, and kitchen appliances frequently integrate significant software components, empowering owners to impede unauthorized imports based on copyright grounds.

Therefore, the evolving landscape of trademark and copyright laws indicates the dynamic strategies adopted by brand owners to safeguard their rights in the face of parallel imports, balancing the interests of consumer clarity and intellectual property protection.

Common Law Tort

A multifaceted approachlies in the utilization of the common law tort of **'passing off'** as an advantageous complement to other legal grounds for action. Passing off, a common law tort, shields traders from misrepresentation by others, and in the realm of parallel imports, passing off holds relevance particularly when a situation arises wherein a trader falsely represents the parallel-imported goods as '**authorized products**,' insinuating that they have been imported through legitimate channels despite the absence of such legitimacy. Thus, success in a passing off claim hinges on demonstrating a likelihood of confusion regarding the goods' source.

Moreover, parallel importation can jeopardize a brand's reputation if the quality of imported goods deviates from the authorized products, potentially giving rise to a common law tort claim.

In conclusion, the exploration of parallel importation within the framework of common law tort entails a nuanced understanding of territorial rights, exhaustion doctrines, and the imperative to shield brands from unauthorized use. As commerce continues to evolve globally, jurisdictions may adapt their legal frameworks to meet the challenges posed by parallel importation and the dynamic nature of international trade.

Conclusion

The intricacies surrounding parallel importation underscore the delicate equilibrium required between the prerogatives of trademark owners in controlling product distribution and the bedrock principles of free trade and competition.

The diverse approaches adopted by different jurisdictions further complicate this landscape, introducing a spectrum of legal perspectives on the legitimacy of parallel importation. While proponents argue that such practices augment consumer choice and foster healthy competition, opponentsemphasizethe potential detrimental effects on brand image and the authority of trademark owners over their distribution channels.

The landscape is further complicated by international variations in the treatment of parallel importation, requiring trademark owners to navigate a legal minefield as what is legal in one jurisdiction may constitute infringement in another. Courts face the delicate task of balancing competition and brand protection, essential for maintaining a fair and effective legal framework. Additionally, the impact of contractual agreements, such as exclusive distribution arrangements, looms large over the legality of parallel importation, with enforceability and interpretation playing pivotal roles in legal proceedings.

Therefore, a comprehensive examination of parallel importation and the doctrine of territorial exhaustion is indispensable for unraveling the intricacies of brand protection in a globalized marketplace. This necessitates a sophisticated perspective that accommodates the rights of trademark owners alongside the interests of consumers and the broader competitive landscape.

Content Regulation in Social Media: The Human Rights Paradigm

Ponni J.*

ABSTRACT

Though Social media platforms are seen as facilitators of free speech they are in turn involved in removing and regulating so much of content. These platforms are not universal services suited to everyone since the rules of propriety are made by a few people who share a particular world view. These sites indemnify themselves stating all they do are hosting what others post but in truth they do a whole lot of other functions like moderating content, suspending accounts and also sorting content highlighting some posts over others. In effect these tech giants who are private entities restrict and regulate more speech than many of the countries. This shows the amount of control these tech giants have on our freedom of speech and expression and the dire need to regulate these platforms. When it comes to content regulation by the private platforms, there are no proper laws or guiding principles. There comes the solution of introducing human rights principles to content regulation over social media.

Key words: Social media, content regulation, human rights, ICCPR, freedom of speech and expression.

Introduction

In today's digital world the use of social media is inevitable. Social media platforms portray themselves as facilitators of free speech boasting about how much content they make available deliberately suppressing data on how much content they remove.[1] The sites often indemnify themselves stating all they do are hosting what others post but in truth they do a whole lot of other things like moderating and deleting content, suspending accounts and also sorting content in particular ways highlighting some post over others. In effect these tech giants who are private entities restrict and regulate more speech than most of the countries. This shows the amount of control these tech giants have on our freedom of speech and expression and the dire need to regulate these platforms. When it comes to regulation by the

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[1] These platforms present themselves as universal services suited to everyone whereas in practice, they are not suitable for all as the rules of propriety are made by a handful of people who share a particular world view.

private platforms, there are several problems as discretionary powers are vested in private bodies and there are no proper laws or guiding principles. There comes the question of introducing human rights principles to content regulation over social media.

Social Media

Social media split into two words SOCIAL and MEDIA connotes media which is all the more social. Social media is an internet-based form of communication. Social media are web-based services that allow individuals, communities, and organizations to collaborate, connect, interact, and build community by enabling them to create, co-create, modifies, share, and engage with user-generated content that is easily accessible.[2]They are web-based platforms that predominantly support online social networking, online community-building, and maintenance, collaborative information production and sharing, and user-generated content production, diffusion, and consumption.[3]It blends the broad reach of broadcast media with the interactive nature of interpersonal communications. Users can reach out to the whole world using their accounts.

Social media includes websites and applications that rather than creating content of their own content enable users to create and share content or to participate in social networking. Social media has become an inevitable part of our lives facilitating users to create and share information, ideas, interests, anything and everything via virtual communities. It has transformed itself from a mere means of communication to a virtual gathering place, a marketing tool, a news media and what not. It has changed the way people or groups interact and have made sharing of information much easier. It is popular since it allows users to communicate on a larger scale and range. One can communicate with people anywhere in the world in the blink of an eye. There are many forms of social media including blogs, micro-blogs, wikis, social networking sites, photo-sharing sites, instant messaging, video-sharing sites etc. Billions of people around the world use social media to share information and make connections. Today a person's day starts with scrolling down facebook page or instagram profile. On a personal level, social media allows us to connect with friends and family, watch entertaining contents, be informed about things happening around us etc. On a professional level, social media enables us to broaden knowledge in a particular field

[2]Luke Sloan & Anabel Quan-Haase (eds.), SAGE Handbook of Social Media Research Methods, 17 (SAGE Publications Ltd, London,2016)

[3] Christian Fuchs, Kees Boersma, et. al. (eds.),Internet and Surveillance: The Challenges of Web 2.0 and Social Media, Introduction 3 (Routledge, New York, 2012)

and build professional network by connecting with other professionals in the same industry. At the business level, social media allows to communicate with the customersand promote the brand and target advertisements to potential consumers.

Some popular social media platforms include

- Facebook: A platform where users create a personal profile, add other users as friends and communicate by exchanging messages, sharing posts including photos and videos and sendingstory updates. Brands use facebook for promotion.
- Whatsapp: A free messaging and video calling app where people can share texts, photos, audios, videos etc to individuals as well as groups.
- Instagram: A free photo and video sharing app that allows users to apply digital filters or special effects to thephotoes and videos and then share them on a variety of social networking sites.
- Twitter: A micro-blogging platform that helps people to stay connected through the exchange of short status messages within a 140-character limit.
- YouTube: A platform for video hosting and watching.
- Blogs: A platform for discussions on a specific topic.
- LinkedIn: A platform where groups of professionals with similar areas of interest can share information and participate in conversations.

Problems with Social Media

In earlier days a person's day started with a cup of tea and a newspaper. But today it starts with scrolling down one's facebook page or whatsapp chat or instagram profile or the like. All internet content is predominantly accessed through social media platforms and apps. In most countries, online platforms are necessary for carrying our daily affairs of the state. Even governmental agencies and public officers have their own social media pages and they publish necessary information and warnings through these pages. These platforms have a direct influence on all our actions. Once we decide to buy a product and search for it on the internet, our social media pages are flooded with advertisements of similar products. This shows the impact these tech companies have on our privacy. Though a major portion of online content are helpful, social media also circulates

manytypes of content that can harm people and cause tension in the society. The 2016 US elections and Cambridge Analytica scandal has brought questions on platform involvement in the spread of fake news and the alleged manipulation of electoral politics, privacy breaches and data misuse, and abuse of market power.[4]Platforms have also been heavily criticized for failing to reduce online hate speech, abuse and harassment.

Problems Concerning Content Regulation in Social Media

If at all content regulation is the answer, private norms which vary according to each company's business model have brought more chaos than absence of regulation.[5]Social media are ubiquitous and therefore national laws are of no use for companies that seek common norms for their geographically and culturally diverse user base. Platforms in their endeavour to regulate content effectively have taken several steps including hiring thousands of moderators, developing software to identify objectionable content and reforming their rules and regulations. The problem is lack of uniformity in the rules and regulations of various platforms.

Content regulation may be by removing the content as such or by issuing warning notices or conducting fact-checking or lessening popularity by means of algorithms. It is the platform that chooses which accounts to suspend or block entirely and which to be allowed to continue after deleting the impugned post. These platforms are given a long rope when it comes to making the rules and regulations. These platforms often unilaterally change their rules without public consultation and also add exceptions to the rules. The users do not have any idea on the intricacies of the rules and regulations. This lack of transparency and uniformity leads to lack of compliance by users. There are numerous problems associated with content moderation by platforms themselves.

The terms of service and other rules made by social media platforms are vague voluminous and not transparent. The terms of service and rules are confusing and are voluminous in such a manner that nobody would bother to read them and so any one would instantaneously accept the rules. Also, the users are kept in the dark as to the

[4] Terry Flew, Fiona Martin, Nicolas Suzor, "Internet regulation as media policy: Rethinking the question of digital communication platform governance", 10(1)J. Digit. Media Policy50(2019)

[5] David Kaye (UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. A/HRC/38/35 (Apr. 6, 2018).

intricacies in the rules. The companies have hidden exceptions and provisos to their published rules. So even diligent users cannot properly comprehend the rules that govern their activity online. A law that restricts our freedom of speech must be precise and known to all who are regulated.

The content that circulates over social media influences people and certain posts can have serious repercussions. Some posts incite mass violence, some posts hurt religious sentiments of particular class of people, some posts spread misinformation on certain diseases and cause panic, some posts corrupt the minds of children and youth publishing unwanted content, some posts undermine privacy of others etc. Companies have to be cautious in deciding whether to remove content and to leave it.

Another major problem is that the rules and standards social media companies apply to users are based on laws in USA whereas the users belong to different nationalities and different cultural backgrounds.[6] Another issue is that content moderation is often resorted to by states to carry out silent and invisible censorship on companies.[7]

The answer to these problems lies in introduction of a uniform set of standards to regulate content. Having a well-defined set of rules can save the platforms from unreasonable censorship requests from governments and also give platform users a legitimate opportunity to challenge the actions taken by the platform companies.

Thinking of introducing a single set of rules to regulate content over various platforms, human rights principles is the most plausible solution. Human rights principles being universal and certain can solve the issue of vagueness and hidden rules. Also, when companies make their terms of service in line with human rights law, States will find it harder to exploit them to censor content.

As David Kaye noted human rights standards, if implemented transparently with meaningful user and civil society input, provide a framework for holding both States and companies accountable to users across national borders.[8]

International Human Rights Law in Content Regulation

[6] Michael Karanicolas, "Squaring the Circle Between Freedom of Expression and Platform Law", 20 PITT. J. TECH. L. & POL'Y,183 (2020)
[7]Susan Benesch, "But Facebook's Not a Country: How to Interpret Human Rights Laws for Social Media Companies", 38 JREG,99(2020)
[8]*Supra* note 4

In the recent years there has been growing consensus on the need to apply human rights principles to content regulation on social media.[9]International human rights law manifests in a plethora of treaties and declarations. In spite of the fact that International Human Rights law predominantly applies to states, the United Nations Guiding Principles on Business and Human Rights which was adopted in 2011 deals with the human rights obligations of transnational corporations and other business enterprises. The principles though non-binding provides a protect, respect, remedy frame work urging businesses to follow international human rights law in their affairs.[10]The guiding principles are divided into three chapters namely one that deals with state responsibility to protect human rights, one that deals with corporate responsibility to respect human rights and the last chapter dealing with access to remedy. Under the chapter on corporate responsibility to respect human rights the companies are directed to respect and observe at least the International Bill of Rights and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.[11] Concentrating of regulation of speech and expression, the principal right that social media platforms facilitate and restrict, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) are the principal instruments to be considered. Freedom of expression is the mother of all the other liberties. It is true that social media companies facilitate free speech by enabling users to express their views freely over their platforms. But problem arises when these companies start to restrict free speech by regulating the content. Social media platforms should incorporate directly into their terms of service and community standards, relevant principles of human rights law that ensure content-related actions will be guided by the same standards of legality, necessity and legitimacy that bind State regulation of expression.[12]The right to free expression includes the right of an individual to express as well as the right of the community to hear and be informed. Freedom of speech and expression finds place in almost all human rights instruments including Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and European Convention on Human Rights.

[9]Evelyn Douek, "Limits of International Law in Content Moderation", 6 JITCL 37 (2021)
[10]Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy" Framework, U.N.Doc. A/HRC/17/31 (Mar.21,2011)
[11]*Id* at principle 12
[12]*Supra* note 4.

Art. 19 of the Universal Declaration of Human Rights guarantees to everyonetheright to hold opinions without interference and the right to seek, receive and impart information and ideas through any media and regardless of frontiers.[13]Itdoes not provide corresponding obligations. The International Covenant on Civil and Political Rights offers a detailed frame-work for restrictions on freedom of expression. Instead of specifying which kinds of content may be restricted, Art.19 of ICCPR identifies the terms on which restrictions may be imposed. Article 20 prohibits propaganda for war and advocacy of national, racial, or religious hatred that constitutes incitement to hostility, discrimination or violence.[14]Freedom of speech can be restricted only if the restriction is provided by law and necessary. So, a restriction must satisfy the three-prong test of legality, necessity and legitimacy.

Applying the Three Prong Test Of Article 19 To Content Regulation By Social Media Platforms.

LEGALITY- Provided by Law- The ICCPR's provisions guides the social media companies by mandating that all restrictions be provided by law. Though social media companies cannot make laws as such, their rules would count as norms. The UN Human Rights Committee while interpreting the ICCPR, has clarified that a norm can be considered a law.[15] A norm "must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly, and it must be made accessible to the public."[16]If the norms are publicly available the users can control their conduct accordingly. So, the rules laid down by social media companies can have the status of norms if they are precise and are made available to public. Vague public rules give these private companies so much of discretion to make exceptions. Prior disclosure of terms would put a check on discretionary practices by the companies. In compliance with Article 19(3), companies must publish rules in sufficient detail to give the public a clear idea on the do s and don'ts.

NECESSITY AND PROPORTIONALITY -To be necessary under 19(3), a restriction should not be merely useful, reasonable or desirable. The restriction placed must be the best possible way of regulating without causing harm. Social media companies have a variety of waysfor restricting content. Companies can remove content or shut down

[13]The United Nations Charter, art. 19
[14] International Convention on Civil and Political Rights, art. 20.
[15]General Comment No. 34, U.N. Human Rights Comm'n, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) at 25
[16]*Id*

accounts. But taking note of the speed and range of communication over internet, removing content or shutting down account is not much effective because by the time content is removed, harm might have already been caused as the harmful content is circulated to a large number of people within short time.

Thinking of other ways to protect freedom of expression and to prevent further harm, best method would definitely be prevention. Many companies require users to verify their identities to ensure good conduct. Companies use less restrictive measures like down ranking or controlling the virality of a post. Messaging apps permit forwarding content toonly a few accounts at a time. We might have encountered this while trying to share photos with more than five persons via whatsap as whatsapp restricts the number of people to whom message can be send in a single transaction to five. The companies are obliged to adhere to the restriction that is strictly necessary and proportionate. The restriction must be necessary to protect a legitimate interest and to be the least restrictive means to achieve the purported aim.

LEGITIMACY- The Covenantstipulates that the restrictions can be placed on freedom of speech only if it is absolutely necessary and shall only to respect the rights or reputations of others or to protect national security, public order, public health or morals.[17] When ICCPR was drafted it was meant for states to comply while restricting content.

Considering the ground of rights and reputations of others, the impact of damage to rights and reputation is much higher online than offline as the speed and range of communication is greater. Legal remedies against such acts are generally under national laws and they simply punish the wrong doers after harm has been caused without limiting its impact. Jurisdictional issues arise when the content crosses borders. So, it would be best if the social media companies can regulate such content with the content regulation strategies in their arsenal while adhering to principles of human rights.

Though a private company like a social media platform cannot regulate based on national security, national security is a ground taken by states to restrict content unreasonably by pressurising companies to take down content. When the ground of national security is unreasonably brought in, the company must be cautious. Social media companies can deny government request to remove content based on national security

[17]*Supra* note 13, art.19(3)

relying on the fact that the company being a private entity cannot claim national security as a reason for restricting speech. On a similar line, governments deceptively use the ground of protection of public order to restrict free speech over the internet. All such efforts should be condemned.

Examining the ground of morals, the meaning of morality is different for different cultural groups and different states. The platforms take note of the cultural fabric of the state while adhering to the human rights principles.

Social media companies should regulate to protect public health. The pandemic situation has shown us the need for regulation by social media companies to curb the spread of dangerous disinformation. The days of measles break out in USA in 2019 saw the spread of anti-vaccine misinformation on various social media platforms, their impact on lives of people and the steps taken by various platforms to combat misinformation.[18]

Prohibition of Certain Content Under Article 20

Article 20 posts a duty on states to prohibit any speech that amounts to propaganda for war or any advocacy of hatred based on nationality, race or religion inciting to discriminate or to perpetrate hostility or to commit violence.[19]Prohibition can be of civil, administrative or criminal nature.[20]The terms propaganda and war are left undefined in any of the UN Instruments. The views of scholars and the interpretations by Human Rights Committee are to be considered to ascertain the meaning and ambit of the words propaganda and war.[21]Most scholars hold that propaganda for war refers to incitement to war or at least advocacy for war.[22] The use of the term "propaganda" instead of "incitement" shows that the intent is to prohibit a broader category of content than directly calling for war, or inciting a population to condone it.[23]

War refers to engaging in transborder wars of aggression contrary to the U.N. Charter or in contravention of international law and does not include advocacy of self-

[18] Louise Matsakis, "Facebook Will Crack Down on Anti-Vaccine Content", *WIRED* March 7, 2019. Available at https://www.wired.com/story/facebook-anti-vaccine-crack-down/ (last visited on Nov 27, 2023).
[19]*Supra* note 14
[20] Michael Lwin, "Applying International Human Rights Law for Use by Facebook", 38 JREG78 (2020)

[21] Evelyn Aswak, "Propaganda for War & International Human Rights Standards" 24(1) Chi. J. Int'l L1 (2023)
[22]*Id*
[23]Michael G. Kearney, The prohibition of propaganda for war in international law, 9, (Oxford University Press, Oxford, 2008)

determination or the right to self-determination and independence or civil wars.[24]The Special Rapporteur on freedom of speech and expression interprets the term war to include "aggression or a breach of the peace contrary to the Charter of the United Nations, thereby preventing the misuse of this provision to counter internal disturbances, and interprets propaganda to mean incitement to such aggression.[25]

States are mandated to prohibit by law any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.[26] Under the convention only religious, racial and national hatred are covered. The then-UN High Commissioner for Human Rights Navanethem Pillay in an attempt to clarify the incitement threshold required under Art 20 (2)in 2012 started a project which materialised into a UN document known as the Rabat Plan of Action.[27] Rabat employs a six-part threshold test to determine the severity necessary to criminalize incitement and the factors are:

• Context of the statement- In determining the gravity of the statement, the socio-political context at the time when the speech was made is to be considered.

•Speaker's status or position- The words of the political or spiritual or religious leader has greater value than words of an ordinary person as far as the audience is concerned. So, the status of the speaker, or his position in the context of the audience whom he addresses is important.

•Intent to incite audience against a group-Mere negligence or recklessness are not fatal as mere distribution or circulation does not amount to advocacy or incitement. There should be an intent to incite audience against a particular group.

• Content and form of the statement-The form, style, nature of arguments has to be observed to ascertain the provocative nature of the statement.

• Extent or reach of the speech – The size of the audience is significant. The mode of communication also determines the extent or reach of the statement.Publication through

[24] U.N. Human Rights Committee (HRC), ICCPR General Comment No. 11: Prohibition of Propaganda for War and Inciting National, Racial, or Religious Hatred (Art. 20) at 1 (July 29, 1983).
[25] Irene Khan (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), Rep. on Disinformation and Freedom of Opinion and Expression During Armed Conflicts, U.N. Doc. A/77/288 (Aug. 12, 2022).
[26] *Supra* note 14,art 20(2)
[27] U. N., Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence, A/HRC/22/17/Add.4 (Oct. 5, 2012)

broadcast in the mainstream media or via the Internet definitely has broader reach than publication through leaflets.

• Likelihood of harm including imminence- There should be a reasonable probability that the statement would succeed in inciting the audience against a particular group.

The test has to be adapted to social media scenario. When it comes to online expression it might be difficult to discern certain factors. Imminence is not suitable for online content moderation as harmful content can reach a large crowd in literally no time.Also, in the online landscape identifying intent can be challenging as the person who originates inflammatory content might intent to incite violence but people who share it might not or vice versa. The Rabat test can however guide the companies in deciding which action to take to restrict the content.

Conclusion

In today's digital world everything is done online. People order food online, purchase clothes, house hold articles and grocery online, pay utility bills online, attend classes and meetings online, consult doctors online, watch movies online etc. People spent most of their leisure time on social media. Social media platforms foster variety of contents of which some may be unwanted or harmful. There has to be some kind of moderation of the data published through social media as the content can spread across countries in matter of seconds. Since the data are transmitted transnationally, national laws are not effective in regulation of the content. Considering some kind of regulation by the platforms themselves, there might be problems as the terms and conditions are laid down by a number of people employed by the companies and their views cannot be used as universal. The social media platforms while hosting content regulates it by moderating and deleting content, suspending accounts, sorting content in particular ways, highlighting some post over others etc. In effect these private companies restrict and regulate much more speech than any country in the world does. Giving unbridled powers to these private platforms in regulating content would be absurd. Introducing human rights principles to guide the platforms in regulating content over social media is the best way to ensure propriety. However human rights principles have to be interpreted and adapted to suit the social media companies to provide a framework

Ensuring Prisoners' Rights in India: A Path Towards Rehabilitation and Justice

Neethu S.T.*

Abstract

The protection of prisoners' rights is a fundamental aspect of any fair and just society. In India, recognizing the significance of upholding the rights of prisoners is not only a moral obligation but also a legal imperative. Ensuring that prisoners are treated with dignity, provided necessary safeguards, and given opportunities for rehabilitation is crucial for their successful reintegration into society. The Indian justice system recognizes the significance of upholding prisoners' rights as a crucial aspect of rehabilitation and achieving justice. Ensuring that prisoners are treated fairly, humanely, and in accordance with the law is not only a moral imperative but also a legal obligation.This article examines the rights of prisoners in India and their significance in the pursuit of rehabilitation and justice. It highlights the constitutional provisions and legal frameworks that protect prisoners' rights, emphasizing the right to dignity and humane treatment. The article explores various initiatives undertaken in India to ensure fair trials, access to legal aid, and special provisions for marginalized prisoners.

Key Words: Prisoners , Constitution, Rehabilitation , Judiciary, Justice

" Whenever fundamental rights are flouted or legislative protection ignored,
to any prisoner's prejudice, this Court's writ will run, breaking
through the stone walls and iron bars, to right the wrong and restore the rule of law

-Justice V.R Krishna Iyer

Introduction

All men are born equal and are endowed by their creator with some basic rights. These rights are mainly the right to life and liberty, but if any person doesn't comply with ethics of the society then that person is deprived of these rights with proper punishments.[1] After a long struggle, society recognized that there are, Rights of Prisoners which should be made available to them. The main objective of prisons is to bring offenders back to the mainstream

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[1] Around 300 years ago, the conditions of prisoners were just next to worse, because they were brutally treated and there were no specific provisions for them.

of society. If a person commits any crime, it does not mean that by committing the crime, he ceases to be a human being and that he can be deprived of those aspects of life that constitute human dignity.

Prisoners' Rights is a serious issue to consider. Prisoners are human beings as well, but they are not treated as such. Recently, the Supreme Court intervened in a case involving prisoners and the injustices they face. In India, prisoners are subjected to inhumane treatment. Inhumane conditions include ill-treatment, multiple fire hazards, inadequate food, inadequate health and medical facilities, and a lack of functioning toilets, sanitation, custodial torture, and deaths. The prison administration lacks proper governance, resulting in violations of prisoners' human and fundamental rights. There is a need for reform in the justice system, as well as a practical shift towards reformative theory. Prison is an important component of the criminal justice system. It is where the accused or prisoners are kept separately so that they are subject to discrimination of some rights that are not available to the accused from the poor section of society but are available to the person from the elite section of society.

Definition and Meaning of Prisoners

In popular mind, a prisoner is an offender, who is considered as a threat to societal order and personal security, ironically a person safest in institutionalized cells isolated from the world outside. Once locked away he is forgotten and the distinction between imprisonment as punishment and imprisonment for punishment is little recognized. The term 'prisoner' draws within its definition all persons housed in prisons. There is no difference as to the penological status of the incarcerated. The prisoners can be categorized according to the nature of the crime they have committed and the nature of the sentence to which they are allotted. They are given different treatments according to the sentence they are undergoing.[2]

Convicts are those prisoners who are sentenced to be imprisoned. They are further divided into two categories as per their sentence. Those prisoners who are sentenced to rigorous imprisonment are subjected to hard labour that is for eight hours daily in the jail and those allotted simple Imprisonment have to remain idle as undertrials. But if they are willing to do work they have to give a written undertaking as to work and thus they can work. Those prisoners who are awarded with death sentence are classified as condemned prisoners and they are kept in separate jails. There are also foreign prisoners, who have completed their

[2] http://www.legalserviceindia.com/articles/articles. html, Accessed on 15th November 2023 , 7 pm.

provided sentence but are kept in a Transit camp of jail, till their depository to their concerned States or countries, are meant by the term inter varies.

Rights Granted to Prisoners

If the human is convicted, it does not mean that he is not human anymore. He is human and should be treated like a human being. All human beings have naturally been granted human rights and fundamental rights granted by the constitution. These rights are also available to prisoners right to freely move is restricted as his freedom is subject to certain restrictions but basic rights are available like Right to food, Right to equality, etc. There are basic rights that are granted to prisoners which can't be taken away. Whenever these rights are being infringed prisoners have the remedy to approach the high court or Apex court to fight for the violation of their rights. These rights comprises of human rights as well as constitutional rights.

Constitutional and other Statutory Provisions Framework:

Prisoners are also a human being even after the committed of crime. It includes the various legal rights, constitutional rights, and other statutory safeguards for convicted or under-trial prisoners.

It provides right against the conviction for the offence and right against self-incrimination.[3] One of the most important Article 21, everyone has a right to life with human dignity. The right to life and Personal Liberty is the backbone of Human Rights in India. Nobody can be deprived from his life and personal dignity because the word 'life' also includes 'living with dignity' in this case [4]. Therefore 'life" did not mean mere animal existence, as upheld in the *Maneka Gandhi v. Union Of India*[5] case.

Article 22 provides the safeguards to the arrested person by informing the grounds of arrest, granted the right to choose lawyer of his/her choice, and present the accused before the nearest Magistrate under 24 hours. Judiciary has also upheld this right in this case.[6]

Right to write is also an important right which must be given to the prisoner. By this right prisoner can express their views to the outside world on any matter like what is the condition of prison system, what is going on in jail and they can also write a letter to his family members, friends, relatives or lawyer. They can share his political views. They can enjoy

[3] Article 20 of the Constitution of India
[4] Francis Coralie Mullin v. Administrator, Union Territory of Delhi (1981) 746.
[5] AIR 1978 SC 597
[6] D.K. Basu v. State of West Bengal , (1997 (1) SCC 416)

freedom to speak and express anything via letter, article, any book without any limitation of pages and words. But written content cannot be against the security of India otherwise it will be censored by jail authorities and restriction can be imposed. In most of the decision of the SC, court mentioned that right to life also includes right to express oneself under article 21 but prison administrations hardly taken note of such rulings.[7]

Lacunae in Legislation

For more than a century, we have grappled with the absence of a comprehensive legislation framework to safeguard the rights of prisoners. The Prison Act of 1894, last amended in 1957, remains an inadequate piece of legislation in addressing the rights and need of prisoners. In 1894, The Prison Act was passed by the colonizers government which deals with the laws relating to prisons in India. This act includes maintenance of prisons, duties of prison officers, powers of deputy and assistant jailers, admission, discharge and removal of prisoners, discipline of prisoners, employment of prisoners, health of prisoners, visit to prisoners, law relating to prison offences by any prison.

This act does not include any welfare acts for prisoners and it does not help to any prisoner to become a good human being because the object of this act was only to regulate the administration of prison and not to reform any prisoner[8]. This act does not carry the provisions related to rehabilitate and reformation of prisoner in prison. The actual implementation is not followed by any jail authorities which creates problems among people.

This act has many criticisms because the provisions of this act has not any relevance in present scenario as many people are attached with human rights. There was no provision related to protection of human rights of prisoners. This act did not include the specific provisions related to human rights for women prisoner except one or two, which is not enough in today's society. By this act, they were more consideration about the prison working than the treatment of prisoners.

After this Act, there are many legislations which came in India before and after independence, namely: –

1. The Prisoners Act, 1900

[7]https://www.epw.in/engage/article/prisoners-right-write-why-sc-rulings-should-be, Accessed on 15th December 2023 at 11 PM.
[8] Anita, *Prisoners' Rights in India: An Analysis of Legal Framework*, 6 INDIAN JOURNAL OF LAW AND JUSTICE 135(2015).

2. The Transfers of Prisoners Act, 1950
3. The Repatriation of Prisoners Act, 2003
4. Model Prison Manual, 2003
5. Indian Penal Code, 1860
6. Code of Criminal Procedure, 1973
7. Identification of Prisoners Act, 1920
8. The Prisoners (Attendance in Courts) Act, 1955

Despite several initiatives, including the Mulla Committee's[9] recommendations on jail reform and the drafting of a new bill by the government in collaboration with the National Human Rights Commission (NHRC), a law for prisoner's rights the dream to keep it in parliament is kept away till date. While our Constitution stands as the sentinel of human rights, it lacks specific provisions exclusively dedicated to prisoners. It is high time for our legislature to fulfill its duty by enacting laws that not only protect society but also offer prisoners a chance at rehabilitation and reintegration into the mainstream.

International Safeguards of Prisoner's Rights

International safeguards for prisoners' rights are essential agreements established at the global level to ensure humane treatment, fair trials, and protection of individuals deprived of their liberty. These safeguards are crucial to uphold human rights, prevent abuses, and provide justice. India has signed various international conventions on different aspects of human rights, which evolve after the establishment of U.N.

Here's a simplified explanation of some key international instruments and principles:

1. Universal Declaration of Human Rights (UDHR)[10] –

Article 9 – "No one shall be subjected to arbitrary arrest, detention or exile". This means that governments cannot arrest or detain people for no reason or without proper legal procedures.

- International Covenant on Civil and Political Rights (ICCPR)[11] –

[9]https://www.mha.gov.in/sites/default/files/Mulla%20Committee%20implementation%20of%20recommendations%20-Vol%20I.pdf, Accessed on 15th December 2023 at 12.29 PM.
[10]https://www.un.org/en/about-us/universal-declaration-of-human-rights. , Accessed on 15th December 2023 at 1 PM.

Article 9 – "Everyone has the right to liberty and security of person."

Article 10 – "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity and of the human person."

- Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment –

Article 1 – "No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment".

- The United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)-

Rule 1– "All prisoners shall be treated with the respect due to their inherent dignity and value as human beings".

Role of Judiciary to Protect The Fundamental Rights Of Prisoners

Judiciary plays an important role in safeguarding the fundamental rights of prisoners in India. These rights are enshrined in the Constitution of India in various Articles as include the right to life and personal liberty, right to equality and right to be treated as dignity among others. It ensures that even those accused of crimes are treated with dignity and have access to a fair legal process. In India, human rights hold a prominent position in our legal framework. Our Constitution often regarded as the cornerstone of our democracy, not only guarantees fundamental rights but also empowers our highest courts to protect and enforce these rights. This provides a strong foundation for the protection of human rights.

Here are some judgments of Supreme Court in which the court protect the fundamental rights of the prisoners: –

Preventing Torture and Inhuman Treatment

The Judiciary ensures that prisoners are not subjected to torture or inhuman treatment. In the case of D.K. Basu v State of West Bengal [12], Supreme Court issued guidelines to prevent

[11]https://www.google.com/search?q=%E2%80%A2+International+Covenant+on+Civil+and+Political+Rights+(ICCPR&rlz=1C1JZAP_enIN919IN919&oq=%E2%80%A2%09International+Covenant+on+Civil+and+Political+Rights+(ICCPR&gs_lcrp=EgZjaHJvbWUyBggAEEUYOTIHCAEQABiABDIICAIQABgWGB4yCAgDEAAYFhgeMggIBBAAGBYYHjIICAUQABgWGB4yCAgGEAAYFhgeMggIBxAAGBYYHjIICAgQABgWGB4yCAgJEAAYFhge0gEJMTYxMDVqMGo0qAIAsAIA&sourceid=chrome&ie=UTF-8, Accessed on 5th December 2023 at 7 PM.

[12] Supra note 5.

custodial torture and protect the dignity of individuals in custody. It is the right of every prisoner to be protected against any type of cruel or inhuman treatment. The Supreme Court of India in several cases has highlighted the harsh treatments faced by prisoners and directed state and prison authorities to check and regulate the same. The court also prohibited the use of instruments such as handcuffs, chains, irons and straitjackets in punishing the prisoners. Some other instruments of restraint are permissible but only under certain circumstances. These circumstances are mentioned hereunder:

1. Using instruments of restraint for precaution during the transfer of prisoners against escape, conditional upon the fact that it shall be removed while producing the prisoner before an administrative or judicial body.
2. If the medical officer permits the same on certain medical grounds;
3. In cases wherein it is difficult to prevent a prisoner from self-harm or damaging the property around, the director in consultation with the medical officer and after reporting the higher administrative authority may order the prisoner to be put in instruments of restraint.

The patterns and manner of use of instruments of restraint shall be decided by the central prison administration. Such instruments must not be applied for any longer time than is strictly necessary.

Right to Speedy Trial

Prisoners have the right to speedy trial. The Judiciary intervenes if there are unreasonable delays in the trial process. For instance, in case of *Hussainara Khatoon v Home Secretary, State of Bihar*[13] the Supreme Court ordered the release of under-trial prisoners who had been in custody for prolonged periods awaiting trial and held that prolonged detention without trial violates the right to personal liberty.

Right to Legal Aid

Legal assistance plays a significant part in the life of an accused awaiting trial or any prisoner or convicts, for that matter. The 42nd Amendment to the Constitution (1976) of India incorporated services of free legal aid as Article 39A under the head Directive Principles of State Policy. Though this article is part of the directive principles of state policy and hence,

[13] 979 AIR 1369

not enforceable, the principles underlined therein are of utmost importance. It is incumbent upon the State to keep this article in mind while framing rules and regulations for prisoners, criminals or convicts.

The parliament has enacted the Legal Services Authorities Act in 1987 wherein it guaranteed legal Aid. It also directed various state governments to set up Legal Aid and Advice Boards, and frame schemes aiming to provide Free Legal Aid. This was done so that the Constitutional mandate of Article 39-A could be given effect. If we look into the jurisprudence of Indian Human Rights, it can be said that legal aid is of a wider dimension and it is available in civil, administrative, or revenue cases other than just criminal cases.

In the case of *Madhav Hayawadanrao Hoskot v. the State Of Maharashtra*[14]**,** the three-judge bench of the Supreme Court of India read Articles 21 and Articles 39-A along with Article 142 and Section 304 of CrPC together emphasized that the government of the country is under a duty to aid and provide legal services to the convicted or accused individual.

Justice Krishna Iyer emphatically declared that *"Right to free legal aid is the State's duty and not Government's charity".* In the case of *Khatri v State of Bihar*[15], the Supreme Court held that the state must provide legal aid to indigent prisoners.

Prison Reforms

Court often issues directions for prison reforms to improve living conditions, healthcare, and vocational training for prisoners. In the case of Sunil Batra v Delhi Administration[16], the Supreme Court laid down guidelines for prison reforms.

Protection of Human Dignity

The Judiciary emphasizes that prisoners, though deprived of liberty, retain their human dignity. In the case of Charles *Sobhraj v. Superintendent, Central Jail* [17], the Delhi High Court held that even prisoners have the right to be treated with humanity.

[14] AIR 1978 SCC 1548
[15] Khatri v.State of Bihar 1981 SCR (2) 408
[16] Sunil Batra v Delhi Administration (1978) 4 SCC 409
[17] 1978 SC 1514

Right to Education

Right to education is a Fundamental Right and therefore it should be given to every citizen of the country. Along with education, the right type of education must be imparted. In Mohammad *Giasuddin v. State of AP*[18], the court tried to regulate the manner of work and education provided to the inmates of the jail. It directed the state government to look into the nature of work and education given to the prisoners and check that the work provided is "not of a monotonous, mechanical, intellectual or like type mixed with a title manual labour…". The court further stated the facilities of liaison through correspondence courses must also be given to prisoners who are interested in doing higher or advanced studies. Moreover, basic learning such as tailoring, embroidery, and doll-making should be extended to the women prisoners. In addition to that, well-educated prisoners should be given the opportunities to engage in some sort of mental-cum-manual productive work.

Right to receive books/magazines

In *George Fernandes v. State* of Maharashtra[19]**,** the court took cognizance of the case wherein the Superintendent of the Nagpur Central Jail had fixed the number of books to be allowed to the inmates to be 12. However, the power to take such decisions was not vested in him, though being a superintendent he could disallow a book terming it as "unsuitable". This was stated in consonance with the Bombay Conditions of Detention Order, 1951.

The court further added "all the restraints on liberty, that no knowledge, learning, and pursuit of happiness is the most irksome and least justifiable. Improvement of mind cannot be thwarted but for exceptional and just circumstances. It is well known that books of education and universal praise have been written in prison cells."

Right to publication

The Supreme Court held in a case wherein the prisoner was not allowed to read a scientific book that there was nothing in the Bombay Detention Order, 1951 that prohibits a prisoner from writing or publishing a book. It stated that the book prisoner wanted to read was merely a work of science, ("Inside the Atom") and it could not be regarded as detrimental to public interest or safety as provided under the Defence of India Rules, 1962.

[18] AIR 1977 SC 1926
[19] (1964) 66 BOMLR 185

Further, in *State of Maharashtra v. Prabhakar Pandurang Sanzgir* [20]wherein an accused detained under preventive detention was not allowed to hand over his unpublished book to his wife for publication, the court termed such an act as violative of Article 21.

In yet another case of *Rajgopal v. State of Tamil Nadu*[21]**,** the Supreme Court held that there was no authority in law that could priorly deny the permission to publish the autobiography of Auto Shanker (prisoner) under the fear or impression that it would cause defamation of prominent IAS and IPS officers. The concerned officials can take action after the publication and only if the publications are false.

The Supreme Court gave a various judgment related to the protection of prisoners but the implementation of these judgment is very slow. The main problem is to do the implement of these judgment in real world which increase the pendency of these cases in court again and again. The main role and responsibility of these problems is in the hands of "Executive" and "Judiciary". These pillars protect and safeguard the life and liberty of the citizens of the country. Continuous efforts are needed to strengthen and implement these safeguards effectively.

Ensuring prisoners' rights in India is crucial not only for upholding human dignity but also for fostering rehabilitation and justice within the criminal justice system. A focus on prisoners' rights can contribute to a more humane and effective approach to corrections, emphasizing rehabilitation over mere punishment. Here are some key aspects to consider:

1. Legal Framework and International Standards:
    - Strengthen and enforce existing legal frameworks that protect the rights of prisoners, including the Constitution of India and international treaties such as the Universal Declaration of Human Rights.
    - Incorporate international standards such as the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) into domestic legislation.
2. Access to Legal Aid:
    - Ensure that prisoners have access to legal representation and assistance throughout the judicial process.

[20] AIR 424 SCC 1966
[21] AIR 264 1994 SCC (6)

- Facilitate legal literacy programs within prisons to empower inmates with knowledge about their rights and the legal system.

3. Humane Conditions of Confinement:
    - Improve living conditions in prisons, addressing issues such as overcrowding, sanitation, and healthcare.
    - Implement measures to prevent torture, cruel, inhuman, or degrading treatment, in line with international human rights standards.
4. Rehabilitation Programs:
    - Develop and implement rehabilitation programs that focus on education, vocational training, and mental health support.
    - Promote skill development to enhance prisoners' chances of successful reintegration into society upon release.
5. Family and Community Engagement:
    - Encourage family and community involvement in the rehabilitation process to create a support network for prisoners.
    - Facilitate communication between prisoners and their families, where appropriate, to maintain familial ties.
6. Reentry Programs:
    - Establish comprehensive reentry programs to facilitate the smooth transition of prisoners back into society.
    - Provide support for finding employment, housing, and addressing mental health issues post-release.
7. Juvenile Justice System:
    - Develop a separate and rehabilitative approach for juveniles in conflict with the law, emphasizing education, counseling, and skill-building rather than punitive measures.
8. Independent Oversight:

- Establish independent bodies or ombudsman to monitor and investigate complaints related to human rights violations within prisons.
- Conduct regular and unannounced inspections of correctional facilities.

9. Technology Integration:
    - Explore the use of technology for improved prison management, including record-keeping, communication, and monitoring of conditions.
    - Ensure that technological advancements are used ethically and in a manner consistent with human rights principles.
10. Public Awareness and Advocacy:
    - Increase public awareness about the importance of prisoners' rights and rehabilitation for a more informed and empathetic society.
    - Encourage civil society organizations to advocate for the rights of prisoners and monitor the implementation of policies and programs.

By addressing these aspects, India can move toward a criminal justice system that prioritizes rehabilitation and respects the fundamental rights of prisoners, ultimately contributing to a more just and compassionate society.

Conclusion

Ensuring prisoners' rights in India is not only a legal imperative but also a crucial step towards fostering rehabilitation and justice within the criminal justice system. The protection and promotion of prisoners' rights contribute to a more humane and effective approach to incarceration, emphasizing the potential for rehabilitation rather than solely punitive measures. In conclusion, a holistic and rights-based approach to imprisonment is essential for several reasons. Firstly, it upholds the principles of human dignity and equality enshrined in the Indian Constitution, treating prisoners with the respect and decency to which every individual is entitled. Secondly, by safeguarding prisoners' rights, we create an environment conducive to rehabilitation, acknowledging the potential for positive transformation and reintegration into society. Rehabilitation is a key component of any justice system seeking long-term societal well-being. By ensuring prisoners have access to education, vocational training, and mental health services, we equip them with the tools necessary to rebuild their lives and contribute positively to society upon release. This not only benefits the individual

but also reduces the likelihood of recidivism, creating safer communities. Moreover, a focus on prisoners' rights aligns with international human rights standards, reinforcing India's commitment to global norms. By setting a high standard for the treatment of prisoners, India can enhance its standing in the international community and contribute to the global conversation on justice and human rights.

In essence, the protection of prisoners' rights is a cornerstone in the pursuit of justice and rehabilitation. By acknowledging and addressing the inherent dignity of every person, even those convicted of crimes, we build a more just and compassionate society. Policymakers, law enforcement agencies, and the judiciary must collaborate in implementing and upholding these rights, thereby ensuring that the criminal justice system not only punishes but also rehabilitates, fostering a society built on principles of fairness, equity, and compassion.

The Legal Panorama of Wildlife Trafficking with Primary Underscoring of Tiger Stewardship Strategy

Kasthuri J.*

Abstract

Illegal trade in tigers and other large wildlife invariably garners the maximum attention, but these charismatic species are just part of a broad spectrum of targeted species in India. While we sometimes gain small glimpses into this wider trade through news reports, our understanding of the specifics, in terms of what species are traded, how many, where and by what means, is severely limited. Wildlife Trafficking encompasses obtaining, capturing, poaching, smuggling, importing, exporting, processing, possessing, collecting, and consumption of wild flora, fauna, and fungi, aquatic or terrestrial, dead or alive, including derivatives, parts, and products thereof, which are regulated or protected by national and/or international laws. It is considered among the most profitable illegal industries in the world, with an estimated annual value of 7–23 billion USD about ten years ago. Some examples of illegal wildlife trade are well known, such as the poaching of elephants for ivory and tigers for their skins and bones. However, countless other species are similarly overexploited, from marine turtles to timber trees. Not all wildlife trade is illegal. Wild plants and animals from tens of thousands of species are caught or harvested from the wild and then sold legitimately as food, pets, ornamental plants, leather, tourist ornaments, and medicine. Wildlife trade escalates into a crisis when an increasing proportion is illegal and unsustainable and directly threatening the survival of many species in the wild.

Keywords: wildlife, tiger, illegal trade, preservation, species.

Introduction

Wildlife trade both legal and illegal is an activity that is currently the focus of global attention. Concerns over the loss of biodiversity, partly stemming from overexploitation, and the corona virus pandemic, likely originating from wildlife trade, are urgent matters.[1] These

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[1]Nurse, A., & Wyatt, T*Wildlife criminology*. Policy Press.p.34. (2020).

concerns though centre on people. Only sometimes does the discussion focus on the wildlife traded and their welfare. In this article, we make the case as to why welfare is an important component of any discussion or policy about wildlife trade, not only for the interests of the wildlife, but also for the sake of humans.[2] We detail the harm in the trade as well as the current welfare provisions, particularly in relation to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which guide global transport and trade. There are a number of ways that the current approach to wildlife welfare could be improved, and we propose ways forward in this regard. Most of the wildlife trade, which involves the sale or exchange of wild animals and plants, is legal, un- or partially regulated, and plays a fundamental role in our way of life and global economies. The illegal wildlife trade (also known as trafficking) involving the capture, harvesting and trade of wild animals and plants contrary to national laws is estimated to be one of the largest global black markets.[3]Henceforth, when referring to both the legal and illegal trades we use the term ,legal. Criminology scholars have highlighted the injury and suffering inherent in the, legal wildlife trades .[4]In green criminological studies, it is well documented that many 'legal' practices can be as harmful, if not more harmful than those criminalised [5]. Animal geography and animal activist scholars suggest, from both an anthropocentric and a welfare anima's perspective, it seems that 'unnecessary' animal suffering is an unavoidable part of the (i)legal global wildlife trade, whether the wildlife is alive or killed ,[6]leading some to demand a total ban on all global trade on animal welfare grounds . It is evident from legal and critical animal studies that wildlife are viewed as human property and resources . Despite the substantial evidence of cruelty in the (ii) legal wildlife trade, little academic debate, or research addresses welfare in this rapidly growing area of concern. We propose this lack of regard for or discussion of, welfare stems from humans viewing non-human animals as property rather than as individuals; objects not always as subjects; and as commodities not always as sentient beings.

[2]See ibid at 36
[3]Broom, D. (2014). *Sentience and animal welfare*. Cambridge University.P.45
[4]Clarke, N. (2016). Sentience and animal welfare: Affirming the science and addressing the skepticism. *Animal Sentience, 2016*, 49.
[5]See supra n.1 at 45
[6]ibid

Welfare of wildlife Stitched in Parlance to Welfare of Homosapiens

The 2016 INTERPOL and UNEP [7]report links environmental crimes, such as wildlife trafficking, with other serious illegal activity, including corruption, counterfeiting, drug trafficking, cybercrime, and financial crimes as well as with terrorism and non-state armed groups. In addition to serious criminality and state security, the ,legal trade impacts human security. Human security a concept generally associated with the UNDP [8]Human Development Report "first, needed safety from such chronic threats as hunger, disease and repression. And second, it means protection from sudden and hurtful disruptions in the patterns of daily life,whether in homes, in jobs or in communities". The welfare of wildlifeparticularly the conditions in which they are caught, killed, transported, and kept,have direct and fatal consequences for human health and safety .[9]The ongoing coronavirus pandemic is the result of the latest zoonotic disease likely originating in bats, possibly passing through an unknown second species, and then on to humans through consumption [10]. COVID-19 follows a long list of zoonotic diseases (i.e., Severe Acute Respiratory Syndrome)Zoonotic diseases are responsible for over two billion cases of human illness and over two million human deaths each year. Sixty percent (60%) of emerging infectious diseases are zoonotic and 70% of these are thought to originate from wild animals [11]. Wildlife trade and markets (such as the market in Wuhan, China possibly linked to the COVID-19 outbreak) are identified as unique epicentres for the transmission and mutation of potential viral pathogens [12],found that the diversity of species being brought into highly populated cities contributes to the likelihood of disease emergence. These wild animals are alive, so that they can be killed and delivered as fresh 'products' to consumers. Hundreds of individual wildlife of a variety of species are made more susceptible to diseases by being kept in close and stressful conditions, on an inappropriate diet, and exchanging excrement and viruses .[13]They are then butchered on the same surfaces, which exposes blood and organs to the

[7]Christy, B. (2016). Special investigation: Inside the deadly rhino horn trade. *NationalGeographic*. https://www.nationalgeographic.com/magazine/2016/10/dark-world-of-the-rhino-horn-trade/. Accessed 15 March 2023.
[8]ibid
[9]Wyatt, T. (2014). Non-human animal abuse and wildlife trade: Harm in the fur and falcon trades. *Society and Animals, 22*(2), 194–210.

[10]See supra n.2
[11]ibid
[12]See Supra n.3
[13]see UNESCO Universal Declaration of Animal Rights (http://www.esdaw.eu/unesco.html), Universal Declaration of Animal Welfare (https://www.worldanimalprotection.ca/our-work/global-animal-protection/universal-declaration), Declaration of Animal Rights [40] (http://declarationofar.org/), American Bar

viruses and are then consumed by people [14]The welfare element is critical to the lack of hygiene in such places.

While the legal trade may regulate some aspects of animal welfare and hygiene, these are limited due to infrequent inspections, corruption, and the reliance on markets and companies' self-regulation [15]. Furthermore, inspections will not identify all diseases as not all wildlife carrying disease will appear ill. The illegal trade is unregulated and lacks any of the above controls (e.g., not subject to inspections, quarantines, and other mechanisms for containing disease) [16]. Those not convinced welfare is important for the sake of the animal, may be persuaded of its importance because the physical health of wildlife can affect human health, especially those wildlife intended for consumption in our homes. Consequently, some non-governmental organisations [NGOs] are calling for a ban on wildlife markets

Skinny points for Tiger Trade Attractions.

Lamentably, tiger body parts, such as bones, skins, teeth, and claws, are highly valued in some cultures, where they are believed to have medicinal properties and are used in various remedies and tonics. There is also a demand for tiger products as luxury goods, like rugs, jewellery, and decorative items.[17] Tigers are also desired as exotic pets by some people who are willing to pay large sums of money to own these magnificent creatures. This demand fuels the growth of breeding farms and the exploitation of wild tigers. The high demand for tigers and tiger body parts fuels the illegal trade as consumers are willing to pay significant sums for the products. [18]This makes it an attractive business for criminals, especially since the associated risks are lower. Compared to other serious crimes like human trafficking or drug smuggling, the penalties associated with wildlife trafficking may be lighter.

Bootleg tiger breeding

Illegal tiger breeding farms are captive facilities that breed tigers, keeping them in captivity and exploiting them for various purposes, including the illegal trade in tiger parts and

Associationproposedinternationalconventiononanimalwelfare(https://www.americanbar.org/content/dam/aba/administrative/news/2021/02/midyear-resolutions/101c.pdf) and Global Animal Law Association proposed UNConvention on Animal Health and Protection (https://www.uncahp.org/)

[14]Endcap. (2012). Wild Pets in the European Union. Available at https://endcap.eu/wp-content/uploads/2013/02/Report-Wild-Pets-in-the-European-Union.pdf. Accessed October 2023.

[15]ibid

[16]ibid

[17]See supra n.1

[18]Ibid

products. [19]They operate contravention of national and international laws and regulations. According to WWF (World Wildlife Fund), the number of tigers in these farms has increased in recent years, with about 8,000 tigers reportedly held in over 200 facilities across East and Southeast Asia, mostly in China, Viet Nam, Lao PDR, and Thailand. The WWF believes that these farms:Undermine enforcement efforts to distinguish and stop the trade of wild tigers, Contribute to the demand for tiger products,Facilitate the laundering of illegally obtained tiger parts into legal markets.

These concerns are justifiable, as there is considerable evidence indicating that a significant percentage of tigers killed by poachers are transported from countries like Russia, India, Malaysia, Indonesia, and Nepal.[20] It is noteworthy that all these countries allow tiger farms to operate within their borders. Illegal tiger breeding farms have significant ecological and environmental consequences that harm the tiger species and their habitats. Illegal tiger breeding farms often require large spaces to accommodate captive tigers. These farms often encroach upon natural habitats, leading to deforestation and habitat destruction. Clearing land for such operations contributes to the loss of critical tiger habitats, which are already under pressure from human activities.[21] Illegal breeding farms prioritize specific traits or physical characteristics desired by the black market, such as rare coat colors or other unique features. This selective breeding can lead to a loss of genetic diversity within the captive tiger population. Limited genetic variation reduces the resilience of tigers to diseases, environmental changes, and other threats. The existence of tiger farms, whether legal or illegal, can perpetuate the demand for tiger parts, skins, and products. This demand, in turn, fuels the poaching of wild tigers as a source to meet the market demand for illegal tiger products. The natural tiger populations face significant threats from poaching, habitat loss, and human-wildlife conflict, and the presence of breeding farms can exacerbate these threats by sustaining the demand for tiger parts. The presence of illegal breeding farms undermines legitimate tiger conservation efforts.[22] These farms operate outside the regulatory frameworks and standards set by reputable conservation organizations. The unregulated breeding and

[19]Wyatt, T. (2013). The local context of wildlife trafficking: The Heathrow Animal Reception Centre. In D. Westerhuis, R. Walters, & T. Wyatt (Eds.), *Emerging issues in green criminology: Exploring power, justice and harm* (pp. 108–126). Palgrave Macmillan.
[20]See supra n.13
[21]ibid
[22]Maher, J. and Sollund, R. (2016a). Law enforcement of wildlife trafficking: A comparative strengths, weaknesses, opportunities and threats analysis of the UK and Norway. In Wyatt, T. (Ed.), Special Edition on Wildlife and Forest Trafficking: Trafficking. *Organised Crime and Security: An international Journal, 2*(1), 82–99.

trade associated with these farms can create confusion and mistrust among the public, affecting support for genuine habitat restoration and conservation initiatives.

Legal Protection Scenario

The term "wildlife" encompasses all undomesticated lifeforms, including birds, insects, plants, fungi, and even tiny organisms, in addition to wild animals. Animals, plants, and marine species are just as vital as humans in sustaining a healthy ecological balance on this planet. Each organism on this planet occupies a distinct position in the food chain, contributing to the ecosystem in its unique way.[23]The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is an international agreement to which states and regional economic integration organisations voluntarily sign up.

CITES was drafted as a result of a resolution passed by members of the International Union for Conservation of Nature (IUCN) in 1963.The IUCN is a membership organisation that includes both government and non-governmental organisations. It gives knowledge and methods to public, private, and non-governmental organisations that enable human advancement, economic development, and conservation of nature to take place together.CITES came into effect in July 1975.[24] There are now 183 members (including countries or regional economic integration organizations).The goal of CITES is to ensure that international trading in wild animal and plant specimens does not endanger their survival.The United Nations Environment Programme (UNEP) administers the CITES Secretariat, which is based in Geneva, Switzerland.In the operation of the Convention, plays the role of servicing, advisory, and coordinating.The Conference of the Parties (CoP) to CITES is the Convention's top decision-making body, and it comprises all of the Convention's Parties.In 2016, the 17th CoP was held in Johannesburg, South Africa. In 1981, India hosted the 3rd edition of the CoP.Though CITES is legally obligatory on the parties, it does not replace the national legislation of a country. Rather, it establishes a framework that must be followed by each party, which must enact domestic legislation to ensure that CITES is implemented on a national level.

[23]ibid
[24]World Bank. (2019). Illegal logging, fishing and wildlife trade: The costs and how to combat it. Available at http://pubdocs.worldbank.org/en/482771571323560234/WBGReport1017Digital.pdf. Accessed 3 March 2023.

India is one of the world's acknowledged mega-diverse countries, home to approximately 7-8 percent of the world's recorded species and four of the 34 globally recognised biodiversity hotspots (Himalaya, Indo-Burma, Western Ghats, and Sundaland).In addition to biological resources, India has a rich library of traditional knowledge. In the 10 biogeographic areas of the country, about 91,200 animal species and 45,500 plant species have been identified. Through regular surveys and research, inventories of floral and faunal diversity are being gradually updated with various discoveries.[25]India, as a CITES Party, vigorously forbids the international trade in endangered wild species and has put in place several measures to combat invasive alien species concerns (e.g. certificates for exports, permits for imports, etc.).India has requested that rosewood (*Dalbergia sissoo*) be removed from CITES Appendix II.[26] The species spreads quickly and has the potential to become naturalised outside of its native region; it is also invasive in other parts of the world.It is not essential to regulate the species' trade to keep it from being eligible for inclusion in Appendix I in the foreseeable future. Small-clawed otters (*Aonyx cinereus*), smooth-coated otters (*Lutrogale Perspicillata*), and Indian Star Tortoise (*Geochelone Elegans*) have also been suggested to be moved from Appendix II to Appendix I, offering the species extra protection.The plan also calls for the Gekko gecko and Wedgefish (*Rhinidae*) to be added to CITES' Appendix II. For Chinese traditional medicine, the Gekko gecko is highly traded.

The legislation landscape

Hunting of wild animals has been prohibited under Sec. 9 of the Wild Life (P) Act, 1972. No person is allowed to hunt any wild animal specified in Schedule I, II, III and IV except as provided under sections 11 and 12 of the Act. The Act also prohibits under section 17A, the collection or the trade in specified plants (whether alive or dead or part or derivative) i.e. those listed in Schedule VI of the Act, from any forest land and any area specified by notification by the Central Government.[27] The Schedule VI of the Act lists all the six plants of Indian origin included in CITES appendices. Trade in Scheduled animals / animal article i.e. animals/animal articles covered under Schedule I and Part II of Schedule II which also include some inverterbrate such as insects, corals, molluscs and sea cucumber are prohibited under the said Act. Similarly, the Act disallows trade in all kinds of imported ivory, including that of African elephant. Export or import of wild animals and their parts and products is,

[25]ibid
[26]ibid
[27]See Wildlife Protection Act,1972.

however, allowed for the purpose of scientific research and exchange of animals between Zoos and is subject to licensing by the Director General of Foreign Trade (DGFT), Government of India. The Act has been amended in 2006 leading to the establishment of the National Tiger Conservation Authority and the Wildlife Crime Control Bureau (WCCB) with a statutory backing.

Examining the impacts of wildlife trade controls is not straightforward for a number of reasons. Wildlife trade is affected by a bundle of regulations governing access to resources as well as access to markets - some externally motivated, others long standing domestic requirements. The impacts of these and other regulations are further determined by the associated enforcement effort and effectiveness. Campaigns aimed at changing consumer behaviour, i.e. those directed at reducing demand for certain species or products, have a significant and often greater impact on trade patterns than do changes in trade controls. Changes in trade volumes and related livelihood impacts can also be entirely independent of any concerns related to the trade itself, e.g. as a response to changing fashion trends or economic conditions in countries of export or import. Nevertheless, it is possible to observe some general effects of increased trade controls on trade patterns, including modes of production. Shifts in the trade have consequent impacts on the livelihoods of collectors and traders as well as on the status of the target species.

Conservation-motivated trade controls assume that trade is or is likely to be a major factor causing the decline in a species.[28] However, many other factors may be equally or more important with respect to the conservation status of species in trade. Increased trade controls may be successful at halting or restricting the export of wild species, but will not necessarily address the root causes of decline with the result that their conservation impact may be limited. There are examples where increased trade controls have coincided with an increase in wild populations of species subject to harvest pressure, for example in the case of Vicuña. There are also examples, however, where this has not been the case, the most frequently cited of these being rhinos. Although it is possible to draw attention to the fact that some species have declined in the wild despite being listed in the CITES appendices, it is not similarly possible to know what the situation would have been without added international trade controls. Similarly, it is not possible in most cases to attribute improvements (or at least reduced rates of decline) in species' wild populations solely to international trade controls, as

[28]See https://www.traffic.org/site/assets/files/10044/wildlife-trade-trade-controls-and-rural-livelihoods.pdf, last visited on 12/09/23.

other factors, e.g. increased enforcement effort in range States or decreased demand, may also have played a role.

Bottom line

Furthermore, low welfare standards during trade and trafficking can lead to higher mortality rates, which further compounds existing conservation problems of decreasing species' population numbers. The mortality rate for some species, such as birds, is estimated to range from 30% to as high as 90% in the illegal trade. CITES crucially recognises that communities interact, understand and value animals in a unique manner, based on a variety of socio-economic, cultural, and aesthetic factors. These parties also take a different approach to animal welfare—perceptions, policies and practices are not universal. The same is true for NGOs and local people. Some call for welfare improvements, others for the closure of live animal markets or an end to all trade . Consequently, developing a more welfare-oriented conservation is fraught with challenges. While policy and legislative change requires time and can be difficult, there are more immediate practices in enforcement that could improve wildlife welfare. Foremost, the practice among government and enforcement stakeholders of holding confiscated wildlife in long-term captivity or euthanising them. While confinement and euthanasia are compatible with the policy of 'taking care' of wildlife, from species justice and legal proportionality perspectives, killing healthy animals is not a balanced approach

A Verdict on Preserving Organizational Autonomy: Central Council For Research In Ayurvedic Sciences V. Bikartan Das.

Anina Varghese*

Introduction

Retirement, traditionally seen as the golden period of life is associated with the age of 60 or 65 in many countries. However, the landscape of retirement is evolving rapidly, driven by changing demographics, economic challenges, and the desire for a more active and productive elderly population. This case is centred on a dispute arising from the enhancement of the retirement age for AYUSH doctors working under the Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha, and Homeopathy (AYUSH).

Central Council for Research in Ayurvedic Sciences v. Bikartan Das[1]is a civil leave petition filed by the Central Council for Research in Ayurvedic Sciences (CCRAS) against the Judgement and order of the Orissa High Court. The High Court's decision overturned the order of the Central Administrative Tribunal (CAT) and ruled that the respondent is entitled to an increase in retirement age from 60 to 65 years. This increase in retirement age is applicable to the AYUSH doctors who are employed under the Ministry of AYUSH.The division Bench comprising the Chief Justice of India, Dr. D.Y. Chandrachud, and J.B. Pardiwala, J. allowed the appeal and set aside the impugned order of the High Court.

The age of superannuation dilemma

On 27 September 2017, a decision was made by the Union Cabinet that would significantly impact the lives of AYUSHdoctors working under the Ministry of AYUSH and under the Central Government Health Schemes Hospitals (CGHS) across the nation. The Union Cabinet decreed that the age of superannuation for these dedicated doctors would be extended to the ripe age of 65 years. It was a monumental decision, one that promised hope and continuity in healthcare for countless patients. However, like any significant policy change, there were nuances to consider. The Cabinet's decision had a caveat, it would not apply to the

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[1]2023 SCC OnLine SC 996

autonomous bodies functioning under the Ministry of AYUSH. The detail would ultimately become the central point of contention in a legal battle that unfolded in the subsequent years.

The respondent here is a Research Assistant appointed by the Central Council for Research in Ayurvedic Sciences (CCRAS) on the 7th of October, 1985. On 22nd of March 2018, the respondent penned a representation addressed to the Director General of the Ministry of AYUSH, carrying within it a plea to extend his age of superannuation, not just by a few months, but a full five years, until the 30th of April 2023 instead of 30th April, 2018. But it was rejected on 4th April 2018, the CCRAS order stated that the respondent would retire on the date of 30th April 2018, as he would have reached the age of 60 years, the previous superannuation limit.

The legal battle unfolds

The respondent's quest for an extended retirement age led him to approach the Central Administrative Tribunal (CAT), Cuttack Bench, for relief. Nevertheless, the CAT refused to provide any temporary remedy, leading the respondent to request protection from the High Court. The High Court has granted the aforementioned protection, thereby permitting the respondent to remain in service beyond the date of April 30, 2018, until such time as the CAT resolves the first application.

Subsequently, the CAT ruled against the respondent, holding that he was not entitled to seek parity with AYUSH doctors concerning the retirement age. Dissatisfied with this decision, the respondent approached the High Court, leading to the central issue at hand.

The High Court's Ruling: A Matter of Contention

The High Court's judgment hinged on the nature of the respondent's work. While he had been appointed as a Researcher, it was noted that he also treated patients in Out-Patient Departments (OPD) and In-Patient Departments (IPD), similar to AYUSH doctors. Based on this premise, the High Court found that Clauses 34[2] and 35[3] of the bye-laws were applicable to the respondent and that he should be treated as an AYUSH doctor, despite his initial appointment as a Researcher. Consequently, the High Court set aside the CAT's decision.

[2]The rules governing the retirement of employees of the Government of India as amended from time to time or as desired by the Governing Body shall apply to the employees of the Central Council. Provided that an employee can be retained in service after prescribed age of superannuation if he continues to be physically fit and efficient and it is in the interest of the Central Council to retain him in service.
[3]The Fundamental and Supplementary Rules and General Financial Rules of Government of India as amended from time to time shall apply mutatis mutandis to employees of the Central Council.

Supreme Court's Verdict: Upholding Legal Precedence

The Supreme Court, in its decision, scrutinized the legal framework governing CCRAS and its employees. It noted that CCRAS operates as an autonomous body and its governing body is not obliged to align with the Ministry of AYUSH's decision regarding superannuation, especially when it has clarified that the extension of retirement age does not apply to autonomous bodies like CCRAS.

Preserving organizational autonomy

The decision rendered by the Supreme Court emphasized the independence of organizations in establishing their internal regulations, such as the retirement age. The court, while recognizing its function in preventing unreasonable policy decisions, emphasized that the ultimate power to determine superannuation age policies lies with the pertinent organizations.

The Court referred to the case of the *State ofMaharashtra v. Bhagwan*[4], emphasizing that employees of autonomous bodies cannot claim the same service benefits as government employees as a matter of right. Furthermore, it highlighted that statutory rules governing appointments to specific posts determine the age of superannuation, and even if job responsibilities are similar, they cannot alter the service conditions of an employee.

Criticizing the High Court's Approach

The Supreme Court expressed disappointment in the High Court's handling of the case. It noted that the High Court had granted interim relief to the respondent, extending his service beyond the age of 60 until the CAT's disposal of the original petition. The Court cautioned that such relief should be granted circumspectly, especially when prima facie evidence is lacking.The division bench of Chief Justice of India, D Y Chandrachud, and Justice J B Pardiwala observed that "the entire approach was incorrect" adding "We are a bit of disappointed to observe that the High Court dealt with the present litigation in a very casual manner".

The Court also criticized the High Court's decision to equate the respondent's age of superannuation with that of AYUSH doctors based on the similarity of duties performed. It emphasized that the age of superannuation is governed by statutory rules and other service conditions, not an individual's dedication to their job.The division bench expressed their disappointment saying, "We fail to understand how can the court fix the age of

[4](2022)4 SCC 193

superannuation of an employee saying that he is very much devoted towards his job. The age of superannuation is always governed by statutory rules and other service conditions."

Furthermore, the court also criticized the High Court's decision to grant the interim relief which extended the period of service beyond 60 years, till the disposal of the petition by the CAT. The court observed that the Court or Tribunal should use caution and deliberation when considering the grant of interim relief for the purpose of maintaining employment unless there is clear and unquestionable evidence presented.

The cardinal principles of extraordinary jurisdiction under Article 226: Writ of Certiorari

In this case, the Court outlined two cardinal principles that govern the exercise of extraordinary jurisdiction under Article 226 of the Constitution, particularly concerning the issuance of the writ of certiorari.

The first principle emphasizes that when granting a writ of certiorari, the High Court does not function as an Appellate Tribunal. It does not reevaluate or reexamine the evidence upon which the decision of the lower tribunal is based. Instead, it only sets aside orders that it deems to be without jurisdiction or erroneous. The writ of certiorari can be issued if an error of law is evident on the face of the record. This emphasizes that a writ of certiorari, being a high prerogative writ, should not be granted casually or on mere request.

The second cardinal principle acknowledges the discretionary nature of the remedy granted by Article 226. Even if an action or order challenged in a writ petition is found to be illegal and invalid, the High Court, while exercising its extraordinary jurisdiction, can choose not to overturn it if it serves the cause of substantial justice. This discretion allows the High Court to consider public interest and equity in its decision-making process, ensuring that legal principles are applied in a manner that aligns with the unique circumstances of each case. It underscores the idea that the High Court is not merely a court of appeal but a forum where law and equity are intertwined.

As explained by B.K. Mukherjee, J. In*T.C. Basappa's* case[5], the key principles mentioned include the non-appellate nature of certiorari, the scope of its supervisory role over inferior jurisdiction, and its application when a court acts without jurisdiction or in excess of it. The

[5]T.C. Basappa v. T. Nagappa and Another AIR 1954 SC 440.

Hari Vishnu Kamath case[6] further solidifies the principles outlined in T.C. Basappa, stating that certiorari is issued for correcting errors of jurisdiction and illegal exercise of jurisdiction, but it does not review factual findings made by the inferior court or tribunal.

In essence, these cardinal principles outlined by the Supreme Court emphasize that the writ of certiorari is a powerful tool used by the High Court to ensure that lower authorities act within their legal boundaries and do not violate principles of justice.

Conclusion

This decision has far-reaching implications for organizations across India. The Supreme Court sets a significant legal precedent, clarifying that autonomous bodies like CCRAS have the authority to determine the retirement age of their employees, which may differ from government decisions. It underscores the importance of adhering to statutory rules and regulations in matters of service conditions and superannuation, ultimately upholding the sanctity of the law.

The judgment appears to prioritize the statutory rules governing the CCRAS over the Union Cabinet's decision. The court's decision to emphasize Clause 34 of the Bye-Laws and Memorandum of Association of the CCRAS, which governs superannuation, underscores the principle that an autonomous body has the authority to determine its own retirement age, provided it aligns with its internal regulations.

One critical aspect of the judgment is the court's observation that the High Court, in granting interim relief to the respondent, may have acted too hastily. The court suggested that such relief should only be granted when there is prima facie evidence of unimpeachable character, as prolonging a public servant's service beyond the retirement age without a strong legal basis can lead to undue benefits and injustice to junior employees. This aspect highlights the court's commitment to maintaining the integrity of the retirement system while emphasizing the importance of evidence and due process.

Moreover, the judgment raises questions about the High Court's approach to the matter, criticizing it for making determinations about retirement age based on the nature of an employee's job rather than adhering to statutory rules and service conditions. The court's stance on this issue reflects its commitment to upholding legal frameworks over subjective interpretations based on the nature of work.

[6]Hari Vishnu Kamath v. Ahmad Ishaque and Others, AIR 1955 SC 233

In conclusion, the judgment underscores the importance of adhering to statutory rules and regulations in determining the retirement age of public servants, particularly in autonomous bodies. It highlights the need for careful consideration when granting interim relief in matters involving retirement age. While it may be a disappointment for the respondent, the decision seeks to maintain fairness, equity, and adherence to the law in the realm of public service and retirement.

The impact of this judgment is expected to have far-reaching implications for several industries and sectors, indicating a new era in which organizations will have increased autonomy in managing critical aspects related to their functioning and identity.

BOOK REVIEW

DRUGS, CRIME AND SOCIETY CANNABIS CRIMINOLOGY

By JOHANNES WHEELDON and JON HEIDT

(1st Edition 2023, Routledge)

Price Rs 3494

Akhila S T.*

"Drugs, Crime, and Society: Cannabis Criminology" authored by Johannes Wheeldon and Jon Heidt is a comprehensive exploration into the intricate relationship between cannabis, crime, and society. Through a multidisciplinary approach, the authors dissect the complex dynamics surrounding cannabis legalization, criminal justice policies, and their broader societal impacts. One of the book's notable strengths lies in its rigorous examination of empirical evidence and scholarly research, providing readers with a well-founded understanding of the subject matter. Wheeldon and Heidt navigate through historical, sociological, and criminological perspectives, offering insights into the evolution of cannabis laws and their implications for crime rates, law enforcement practices, and public health outcomes. Furthermore, the authors delve into the nuanced intersections of race, class, and gender within the cannabis criminal justice system, shedding light on the disproportionate impact of drug policies on marginalized communities.

By addressing these pressing social justice issues, "Drugs, Crime, and Society: Cannabis Criminology" contributes to a more nuanced understanding of the broader societal implications of drug prohibition and legalization. However, while the book provides a thorough analysis of the subject matter, some readers might find certain sections to be densely academic, requiring a strong familiarity with criminological theories and methodologies. Additionally, given the rapidly evolving landscape of cannabis laws and policies, the book's relevance may diminish over time without regular updates to reflect new developments in the field. In conclusion, "Drugs, Crime, and Society: Cannabis Criminology" offers a valuable resource for scholars, policymakers, and practitioners seeking to deepen their understanding of the intricate connections between cannabis, crime, and society. Despite its academic nature, the book succeeds in unpacking complex issues surrounding drug policy and criminal justice with clarity and depth.

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