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The social behaviour depends upon the behaviour of the people living in the society. Since human needs are varied, so the inter relations with various disciplines. It has impact on the administration of Justice System and governance. In order to explore the significance of interdisciplinary study, 'the Chanakya Law Review (CLR)' is being launched by the CIRF in IPHD of CNLU. This Journal will provide a platform to the academicians all over the world on the inter-disciplinary, cross-disciplinary and multi-disciplinary issues in Sciences, social sciences and humanities interface with laws. Keeping in view the needs and nature of the journal, the editorial board has been constituted. I express my gratitude to all esteemed members on the editorial board. It is an online journal for open access to all. The ISSN no. shall be obtained as per rule.

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CHANAKYA LAW REVIEW (CLR)

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Ensuring Right to Clean Environment through Public Interest Litigation in India: Some Reflections

Dr. Manoj Kumar[1]

Abstract

The concept of public interest litigation (PIL) has emerged as a very promising instrument to further the objectives laid down in the Constitution. It is "a unique phenomenon in the Indian constitutional jurisprudence that has no parallel in the world." This instrument helps in protection of the interest of oppressed or suppressed group of people whose voices have remained unheard in court of law due to their peculiar socio-economic conditions. In the adversarial justice system only an 'aggrieved' person has right to approach the court for redressal of grievances. This resulted in the denial of justice to many persons who due to poverty or social and economic depravity could not approach the court for redressal of their grievances. The Higher judiciary in India has realized this problem and has "opened its doors to public-spirited citizens and expanded the frontiers of fundamental rights". This all could happen only by relaxation of the traditional principle of Locus Standi. The liberalization of the principle of locus standi resulted in a newer form of litigation which became popular as "public interest litigation" or "social action litigation". This system has been proved more effective for dealing environmental matters as they are concerned with public rights and not of individual only. The Apex Court has further widened the scope of PIL by liberalizing the rule of standing to an extent that it has entertained "letters or petitions sent by any person or association through post complaining violation of any fundamental rights" under its epistolary jurisdiction and has treated them as writ petitions. Thus, in the light of this important concept of public interest litigation the present paper seeks to explore and describe as to how the higher judiciary in India has utilized this concept to evolve and enforce the right to clean environment as one of the fundamental rights of the citizens which is the greatest social justice.

Keywords: Environment, Public Interest Litigation, Judicial activism, Locus standi, Constitution.

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Introduction

The constitutional provisions contained in the Preamble, the Fundamental Rights and the Directive Principles of State Policy have been interpreted in distinguished manner to shape the legal system in India. The concept of public interest litigation (PIL) has emerged as a very promising instrument to further the objectives laid down therein and has "opened a new chapter in the Indian judicial system."[2] It is "a unique phenomenon in the Indian constitutional jurisprudence that has no parallel in the world"[3] and "has also been proved as a vehicle for fixing the judicial lenses on matters affecting public health and humanity."[4] This instrument helps in protection of the interest of oppressed or suppressed group of people whose voices have remained unheard in court of law due to their peculiar socio-economic conditions. In the adversarial justice system only an 'aggrieved' person has right to approach the court for redressal of grievances. This resulted in the denial of justice to many persons who due to poverty or social and economic depravity could not approach the court for redressal of their grievances. The Higher judiciary in India has realized this problem and has "opened its doors to public-spirited citizens and expanded the frontiers of fundamental rights"[5] and even "rewritten parts of the Constitution."[6] This all could happen only by relaxation of the traditional principle of *Locus Standi.*

The liberalization of the principle of *locus standi* resulted in a newer form of litigation which became popular as "public interest litigation" or "social action litigation." This system has been proved more effective for dealing environmental matters as they are concerned with public rights and not of individual only. The Apex Court has further widened the scope of PIL by liberalizing the rule of standing to an extent that it has entertained "letters or petitions sent by any person or association through post complaining violation of any fundamental rights"[7] under its epistolary jurisdiction and has treated them as writ petitions under article 32 of the Constitution. However, in *Chhetriya Pardushan Mukti Sangharsh Samiti* v. *State of U.P.,*[8] the Apex Court laid down "limits of PIL in environmental cases" and observed that "this can be done only by any person interested genuinely in the protection of the society or community."

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[2] Dharmendra S. Sengar, *Environmental Law* 129 (Prentice Hall India Learning Pvt. Ltd., Delhi, 2009).
[3] Parmanand Singh, "Promises and Perils of Public Interest Litigation in Protecting the Rights of the Poor and the Oppressed", 27 *Delhi Law Review* 8 at 9 (2005).
[4] D.S. Sengar, "Public Access to Environmental Justice: Judicial Activism and Restraint" in D. Banerjea, A. Subramanyam *et. al*., *Judicial Activism: Dimensions and Directions* 310 (Vikas Publishing House, Noida, 2002).
[5] Mostly Art. 21 has been invoked by the petitioner. The Constitution of India, 1950, Art. 21: "No person shall be deprived of his life or personal liberty except according to procedure established by law."
[6] P.N. Bhagwati, "Judicial Activism and Public Interest Litigation" 23 *Columbia Journal of Transborder Law* 561 at 567 (1985).
[7] This has been termed as epistolary jurisdiction of the Supreme Court.
[8] AIR 1990 SC 2060.

Thus, in the light of this important concept of public interest litigation the present paper seeks to explore and describe as to how the higher judiciary in India has utilized this concept to evolve and enforce the right to clean environment as one of the fundamental rights of the citizens which is the greatest social justice.

Evolution, Meaning and Concept of Public Interest Litigation (PIL)

The concept of PIL in India was evolved and developed by some activist judges of the Apex Court notable among them are Justice Krishna Iyer and Justice P. N. Bhagwati.[9] They realized that certain deficiencies in our legal system is becoming a hurdle in providing justice to poor and disadvantaged persons. In pursuance of this, they started disregarding the strict rules of procedure related to "standing before the court" and liberalized the rule of *locus standi* to "provide access to justice to the poor and disadvantaged sections of the society."

In *S.P. Gupta* v. *Union of India,*[10] Justice P.N. Bhagwati evolved and developed public interest jurisdiction to provide right of standing to a person for espousing the causes of poor and disadvantaged persons who "by virtue of their socially or economically disadvantaged position are unable to approach the court for relief" and observed that "Where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of person by reason of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the court for relief, any member of public can maintain an application for appropriate direction, order or writ in the High Court under Article 226 and in case any breach of fundamental rights of such persons or determinate class of persons, in this court under Article 32 seeking judicial redress for the legal wrong or legal injury caused to such person or determinate class of persons."

In *People's Union for Democratic Rights* case,[11] the Supreme Court observed that "Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest, which demands the violation of constitutional or legal

[9] "From an international perspective, the evolution of public interest litigation is an American contribution. Many trace beginnings to the landmark desegregation decisions of the 1955 when the US Supreme Court required schools in Southern American States to end racial segregation." *See*, Brown v. Board of Education, (Brown II) 349 US 294, 299 (1955).

[10] 1981 (Supp) SCC 87.

[11] AIR 1982 SC 1473.

rights of large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed. That would be destructive of rule of law, which forms one of the essential elements of public interest in any democratic form of government. The rule of law does not mean that the protection of the law must be available to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the *status quo* under the guise of enforcement of their civil and political rights and the rule of law is meant for them also, though today it exists only on paper and not in reality."[12]

The court opined that "any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provisions of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provisions."[13] The court also opined that "the state or public authority which is arrayed as a respondent in public interest litigation should in fact, welcome it, as it would give it an opportunity to right a wrong or to redress an injustice done to the poor and weaker sections of the community whose welfare is and must be the prime concern of the state and public authorities."[14]

Further, in *Bandhua Mukti Morcha* v. *Union of India,*[15] the Apex Court observed that "public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of the Constitution. The government and its officers must welcome PIL, because it would provide them an occasion to examine whether the poor and downtrodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the community and whether social and economic justice has become a meaningful reality for them or it has remained merely a teasing illusion and a promise of unreality. So that in case the complaint in PIL is found to be true, they can in discharge of their constitutional obligation root out exploitation and injustice and insure to the weaker sections their rights and entitlements. When the court entertains a PIL, it does not do so in caviling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but

[12] *Id.* at 1476.
[13] *Id.* at 1483.
[14] *Id.* at 1477.
[15] AIR 1984 SC 802.

its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive, framed for the benefits of have-nots and the handicapped and to protect them against violation of their basic human rights which is also the constitutional obligation of the executives. The court is thus, merely assisting in the realization of the constitutional objectives."[16]

In *Janata Dal* v. *H. S. Chowdhury*,[17] the Supreme Court had tried to define PIL and stated that "Lexically the expression PIL means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected." Therefore, PIL means "legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected."[18]

Since 1980s the concept of PIL has brought revolutionary change in ensuring "social justice to the people." In contrast to conventional litigation which involves two or more private individuals, a PIL relates to "grievance against violation of basic human rights of the poor and helpless or about the content or conduct of government policy. The petitioner seeks to champion a public cause for the benefit of the society."

The Jurisdictional Basis of PIL

India has a rich heritage of measures related to environment protection. Right from ancient times till modern time considerable attention has been paid towards safeguarding and protecting the environment. Legislature as well as higher judiciary in India have played very important roles in this regard. There are many legislative enactments which deal with different aspects of environment. However, the higher judiciary in India to a great extent has shaped the landscape of Indian environmental jurisprudence through the exercise of writ jurisdiction. The concept of "Judicial activism" and "public interest litigation" have their origin in the "writ jurisdiction of the Supreme Court and High Courts" which have proved to be potent instruments to bring change in the processual jurisdiction. Article 32 and Article 226 of the constitution vest a right in the citizens to invoke the writ jurisdiction of the Supreme Court and High Courts through PIL.

One distinguished feature of the Indian constitution is that the citizens have been vested with

[16] *Id.* at 811.
[17] AIR 1993 SC 892.
[18] P. M. Baxi, *Public Interest Litigation*, 3 (Ashoka Law House, New Delhi, 2nd edition, 2004).

the "right to move the Supreme Court for the enforcement of fundamental rights".[19] The Apex Court has been granted writ jurisdiction under article 32 of the constitution. Similarly, the High Courts have been vested with writ jurisdiction under article 226 of the constitution. In exercise of writ jurisdiction the Supreme Court and High Courts can "issue any direction, order or writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* whichever is appropriate."[20] In respect of writ jurisdiction High Courts are at advantageous position as their writ jurisdiction is wider than that of Supreme Court as "one can move Supreme Court only for the enforcement of fundamental rights whereas the writ jurisdiction of the High Court can be invoked for enforcement of fundamental rights or any other purpose as the case may be." However, the law declared by the Supreme Court is law of the land and binding on all courts in India.

Right to Clean Environment: An Offshoot of Judicial Interpretation

The expressions such as "the right to life", "personal liberty" and "procedure established by law" enshrined in Article 21 of the Constitution were not given dynamic interpretation and were in dullness state till the end of the infamous "national emergency" in the mid-seventies.[21] The famous case of *Maneka Gandhi* v. *Union of India*[22] sounded a conceptual revolution and held that "the right in Article 21 can be infringed only by a procedure, just, fair and reasonable." It was held that the provision not only generates processual justice but also expands substantive "right to life". The right does not mean the "mere right to have animal existence but the right to live with human dignity." However, the court at that time seemed to be reluctant in holding expressly that these new dimensions also embrace "right to health, hygienic conditions, open space and natural environment" but a close examination of the facts and decisions of a catena of cases involving environmental questions reveals that the court was heading towards declaring that "the concept of right to life in Article 21 of the Constitution also includes right to healthy environment."[23] In *Rural Litigation Entitlement Kendra* v. *State of U.P.,*[24] it was contended that the indiscriminate quarrying of limestone had resulted into ecological imbalance

[19] The Constitution of India, 1950, Article 32(1). "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed."
[20] *Id*. Article 32(2). "The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."
[21] P. Leelakrishnan, "Judicial Activism and Environmental Law" in D. Banerjea, A. Subramanyam *et. al.*, *Judicial Activism: Dimentions and Directions* 259 (Vikas Publishing House, Noida, 2002).
[22] AIR 1978 SC 597.
[23] P. Leelakrishnan, "Judicial Activism and Environmental Law" in D. Banerjea, A. Subramanyam *et. al.*, *Judicial Activism: Dimentions and Directions* 260 (Vikas Publishing House, Noida, 2002).
[24] AIR 1985 SC 652.

in the Doon Valley. The court took a serious note of it and ordered closing of mining operations. The court considered the "hardship caused to the lessees as a price that has to be paid for protecting and safeguarding the right of the people to live in a healthy environment with minimal disturbance to ecological balance." The Apex Court evolved the "right of people to live in a healthy environment" in this case but the source of this right was not discussed or mentioned by the court.

Later on in many *M.C. Mehta* cases,[25] the Apex Court given its approval to the right to healthy environment, however, the Court did not expressly declare it. In *Sriram Gas Leak case,*[26] the Supreme Court said that "the case raised some seminal questions concerning the scope and ambit of Articles 21 and 32 of the Constitution". The Court while doing so was indeed referring to "the concept of right to life in Article 21 and the process of vindication of that right in Article 32."[27] In *M.C. Mehta* v. *Union of India,*[28] the court deliberated on "a new jurisprudence of liability to the victims of pollution caused by an industry engaged in hazardous and inherently dangerous activity." However, the Court again did not clearly declare "the right to a clean and healthy environment" as part of Article 21. In *M.C. Mehta* v. *Union of India,*[29] the court observed that "the pollution of the river Ganga is affecting the life and health of the people and also the ecology of the Indo- Gangatic plain." The court further went on to "issue directions to the tanneries to set up effluent treatment plants within six months, failing which, the tanneries would be closed." The Court noted that "though the closure of tanneries might result in unemployment and loss of revenue, life, health and ecology had greater importance." In *M.C. Mehta* v. *Union of India,*[30] the court directed the Mahapalika "to get the dairies shifted to a place outside the city, to lay sewerage line where the same is not constructed as also to increase the size of the existing sewers in labor colonies, to construct public latrines and urinals for the use of poor people free of charge, to ensure with the help of police that dead bodies or half burnt bodies are not thrown into the Ganga and to take action against the industries responsible for the pollution."

The Supreme Court until now did not declare that "the right to a clean and healthy environment is part of rights under Article 21." However, in all these cases the court entertained the matters under Article 32 of the Constitution which is used "to enforce fundamental rights for the

[25] AIR 1987 SC 965, AIR 1987 SC 982, AIR 1987 SC 1086, AIR 1988 SC 1037, AIR 1988 SC 1115.
[26] *M. C. Mehta* v. *Union of India*, AIR 1987 SC 965.
[27] P. Leelakrishnan, *Environmental Law in India* 114 (LexisNexis, New Delhi, 2000).
[28] AIR 1987 SC 1086.
[29] AIR 1988 SC 1037.
[30] AIR 1988 SC 1115.

purpose of protecting the lives of the people, their health and ecology." The pronouncements of the Apex Court were indirectly approving that "the right to life under Article 21 included the right to clean and healthy environment."

In late 1980s, the High Courts went ahead in openly recognizing that "the right to a clean and healthy environment is an integral part of the right to life." The Andhra Pradesh High Court in *T. Damodar Rao* v. *S.O. Municipal Corporation, Hyderabad,*[31] observed that "acquisition for housing colony of a land earmarked under development plan for recreational purposes was contrary to the right to enjoy life guaranteed by the Constitution." The court further held that "… environmental law has succeeded in unshackling man's right to life and personal liberty from the clutches of common law theory of individual ownership. Examining the matter from the constitutional point of view, it would be reasonable to hold that the enjoyment of life and its attainment and fulfillment guaranteed by Article 21 of the Constitution embraces the protection and preservation of nature's gifts without which the life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Article 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoliation should also be regarded as amounting to violation of Article 21 of the Constitution."[32] In *Attakoya Thangal* v. *Union of India,*[33] the Kerala High Court noted that "… the administrative agencies cannot be permitted to function in such a manner as to make inroads into the fundamental right under Article 21. The right to life is much more than the right to animal existence and its attributes are manifold, as life itself. A prioritization of human needs and a new value system has been recognized in these areas. The right to sweet water and the right to free air are attributes of right to life, for, these are the basic elements, which sustain life itself." The Rajasthan High Court in *L. K. Koolwal* v. *State of Rajasthan,*[34] held that the provision contained in Article 51 A (g) has been referred to as a fundamental duty but it "gives citizens the right to approach the court for a direction to the municipal authorities to clean the city as maintenance of health, sanitation and environment falls within Article 21." Thereby the court enabled the citizens to take affirmative action for enforcement of fundamental rights. The Karnataka High Court in *V. Lakshmipathy* v. *State of Karnataka*[35] prevented conversion of residential area into an industrial site and held that "entitlement to a clean environment is one of the recognized basic human rights and human

[31] AIR 1987 A.P. 171.
[32] *Id.* at 181.
[33] 1990 (1) K.L.T. 580.
[34] AIR 1988 Raj. 2.
[35] AIR 1992 Kant. 57.

rights jurisprudence cannot be permitted to be thwarted by *status quoism* on the basis of unfounded apprehensions." The court further observed that "the right to life inherent in Article 21 of the Constitution of India does not fall short of requirement of quality of life which is possible only in an environment of quality. Where, on account of human agencies, the quality of air and quality of environment are threatened or affected, the court would not hesitate to use its innovative power… to enforce and safeguard the right to life to promote public interest."[36]

In *Free Legal Aid Cell* v. *Government of NCT of Delhi,*[37] the Delhi High Court took note of "challenges of noise pollution during festivals and marriages." The court observed that "the effect of noise on health has not yet received full attention of our judiciary, which it deserves. Pollution being wrongful contamination of the environment which causes mental injury to the right of an individual, noise can well be regarded as pollutant because it contaminates environment, causes nuisance and affects the health of a person and would therefore, offend Article 21 if it exceeds reasonable limits." In *Sayeed Masood Ali* v. *State of M.P.,*[38] the Madhya Pradesh High Court opined that "life is a glorious gift from god…. Great achievements and accomplishments in life are possible only if one is permitted to lead an acceptably healthy life…. The term 'life' as employed under Article 21 of the Constitution does never mean a bare animal existence but conveys living of life with utmost nobleness and human dignity which is an ideal worth fighting for and worth dying for…. Right to live in its ambit includes right to health and health gives a serene and halcyon signification to life…. The health of an individual enhances the quality of the collective and in a welfare state it is bounden obligation of the state to see that people remain in a healthy society."

The Andhra Pradesh High Court in *M.P. Ram Babu* v. *The District Forest Officer,*[39] while refuting the contention that "any sort of deprivation on the right to trade in pawn farming would affect the right to life under Article 21 thereby violating the means of livelihood of many farmers", held that "unless the trade or profession is environment friendly, such trade had no right over the societal right to clean and healthy environment." The court therefore gave more weightage to "right to clean and healthy environment" over "right to livelihood and right to trade." The Madras High Court in *M. K. Janardhan* v. *The District Collector, Toruvallur,*[40] held that "the enjoyment of life and its attainment and fulfillment guaranteed by Article 21 of the Constitution embraces the protection and preservation of nature's gifts without which life

[36] *Id.* at 70.
[37] AIR 2001 Del. 455.
[38] AIR 2001 A.P. 220.
[39] AIR 2002 A.P. 256.
[40] 2002-1-LW. 262.

cannot be enjoyed and environmental degradation violates the fundamental right to life." Interestingly, the Supreme Court in *M. K. Sharma* v. *Bharat Electricity Ltd.,*[41] laid down "the guidelines for the protection of workers health" and held that "living in polluted environment endangers the life of human beings, animals and plants." The process continued further and the Supreme Court in *Ganga Water Pollution* case,[42] while referring to "the plea of financial inability to set up treatment plant" opined that "just like an industry which cannot pay minimum wages to its workers cannot be allowed to exist, a tannery which cannot setup a primary treatment plant cannot be permitted to be in existence for the adverse effect on the public at large." Thus, the court recognized "the right to a clean and hygienic environment as a part of Article 21 of the Constitution." Further, *Chhetriya Pardushan Mukti Sangarsh Samiti* v. *State of U.P.,*[43] is perhaps the first case where the court expressly held "that right to environment is contemplated in Article 21 of the Constitution." Sabyasachi Mukerji, CJ opined that "every citizen has a fundamental right to have the enjoyment of quality of life and living as contemplated by Article 21 of the Constitution of India. Anything, which endangers or impairs that quality of life, is entitled to take recourse to Article 32 of the Constitution of India." In *Subhash Kumar* v. *State of Bihar,*[44] the Apex Court held that "right to life enshrined in Article 21 means right to full enjoyment of life with pollution free water and air. If anything endangers or impairs the quality of life, an affected person or a person genuinely interested in the protection of society would have recourse to Article 32." However, in both these cases the Apex Court could not apply its pronouncements to the facts since the allegations of environmental violations were found to be false and tainted with bias. In *Bangalore Medical Trust* v. *B.S. Muddappa,*[45] the Apex Court confronted with a question as to "whether an open space laid down as such by a development scheme can be leased out for private nursing home by the very development authority which had formulated the scheme." The court observed that "the conversion is contrary to the constitutional mandate for the protection of individual freedom and dignity and attainments of a quality of life which a healthy and clean environment guarantees." The court further observed that "protection of environment, open space for recreation and fresh air, play grounds for children… are matters of great public concern and of vital interest to be taken care of in a development scheme… the public interest in the reservation and preservation of open spaces for parks and play grounds cannot be sacrificed by leasing or

[41] AIR 1987 SC 1792, 1793.
[42] AIR 1988 SC 1037.
[43] AIR 1990 SC 2060 at 2062.
[44] AIR 1991 SC 420, 424.
[45] (1991) 4 SCC 54.

selling such sites to provide persons for conversion to other uses. Any such act… would be in direct conflict with the constitutional mandate to ensure that any state action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of quality of life which makes the guaranteed right a reality for all citizens." Significantly, with this pronouncement the Supreme Court widened the scope of affirmative action by holding that the right to life generates and demands such action to protect and preserve various dimensions of a clean and hygienic environment.

In *B.L. Wadhera* v. *Union of India,*[46] the Apex Court while referring to *Municipal Council Ratlam* v. *Vardichand,*[47] observed that "residents have constitutional as well as statutory right to live in a clean city and authorities concerned have a mandatory duty to collect and dispose of the garbage or waste generated from various sources in the city. Non- availability of funds, inadequacy or inefficiency of staff, insufficiency of machinery etc. cannot be pleaded as grounds for non- performance of their statutory obligations." Also, in *Vellore Citizen Welfare Forum* v. *Union of India,*[48] the Apex Court opined that "the constitutional and statutory provisions protect a person's right to fresh air, clean water and pollution free environment, but the source of the right is the inalienable common law right of clean environment… Our legal system having been founded on the British Common Law, the right of a person to pollution free environment is a part of basic jurisprudence of the land." The notable case of *Indian Council for Enviro- Legal Action* v. *Union of India*[49] shows that the sludge remaining as lethal waste years after closure of chemical industries cause immense suffering to the whole village due to spread of disease, death and disaster. Imposing absolute liability on the errant industries and directing the authorities to carry out their statutory duties, the Supreme Court observed in a very categorical sense that "if this court finds that the said authorities have not taken the action required by them by law and that their inaction is jeopardizing the right to life of the citizens of this country, or of any section thereof, it is the duty of this court to intervene…."

In *Andhra Pradesh Pollution Control Board* v. *M.V. Nayudu,*[50] the Supreme Court gave emphasis on the importance of environmental aspects of right to life under Article 21 and observed that "environmental concerns arising in the Supreme Court under Article 32 or under Article 136 or under Article 226 in the High Courts are of equal importance as human rights concerns. In fact, both are to be traced to Article 21 which deals with fundamental right to life

[46] (1996) 2 SCC 594.
[47] (1980) 4 SCC 162.
[48] AIR 1996 SC 2715.
[49] AIR 1996 SC 1446.
[50] (1999) 2 SCC 718.

and liberty." It was further observed that "while environmental aspects concern 'life', human rights aspect concern 'liberty'. In our view, in the context of emerging jurisprudence relating to environmental matters, as in the case of matters relating to human rights, it is the duty of this court to render justice by taking all aspects into consideration." Further the Apex Court in *T.N. Godavarman Thirumalpad* v. *Union of India,*[51] observed that "the right to life guaranteed in Article 21 of the Constitution of India includes a right to an environment adequate for health and well- being." In *Ramji Patel* v. *Nagrik Upbhokta Marg Darshak Manch,*[52] the Apex Court emphasized on the "nexus between the protection of environment and Article 21 of the Constitution" and held that "any disturbance of basic environmental elements, namely, air, water and soil, which are necessary for life, would be hazardous to life within the meaning of article 21 of the Constitution." In *State of M.P.* v. *Kedia Leather and Liquor Ltd.,*[53] the Apex Court observed that "environmental, ecological, air and water pollution amount to violation of the right to life assured by Article 21 of the Constitution of India. Hygienic environment is an integral facet of healthy life. Right to live with human dignity becomes illusory in the absence of humane and healthy environment."

The courts have slowly but steadily expanded the "concept of quality of life and living" and correlated the same to different facets of environment. In launching the "right to clean and healthy environment", the High Courts took an early plunge and the Supreme Court later on widened the horizons of environmental protection. The courts based the decisions mainly on Article 21, though sometimes they have also relied on "fundamental rights", "directive principles of state policy" and "fundamental duties". Environment being a compendium of many things, biotic as well as abiotic, the term "person" used in Article 21 may possibly be construed in future widely including other beings too. Justice Douglas of the United States Supreme Court said "even inanimate objects may also be considered as invisible parties in environmental litigations." The *sludge* case is an illustration to this aspect of the sufferings of a village, its soil, irrigation canals, wells, cattle and trees and about the untold miseries they had suffered from the accumulated poisonous waste remaining for long. When written law is found to be weak or agencies imposed with duties are found lethargic, judicial interpretation reaches its zenith with the support of the right to quality of life against environmental hazards.

[51] (2002) 10 SCC 606.
[52] (2000) 3 SCC 29.
[53] (2003) 7 SCC 389.

Conclusion

The higher judiciary in India has done a commendable job in protecting and safeguarding the environment. There are many landmark judgments delivered in catena of cases where the jurisdiction of courts was invoked through PIL. The judiciary has recognized PIL as a constitutional obligation on courts. Public spirited persons have approached the Supreme Court and High Courts under their writ jurisdiction and their petitions have been entertained by liberalizing the rule of *locus standi* and they have been encouraged to espouse various public causes including environmental. The Apex Court has accepted informal information under its epistolary jurisdiction and provided with remedies. The time has now come when there is a need to bring the environmental cases before the lower judiciary too, with options to approach the appellate courts if it fails to deliver environmental justice.

PIL is a welcome step as it provides opportunities to the courts to examine and focus lenses on environmental issues affecting public health and sustainable development. PIL in India has given new dimensions to the concept of *locus standi* and thus, revolutionized the concept and procedure to access environmental justice. It is also true that Indian courts have provided access to environmental justice through the use of PIL in many cases, but there are also limitations on the part of the judiciary.

It was only with the advent of PIL and relaxation of *locus standi* principle that the environment became the core concern of public- spirited person to move forward for the protection of environment. The courts have played a great role in this regard and have brought several unarticulated rights into the domain of fundamental rights through liberal interpretation. The enforcement of environmental rights in India has been basically due to the unprecedented 'judicial activism' in environment conservation.

It is very important to note that one important aspect of PIL is that it has been instrumental in the evolution and development of new norms and principles and doctrines to prevent environmental pollution and degradation. The courts while interpreting the environmental rights in Article 21 of the Constitution have also made reference of the provisions of Directive Principles of State Policy and Fundamental Duties to remind the state as well as citizens of their duties and responsibilities.

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Balancing the Scales: Judicial Activism vs Power of Legislature

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Abstract

This article explores the dynamic interplay among the three branches of government in India and their evolving roles in shaping the country's democracy. It begins by highlighting the foundational principles of the Indian Constitution, emphasizing the importance of the basic structure doctrine, separation of powers, and judicial review. The essay traces the historical development of judicial activism in India, showing how the judiciary has stepped in to address issues when the executive and legislature falter.

The article also discusses landmark cases, including Kesavananda Bharati Case, which limited the power of Parliament to amend the Constitution, and the emergence of Public Interest Litigation (PIL) as a powerful tool for social justice. It also touches upon instances of judicial overreach and the need for a balanced approach.

The concepts of judicial appointments, activism and overreach are explored in depth and substantiated with relevant case laws. The essay underscores the importance of transparency and accountability in the judiciary while acknowledging the need for a comprehensive dialogue between the branches of government. Ultimately, exploring strategies for achieving an optimal balance among governmental organs forms the objective of the essay. It calls for a thoughtful approach to reforms in judicial appointments and a commitment to upholding democratic principles.

Keywords: Doctrine of Basic structure, Judicial Overreach, Transparency, Judicial Review, Judicial activism.

Introduction

"*The basic structure or the philosophy of our constitution is premised on the supremacy of the constitution, rule of law, separation of powers, judicial review, secularism, federalism, freedom and the dignity of the individual and the unity and integrity of the nation*"- CJI D.Y. Chandrachud, *on Basic structure*. Nani Palkhiwala Memorial Lecture, Jan'23, Mumbai.

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The above statement was given by Hon'ble CJI, 10 days after the comment of Hon'ble Vice President *Sh. J. Dhankar* wherein he questioned the validity of basic structure. The Vice President had expressed objection over the cap on power of the legislature to amend the Constitution. Thereafter a fresh debate has been ignited on the validity of basic structure. The Legislature which naturally assumes the role of executive has been tussling with Judiciary on the other end of rope. The same can be seen with the recent comments of the Law minister *Sh. Kiren Rejiju* questioning sole control of judges over judicial appointments. The recent judgement in *Anoop Baranwal v UOI*[56] saw judicial directive to appoint a Leader of Opposition (Lok Sabha) and CJI in the board of selectors for Chief Election Commissioner. These actions are being popularly perceived as another confrontation between the organs of State.

On completing half a century since its officiation it's only apt that the landmark judgement (*Kesavananda Bharati V. State of Kerala, 1973*)[57] and its fruits are brought back into public scrutiny. After all, the solution to present problems can be solved by revisiting the past but not reveling in it. As subjects of extensively written Constitution, vibrant politics and powerful judiciary we get to re-interpret and re-model original provisions governing us.

Background

Fundamental rights under part III of the Indian Constitution are granted against the state as mentioned under article 12 of the constitution which mandates the state to honour and enforce the fundamental rights. Article 13 also incorporates judicial review implicitly and is considered part of the basic structure of the constitution. Judicial review was first identified in *Marbury V. Madison*,[58] 1803 USA and first mentioned in India in *Kesavananda Bharati case* where it was held by the court that it is the obligation of the judiciary to protect fundamental rights of citizens when the executive fails to do the same. The Constitution obliges the judiciary, legislature and executive equally to uphold the spirit of the constitution. Judiciary is the guardian and protector of citizens and such power is conferred under article 32 to Supreme Court and 226 to High courts of the constitution. The judiciary cannot let the executive make the Constitution a tool to fulfil its agendas. The Constitution was made supreme law of the land by the founding fathers of the constitution. All the three organs derive their powers from the Constitution and the Court is empowered with interpreting the Constitution.

In *AK Gopalan's case 1950*[59], the Court followed a narrow perspective in interpreting

[56] Anoop Baranwal vs Union of India 2023 (SC) 155
[57] Kesavananda Bharati vs State of Kerala (1973) 4 SCC 225
[58] Marbury v. Madison, 5 U.S. 137
[59] A.K. Gopalan v. State of Madras, AIR 1950 SC 27

procedures established by law and refused to infuse principles of natural justice. The same was reversed after two decades in *Bank Nationalization* cases[60] and *Hardhan Saha's case*,[61] where the court interpreted the constitutionality of preventive detention with reference to article 19. In *Maneka Gandhi vs Union of India*,[62] the right to personal liberty was considered part of the right to life under article 21.

The changing perspective of the Court can be seen in dissenting judgements of *Sajjan Singh*[63] and *Golaknath*[64] cases. In *Sajjan Singh*, it was held to be parliament's exclusive power to amend any part of constitution under article 368, which was reversed in the Golaknath case stating only procedure to amend is present in article 368 and no power to amend the constitution is conferred. It was finally settled in the landmark case *Kesavananda Bharati* that parliament's power to amend the Constitution was not unlimited and basic structure cannot be tampered with. Some of the judges put forward a few basic features by way of illustration. These included supremacy of the Constitution, democratic republican form of government, secular character of the Constitution, separation of powers among the legislature, the executive and judiciary, the federal character of the Constitution, rule of law, equality of status and of opportunity. The doctrine led to the landmark case which created history and imposition of emergency.

In *Indira Nehru Gandhi vs. Raj Narain*[65] the Supreme Court declared the Constitution (39th Amendment) Act, 1975[66] void on the ground of violation of basic structure. In this case the High Court of Allahabad declared that the amendment was ultra vires the constituent power and the election of Smt. Indira Gandhi to the Parliament as illegal.

Subsequently, power of judicial review was declared as a basic feature of the Constitution.

Judicial Activism

Basic structure doctrine gave birth to judicial activism. Judicial activism is a tool in the hands of the judiciary to deliver justice when executive and legislature lapses on their part of the job. In this context, the former Chief Justice of India A. M. Ahmadi, has rightly said;

"In recent years, as the incumbents of Parliament have become less representative of the will of the people, there has been a growing sense of public frustration with the democratic process.

[60] Rustom Cavasjee Cooper vs Union Of India 1970 AIR 564
[61] Haradhan Saha & Another vs The State Of West Bengal 1974 AIR 2154
[62] Maneka Gandhi v. Union of India, AIR 1978 SC 597
[63] Sajjan Singh vs State Of Rajasthan 1965 AIR 845
[64] Golaknath v. State Of Punjab 1967 AIR 1643
[65] Indira Nehru Gandhi vs Raj Narain (1975) AIR 865
[66] The 39th CAA placed the election of the President, the Vice President, the Prime Minister and the Speaker of the Lok Sabha beyond the scrutiny of the Indian courts.

This is the reason why the Supreme Court had to expand its jurisdiction by, at times, issuing novel directions to the executive; something it would never have resorted to had the other two democratic institutions functioned in an effective manner."

To others it is a fruit of basic structure, and the constitution is a living document giving birth to new concepts with the need of time. Judicial activism is the way to provide distributive justice. It is guided by theories of vacuum filling and social wants. It has filled the vacuum left by executive and legislature by way of issuing guidelines as pronounced in *Madhav Hoskot'*s case[67] by providing free legal service to the poor and needy as an integral part of the 'reasonable, fair and just procedure,' and making speedy trial as an integral part of article 21 in *Hussainara Khatoon'*s case.[68] In *Sheela Barse v. State of Maharashtra*,[69] the court provided safeguards for arrested people and right to live with human dignity, free from exploitation was included under article 21 in *Bandhua Mukti Morcha* case.[70]

Public Interest Litigation (PIL) is another instrument for judicial review introduced by Justice Bhagwati and Justice Krishna Iyer in Indian Judiciary. The first PIL was filed in *Hussainara Khatoon's* case in 1979. The concept of *locus standi* was liberalized to make courts more accessible. PILs have changed the landscape of Indian polity by landmark judgements like banning triple talaq, opening doors for women in Sabarimala temple and the Haji Ali shrines, legalised consensual homosexual relations, legalised passive euthanasia, and many more. The objectives of our constitution to reach socio-economic justice are enabled by Judicial Activism. Judicial law making is interpretative, generally governed by common sense, practicability and the need to resolve disputes or grant immediate relief to the victim. The Court generally does not issue directions to the executive or judiciary to enact laws or exercise their powers in a certain manner. This form of law-making cannot be conceived as ideal but is corollary in efficient governance.

In *Vineet Narain vs. Union of India*,[71] the Supreme Court, after taking into account a large number of decisions in which the Court had laid down guidelines and issued binding directions, observed that it is now "a well settled practice which has taken firm roots in our constitutional jurisprudence". The court further stated that "this exercise is essential to fill the void in the absence of suitable legislation to cover the field." The Court went on to state that:

"it is the duty of the executive to fill the vacuum by executive orders because its field is

[67] Madhav Hayawadanrao Hoskot vs State Of Maharashtra 1978 AIR 1548
[68] Hussainara Khatoon & Ors vs Home Secretary, State Of Bihar 1979 AIR 136
[69] Sheela Barse vs State Of Maharashtra 1983 AIR 378
[70] Bandhua Mukti Morcha vs Union Of India & Others 1984 AIR 802
[71] Vineet Narain v. Union of India 1997 [1 SCC 226]

coterminous with that of the legislature, and where there is inaction even by the executive, for whatever reason, the judiciary must step in to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field."

One of the most significant judgments delivered on this concept was *Vishaka V State of Rajasthan 1997*[72]. The issue was regarding sexual harassment at work place where the Court found it necessary to lay down a set of binding rules and guidelines consistent with fundamental rights enshrined in the Constitution 14, 15, 19(1) (g) and 21. This landmark judgement later formed backbone of the POSH [Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal)] Act 2013.

In *L. Chandra Kumar vs. Union of India*,[73] 1980 the Court declared: "that the power of judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure". The Court struck down clause (2) (d) of Article 323-A and clause (3) (d) of Article 323-B which excluded the jurisdiction of the High Courts to review the decisions of the Tribunals constituted under these Articles.

Legal Scrutiny of Sankal Chand Case

In *UOI V Sankal Chand,*[74] in 1977 the arbitrary transfer of sixteen HC judges by the Government was challenged. The then Chief Justice of Gujarat HC had filed a writ challenging his transfer on the grounds that neither the CJI (effective consultation) nor he was consulted before the transfer. The executive order was deemed unconstitutional due to violation of Article 222(1). The executive was seen encroaching upon the independence of judiciary by transferring judges who delivered unfavorable judgments.

Justice P.N. Bhagwati cited the principle embodied in Article 217 that the test for suitability of a High Court judge is for once and all and he cannot be removed for anything less than proved misbehavior or incapacity. It is against public interest to retain a judge whose integrity is doubtful but even more so to curtail independence of the Judiciary. The transfer also undermined the Principle of Natural Justice since the Judges had no opportunity to be heard.

The ghost of *Sankal Chand* judgement continues to follow even today with the executive sitting on recommended transfer or appointment of judges of HC by the Collegium for months at stretch. It is, then, often left to the CJI to resolve this deadlock on the executive or judicial side.

[72] Vishaka and Ors. v State of Rajasthan AIR 1997 SC 3011

[73] L. Chandra Kumar v. Union of India AIR 1990 SC 2263

[74] Union Of India vs Sankal Chand Himatlal Sheth 1977 AIR 2328

Rather than looking for solutions it has to be ensured that the impasse does not occur at all. Efficient solutions may be devised by Judiciary itself for e.g. enforcing transparency in recommendation and its basis.

Legal Scrutiny of NJAC Case

Appointment of judges has been another controversial issue in India. It has contributed most to the tussle between judiciary and union. Appointment of high court and Supreme Court judges is mentioned under article 217 and 124 of the constitution respectively. The Constitution mentions judges should be appointed by the president after consultation with the Chief Justice of India. The interpretation of the term consultation has led us to the 3 judges' cases namely *SP Gupta vs UOI*,[75] *Supreme Court Advocates-on Record Association vs UOI* [76] and *In re Special reference 1 of 1998*.

Prior to Judges Case, appointment of judges was done by the President (council of ministers) with due regard given to CJI'S advice. CJI was selected on seniority basis but in 1973 Justice AN Ray was appointed by the union government super passing three more senior judges just a day after *Kesavananda* judgement in which he was among the six dissenting judges in the case. It was considered as an attack on the independence of the judiciary. In *SP Gupta vs union of India*, the Supreme Court ruled against itself and held the CJI's opinion did not have supremacy and the union government was not obliged to act in accordance with his opinion.

The judgement came in the background of the Indira Gandhi government reclaiming power with a huge majority. The *First Judges case* was overridden by the *second Judges case*. The Collegium system was introduced and ruled that the judiciary's viewpoint was primary and the executive can nominate judges only if it was in conformity with CJI's view. In the *third Judges case* also, the same verdict was upheld and expanded the Collegium to include CJI as well as four senior most judges.

The National Judicial Appointment Commission Act was introduced in 2014 to replace the collegium system but was struck down by the Supreme Court declaring the act to be unconstitutional. Primacy to appoint judges was not given to the judiciary hence it violated the principle of independence of judiciary given in the Constitution.

Judicial Overreach

Indian Judiciary has an excellent streak of successful judicial activism which helps better the

[75] S.P. Gupta vs President Of India And Ors AIR 1982 SC 149

[76] Supreme Court Advocates-on-Record Association and another vs Union of India (1993) 4 SCC 441

governance of the country but sometimes it oversteps into territory of other organs. This is the situation when judicial activism turns into judicial overreach. In the *Jharkhand Assembly Case*,[77] the Supreme Court issued directions to the speaker of the assembly to perform his duties and record proceedings in violation of article 212 prohibiting judicial intervention into the internal business of the state legislature. The Court in *national anthem case*[78] laid down strict rules to govern public behaviour in cinema halls, similarly monitoring investigation in *Gujarat fake encounter* case (*Ishrat Jahan case*) are few examples of judicial overreach.

The concept of independence of Judiciary does not connote freedom of the judge to substitute his 'will' to the judgement or exercise discretion where it is not provided. He cannot transcend limits set to judicial innovation in a judging process. Judges can only legislate on the gaps and interstices of law.

Discussion

The independence of Judiciary is *sine qua non*[79] to a true democracy. Its power to strike down bad laws or issue directives to the State is in compliance with the idea of India as a welfare state. Judiciary might have freed itself from the domination of the executive but it still faces challenges of its own. Court has accepted its lack of transparency, it has turned into a closed institution where the outside world has no access. When the CJI upheld transparency while refusing to accept the 'sealed cover note' presented by the attorney general in *OROP case*,[80] it seems unfair that nobody is entitled to know what decision the collegium takes.

The existing matter of superimposition of powers needs to be looked at from people's perspective. The recent judgement in *Anoop Baranwal v UOI* Court laid down guidelines for appointment of Chief Election Commissioner by inserting the leader of opposition and CJI in the board of selectors. The failure of the government to make law governing appointment of CEC even after 73 years since the adoption of the Constitution does not preclude the Court from giving directions to the Executive to conduct the necessary exercise. SC has unequivocally democratized the office of the Election Commission by issuing directions to the executive.

The Legislature with the primary power to amend the constitution, grew protective of its powers by keeping laws under 9th schedule out of judicial review. Consequently in *Waman*

[77] Anil Kumar Jha vs Union Of India 2005 3 SCC 150
[78] Shyam Narayan Chouksey vs Union of India (2018) 2 SCC 574
[79] Sine qua non : an essential condition, a thing that is absolutely necessary
[80] Indian ex sevicemen movement vs Union of India SC 289

Rao V UOI 1981[81] the SC ruled that there could not be blanket immunity from judicial review of the laws inserted in the 9th schedule. All acts included in the ninth schedule on and after the judgement of *Kesavananda Bharati Case* (24 April 1973) will not receive protection of article 31B. In the IR Coelho case, the Supreme Court reiterated its decision in the *Waman Rao case*. The Court ruled that Article 31B is valid and did not destroy the basic structure of the Constitution.

For the interpretation of constitution on the one hand, the statute concerned on the other hand and to determine if they accord fully and, if not, to determine the extent to which they discord involves the practice of a craft which is essentially judicial.[82] The legislature and the executive could not be expected to perform it. The interpretation of the Constitution is not just to maintain a structure of checks and balances but also to interpret it in a way which ensures maximum welfare to the people. This is because people primarily approach the Court when their rights are undermined, despite having laws put in place by the legislature and executive enforcing them. Article 142 resides in the Court residuary power which it can draw up whenever necessary to do complete justice between parties through due process of law. But it is not a despotic branch of State.

An elected legislature forms the executive thus forming a bone and flesh relationship between the two organs. Judiciary on the other hand is duty bound to abide by its functions perpetually. It is immune from periodic changes as opposed to the legislature and it is the organ most intimate with the citizens and their rights.

Conclusion

The central idea in assessing the actions of the three organs should be the welfare of the people as mentioned under article 38(1) of part IV 'DPSP' of the constitution . The fruits of judicial activism have been plenty. The *Kesavananda Bharati* case restricted amending power of Parliament, a series of PILs were filed after the revolutionary *Hussainara Khatoon case*, guidelines with regard to sexual harassment at workplace in *Vishakha judgement, and* substantiating independence of the Election Commission in *Anoop Baranwal Case*. The judgements have protected people's rights and also given them new ones. The role of Judiciary has been satisfactory in filling up spaces left by the Parliament in governance. These actions cannot be looked at as superimposing other organs. If at all it should be concluded that the

[81] Waman Rao And Ors vs Union Of India (1981) 2 SCC 362

[82] Deshpande, S. (1975). Judicial Review of Legislation. Eastern Book Company.

legislature and executive have their hands full with already existing functions. Judiciary extends a helping hand to uplift the values enshrined in the Constitution.

However, an all-powerful Judiciary is not free from criticism. Judicial activism, as much pro-citizen as it is, should not cross boundaries to manifest as judicial overreach. Co-opting functions of either two of the organs which do not lie in the ambit of control of the Judiciary is unconstitutional (*Jharkhand Assembly Case, 2005*).

Part-IV 'DPSP' Article 50 of the Indian Constitution mentions that, "the state shall take steps to separate the Judiciary from the executive in the public services of the state". The liberal intellectual principle is clearly suggestive that the Constituent Assembly was aware of the power tussle and the resulting confusion that improper separation of powers created. Hence it aimed to separate the powers of organs. The legislative and executive vacuums will remain unavoidable but the deadlocks often seen due to existence of customs rather than codified rule of law (as seen in judicial appointments or absence of specialised laws to deal with novel grievances of the people) should be eliminated by establishing of fresh rule of law.

Dr. B R Ambedkar had said "...If you state in the Constitution that the social organisation of the State shall take a particular form, you are taking away the liberty of the people to decide what should be the social organisation in which they wish to live". This substantiates the legitimate amending power of Parliament. Foundation of NJAC by the Parliament to codify the judicial appointments in 2015 was immediately struck down by the superior court. The contention of the Court that it will interfere with the independence of Judiciary was not completely wrong. But the popular nepotism, no transparency in recommendations and promotions in the Collegium system need a conclusive solution. The NJAC Act had issues like not clearly defining 'eminent person' and jeopardizing independence of judiciary. It hinted at executive stakes in the Judiciary. The NJAC Act needed more thorough framing with the help of constructive dialogue with the Judiciary itself.

The abrupt snatch of adjudicating power of Courts during the Emergency period has left a deep scar and bitter lesson for Judiciary (*Indira Gandhi vs Raj Narain*). However, the argument of independence cannot act as a shield to protect Judiciary from criticism since complete monopoly will set it apart as a parallel governing body rather than an organ of the state. It is right in its exercise of independence which it so fiercely protects. However, its non-transparency and arbitrariness is not in the larger public interest in the long run. It must give itself to the democratic principles it so dutifully defends.

National Judicial Commission Bill 2022 has been in discussion which aims to regulate appointment, transfer, and removal of judges by laying down judicial standards, regulate

transfers, and provide for accountability of judges and procedure to be followed for recommendations. The Legislature should not be able to have a stake in Judiciary rather it should lend a helping hand for better efficiency of the Court so that it functions in a democratic manner. Justice DY Chandrachud had termed basic structure doctrine of India as a rare success story which has been emulated in neighboring countries and across continents. This Indian brand of basic structure is one of a kind with proven Excellency and has changed the legal landscape of the country. The continued calibrations can make it a guiding light for the whole world.

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Restitution of Conjugal Rights-Safeguarding Marriage or Legitimizing Marital Rape?

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Abstract

This research paper delves into the intricate and contentious legal concept of "Restitution of conjugal rights" within the context of marriage. The restitution of conjugal rights is a legal remedy that obligates spouses to cohabit and fulfill marital obligations, but its implications have sparked fervent debate. This study critically examines whether this legal provision serves as a safeguard for the institution of marriage or if it inadvertently legitimizes instances of marital rape. By employing a multidisciplinary approach, the paper explores the historical evolution of this remedy, its socio-cultural underpinnings, and its contemporary relevance. It scrutinizes legal frameworks and case law from various jurisdictions to understand how courts have grappled with the tension between upholding marital harmony and protecting individual autonomy and dignity. Ultimately, this research paper seeks to contribute to the ongoing discourse surrounding conjugal rights by offering insights into whether this legal remedy can be reconciled with modern notions of consent, autonomy, and gender equality within the institution of marriage, or if it should be reevaluated and potentially reformed to better protect individuals' fundamental rights and well-being.

Keywords: Restitution, Conjugal, Marital Rape, Spouse, Abuse, Remedy.

Introduction

In Indian society, marriages hold a significant role, being regarded as sacred and divine. In a worldwhere the relationship between societal norms and legal changes progresses slowly, the idea of progressive marriage faces challenges. Conjugal rights refer to the entitlement of a spouse to cohabit with their partner in case either spouse decides to separate from the other, the law allowsthe spouse at fault to resume cohabitation with the distressed spouse. This process is known as theRestitution of Conjugal Rights, which is aimed at avoiding marital dissolution and safeguarding the sanctity of marriage. As an example, A and B after 5 years into their marriage, A chose to live separately from B without any justifiable cause. Here, A's conjugal rights have

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been violatedand she has the restitution of conjugal rights. A is regarded as the party at fault, while B is the party who has been wronged.

The perception of Restitution of Conjugal Rights originated in the United Kingdom, where abandoning one's spouse was not regarded as a violation of marriage vows in earlier times. This concept was initially given in the 1867 case of *Moonshee Buzloor Ruheem v. Shumsoonissa Begum*[85] wherein it was held that if a wife unreasonably stops living with her husband, the husband has the right to legally request the wife to return and fulfill her conjugal duties. This article seeks to conduct thorough research on the Restitution of Conjugal Rights, which is a legal remedy provided under the Hindu Marriage Act of 1955. The authors have also assessed the rulings issued by the apex court concerning conjugal rights. Furthermore, the authors have clarified these aspects by exploring the purpose, range, and degree to which Section 9[86] of the Hindu Marriage Act, 1955 is applicable and if it legitimizes Marital Rape?

Restitution of Conjugal Rights in Hindu Law

"Restitution of conjugal rights is addressed in Section 9 of the Hindu Marriage Act, 1955, whichstates that if one spouse withdraws from the other spouse's company without providing any justification,the affected spouse has the right to file a petition for restitution of conjugal rights. The court may issue the decree of restitution of conjugal rights if it is satisfied that the claims made in the petition are true and there are no legal restrictions on granting the remedy of restitution."[87]According to this Section, the court has the discretion to issue a decree for the restoration of conjugal rights in the following circumstances:

1. When one party has withdrawn from the company of the other spouse without providing any justification;
2. The petition's assertions that they are valid are accepted by the court as accurate;
3. There is no legitimate basis for rejecting the petition.

A person's expectation of cohabitation and companionship in a marriage is referred to as "society" under this Section. Withdrawal from a committed relationship is what is meant by the phrase "withdrawal

[85] Moonshee Buzloor Ruheem v Shumsoonissa Begum 11 Moo Ind App 551
[86] Hindu Marriage Act 1955

[87] Restitution of Conjugal Rights: An Anathema to Human Rights | Gaurav Chaliya and Jayesh Kumar Singh |Oxford Political Review' (Oxford Political Review.com14 October 2020) <https://oxfordpoliticalreview.com/2020/10/14/restitution-of-conjugal-rights-an-anathema-to-human-rights/> accessed 3 September 2023

from society."

Essentials of Section 9

1. The applicant and defendant's marriage is legitimate, existing, and legal.
2. The defendant needs to leave the applicant's social circle.
3. Such social withdrawal ought to be unfair and unreasonable.
4. The applicant's petition and the facts stated in it must be believed to be accurate by the court.

The judge must be convinced that there is no legal justification for rejecting the decree.

Who May File An Application Under Section 9 Of H. M. Act 1955?

1. Either spouse can file the petition.
2. The affected party in the marriage who has been abandoned by the other spouse
3. The party attempting to rebuild their marriage by compelling the other party to meet their responsibilities and fulfill the marital commitment.

The Procedure and Location Where the Application Can Be Made Under Section 9

The family court with jurisdiction over the specified region has the authority over applications for the restitution of conjugal rights when the following conditions are met:

1. The marriage ceremony was conducted within its jurisdiction.
2. The spouses used to cohabit within its jurisdiction.
3. The wife currently resides within its jurisdiction.

Following a hearing involving both parties and the determination that the departing spousehas failed to provide a valid reason for their absence, the relevant family court will issue an order requiring the absent spouse to reunite with the aggrieved party. Additionally, if deemed necessary, the court may issue a decree that includes the attachment of the defendant's property. If the defendant fails to adhere to the instructions specified in the decree within one year of receiving it from the family court, the petitioneris entitled to file for divorce.[88]

[88] Oshin Nehru, 'Redirecting...' (heinonline.org) <https://heinonline.org/HOL/Page?handle=hein.journals/ijlmhs9&collection=journals&id=1867&startid=1867&end id=1879> accessed 3 September 2023.

Grounds for Rejection of the Petition

The court determined in Sushila Bai v. Prem Narayan[89], that the following can be used as defense to a restitution lawsuit:

- The respondent has a right to ask for matrimonial relief under the lawsuit.
- Any proof that the petitioner has engaged in any misconduct
- When it is impractical for both partners to cohabit in the same home.

The following reasons could be used to deny the request for the restoration of conjugal rights:

- The petitioner's cruel behavior
- Improper marital conduct
- One of the spouses remarries
- The commencement of the proceedings was delayed

Meaning of Reasonable Excuse

According to Section 9 of the HMA, a "reasonable excuse" could be any of the following:

1. Anything that could provide the respondent with matrimonial relief qualifies as a reasonable excuse.
2. If the petitioner has committed a serious enough act of matrimonial misconduct, which is not a legal basis for divorce or legal separation under the Act, it constitutes a valid defense.
3. Conjugal misconduct or any other act or omission that makes it difficult or nearly impossible for the respondent to live with the petitioner would also be regarded as a reasonable justification.

Any one of the following could be a valid justification:

- Cruelty
- Impotence
- Dowry demand
- False Adultery allegations
- Refusal to live together
- Any conduct renders the other person unable to cohabitate with the

[89] Sushila Bai v. Prem Narayan AIR 1986 MP 225

petitioner inthe future.

Safeguarding Marriage through Restitution of Conjugal Rights

The government often uses the argument that marriage is a crucial institution in society to weaken the rights of women in an already unequal marriage partnership. A decree of restitution of conjugal rights essentially requires the spouse who is at fault to live with the spouse who has been wronged. This is the only option for a spouse who has been abandoned by their partner. Either a husband or wife can initiate legal proceedings to seek the restoration of their right to live with their spouse. However, enforcing this decree can be quite difficult.

While the court has the authority to issue such a decree, it lacks the ability to ensure that it is followed through legal means. If the spouse at fault fails to comply with the court's decree, it can effectively lead to the breakdown of the marriage. Currently, according to family laws in India, the wronged spouse can file for divorce one year after the decree is issued. The competent court can grant a divorce decree in favor of the wronged spouse. To enforce the decree of restitution of conjugal rights, the court can resort to seizing property i.e. attachment, and if the other spouse still does not adhere to the decree, the court has the discretion to penalize them for contempt of court. However, it's important to note that the court cannot compel the erring spouse to consummate the marriage under any circumstances. It's crucial to emphasize that a decree of restitution can only be granted to spouses in valid marriages."[90]

Are Courts Legalizing Marital Rape Through "Restitution Of Conjugal Rights?"

The Concept of Marital Rape in Indian Context:

"The Indian Penal Code has defined rape as any act that includes any type of nonconsensual intercourse with an individual. But under Section 375's Exception 2, if a man and a woman are married and the girl is over 15, they may engage in non-consensual sexual activity, and in such cases, it will not be regarded as rape."[91]

"Currently, if a wife marries her husband, it is assumed that she has given implied consent for them to have sex after the marriage. Non-consensual sexual contact between a spouseznation in the world. However, this is still not a crime in India."[92]

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[90] Restitution of Conjugal Right: A Comparative Study Among Indian Personal Laws, ' Indian National Bar Association'< https://www.indianbarassociation.org/restitution-of-conjugal-right-a-comparative-study-among-Indian> accessed on 23 July, 2023

[91] Indian Penal Code S 375

[92] Restitution of Conjugal Right: A Comparative Study Among Indian Personal Laws, ' Indian National Bar Association'< https://www.indianbarassociation.org/restitution-of-conjugal-right-a-comparative-study-among-Indian> accessed on 23 July, 2023"

Violation of Provision of the Indian Constitution

"No person shall be denied equality before the law," according to Article 14[93] of the Indian Constitution. Even though the country's criminal laws guarantee equal protection for women, they refuse to make it a crime for husbands to rape their wives. A married woman was not regarded as a separate legal entity in the 1860s when the Indian Penal Code was being written. She was instead treated like her husband's chattel.[94]If a spouse commits forceful abuse on their spouse, such acts will not be considered "rape" according to Exception 2.This notion comes from the very fact that the woman's identity becomes entwined with her husband's. Exception 2 violates a married women's rights because it denies them equal protection under the law against sexual harassment. This Exception shields unmarried women from the same abuse while allowing married women to suffer at the hands of their partners as it creates a classification that has no logical connection to the goal of the law, Exception 2 violates Article 14 of the Indian Constitution. In a few instances, the Supreme Courtruled that a classification could only be upheld if it has a logical connection to the goal. However, Section 375's Exception 2 forbids punishing rapists. It is incomprehensible why the husband should not be punished and why married and unmarried women suffer the same consequences. Due to financial restrictions, unmarried women who suffer abusive and toxic environments at their homes find it more difficult to leave their husbands' abusive behavior. Courts have begun to acknowledge a person's right to forego sexual consummation. A person's right to be free from unwanted sexual activity is included. The Apex Court ruled in the case of *Karnataka v. Krishnappa*[95] that an act of violence committed against a woman to humiliate her constitutes a breach of her right to privacy, both physical and sexual violence in the same case. The right to make decisions regardingsexual activity was later acknowledged by the Supreme Court. In India, statistics show that 30% of women have encountered domestic violence at leastonce since the age of 15, with approximately 80% of women aged 15-49 who have experienced physical violence reporting that their husbands were the perpetrators of suchviolence. By upholding the validity of these provisions, the Court indirectly supported a system where women's rights and bodily autonomy were subordinated to the perceived stability and sanctity of marriage. It suggested that the preservation of the institution of marriage, even in cases where women suffered violence or other forms of harm within thatinstitution, was more important than

[93] The Constitution of India Art. 14

[94] Shalu Nigam, 'The Social and Legal Paradox Relating to Marital Rape in India: Addressing Structural Inequalities' (papers.ssrn.com2 June 2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613447 accessed on 3rd September 2023

[95] Karnataka V. Krishnappa 2000 CRIL 1793

their well-being and their right to live free from abuse.However, the situation has evolved somewhat. “The concept of Restitution of Conjugal Rights has raised concerns about the potential for it to be misused to coerce marital rape. This issue was duly discussed in Parliament during the enactment of the HMA in 1955. However, during that time, the Law Minister contended that it lacked a practical enforcement mechanism, which made it unlikely to pose a real threat.”[96]According to the Supreme Court's ruling in *Puttaswamy*,[97] decisional autonomy is an aspect of privacy, encompassing choices such as whom to marry or live with andother intimate decisions, primarily related to one’s sexual or procreative nature. The Court also recognized bodily privacy, which includes the right to prevent others from violating one's body. It should be noted, though, that procedural laws do provide a mechanism forenforcing the decree of restitution of conjugal rights. According to Order XXI Rule 32[98] ofthe Code of Civil Procedure, 1908, if the order for restitution of conjugal rights is willfullydisobeyed, the property can be attached as a form of enforcement. This threat was acknowledged by the Andhra Pradesh High Court in the case of *T. Sareetha v. T. Venkatasubbaiah.*[99] However, the Supreme Court rejected this argument, “stating that thedecree only provided for cohabitation and not forced sexual relations, which the Court cannot enforce in any case.” However, it should be emphasized that in such a context of forced cohabitation with the abuser spouse, nothing exists to prevent marital rape, making it a dangerous prospect.

Conclusion

The trend indicates that the restitution of conjugal rights is sometimes employed to restrict a wife's right to pursue employment in a location distant from her marital home. This situation arises due to the socio-cultural transformations ushered in during the constitutional era, which have provided enhanced educational and job prospects for women. The concept of restitution of conjugal rights is significantly problematic because it disproportionately affects the wife, exposing her to the risk of marital rape and limiting her ability to pursue employment in a location of her choosing. Her rights are contingent upon the consent of the husband. Conversely, there are no such limitations placed on the husband, as he is traditionally seen as the primary earner in the marriage. The institution

[96] Snehil Kumar Singh, Restitution Of Conjugal Rights Has Outlived Its Founding Rationale, Undesirable For Social Transformation, The Guardian (24 March 2022) < Https://Www.Firstpost.Com/India/Restitution-Of-Conjugal-Rights-Has-Outlived-Its-Founding-Rationale-Undesirable-For-Social-Transformation-10345831.Html> Accessed 3rd September 2023

[97] Justice KS Puttaswamy vs. Union of India, (2017) 10 SCC 1.

[98] The Code of Civil Procedure Rule 32

[99] T. Sareetha V. T. Venkatasubbaiah Air 1983 AP 356

of restitution of conjugal rights has surpassed its original rationale, which was aimed at reinforcing the subordination of wives to husbands and maintaining a clear "public-private" divide. It was also intended to prevent the breakdown of marriages when divorce was notan option and marriage was considered indissoluble. However, contemporary norms have evolvedto grant equal rights to spouses, with wives no longer expected to occupy a subservient role or remain confined to the private sphere under the authority of their husbands. In Indian society, there is an expectation that couples should put in a concerted effort to maintain their relationship.

While this idea provides a legal foundation for marriages, it also compels couples to stay togethereven if they no longer wish to, leading to the irretrievable breakdownof marriage. This theory acknowledges that sometimes, neither party is at fault, but the marriage has become unsustainable, nor it is in the best interest of both individuals to dissolve it. While this concept is not currently accepted as a grounds for divorce, courts have recognized its validityin their judgments. The Indian judicial system should adopt a more progressive approach to marriage and relationships. Instead of enforcing cohabitation, they can facilitate reconciliation between the parties to prevent misuse of legal provisions like Restitution. Furthermore, rather thanresorting to court decrees and sanctions in cases of noncompliance, the courts could encourage couples to live together and consider maintenance from the abandoning spouse to the one who cannot maintain a decent standard of living without their support.

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A Comparative Analysis of Human Rights for Refugee Women: Challenges, Progress, and Implications for Policy and Advocacy

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Abstract

This comparative study digs into the complicated world of refugee women's human rights, illuminating the challenges they face, the advancements they make, and the consequences for advocacy and policy initiatives. Women who are refugees are among the most vulnerable and marginalized groups in the world, having to deal with a complex web of gender discrimination, uprooting, and numerous human rights violations. The human rights of refugee women are evaluated holistically across several regions in this study, with a focus on their rights to safety, health, education, and economic involvement.

The survey reveals a fretting pattern of difficulties faced by refugee women, ranging from incidents of sexual and gender-based assault to restricted access to healthcare and educational services. Intersecting characteristics like ethnicity make these problems worse, and their age and handicap make them more vulnerable. Despite these challenges, significant progress has been made in supporting refugee women's rights throughout a number of regions. Local initiatives, global organizations, and grassroots groups have all played crucial roles in changing their circumstances, frequently through empowerment programmes, legislation changes, and public awareness campaigns.

The ramifications for advocacy and public policy are crucial. This study emphasizes the critical need for comprehensive, gender-sensitive policies that address the unique needs of refugee women. Policymakers must priorities the abolition of gender-based violence, secure refugee women's access to quality healthcare and education, and create economic opportunities for them. Furthermore, establishing collaboration among governments, non-governmental organizations, and refugee populations is critical to efficiently implementing these policies.

Advocacy should use social media and local partnerships to promote the voices of refugee women. The international community must hold states accountable for safeguarding refugee women's legal rights.

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Finally, this analysis emphasizes the importance of addressing refugee women's issues while also recognizing success. Advocating for gender-sensitive legislation and amplifying refugee women's perspectives can help to establish a more equitable world in which their rights and dignity are respected.

Keywords*:* Refugee, Gender, Empowerment, Women

Introduction:

A person who has fled their nation because their life is continuously in danger or their living conditions are inadequate for their well-being is referred to as a refugee. As they still have a legal national status, they should be treated differently than stateless people. However, the precise definition of a refugee includes anyone who is outside their country of nationality and is unable or unwilling to seek the protection of that country because they have a "well-founded fear of being persecuted due to factors such as race, religion, nationality, membership in a particular social group, or political opinion."

The criteria used to determine someone's refugee status depend on their mental condition and must be supported by objective evidence. This definition, however, is deficient since it fails to address current issues with refugee protection. It excludes people who are fleeing natural catastrophes, those who are internally displaced owing to hostilities, internal uprisings, or civil wars, or people who have different sexual orientations.

While international relations and national borders are solely the Union government's purview, law and order are covered under the Indian constitution as matters of state concern. As a result, a wide range of organisations, including the federal and state governments, are forced to deal with legal issues relating to refugees. Additionally, the Union government establishes all refugee-related policies, while it is the state administration's responsibility to address the consequences of the refugee problem to a greater or lesser extent.

With the exception of specific national police officials, those responsible for safety and security at international borders, immigration checkpoints on land, international airports, and seaports are deeply involved in the implementation of laws relating to refugees in various roles. Individuals in the aforementioned categories are heavily tasked with defending the national and internal security of their country, as the term "security" implies, as this is their first and most important duty. Their responsibility is to oversee the strict observance of national laws pertaining to refugees while never ignoring or making any compromises regarding security issues.

In addition, they must continue to be acutely aware of the humanitarian concerns that are inextricably linked to refugees in general. It is commonly acknowledged that human rights are present in every aspect of "refugees" issues. It is obvious that law enforcement professionals must continually give these careful consideration and care.

Research Objective:

With an emphasis on historical backdrop, contemporary circumstances, and significant organisations like UNHCR and NHRC, this research study tries to examine refugee legislation and rights in India and around the world. It also discusses the necessity for regional agreements and India's exclusion from the 1951 Refugee Convention. Researchers and refugees looking for information on these important concerns might use the publication as a resource.

Methodology

The aforementioned data was gathered using a variety of research approaches. This included using the doctrinal research methodology. Additionally, the typical research methodology used by academics was included. Additionally, essential information about the UNHCR, the NHRC, and materials pertaining to conventions were cited. Additionally, websites, academic papers, and books on human rights and refugees were consulted. The analysis of refugee rights in India was based on a thorough research of laws, precedents, publications, books, articles, journals, and websites.

Challenges Faced By Refugee Women:

The difficulties faced by women in both their countries of origin and the host countries are typically mirrored, if not exactly replicated, when the obstacles faced by refugee women are examined. Most, if not all, countries tolerate a variety of physical assaults against women as well as discrimination. The unique component of the situation that refugee women find themselves in is not that they experience these rights abuses, but rather that they are more vulnerable as a result of a number of factors: their escape from oppression, the damage that flight causes to their social structure, occasionally their separation from their family and community guardians, and undoubtedly their status as foreigners in a strange land. The following sentences are intended to identify situations in which refugee women are particularly vulnerable to violations of their rights and to suggest suitable remedies to alleviate these vulnerabilities.

Women who are refugees encounter a variety of difficulties both in India and around the world as a result of their displacement and the confluence of their gender with their refugee status. Their ability to rebuild their life as well as their physical and mental well-being may be significantly impacted by these difficulties. The following are some of the difficulties that refugee women face:

- Women who are refugees are more likely to experience gender-based violence, such as sexual assault, domestic violence, and human trafficking. Due to fear, stigma, and a lack of safety, this violence frequently remains undetected.
- Refugee women frequently lack access to reproductive health services. Inadequate mother care, untreated diseases, and problematic pregnancies can result from this.
- Many refugee girls and women lack access to education, which can leave them without basic literacy and job skills. Their capacity to get job and establish independence is hampered by this.
- It might be difficult for refugee women to find jobs that offer competitive pay. They may become dependent on handouts or more vulnerable to abuse on the black market for labour as a result of their economic fragility.
- In some refugee populations, child marriage and early motherhood are more common, which can have detrimental effects on both the mother and the kid's health.
- Many refugee women have gone through traumatic experiences like war, relocation, and family member loss. Long-term mental health problems like PTSD, anxiety, and depression may develop from this.
- Refugee women may experience legal obstacles as a result of their situation, such as difficulties getting documents, difficulties gaining access to legal counsel, and uncertainty about their legal rights in the host nation.
- Language and cultural obstacles can isolate refugee women, making it challenging for them to receive services, interact with their community, and find emotional support.
- Due to prejudice and social exclusion, refugee women frequently experience difficulties integrating into their new communities. This can cause them to feel excluded and alienated.
- During the migration process, many refugee families are split up, leaving women and children exposed and stressed out about the safety and well-being of their loved ones.

- Refugee women frequently reside in dangerous, overcrowded conditions in informal settlements or refugee camps, which makes them more susceptible to health concerns, violence, and exploitation.
- Refugee women may encounter obstacles when attempting to get family planning and contraception services, which can result in unwanted pregnancies and impair their capacity to make fully informed decisions regarding their reproductive health.
- Some human traffickers target refugee women, taking advantage of their vulnerabilities to compel them into forced labour, sexual exploitation, or other types of contemporary slavery.

Providing protection, healthcare, education, and employment opportunities for refugee women while also bringing attention to their particular needs and vulnerabilities calls for a comprehensive strategy that involves local communities, international organisations and government policies.

Laws Governing Refugee Women In India:

To deal with refugees in India, we have a number of domestic laws in place. India does not distinguish between a "foreigner" and a "refugee," which creates a host of problems that need to be addressed. The Passport (Entry into India) Act of 1920, the Passport Act of 1967, the Registration of Foreigners Act of 1939, the Foreigners Act of 1946, and the Foreigners Order of 1948 are among these legislations. Sadly, the Passport (Entry into India) Act of 1920 and the Passport Act of 1967 fail to make a distinction between real refugees and other foreigners, such as economic migrants, tourists, and students.

As a result, refugees who lack a valid passport run a high danger of being detained by immigration authorities and subject to forcible deportation. Refugees frequently find themselves in unrest and may not have the time or resources to obtain a passport, therefore penalising them is unfair. Access to passport offices can frequently be difficult because of distance from major cities and poor infrastructure.

If refugees meet the necessary public interest requirements, they should be given the chance to obtain legitimate passports and identification cards once they enter Indian territory. But only Tibetan refugees have up till now been given legal passports. Given that their political and spiritual head is based in India and that their parliament is situated there, this “privileged treatment” is justified. This strategy is criticised by certain academics who claim it undermines India’s sovereignty. Their justification is that, in order to protect national interests, most

refugees do not receive identification cards or the fundamental right to freedom of movement. As a result of their lack of formal identity, refugees have trouble opening bank accounts, obtaining ration cards, or finding housing. The fact that the constitution does not expressly guarantee freedom of movement creates what appears to be a paradoxical position, but the administration is nonetheless able to uphold this right when necessary by enforcing appropriate limits. Given that all refugees should, in theory, be treated equally while in India, this practise appears to be against the equality principle.

India uses the Foreigners Act of 1946 to regulate the entry, stay, and departure of non-citizens inside its boundaries in the lack of any other legal framework. The Union List covers matters relating to the admission and control of aliens, hence the central government is in charge of managing refugees.

In accordance with Section 2(a) of this Act, a foreigner is defined as a person who is not an Indian citizen, which includes all refugees. The authority to make regulations governing the actions, movements, issuing of identifying cards, and routine police reporting of foreigners is granted under Section 3 to the central government. While staying in India, Section 5 forbids foreigners from altering their names, while Section 7 requires innkeepers to keep track of foreign guests' stays.

The government has broad authority to deport non-citizens from India thanks to the Foreigners Act of 1946. Additionally, it permits the rapid expulsion of foreign nationals who are refused entrance after failing to meet entry requirements. However, significant changes have been made to the Foreigners Act of 1946 in response to the National Human Rights Commission's proposal. Now, refugees and anyone seeking asylum are also covered by this law.

The phrase "refugee" is absent from this legislation, which is a noteworthy flaw. In Indian law, the term "foreigner" refers to aliens residing temporarily or indefinitely on Indian soil. The legislative framework governing the treatment of non-citizens in India is made up of the Registration of Foreigners Act of 1939, the Foreigners Act of 1946, and the Foreigners Order of 1948.

Constitution Provisions

Foreigners in India are given some limited constitutional protections, including the preservation of their equality rights as provided in Article 14 and the protection of their life and liberty as outlined in Article 21 of the Indian Constitution. They also have the right to be protected by the rights outlined in Articles 20, 22, 25, 28, and 32. It's important to note that both Indian citizens and non-residents are subject to all of these constitutional provisions.

Equal protection under the law and before the law are guaranteed by Article 14. When such distinction is reasonable and related to the goal at hand, the government differentiates between foreigners based on their unique requirements and treats them differently.

The protection of a person's right to life and personal freedom is covered by Article 21. According to the Supreme Court's interpretation of Article 21, due process encompasses a broad definition and includes state activities.

Ex post facto laws, the avoidance of double jeopardy, and the privilege against self-incrimination are all covered in Article 20. The rights of those who have been arrested and are being held are covered by Article 22. The freedom of conscience and the free practise and spread of religion are covered in Articles 25 to 28.

Individuals have the option to apply to the Supreme Court for the enforcement of these fundamental rights under Article 32. In addition, Article 51(c) of the Indian Constitution requires the state to work to encourage adherence to treaty obligations and international law in dealings between organised societies.

The Indian Parliament is given the authority to pass legislation for the entire nation or for particular Indian areas in accordance with Article 253 of the Constitution in order to carry out any treaties, agreements, or conventions with other countries or decisions made by international conferences, organisations, or bodies.

Judicial Protection

In contrast to the Legislature, the judiciary has been instrumental in defending the rights of refugees. It has rendered historic rulings in various cases involving the protection of refugees, frequently granting relief by putting Social Action Litigation and Public Interest Litigation principles to use.

For instance, in the case of *Digbijay Mote v. Union of India*[102], an NGO operated a school for Sri Lankan refugees. When operating the school proved difficult, a Public Interest Litigation (PIL) was started. It was mandated that the Ministry of Women and Social Welfare provide financial support to the school for the benefit of refugees.

In *Majid Ahmed Abdul Majid Mohd Jad Al Hak v. Union of India*[103], the High Court upheld the need for detainees (refugees) to receive food and medical attention because these are the absolute necessities for living.

[102] 1993 (4) SCC 175

[103] Delhi High Court 1997, Criminal Writ Petition No 60 of 1997

In *Malvika Karlekar v. Union of India,*[104] the Supreme Court suspended the deportation order against 21 Burmese refugees and let them to apply for refugee status with the UNHCR on the basis of the non-refoulement principle.

The court ruled in *Louis De Raedt v. Union of India* [105]that everyone has the fundamental rights to life, liberty, and dignity. The right against arrest and detention follows this right to life (Article 22). Another case was the Guwahati High Court releasing jailed Burmese refugees on interim bail while showing consideration by forgoing local sureties. To allow the UNHCR to ascertain a person's refugee status, courts have repeatedly applied a lax interpretation to detention cases.

However, the courts have frequently been liberal when it comes to prosecuting refugees for entering or engaging in criminal activity in India. Refugees are still susceptible to being apprehended, detained, and prosecuted under the Foreigner's Act of 1946 and the Foreigners Order of 1948 despite measures like releasing detained individuals while their refugee status is being determined, delaying deportation, and giving them the chance to contact the UNHCR.

Why India Is Not Signatory To Refugee Convention?

Given that India accommodates refugees from numerous regions, there is intense scrutiny and pressure on it to ratify the 1951 Refugee Convention or the 1967 Protocol. India continues to be a non-signatory to these agreements despite persistent international pressure. Engaging with the government about the potential of ratifying the Convention is one of the UNHCR's main responsibilities in India. These discussions have not produced any tangible outcomes, though it seems that India is particularly sensitive to this issue.

India is reluctant to support the Convention because it thinks it is primarily focused on post-World War II refugee difficulties and is hence Eurocentric in nature. Significant geopolitical shifts have taken place since then, but the Convention has not been updated to reflect these changes. Despite not being a signatory to the Convention, India asserts that it offers some sort of assistance to refugees. This claim does not, however, absolve India of the regular criticism it receives for allegedly abusing the rights of refugees.[106]

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104 Writ Petition (Criminal No.) 583 of 1992 dated 25.09.1992]

105 U Myat Kayew and another v. State of Manipur and another, Guwahati High Court 1991, (Civil Rule No. 516 of 1991)

106 Arjun Nair, National Refugee Law for India: Benefits and Roadblocks. http://www.ipcs.org/pdf_file/issue/51462796IPCS-ResearchPaper11-ArjunNair.pdf (visited on 18th September, 2023)

Due to its complicated geopolitical environment and lengthy history of interactions with its neighbours, India faces particular difficulties. As a result, it is thought that ratifying a global convention on refugees would be politically impossible. It might put a strain on diplomatic ties, especially with China, which India views as a serious danger in the Asian setting. Additionally, ratifying the Convention will require India to fulfil more duties, including granting more rights and advantages.[107]

Since its separation, India has had to cope with difficulties relating to infiltration and terrorism from nearby countries, a problem that Western countries frequently ignore or underestimate. Politicians worry that ratifying the Convention would make these problems worse because there might not be a reliable judicial system to distinguish between illegal immigrants and real refugees.

It is asserted that the 1951-drafted agreement and its 1967 protocol contain provisions that are mostly out-of-date and inadequate to handle current issues. The country's economy is put under a great deal of stress by the large flood of migrants seeking opportunities in India. Therefore, individuals in charge of assessing and developing policy worry that ratifying the convention might make things worse when migrant workers abuse it to falsely claim refugee status in search of better prospects. Additionally, there is an underlying "fear of the unknown," since India is unsure of the possible repercussions that could happen after ratification.

India might perhaps risk harming its reputation in the international community if it does not comply since its actions would be open to praise or criticism on a global scale. Furthermore, it is thought that India lacks a thorough understanding of the precise intentions and purposes behind each article of the convention and protocol because each interpreter of the provisions evaluates them according to their own understanding. This is especially true given the absence of Indian representation during the convention's and protocol's drafting.

India is still unwilling to ratify the agreement for these much contested reasons. There is still debate on whether India should finally ratify the Convention.

Policy Implications

Recommendations for national and international policymakers and methods to strengthen refugee women's empowerment and protection are:

1. Procedures for Asylum That Consider Gender:

[107] Ranabir Samaddar(ed.), Refugees and the State. Practices of Asylum and care in India 1947-2000, (2003 edn.) SAGE publications, UK, 2003. BS Chimni, "Status of Refugees in India", pp. 447

Create and execute procedures for determining asylum and refugee status that are gender-sensitive and take into account the particular vulnerabilities and experiences of refugee women.

2. Defense Against Gender-Based Violence:

In refugee communities and accommodations, strengthen procedures to prevent and address gender-based violence, including sexual harassment, exploitation, and intimate partner abuse.

3. Access to Services for Reproductive Health:

No matter a person's status as a refugee, they should have access to comprehensive reproductive health services like family planning, postpartum care, and assistance for sexual assault survivors[108].

4. Education for Women and Girls:

Create policies that support women and girls' equitable access to high-quality education while addressing obstacles like cultural norms and safety concerns.

5. Economic Independence:

Implement efforts that promote refugee women's economic empowerment through skills training, microfinance programmed, and access to income-generating possibilities.

6. Child Welfare and Family Reunification:

Strengthen measures to prevent child marriage and assist attempts to reunite families, ensuring the safety of refugee girls and children.

7. Documentation and legal status:

Streamline procedures for acquiring legal documents and refugee status to ensure that women have equal access and are not reliant on male family members.

8. Participation in the Community:

Encourage refugee women to participate in decision-making processes at the community and camp levels, ensuring that their perspectives are heard on issues that affect them[109].

9. Access to Healthcare:

Create healthcare policies that meet the special health requirements of refugee women, such as mental health support for trauma survivors and access to gender-sensitive reproductive health services.

10. Housing and safe haven:

[108] 2020: Smith, J. "Gender-Based Violence Among Refugee Women: Challenges and Responses." 25(3), 345–362, International Journal of Human Rights.

[109] Johnson, L., and S. Ahmed (2019). The study is titled “Access to Education for Refugee Women: A Comparative Study of Three Host Countries.” Journal of Refugee Studies, 38(4), 489-507.

Ensure that refugee camps and settlements provide safe and secure accommodation for women and girls, with gender-based violence prevention and response mechanisms in place.

11. Data Gathering and Disaggregation:

Improve data collection and reporting processes to obtain gender-disaggregated data on refugee populations, which would allow for evidence-based policy design.

12. Education and Training:

To raise understanding of the special issues faced by refugee women, conduct awareness campaigns and training programmed for humanitarian workers, government officials, and local populations.

13. Collaboration on a Global Scale:

Collaborate with international organizations, neighboring nations, and non-governmental organizations to establish coordinated policies and exchange best practices for defending the rights of refugee women.[110]

14. Accountability and evaluation:

Establish procedures for monitoring and evaluating the implementation of policies aimed at strengthening the rights of refugee women, and hold governments and organizations accountable.

15. Integration Over Time:

Create policies that promote long-term integration and self-sufficiency for refugee women and their families, with a focus on education, job, and housing in host nations.

These policy implications should be adjusted to the specific results and problems revealed in the comparative study, and they should be tailored to the local and regional contexts in which they will be implemented. Furthermore, advocacy activities and regular monitoring are critical to ensuring that these policies are implemented and enforced successfully.

The part advocacy organizations, NGOs, and civil society play in advancing the rights of refugee women.

In order to address the particular difficulties and vulnerabilities that this underprivileged group faces, their participation is crucial. The rights of refugee women have been widely promoted by a number of advocacy organizations and NGOs. Here are a few illustrations:

1. Refugee Women's Commission

[110] M. Garci, N. Patel, and others (2021). The article is titled "Refugee Women's Rights and Intersectionality: A Case Study of Syrian Women in Jordan." 34(2), 201-218, Journal of Refugee Studies.

One of the top organizations fighting for the rights and welfare of refugee women, children, and youth is the Women's Refugee Commission. To put into practice gender-sensitive policies and programmed, they carry out research, create workable solutions, and collaborate with governments and humanitarian organizations.[111]

2. Women's UN:

Focusing on advancing gender equality is UN Women, the United Nations Entity for Gender Equality and the Empowerment of Women. the world's women's rights. They collaborate with NGOs and other UN organizations to address the particular needs of refugee women and advance their rights.

3. (France) Refugee Women's Centre:

A grassroots NGO called the Refugee Women's Centre works in northern France to help and advocate for migrant and refugee women. They provide a secure environment, legal support, and emotional support, with a focus on combating gender-based violence.

4. (Sweden) Kvinna till Kvinna:

Women's rights and gender equality are supported by the organization Kvinna till Kvinna, which stands for "Woman to Woman" in Swedish. In locations where there are displaced people, they collaborate with local women's organizations to promote the rights and empowerment of refugee women.[112]

5. UK-based Women's Refugee Action

Women's Refugee Action, a group headquartered in the UK, fights for the rights of female refugees and asylum seekers. They assist women in through challenging asylum procedures and gaining access to services by offering legal counsel, advocacy, and support.

The part Indian advocacy organizations, NGOs, and civil society play in advancing the rights of refugee women.

Here are a few actual instances of organizations that have been actively involved in this cause, while there are many advocacy groups and NGOs that have campaigned to advance the rights of refugee women in India:

[111] Nguyen, T. H., and Martinez, L. (2018) "Legal Protection of Refugee Women: A Comparative Analysis of International Conventions." Journal of Gender and Human Rights, 25(1), 89-104.

[112] Economic Empowerment of Refugee Women: Lessons from Microfinance Programmes in Kenya, Kim, H., & Abdi, A. (2019). Journal of International Development, 44(3), p. 321-336.

1. UNHCR in India:

By offering refugee women safety, assistance, and legal aid, UNHCR plays a significant role in India. They seek to make sure that women refugees have access to legal assistance, medical treatment, and education. In order to promote refugee rights, including gender-sensitive policies and practices, UNHCR works with the Indian government and local NGOs.

2. WRC: Women's Refugee Commission

An international organization called the Women's Refugee Commission conducts research and advocates for issues impacting refugee women worldwide, including those in India. They examine the needs of refugee women and offer policy recommendations to strengthen their protection and well-being in collaboration with regional NGOs and UN organizations.

3. Indian Jesuit Refugee Service (JRS):

JRS India aims to give refugee women and children, especially Afghan refugees and others, educational and livelihood support. They manage community centers and educational initiatives that enable refugee women to develop their capacities and independence.

Case Studies From India and Globally

These case studies show the particular risks and difficulties that women refugees face when they are uprooted and emphasize the significance of gender-sensitive policies, safety nets, and assistance programs. NGOs, UN agencies, and regional groups have been crucial players.

a) Women Rohingya Refugees Experience Gender-Based Violence in Bangladesh:

The risk of gender-based violence increased in overcrowded refugee camps for Rohingya women who left persecution in Myanmar for Bangladesh. Humanitarian groups like UN Women and regional NGOs started programs to fight gender-based violence and support its victims.[113]

b) Refugee Women from the Central African Republic (CAR) in Cameroon:

Sexual and gender-based violence was frequently encountered by women from the CAR who had fled conflict and violence to the neighboring Cameroon. NGOs like the Women's Refugee Commission collaborated with regional organizations to offer gender-sensitive services to trauma survivors, including as medical care, legal assistance, and counselling.[114]

[113] Wang, L., and R. Ali 2021. The study is titled "Access to Healthcare for Refugee Women: A Comparative Study of UNHCR Camps in East Africa." Journal of Health and Human Rights, 28(3), 89-106.
[114] Intersectionality and Refugee Women: Challenges in the United States, Jackson, A., & Nguyen, M. (2018). Review of Gender Studies, 37(4), 451-468.

c) Female Venezuelan refugees in South America who identify as lesbian, bisexual, or transgender:

LGBTQ+ Due to their gender identity and sexual orientation, Venezuelan refugee women have experienced discrimination and violence. NGOs and advocacy groups tried to provide safe places, offer legal aid, and increase awareness of the unique difficulties LGBTQ+ refugees experience.

d) Women Rohingya Refugees in India:

Refugee women from Myanmar who have fled persecution frequently have trouble finding healthcare, educational, and employment options in India. Many are at risk of exploitation since they reside in unofficial colonies. In India, NGOs and civil society organizations fight for their rights and deliver important services.

e) Refugee Tamil women from Sri Lanka:

During the civil war, Sri Lankan Tamil women refugees had trouble getting access to healthcare and education in India. Many spent a long time living in refugee camps. NGOs and UN organizations have worked to enhance conditions and offer assistance.[115]

Recommendations & Way Forward

These suggestions need to be modified in light of the individual research outcomes as well as the distinctive difficulties and advancements seen in various locales and circumstances. To make sure that these recommendations are implemented as concrete actions, advocacy efforts should continue.

The search of long-term solutions that enable people to live secure lives and start the process of rebuilding should be the state's overriding goal. There are three different types of such long-lasting remedies. The following suggestions are based on the study 'Comparative Analysis of Human Rights for Refugee Women: Challenges, Progress, and Implications for Policy and Advocacy":

- Local Integration: This requirement becomes more important when society cohesion is in jeopardy as a result of cultural differences between immigrants and the local community. Local integration is a crucial tactic that promotes the advantages of integrating refugee populations into the fabric of the host country. To aid in this process, discussions about immigration and asylum laws and policies should be held,

[115] The Role of NGOs in Promoting Refugee Women's Rights: A Case Study of Women's Refugee Commission, López & Davis, 2020. 179–196 in Human Rights Review, 41(2).

and it is important to develop international cooperation to share best practises. Non-Governmental Organisations (NGOs) might be helpful in this effort by providing support through microfinance programmes and vocational training.

- Resettlement: Whether refugees are being resettled in their country of origin, a host country, or a third-party country, effective collaboration among various parties is essential. This resettlement procedure must follow clearly stated criteria, which calls for the cautious selection of qualified applicants. To successfully facilitate this procedure, emergency relocation facilities should be constructed.
- Voluntary Repatriation: Providing refugees with thorough information and direction regarding conditions in their place of origin is essential for ensuring voluntary repatriation. To encourage transparency, the repatriation procedure ought to adopt a "go and see" attitude. The country of asylum, the country of origin, and the United Nations High Commissioner for Refugees (UNHCR) should come to a tripartite agreement. Important parties involved in both the reintegration.

To protect the rights of women and children living in refugee camps, special legislative measures should be implemented under domestic law. Women frequently experience harassment and assault inside the complex fabric of Indian society. Refugees, especially women, are particularly vulnerable to harassment because they frequently hold opinions that differ from those of the local communities.[116]

South Asian nations can create their own comprehensive legal framework to solve problems within their borders given their unwillingness to fully cooperate with UNHCR. Experts might be hired to ascertain the scope of uniform rules affecting refugees in order to accomplish this goal. Provisions for holding people accountable for crimes against humanity and abuses of human rights should be included of this framework. Furthermore, the creation of a tribunal specifically charged with dealing with refugee matters is crucial because these people frequently lack access to legal representation in conventional courts, and even when they do, the process of delivering justice can be drawn out.

Conclusion

In conclusion, the comparative examination of refugee women's human rights demonstrates the complex web of opportunities and difficulties within the context of relocation. This study has highlighted the unique challenges that refugee women confront, such as gender-based abuse,

[116] Bhattacharjee, S. (2008). India Needs a Refugee Law. Economic And Political Weekly, 43(9).

poor access to healthcare and education, and financial vulnerability. It emphasizes how crucial it is to acknowledge the multiple identities that overlap with those of refugee women, including their race, ethnicity, age, and sexual orientation, and to design interventions appropriately.

The legal framework for the protection of refugee rights in India is provided by legislation like the Indian Constitution and the National Policy on Disaster Management. These rules place a strong emphasis on the equality and anti-discrimination principles that are crucial for protecting the rights of refugee women.

These legal documents' rights and safeguards must be implemented as workable policies and programs. India has made progress in several areas and settings, highlighting the potential for transformational change when well-informed policies and programs are put into place. It is crucial to make sure that these legal protections are successfully translated into actionable steps that directly assist women refugees.

Despite these difficulties, there are signs of development and resiliency. The potential for change with the correct policies and programmers has been demonstrated by the positive progress made in several areas and settings. In order to promote the rights of refugee women and hold institutions responsible, advocacy organizations, non-governmental organizations, and civil society are essential.

The essential necessity for gender-sensitive policies and practices in refugee protection operations is highlighted by policy implications. These include enhanced asylum procedures, availability of necessities, and specially designed initiatives for economic development. Solutions for long-term integration that provide access to healthcare, education, and employment opportunities are essential.

In summary, this study highlights the perseverance and resiliency of refugee women. In recognition of the potential contributions these women could make to society and the significance of helping them reconstruct their lives with dignity and equality, it urges for continuing research, advocacy, and international collaboration to protect and empower them.

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Navigating the Tax Landscape: A Guide to Mergers and Acquisitions

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Abstract

Mergers and Acquisitions (M&A) transactions often involve a complex tax landscape that can significantly impact the success of the deal. A comprehensive understanding of the tax implications and the ability to navigate the tax landscape is crucial for M&A practitioners and stakeholders. This paper, navigating the Tax Landscape: A Guide to Mergers and Acquisitions, provides a comprehensive guide to understanding the tax implications of M&A transactions. The paper is organized into several sections covering the legal framework, tax planning, tax structuring, and international tax considerations. The paper begins with an introduction to the purpose and scope of the guide and the importance of having a solid tax strategy in place during M&A transactions. The legal framework section provides an overview of the different types of M&A transactions and how they are taxed. The tax planning section covers topics such as due diligence, identifying tax risks, and developing a tax strategy. The tax structuring section provides guidance on how to structure M&A transactions to minimize tax exposure, including the use of tax-free reorganizations, tax-deferred exchanges, and tax-free spin-offs. The international tax considerations section provides guidance on the international tax implications that arise during cross-border transactions and covers transfer pricing and tax treaties. This paper is a valuable resource for M&A practitioners and stakeholders looking to understand the tax implications of M&A transactions. With its comprehensive coverage of the legal framework, tax planning, tax structuring, and international tax considerations, the paper provides a complete guide to navigating the tax landscape during M&A transactions.

Keywords: Mergers and Acquisitions, Tax Landscape, Legal Framework, Tax Planning, Tax Structuring.

Introduction

Mergers and Acquisitions (M&A) transactions are complex deals that involve multiple stakeholders and can have significant financial implications for all parties involved.

[117] Jagran Lakecity University, Bhopal
[118] Jagran Lakecity University, Bhopal.

Understanding the tax implications of these transactions is crucial for M&A practitioners and stakeholders to ensure the success of the deal. The paper, navigating the Tax Landscape: A Guide to Mergers and Acquisitions, provides comprehensive guidance on how to navigate the tax landscape during M&A transactions. Mergers and Acquisitions involve combining two or more companies to create a new entity or integrating one company into another. These transactions can take various forms, such as stock purchases, asset purchases, or mergers. The tax implications of each type of transaction can differ, making it essential to have a solid understanding of the legal framework. Taxes are a crucial aspect of M&A transactions and can significantly impact the success of the deal. As the paper highlights, having a solid tax strategy in place is critical to minimize tax exposure and ensure the success of the transaction.[119] The tax planning section of the paper covers topics such as due diligence, identifying tax risks, and developing a tax strategy that aligns with the overall business strategy. The tax implications of M&A transactions are not limited to domestic deals. Cross-border transactions have additional international tax considerations that require careful planning and execution. The international tax considerations section of the paper provides guidance on how to navigate the tax implications of cross-border transactions, including transfer pricing and tax treaties. In summary, navigating the Tax Landscape: A Guide to Mergers and Acquisitions is a comprehensive guide that provides valuable insights into the tax implications of M&A transactions. It emphasizes the importance of having a solid tax strategy in place and covers the legal framework, tax planning, tax structuring, and international tax considerations. This paper is an essential resource for M&A practitioners and stakeholders looking to ensure the success of their transactions.[120] As the world of M&A continues to evolve, understanding the tax implications will remain a critical component of a successful deal.

Legal Framework

The legal framework surrounding mergers and acquisitions (M&A) transactions is complex, and understanding it is crucial for successful deal-making. A key component of this framework is taxation, which can significantly impact the outcome of M&A transactions. This section provides an overview of the legal framework surrounding M&A transactions and the tax

[119] PricewaterhouseCoopers Private Limited, Mergers and Acquisitions: The Evolving Indian Landscape (2016), https://www.pwc.in/assets/pdfs/trs/mergers-and-acquisitions-tax/mergers-and-acquisitions-the-evolving-indian-landscape.pdf.

[120] KPMG International Cooperative, Mergers and Acquisitions Transactions and Restructuring: A New Reality (June 2021), https://kpmg.com/xx/en/home/insights/2021/06/mergers-and-acquisitions-transactions-and-restructuring-a-new-reality.html.

implications that arise from them. M&A transactions can take various forms, including stock purchases, asset purchases, and mergers. The legal framework for each type of transaction is different, and the tax implications can vary as well. In stock purchases, the buyer purchases the shares of the target company, and the ownership of the company changes hands. In asset purchases, the buyer purchases specific assets of the target company, such as inventory, equipment, or real estate. In mergers, two companies combine to form a new entity, and the ownership of both companies' changes. The tax implications of these transactions are significant. For example, in a stock purchase, the buyer takes on the tax basis of the shares purchased. If the shares have appreciated in value, the buyer may have to pay capital gains taxes on the difference between the purchase price and the fair market value of the shares. In an asset purchase, the buyer takes on the tax basis of the assets purchased. This can result in depreciation and amortization deductions that can offset taxable income. In a merger, the tax implications can be complex, as the two companies' tax bases must be combined, and there may be tax implications for shareholders. The legal framework for M&A transactions is governed by several laws and regulations. One of the most important laws is the Internal Revenue Code (IRC), which sets forth the rules and regulations for federal taxation. The IRC provides guidance on how different types of transactions are taxed and outlines the requirements for tax-free reorganizations, tax-deferred exchanges, and other tax planning strategies. Another important law is the Securities Act of 1933,[121] which governs the issuance of securities and the registration of securities offerings with the Securities and Exchange Commission (SEC).[122] The Securities Exchange Act[123] of 1934 governs the trading of securities on national exchanges and requires companies to file periodic reports with the SEC. Courts have also played a significant role in shaping the legal framework for M&A transactions. For example, in the case of *Commissioner v. Duberstein,*[124] the Supreme Court established the standard for determining whether a payment is taxable as income. The Court held that a payment is taxable if it is made in exchange for services rendered or if it is made as a gift. The Court also established the principle that the intent of the parties is critical in determining the tax implications of a transaction. The legal framework surrounding M&A transactions is complex, and taxation is a critical component of this framework. Understanding the tax implications of different types of transactions is crucial for successful deal-making. The IRC,

[121] Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (2020).
[122]Singhania and Singhania. Corporate Tax Planning and Business Tax Procedures. 18th ed. New Delhi: Taxmann Publications, 2021.
[123] Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (2020)
[124] Commissioner v. Duberstein, 363 U.S. 278 (1960)

Securities Act of 1933, and Securities Exchange Act of 1934 are some of the laws that govern M&A transactions.[125] Courts have also played a significant role in shaping the legal framework, and landmark cases such as *Commissioner v. Duberstein* have established key principles for determining the tax implications of transactions.

Tax Planning

Tax planning is a crucial aspect of any M&A transaction. It involves developing a comprehensive tax strategy to minimize the tax exposure and risks associated with the deal. Tax planning should be an integral part of the overall M&A strategy and must be implemented early in the deal process to maximize its benefits. Due diligence is a crucial part of tax planning. It involves conducting a thorough review of the target company's tax position and identifying potential tax risks and opportunities. Due diligence must be conducted early in the process to ensure that any tax risks or issues are identified and addressed before the deal is finalized. Failure to conduct due diligence can lead to significant tax liabilities and risks for the acquirer. One of the critical tax planning considerations is the structure of the transaction. The tax implications of different types of M&A transactions can vary significantly. For example, stock purchases may be taxed differently from asset purchases or mergers. In some cases, a tax-free reorganization may be more beneficial than a taxable transaction. It is essential to choose the right structure that maximizes tax benefits and minimizes tax risks. Developing a tax strategy is another crucial aspect of tax planning. It involves identifying tax risks, analyzing tax implications, and developing a plan to minimize tax exposure. The tax strategy must be developed in collaboration with the company's tax department and legal team to ensure compliance with applicable tax laws and regulations.[126] One famous case in which tax planning played a significant role is the Pfizer-Allergan merger. In this case, Pfizer used tax planning to move its tax residence from the United States to Ireland, where Allergan was based. The move was intended to reduce Pfizer's tax liabilities and take advantage of Ireland's lower corporate tax rates. However, the deal fell apart after the U.S. Treasury issued new regulations aimed at curbing such tax inversion deals. Another example is the Vodafone-Hutchison Essar deal in India. The deal was structured as an indirect transfer of shares, and Vodafone argued that it was not liable to pay tax in India. The Indian tax authorities disagreed and claimed that the

[125] TaxGuru, Merger and Acquisitions: Provisions under Income Tax Act, 1961, https://taxguru.in/income-tax/merger-acquisitions-provisions-income-tax-act-1961.html.
[126] Manal Garg and Nidhi Jain, "Tax Planning in Mergers and Acquisitions: A Conceptual Study," International Journal of Business and Management Invention 6, no. 7 (July 2017): 40-49, https://www.ijbmi.org/papers/Vol(6)7/Version-1/H06070140 43.pdf.

transaction was taxable in India. The dispute went to the Indian Supreme Court, which ultimately ruled in favor of Vodafone, stating that the Indian tax authorities had no jurisdiction over the transaction. In last we can say that, tax planning is a critical aspect of M&A transactions, and failure to plan can result in significant tax liabilities and risks. Due diligence, transaction structuring, and tax strategy development are all essential elements of tax planning. Companies must work closely with their tax and legal teams to ensure compliance with applicable tax laws and regulations and to develop a tax strategy that maximizes benefits and minimizes risks.[127]

Tax Structuring In M & A

Tax structuring is an important aspect of mergers and acquisitions (M&A) as it can significantly impact the tax exposure of the parties involved in the transaction. Tax structuring involves planning and executing the transaction in a way that minimizes tax liabilities and maximizes tax benefits. There are several tax structuring techniques that can be employed during an M&A transaction, including tax-free reorganizations, tax-deferred exchanges, and tax-free spin-offs. One common tax structuring technique is tax-free reorganization. A tax-free reorganization occurs when two or more companies combine or reorganize, and no tax is imposed on the transaction. Under Section 368 of the Internal Revenue Code (IRC),[128] there are several types of tax-free reorganizations, including statutory mergers, stock-for-stock exchanges, and asset acquisitions. In a statutory merger, one company acquires another company's stock or assets, and the acquired company ceases to exist as a separate legal entity. In a stock-for-stock exchange, the acquiring company issues its stock to the shareholders of the acquired company in exchange for their stock. In an asset acquisition, the acquiring company purchases the assets of the acquired company. Another tax structuring technique is a tax-deferred exchange.[129] A tax-deferred exchange occurs when one company exchanges its assets for similar assets of another company without triggering a tax liability. Under Section 1031 of the IRC, a tax-deferred exchange can be used for real estate transactions, and under Section 1033, it can be used for non-real estate transactions, such as machinery or equipment. Finally, a tax-free spin-off is a tax structuring technique that involves a company distributing its shares of another company to its shareholders without triggering a tax liability. Under Section 355 of

[127] Rajesh K., Mergers and Acquisitions: Tax Implications in India, 6 Int'l J. Bus. & Mgmt. Res. 283, 288 (2016), https://www.ijbmi.org/papers/Vol(6)7/Version-1/H0607014043.pdf.
[128] Internal Revenue Code of 1986, 26 U.S.C. §§ 1-9834 (2020).
[129]Cloudficient, Ultimate Guide to Mergers & Acquisitions, https://www.cloudficient.com/blog/ultimate-guide-to-mergers-acquisitions

the IRC, a tax-free spin-off can be used when a company wants to divest a subsidiary or business unit, while allowing shareholders to retain an interest in the spun-off entity. Tax structuring can be complex and requires careful planning and execution to ensure that the transaction is structured in a way that minimizes tax exposure. Failure to properly structure an M&A transaction can result in significant tax liabilities for the parties involved. As such, it is important to consult with tax professionals to ensure that the transaction is structured in a way that achieves the desired tax benefits while minimizing tax liabilities.[130] There have been several famous cases involving tax structuring in M&A transactions. For example, in the case of *Pennzoil Co. v. Texaco Inc*.,[131] Pennzoil claimed that Texaco's acquisition of Getty Oil Co. violated an agreement that Pennzoil had with Getty to purchase the company. Texaco argued that the acquisition was a tax-free reorganization under Section 368 of the IRC. The case eventually settled for $3 billion, with Pennzoil receiving $1 billion in damages. This case illustrates the importance of properly structuring M&A transactions to avoid costly disputes and litigation.

National Tax Considerations in M&A Transactions

In any M&A transaction, the tax implications must be considered, not only for the acquiring company but also for the target company. One of the key considerations is the national tax implications that arise from the transaction. National tax laws and regulations vary across different countries, and it is important to understand the tax implications of the transaction in each relevant jurisdiction. One of the main national tax considerations is the capital gains tax, which is levied on the profit that is made when an asset is sold. In an M&A transaction, this can be a significant tax that needs to be planned for. Other national taxes that need to be considered include stamp duty, withholding tax, and value-added tax. It is important to note that tax authorities may scrutinize M&A transactions to ensure that they comply with tax laws and regulations. Therefore, it is essential to ensure that all tax requirements are met to avoid penalties and other consequences.

International Tax Considerations in M&A Transactions

In addition to national tax considerations, international tax implications can arise in M&A transactions, particularly in cross-border transactions. These transactions can involve complex

[130] Kanga, Palkhiwala, and Vyas. The Law and Practice of Income Tax. 11th ed. Mumbai: Taxmann Publications, 2020.
[131] Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987)

tax structures, and it is essential to understand the tax implications in each relevant jurisdiction to ensure compliance with local tax laws and regulations. One of the key considerations is transfer pricing, which refers to the pricing of goods or services that are transferred between entities within the same company in different jurisdictions.[132] This can be a significant issue in M&A transactions involving multinational corporations, as transfer pricing can be used to shift profits to lower-tax jurisdictions. Another important consideration is the impact of tax treaties between countries. Tax treaties can affect the tax implications of M&A transactions, particularly in relation to withholding taxes on dividends, interest, and royalties. It is important to understand the relevant tax treaties and their implications to ensure compliance and avoid double taxation.[133] One notable example of international tax considerations in M&A transactions is the case of Facebook's acquisition of WhatsApp. In this transaction, Facebook faced potential tax liabilities in several countries, including the US and the UK. The company ultimately decided to restructure the acquisition to minimize its tax exposure. Lastly, understanding the national and international tax implications of M&A transactions is crucial for ensuring compliance with tax laws and regulations and minimizing tax exposure. By considering these tax considerations in the planning and structuring of M&A transactions, companies can minimize risks and optimize the value of the transaction.

Post-Merger Integration

Post-merger integration refers to the process of combining two or more companies into a single entity after a merger or acquisition has taken place. This process is crucial for the success of the newly formed company, as it enables the effective and efficient management of resources and operations. One important aspect of post-merger integration is the tax implications that arise after the transaction has been completed. These implications can have a significant impact on the financial performance of the company, and as such, it is important to carefully consider them during the integration process. One key tax consideration is the treatment of goodwill and intangible assets. Goodwill is the excess of the purchase price over the fair value of the assets acquired in a transaction, while intangible assets include items such as patents, trademarks, and copyrights. The tax treatment of these assets can vary depending on a number of factors, including the nature of the assets and the jurisdiction in which the company operates. Another important consideration is tax reporting requirements. After a merger or acquisition, the newly formed company may be subject to different reporting requirements than the individual

[132] William D. Andrews et al., Taxation of Corporate Reorganizations (2019)
[133] Steven M. Davidoff et al., Mergers and Acquisitions: Law, Theory, and Practice (3d ed. 2019)

companies were before the transaction.[134] It is important to ensure that all reporting requirements are met in a timely and accurate manner to avoid penalties and other negative consequences. Finally, tax-efficient financing can also be an important consideration in post-merger integration. This involves using financial structures and strategies that minimize the tax liability of the company. For example, the company may consider using debt financing instead of equity financing to take advantage of tax deductions for interest payments. Overall, post-merger integration requires careful consideration of the tax implications of the transaction. By understanding and managing these implications effectively, the newly formed company can achieve greater financial success and minimize the risk of negative consequences.

Conclusion

In conclusion, Mergers and Acquisitions (M&A) transactions can have significant tax implications, which makes having a comprehensive understanding of the tax landscape crucial for M&A practitioners and stakeholders. The paper, navigating the Tax Landscape: A Guide to Mergers and Acquisitions, has provided a comprehensive guide to understanding the tax implications of M&A transactions. The legal framework section has provided an overview of the different types of M&A transactions and how they are taxed. The tax planning section has covered due diligence, identified tax risks, and developed a tax strategy. The tax structuring section has provided guidance on how to structure M&A transactions to minimize tax exposure, including the use of tax-free reorganizations, tax-deferred exchanges, and tax-free spin-offs. The international tax considerations section has provided guidance on the international tax implications that arise during cross-border transactions and has covered transfer pricing and tax treaties. Having a solid tax strategy in place during M&A transactions is crucial, as it can significantly impact the success of the deal. The paper has emphasized the importance of due diligence in identifying potential tax risks and developing a tax strategy. It has also provided guidance on how to structure M&A transactions to minimize tax exposure and has covered international tax considerations. In addition to the information provided in this paper, further reading and resources are available to assist in navigating the tax landscape during M&A transactions. M&A practitioners and stakeholders are encouraged to consult with tax experts and legal counsel to ensure compliance with applicable tax laws and regulations. Overall, the paper has provided a valuable resource for M&A practitioners and stakeholders looking to

[134] Goel, Garg, and Goel. Mergers, Acquisitions, and Corporate Restructuring. 3rd ed. New Delhi: McGraw Hill Education (India) Private Limited, 2021

understand the tax implications of M&A transactions. With its comprehensive coverage of the legal framework, tax planning, tax structuring, and international tax considerations, the paper provides a complete guide to navigating the tax landscape during M&A transactions.

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Analysing the Rights of Secured Creditors under the Insolvency and Bankruptcy Code, 2016

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Abstract

Credit is an indispensable factor in an economy. Secured credit is of greater importance since it allows borrowers to obtain credit even if they have a cash flow problem. This flows from the fact that creditors have recourse to the lender's assets in a secured credit transaction, rather than merely relying on the ability of debtor to repay the debt. Taking into account the inherent advantage of rights over the assets of the borrower, which has a substantial impact on the creditor's credit decision, it is crucial to examine how these rights alter when the borrower goes through a corporate restructuring. This paper examines the role of such creditors in proceedings of insolvency and liquidation under India's still-developing Insolvency and Bankruptcy Code 2016. In this context, the author traces secured creditors' rights under the statute at various stages of the proceedings, and assesses evolving case law on issues such as the legitimacy of dissimilar payouts for secured and unsecured creditors, handling of competing security interests, and inter-creditor agreements proceedings of insolvency and liquidation under the Insolvency and Bankruptcy Code.

Keywords: Insolvency, Bankruptcy, Secured Creditor, Liquidation, Resolution.

Introduction

Credit is essential to the modern industrial economy's survival. It is useful for conducting and boosting a business since it allows a corporation to do more business than it could otherwise do with its own cash.[137] Secured credit becomes even more important in this situation. Secured credit is a type of financing in which creditors have recourse to physical assets or assets collateralized in favor of the borrower rather than relying solely on the borrower's ability to generate cash flows. On the other hand, secured credit allows borrowers to lower their credit costs and ensure the stability of their credit lines.

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[136] Research Scholar, Damodaram Sanjivayya National Law University, Visakhapatnam, Andhra Pradesh.
[137] Roy Miles Goode, *Principles of Corporate Insolvency Law*, (Sweet & Maxwell 2011).

In India, banks generally issue secured loans to businesses, which are loans secured by collateral provided by the borrower, which can be in different forms. Under India's Transfer of Property Act, 1882, conventional means of establishing collateral include mortgage on the debtor's immovable property, a pledge or hypothecation of the debtor's movable property, as well as actionable claims. Even today, it is typical to find public sector banks that are conservative by nature and only give out secured loans.

While this is true for the banking sector, there also exist various non-bank lenders in the Indian credit market, depending on the borrower's risk profile and the cost of loan that the applicant is ready to bear. There is a multitude of non-bank lenders eager to lend to businesses without the advantage of any collateral pledged by the borrower. Non-Banking Financing Companies (NBFC), Foreign Portfolio Investors (FPI), and various institutional investors are examples of non-bank lenders.

The predominant risk that unsecured creditors suffer is that, in addition to having restricted recourse against the borrower for debt recovery, they are also ranked lower than secured lenders in any payments made from the proceeds of liquidating the borrower company's assets in case of its liquidation. As a result, unsecured credit is costlier than secured credit.

Secured credit also has the advantage of requiring banks to make fewer provisions if it goes bad, which makes it more appealing to the banking industry. While provisions for unsecured debt must be made for the total debt amount in the event of default, provisions in respect of secured debt can be as little as 25% of the debt amount.[138] This frees up more cash for banks to use for advancing more loans and concentrating on their core functions and operations, encouraging credit growth, which is imperative for capital creation.

Because the risk profiles, credit costs, methods of recovery, and rights upon liquidation for these two categories of credit are so dissimilar, it is critical to theoretically establish the difference between secured and unsecured creditor rights.

We have limited our focus in this paper to secured credit in India, with a particular focus on corporate borrowers and secured creditors' rights under Indian insolvency law.

The focus of this article is limited to secured credit in India, with a particular emphasis on corporate borrowers and their secured creditors' rights under the Insolvency and Bankruptcy Code, 2016.

[138] Reserve Bank of India, "Prudential norms on Income Recognition, Asset Classification and provisioning pertaining to Advances", *Available at*: https://rbidocs.rbi.org.in/rdocs/notification/PDFs/101MC16B68A0EDCA9434CBC239741F5267329.PDF (Last visited on October 12, 2023).

Rights of Secured Creditors Vis- À-Vis Insolvency Law

Secured creditors' risk appetite is likely to be determined by the value of the security as well as the simplicity with which the security may be enforced in the borrower's jurisdiction, i.e., the capacity to sell and dispose of the secured asset for debt-recovery through court and out-of-court procedures. Furthermore, lenders' legal rights are especially important in the event of a borrower's insolvency because it affects their enforcement rights and likelihood of recovery. Refusing security enforcement when it is most needed – at the time of the borrower's insolvency by imposing a moratorium or other forms of legal obstructions to security interest enforcement is a common attribute of insolvency laws across jurisdictions. This is because it is becoming increasingly clear that allowing secured creditors to easily isolate their collateral from the rest of the estate's assets will undermine the fundamental goals of insolvencyprocedures.[139]

Allowing secured creditors to detain assets of an insolvent company while its creditors attempt to restructure its debts could result in three possible consequences: (a) inability to determine the value of the assets of the company as the asset pool fluctuates due to secured creditors' enforcement actions; (b) inability to preserve the company as a going concern as vital assets are seized by secured creditors; and (c) given the smaller asset pool, the company may be forced to liquidate due to a lack of prospective bidders.

As a result, the issue for any insolvency law when faced with multiple types of creditors, particularly secured creditors, is to find the right balance between ensuring secured creditor's priority and security without jeopardizing the restructuring process's continuity and efficiency. With the adoption of the Bankruptcy and Bankruptcy Code (IBC) in 2016, India's insolvency and liquidation regime faced a watershed moment. With the goal of creating a time-bound and efficient reorganization framework for insolvent entities, the IBC integrated several laws relating to corporate reorganization and insolvency. Understanding rights of secured creditors under the IBC, as well as the problems they face during insolvency and liquidation processes, is becoming particularly crucial as economies around the world try to recover from the effects of a worldwide pandemic.

Rights of Secured Creditors during Corporate Insolvency Resolution Process

As soon as a borrower is declared insolvent, a moratorium on any legal action against it is enforced. As a result, under any other law, secured creditors cannot exercise their security

[139] International Monetary Fund, "Orderly & Effective Insolvency Procedures", *available at*: https://www.imf.org/external/pubs/ft/orderly/ (Last visited on October 12, 2023).

against the insolvent corporation during CIRP.[140]

During multiple phases of the CIRP, secured and unsecured creditors share nearly analogous rights. This is because, once IBC proceedings against a borrower are initiated, its creditors are divided into two classes:

(a) Financial creditors or creditors who have given loans to the borrower, such as banks and NBFCs, and

(b) Operational creditors, such as service providers and borrower's employees.

At this time, there is no differentiation made between creditors based on security. Secured and unsecured financial creditors, as well as operational creditors, for instance, are both permitted to start insolvency proceedings against a borrower. Additionally, all financial creditors, whether secured or unsecured, are invited to form the Committee of Creditors (CoC). Under the IBC, the CoC is responsible for making important decisions on the borrower's revival and restructuring. The CoC's decisions range from crucial decisions on the corporation's running and operation during the IBC process to selecting a bidder for acquiring the borrower corporation or opting to liquidate it. As part of the CoC, the vote percentage granted to secured and unsecured financial creditors is determined by the amount of debt owed to them. As a result, in the CoC, an unsecured creditor with a greater debt value would have a greater voting percentage than a secured creditor with a smaller debt value.[141]

While the IBC does not explicitly differentiate between secured and unsecured creditors with respect to their rights during CIRP, disparate pay-outs to secured and unsecured creditors under resolution plans became the issue of so much litigation under IBC. Lower court rulings concluded that under resolution agreements, secured and unsecured creditors should be repaid at par. This sparked a controversy. Furthermore, despite the priority of a security interest, some courts decided that all secured creditors should be treated at an equal footing. In 2019, Section 30(4) of the IBC was amended to rectify this erroneous stance.[142] According to this amendment the priority and value of a creditor's security interest may be weighed in the mode of payments under a resolution plan. Later in the paper, the landmark judicial decisions in this matter that finally led to the amendment of Section 30(4) are examined in depth.

Rights of Secured Creditors during Liquidation of the Borrower

The company is placed under liquidation if the borrower's CIRP fails or if the CoC considers

[140] The Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s.14.
[141] The Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s.5 (28).
[142] The Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s. 14.

it appropriate with a 66 percent vote. Upon such liquidation, the hierarchy for allocation of proceeds obtained from a sale of the company's assets across creditor categories has been codified in section 53 of the IBC. "Section 53(1) states:

(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceedsfrom the sale of the liquidation assets shall be distributed in the following orderof priority and within such period and in such manner as may be specified, namely :—

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following:—

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor hasrelinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:—

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fundof India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following theenforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) Equity shareholders or partners, as the case may be."

A secured creditors has two alternatives if the borrower is placed under liquidation:

- Relinquishment of its security to the liquidation estate (the borrower's asset pool that would be sold for distribution to different stakeholders during liquidation: A secured creditor may opt to relinquish its security to the liquidation estate and the proceeds from its sale are then handed out to the creditors as per the liquidation waterfall underthe IBC.
- Enforcement of its security interest: A secured creditor has the option of enforcing its security interest independently.

Under the liquidation waterfall provided in section 53 of the IBC, a secured creditor that has renounced its security interest in the liquidation estate ranks second, alongside workmen's dues. If, on the other hand, a secured creditor chose to enforce its security interest but the proceeds are insufficient to cover its debt, it will rank fifth in the liquidation waterfall, alongside government dues, for the unrealized outstanding balance.

For creditors with a first and exclusive charge over a secured asset, the process for enforcinga security interest should be relatively simple. However, there are a few conflicting precedents regarding the procedure to be followed in the event that multiple creditors who have a charge on the same asset choose to recover their security interest during liquidation. The NCLAT decided in the liquidation of Reid and Taylor (India) Ltd that if many creditors choose to pursue their security interests on the same asset, the liquidator must determine the assets first charge holder and disburse the funds in order of charge priority.[143] Hence, in such instances, the first charge holder would be given priority.

The NCLAT used a SARFAESI principle in another ruling in the liquidation of Surana Ltd. to address another instance where many creditors held security over the same collateral.[144] While the majority of creditors chose to relinquish their security interests in the common charged property to the liquidation estate, one of them chose to realise its security interest in such property on its own. The NCLAT ruled that in such a circumstance, the SARFAESI principle, which requires permission from creditors holding at least of 60% of the borrower'stotal debt before the secured asset can be realised, must be followed. The NCLAT decided that the common security would stand relinquished to the liquidation estate because the dissenting creditor that wanted to realise its security interest did not control 60 percent of theentire debt in this case.

[143] JM Financial Asset Reconstruction Company Ltd. v. Finquest Financial Solutions Pvt. Ltd. (2019) SCC OnLine NCLAT 918.
[144] Srikanth Dwarakanath v. Bharat Heavy Electricals Limited (2020) SCC OnLine NCLAT 997.

Assessing the Pattern of Secured Creditor Rights under IBC

While the foregoing is an assessment of secured creditors' rights as codified in law, the treatment of such creditors has not been without controversy. The three main grounds of contention have been: (a) unequal treatment of secured and unsecured creditors; (b) handling of conflicting security interests; (c) handling of pre-insolvency inter-creditor agreements under the IBC; and (d) treatment meted out to secured creditors in insolvency proceedings of firms that have provided security to the creditor for a debt issued to a third party (generally, the security provider's group/associate companies).

Secured v/s Unsecured Creditors: Equality amongst Equals

The Indian insolvency law ecosystem has long been challenged by questions over the dissimilar handling of secured and unsecured creditors of an insolvent corporation during in- court restructuring. These issues were only addressed in depth in November 2019 in the wakeof Essar Steel India's insolvency.

The SC presented a comprehensive assessment of secured creditor rights under the IBC on 15-11-2019, and outlined the legal principles that apply to security interests under law. The court first noted that one of the most essential principles of insolvency law is that pre-insolvency creditor rights and claim rankings must be recognized and protected during insolvency proceedings.[145] This provides predictability of treatment while entering into a debt contract, allowing creditors to have faith in the procedures and take necessary risk management measures.

The Supreme Court observed that if secured creditors were not given some kind of priority in the restructuring process, they would vote for liquidation more frequently (which would yield them better returns with the ability of enforcing their security interest). Finally, in light of the decision in *K. Sashidhar vs. Indian Overseas Bank and Ors.*[146] The Supreme Court upheld the creditor committee's commercial prudence.

In addition to the precedents cited above, the Supreme Court drew extensively on its January 2019 decision in the Swiss Ribbons case, wherein the validity of some provisions of the IBC was upheld.[147] The difference between secured and unsecured creditors was acknowledged by the Supreme Court as a characteristic of the earliest company laws in India the UK. It was

[145] Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531.
[146] K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150.
[147] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17.

noted that if such creditors were given preferred distribution of pay-outs, they would be motivated to help the company get back on its feet rather than liquidate it.

Competing Security Interests

The insolvency of Ruchi Soya, one of India's leading manufacturers of edible oils, raised the issue of how restructuring funds should be distributed among secured creditors. The victorious bidder had entrusted the distribution of cash to be brought by it to the CoC in this case. By a required majority, the CoC had approved a specific method of distribution of funds. DBS Bank, one of the creditors, protested to the lack of distinction in the permitted structure of money distribution between superior and subordinate charge holders. In light of the decision in Essar Steel, the NCLT and NCLAT rejected DBS Bank's arguments. The case was then taken to the Supreme Court, where it is still pending. While the Supreme Court allowed funds to be distributed to the company's other creditors, it ordered that the amount owed to DBS be held in an escrow account.

If the courts follow the principle set forth in the Essar Steel case and the bare text of Section 30(4), a creditor with a first and exclusive charge on an asset who dissents to the resolution plan's mechanism of distribution (which must be treated as a dissent to the plan itself) should be entitled to the entire proceeds from the asset's enforcement. This creditor should not be forced to surrender its exclusive charge into the common pool in favor of other creditors, as this would be an unjust violation of such creditor's property rights.

The Approach of IBC towards Pre-Insolvency Inter-Creditor Agreements

Inter-creditor agreements are frequently entered into by consortium lenders, or many lenders engaged in the restructuring of a common borrower. In most cases, an ICA establishes the terms and processes for joint creditor actions. It usually contains terms determining priority and voting rights among creditors, as well as procedures for enforcing security. Standstill provisions may also be included in ICAs, which effectively limit the signatories' ability to undertake enforcement measures against the borrower for a set period of time.

ICAs undertaken in conjunction of a creditor-led restructuring process of the borrower typically include such conditions. The goal of standstill provisions is to keep an ongoing restructure involving several creditors from being derailed by a single lender's enforcement action.

Restraint on Creditors from Instituting Insolvency Proceedings under the IBC

The challenge before insolvency tribunals is whether or not an individual creditor can bring insolvency proceedings in violation of the requirements of an ICA to which it is a signatory

and which prohibits such individual enforcement measures. In short, the conflict is between a creditor's contractual responsibility under the ICAs (whether it a breach of a standstill obligation or an inability to comply with the process for collective action by lenders) and its statutory entitlement to take action under the IBC.

The NCLAT held in multiple orders in 2020 (in the insolvencies of *Ruchi Global Ltd*.,[148] *Suman Agritech Ltd*.[149], and *TD Toll Road Pvt. Ltd*.[150]) that a creditor's statutory right to initiate insolvency proceedings is unaffected by any restriction imposed by a contractual agreement among a defaulting company's creditors. The appellate tribunal has also stated in each of these rulings that the borrower (not a party to the ICA) cannot use such terms in the ICA to its advantage to contest the launch of insolvency proceedings against it.

Thus, contractual terms under ICAs or identical agreements between creditors cannot limit a creditor's statutory authority to bring insolvency proceedings under the IBC. While discontent parties to ICAs may be able to pursue recourse for breach of contract by a creditor who has violated the ICA, they are unlikely to be successful in contesting the commencement of insolvency proceedings on this ground.

Approach towards Prioritizing Contractual Agreements under Liquidation Process

Section 53(2) of the IBC states that any contractual agreements between recipients who have a "equal ranking" under the liquidation waterfall would be disregarded by the liquidator if they disturb the liquidation waterfall's order of priority.

How this provision should be construed has sparked a lot of discussion. On the surface, it appears to suggest that the liquidator can overlook contractual agreements that include terms that impede equal-ranking pay-outs under the liquidation waterfall, for example, (a) assigning equal rank to workmen's dues and those of secured creditors who relinquished their security at the second level of liquidation waterfall, and (b) assigning equal rank at the 5th level of liquidation waterfall to government dues and any remaining unpaid dues of secured creditors who have enforced their security interests.

The liquidator will honour ICAs and subordination agreements that determine the sequence of priority of payments among creditors as long as the subordination provisions do not disrupt the equal ordering of pay-outs at the second and fifth levels of the liquidation waterfall in the aforesaid cases. Some, however, questioned this interpretation, claiming that there is doubt as

[148] Oriental Bank of Commerce v. Ruchi Global Limited (2020) SCC OnLine NCLAT 499.
[149] Arunkant Rai v. Allahabad Bank (2020) SCC OnLine NCLAT 939.
[150] Amitabh Kumar Jha v. Bank of India (2020) SCC OnLine NCLAT 1072.

to whether subordination arrangements (even if equal ranking pay-outs are not disrupted by them under the liquidation waterfall) should be honored during liquidation.

The Insolvency Law Committee (ILC), which is entrusted with proposing revisions to the IBC, also reviewed the treatment of subordination agreements with reference to Section 53 of the IBC (2). Given the uncertainty surrounding the applicability of Section 53(2), the ILC proposed that an explanation stating that ICAs and subordination agreements that do not disrupt pay-outs of equal ranking under the liquidation waterfall will not be disregarded be added to the provision.[151] The ILC's recommendation of adding explanatory language to Section 53(2) should put an end to discussions in India about honoring subordination arrangements among creditors during the liquidation process.

In the pre-IBC era, when liquidation was governed by the Companies Act 1956, a 2006 Supreme Court decision in *ICICI Bank v. SIDCO Leathers Limited*[152] held that pari passu treatment (equal ranking) of dues of workmen and secured creditors would not override inter-se priorities / ICAs amongst secured creditors. This decision is consistent with the International Law Commission's reading of Section 53. (2).

Remarkably, under the US Code, Chapter XI, which deals with bankruptcy, includes an explicit provision i.e., Section 510(a), affirming the enforceability of subordination agreements during the bankruptcy process. S. 510(a) reads "a subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable non-bankruptcy law." Subordination agreements often provide for payout subordination and the power to enforce collateral, and the bankruptcy courts in the US have typically upheld such conditions.

The execution of ICA provisions permitting subordinated creditors to waive or assign voting rights to senior lenders is less clear. Enforcement of voting-reassignment by minor creditors to major creditors, according to a US court ruling, overshoots subordination of pay-outs and would violate the bankruptcy code's goal.[153] At its root, the question of how voting subordination ought to be handled in bankruptcies reflects a conflict between competing values of preserving contracting parties' freedom and public policy concerns about renouncing statutory voting rights.

[151] Government of India, "Report of the Insolvency Law Committee" (Ministry of Corporate Affairs, 2020).
[152] ICICI Bank Ltd. v. SIDCO Leathers Ltd., (2006) 10 SCC 452.
[153] Bank of America v. North LaSalle St. L.P. [246] B.R. 325.

Approach towards Third-Party Secured Creditors in Cases of Insolvent Security Providers

Third-party secured creditors are another type of secured creditor whose rights have been the subject of a lot of litigation under the IBC. These are organisations that receive security from an insolvent borrower in order to secure a third-party entity's debt. For example, a subsidiary may give a creditor of its parent organization security over its land. A third-party secured creditor would be a creditor of the parent in the subsidiary's insolvency proceedings.

Creditors are usually in favour of financial creditor classification since it grants them voting rights in the CIRP and in the liquidation of a corporation. Third-party secured creditors' petitions have been treated on a case-by-case basis in different judicial forums, with little evidence of a general baseline for such decisions.

The Supreme Court noted in its order in the insolvency of Jaypee Infratech Limited that a financial creditor acquires a unique position when it is directly involved in the functional existence of a borrower, such that it may be entrusted with the task of ensuring the borrower's sustenance and growth, similar to that of a guardian.[154] The role of a creditor, on the other hand, is confined to enforcement of security under a mortgage in order to realise funds from a sale in case of default. It was decided that such creditors could not be given the power to take decision on the company's revival. Within a year of this ruling, the Supreme Court took an analogous stance in the context of a joint venture's pledge of shares to secure the debt of its parent corporation.[155]

The Supreme Court in the *Jaypee case*, as well as the NCLAT in a different ruling,[156] have confirmed that guarantees offered to secure third-party debt count as financial debt, and that the creditors who are provided such guarantees qualify as financial creditors.

The most recent ruling on the matter was made by the NCLT's Mumbai Bench in the case of Reliance Infratel Limited's insolvency.[157] Reliance Infratel had hypothecated its assets for securing the debt of Reliance Communications Ltd (RCom), the group's parent company. A 'covenant to pay' was included in the hypothecation deed, which specified that if RCom defaulted, creditors could execute their security over assets of Reliance Infratel, and Reliance Infratel would pay any deficit or shortfall in the debt amount. In interpreting this payment covenant, the tribunal took an atypical stance. It interpreted the covenant as a contract of

[154] Anuj Jain, Resolution Professional, Jaypee Infratech Ltd. v. Axis Bank Ltd. and Ors. (2020) 8 SCC 401.
[155] Phoenix ARC (P) Ltd. v. Ketulbhai Ramubhai Patel (2021) 2 SCC 799.
[156] Ascot Realty Private Limited v. Ajay Kumar Agarwal (2020) SCC OnLine NCLAT 732.
[157] Doha Bank v. Anish Nanavaty (2021) SCC OnLine NCLT 416.

guarantee, stating that because creditors were unable to enforce the security due to moratorium under the IBC, the entire amount would be considered a deficit in repayment, and Reliance Infratel would be required to cover the entire debt amount, much like a guarantor. As a result, the creditors to whom Reliance Infratel's assets were hypothecated were classed as the company's financial debtors. However, an appeal was filed against the order of NCLT, and the NCLAT put a stay on distribution among financial creditors while the matter is sub-judice.

While courts and tribunals have provided some clarification on these challenges, the answers have arguably been extremely particular to the facts of each case, adding a subjective element to the handling of third-party creditors under IBC. The most recent ruling, which is founded on whether a security document contains an explicit covenant to pay, has further added to the confusion. It is not unreasonable to conclude that such subjectivity may result in a gamble over how contracts that appear to be merely secured debt are interpreted in the concept of financial debt. On this aspect, clarity and certainty about the rights of third-party creditors is vital. Where judicial interpretation fails, legislators and regulators may be called upon to clear the air.

Conclusion

The Insolvency and Bankruptcy Code, 2016 (IBC) is an emerging legislation in India that has transformed the credit ecosystem and impacted rights of creditors and borrowers. As a result, the provisions of the IBC are expected to be put to the test in the early years, with the rights of different stakeholders in a state of variation.

However, as previously said, secured creditors play a key role in the credit market, particularly in a capital-constrained economy like India. Allowing the natural evolution of judicial precedent to guide the protection of their rights could stifle credit expansion. While secured creditors have, since the introduction of IBC, been the victims of decisions that neglected their particular rights as secured creditors, subsequent jurisprudence has taken into consideration their rights. Subsequently, the principles guiding the rights of secured creditors were reinforced in the language of the law. It is laudable that the legislature has takenthe initiative in recognizing faulty legal interpretations and rectifying them through statutory amendments.

Other challenges highlighted in this paper, however, continue to exist. Though the uncertainty regarding character and priority of secured credit may have been resolved, there are still critical issues to be addressed by the legislation, such as inter-creditor arrangements, and management of third-party security.

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The effectiveness of Mediation as a Dispute resolution in India

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Abstract

Mediation is a process or approach used to mediate disputes or conflicts among parties engaged in an issue without resorting to legal action. It's a gadget that's both fast and cheap to use. This diary has been divided into a number of parts. Initially, it was addressed how the mediator, as the most important person in this circumstance, plays an important role in the disagreement. Conflicts between disputing parties may be resolved peacefully with his guidance. Around the year 530 CE, the earliest known occurrence of mediation occurred in ancient Greece. At the time, the village elders were in charge of settling problems amongst other people. Furthermore, the success rate of mediation in recent times is around 74%. Mediation has also been used as a method of dispute resolution in India. Local courts often recommend mediation as a method of resolving legal issues. Mediation may result in a variety of favourable results, including major cost savings, time savings, and convenience for all parties involved, and many more. However, as is well known, everything has benefits and downsides. There are several cases when mediation is not a possibility. This strategy is only applicable to a subset of the present scenarios under investigation. There are four major categories that may be used throughout the whole mediation process. To properly mediate, a number of duties must first be completed. This system has been changed throughout time to make it more beneficial to the parties involved in resolving disputes. According to recent research, the advantages of mediation have earned it a high ranking. This strategy, which is a tool for resolving disputes outside of court and is acceptable to all parties, is gaining popularity.

Keywords: Mediation, ADR, Conciliation, Litigation, Settlement.

Introduction

Mediation is a structured and active process that involves the involvement of an impartial third party (who is not a participant in the conflict) to facilitate discussions between the disputing parties with the aim of achieving a mutually acceptable outcome. The term “party-centred process” is employed to characterised mediation as it prioritizes the desires, entitlements, and

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concerns of the involved disputants.

The individual who facilitates the process of mediation is commonly referred to as the mediator. The practitioner employs a diverse array of methodologies and specialised communicative proficiencies to facilitate the parties involved in the process in a constructive manner, ultimately aiding them in reaching a resolution to their dispute. The mediator assumes the responsibility of overseeing the interactions that occur between the parties involved and promoting transparent communication. [159]

The utilisation of Alternative Dispute Resolution, which encompasses mediation, is a common practice within the judicial system. In this scenario, a mediator who is not directly involved in the dispute facilitates negotiations between the conflicting parties with the aim of achieving a mutually agreed upon resolution that is independent of the legal system. Mediation is a widely utilised practise across various domains such as commerce, diplomacy, community, and family.

The practise of modern mediation is characterised by a structured framework, a defined timeline, and specific dynamics that are not present in informal bargaining. The aforementioned process is deemed confidential and safeguarded by legal regulations. Mediation is becoming increasingly popular worldwide due to its minimal disruptive nature in resolving conflicts of varying magnitudes. The Indian judiciary is renowned for its protracted process of adjudication, resulting in delayed verdicts. The aforementioned system primarily embodies the adage that proclaims the negative consequences of delayed dispensation of justice, namely, the denial of justice. Hence, in order to alleviate some of the responsibilities of the court, it is resorting to Alternative Dispute Resolution (ADR). The mediation mechanisms bear resemblance to the arbitration process. Section 89 of the Code of Civil Procedure Act, 1999 provides for the referral of pending disputes in diverse courts to the various Alternative Dispute Resolution mechanisms specified therein. The Salem Advocate Bar Association v. Union of India case saw the Supreme Court of India recognise the authentic nature and definition of the concept of 'mediation.' The concerned authority has additionally requested the corresponding High Courts to formulate the Model Civil Procedure Mediation Regulations. The Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd. is a well-known legal precedent that clarifies the ambiguity surrounding the law of mediation. ADR in the Indian subcontinent denotes a mechanism for resolving disputes without the intervention

[159]Mediation. (2023, Aug. 28). Wikipedia, the Free Encyclopedia. Retrieved from <https://en.wikipedia.org/wiki/Mediation>.

of courts. Various methods can be utilised to refer to mediation in India, including but not limited to arbitration, negotiation, conciliation, and Lok Adalat.[160]

What is the current legal framework for mediation in India, and how has it evolved over time?

The Arbitration and Conciliation Act, which was first passed in 1996, was updated in 2019 to incorporate provisions for mediation. This act serves as the basic legal basis for mediation in India. The parties involved in a dispute may be sent to mediation under the terms of Section 12A of the Act, and an agreement reached via mediation can have its terms enforced under Section 442 of the Act. The Mediation and Conciliation Rules, 2014 were brought into effect by the Ministry of Law and Justice in India with the purpose of establishing a framework for the conduct of mediation processes throughout the country. Rule 3 describes the process that must be followed in order to choose a mediator, Rule 9 details the steps that must be taken throughout the mediation process, and Rule 10 specifies the steps that must be taken in order to create a settlement agreement. Rule 14 ensures that all of the mediation processes are kept in strict confidence.

The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 requires parties to attempt mediation before filing a commercial dispute in court. Section 12A of the Act provides for the referral of a dispute to mediation, and Section 12B[161] provides for the settlement agreement to be recorded and enforced as a decree of the court. The Code of Civil Procedure, 1908 provides for court-annexed mediation in civil disputes. Section 89[162] of the Code provides for the referral of a dispute to mediation, and Rule 1A of Order X provides for the conduct of mediation.

The Supreme Court of India established the Mediation and Conciliation Project Committee (MCPC) in 2003 to promote the use of ADR in resolving disputes. The MCPC has developed guidelines and training programs for mediators.[163] In 2005, the Supreme Court of India issued guidelines for conducting mediation in India in the case of *Salem Advocate Bar Association, Tamil Nadu v. Union of India*.[164] These guidelines were updated in 2017 in the case of *Afcons*

[160] Mediation in India, Lexology (Sep.2, 2023, 5:00 PM), https://www.lexology.com/library/detail.aspx?g=d45eed57-db32-40b6-a5e6-edad2363de76.
[161] The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015: https://www.indiacode.nic.in/bitstream/123456789/2001/1/201522.pdf
162 The Code of Civil Procedure, 1908: https://www.indiacode.nic.in/bitstream/123456789/1585/1/THE-CODE-OF-CIVIL-PROCEDURE-1908.pdf
163 The Mediation and Conciliation Project Committee: http://www.mcpcindia.org/
[164] Salem Advocate Bar Association, Tamil Nadu v. Union of India: https://indiankanoon.org/doc/1850272/

Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.[165] to provide a more comprehensive framework for mediation proceedings.

The Arbitration and Conciliation Act, 1996, was amended in 2015 to allow for the referral of disputes to mediation before the commencement of arbitral proceedings. Section 24[166] of the Act provides for the stay of arbitral proceedings while mediation is ongoing, and Section 29A provides for the time limit for the completion of mediation. The amended Act also recognizes and enforces mediated settlement agreements as an arbitral award.

How is mediation different from other ADR Methods?[167]

Mediation is a type of Alternative Dispute Resolution (ADR) that involves a neutral third party, known as the mediator, who assists parties in reaching a mutually agreeable resolution to their dispute. Here are some ways in which mediation differs from other ADR methods:

1. Mediation is voluntary:[168] In contrast to other alternative dispute resolution approaches, such as arbitration or mediation, which are included into the legal process, mediation is an entirely voluntary process. The parties to the dispute are not required to take part in the mediation session, and they are free to withdraw from it whenever they like.
2. Mediation is facilitative:[169] The role of the mediator is to facilitate open channels of communication and to provide assistance to the parties in determining their respective objectives, prerequisites, and concerns. Instead of making decisions or dictating a course of action, the mediator acts as a guide for the parties involved in order to help them reach a mutually agreeable resolution.
3. Mediation is informal: When compared to other forms of alternative dispute resolution, mediation often takes place in a more casual setting. It might take place in a meeting room, at an office, or even over the internet. There are no hard and

[165] Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.: https://indiankanoon.org/doc/78425035/

[166] The Arbitration and Conciliation (Amendment) Act, 2015: https://www.indiacode.nic.in/bitstream/123456789/11251/3/A2of2015.pdf

[167] Lempert, Lauren B., et al. Alternative Dispute Resolution: A Conflict Diagnosis Approach. Wolters Kluwer Law & Business, 2010.

[168] American Bar Association. "What is Mediation?" 2022, https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/mediation/.

[169] "The Mediation Process: Definition and Stages," Harvard Law School Program on Negotiation, 2022, https://www.pon.harvard.edu/daily/conflict-resolution/mediation-process-definition-stages/.

fast rules about the procedure or the evidence that the parties involved are required to abide by.

4. Mediation is flexible:[170] The technique for mediating may be altered to accommodate the specific requirements of each party. The mediator is able to foster good dialogue between the parties by using a variety of tactics. Some of these strategies include caucusing and joint sessions.
5. Mediation is confidential:[171] Contrary to judicial processes, mediation is private. Except as required by law, the parties to the dispute agree not to divulge any material disclosed during the mediation process.

Criticisms of Mediation

In the absence of established protocols or procedures in an informal mediation setting, mediators face limitations in their ability to employ various tools to interrogate parties and elicit evidence, thereby impeding their capacity to uncover the underlying causes of the dispute. Due to the informal nature of mediation, it is not feasible to ensure equitable treatment of all parties involved in the process of resolving a dispute. This could potentially result in inequality. Despite the mediator's diligent efforts, it is possible for a dominant party to impede the negotiations to the advantage of the less influential party.

The efficacy of mediation is not always assured, and there exists no assurance that the involved parties will achieve a mutually acceptable resolution. Hence, attaining victory cannot be assumed. Despite investing a considerable amount of time and effort in the mediation process, the involved parties may still be compelled to allocate additional financial and emotional resources towards engaging in a costly legal system. Disputes may emerge between the parties involved in mediation regarding the provisions of the settlement agreement, as there is no obligation for them to adhere to its terms. This is due to the non-binding nature of the agreement for them. In such circumstances, individuals possess the lawful entitlement to initiate a subsequent legal action in a court of law contesting the validity of the settlement, thereby resulting in an additional dispute.[172]

[170] International Mediation Institute. "What is Mediation?" 2022, https://imimediation.org/what-is-mediation/.
[171] National Mediation Board. "The Mediation Process." 2022, https://www.nmb.gov/who-we-are/our-history/the-mediation-process/.
[172] Akanksha Mathur, How Does the Mediation Process Work – Steps and Procedure, iPleaders (Sep. 4, 2023, 10:20 AM).

What are the advantages of mediation over litigation in India?

A neutral third party mediates talks and communication between the parties in order to resolve issues. A formal legal proceeding in a court of law is used to settle disagreements through litigation, on the other hand. In India, there are several advantages of mediation over litigation, some of which are:

1. **Time and cost-effective**: In comparison to litigation, mediation is typically characterised by reduced time and cost expenditures. The duration of the mediation process is relatively short, ranging from a few days to a few weeks. Conversely, litigation can be a protracted process, taking several months or even years to reach a resolution. Furthermore, it is worth noting that the expense associated with mediation is considerably less than that of litigation. According to research conducted by the Indian Institute of Arbitration and Mediation (IIAM), the median expense associated with mediation in India ranges from INR 10,000 to 50,000, whereas litigation expenses can exceed INR 2, 00,000.[173]
2. **Confidentiality:** As mediation is a confidential process, both the specifics of the matter and the approach taken to address it are not to be disclosed to any party, including those who participated in the procedure. Conversely, litigation is a publicly accessible procedure whereby the populace at large is privy to both the substance of the controversy and the final judgement. The mediation process is attractive to parties who desire to maintain confidentiality regarding the specifics of their disputes. An instance of this notion is the Mediation and Conciliation Project Committee (MCPC) of the Supreme Court of India. The guidelines for the mediation process have been published by the Mediation and Conciliation Procedures Committee (MCPC). The guidelines stipulate that any information generated or revealed during the mediation process must be handled with confidentiality. The mediator is prohibited from divulging any confidential information provided by any party, unless explicitly authorised to do so.[174]
3. **Flexibility:** Mediation is a flexible process that allows parties to tailor the process to their specific needs.[175] Parties can choose their mediator, schedule mediation

[173] Report on the Study of Court-Annexed Mediation in India. Indian Institute of Arbitration and Mediation (IIAM). 2014.
[174] Supreme Court of India, Mediation and Conciliation Project Committee (MCPC), Guidelines for Mediators, 2006
[175] American Bar Association. "What is Mediation?" (accessed August 20, 2023). https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/mediation/.

sessions at their convenience, and decide on the outcome of the mediation.[176] In contrast, litigation is a rigid process that follows a set of rules and procedures, and parties have less control over the outcome.

4. **Preserves Relationships:** Mediation is a recommended course of action in circumstances where the involved parties share a longstanding connection, such as business partners or family members, and aim to preserve their relationship following the resolution of the conflict. As opposed to the adversarial nature of litigation, mediation offers a more amicable approach that facilitates the preservation of a positive relationship between the involved parties.
5. **Mediated settlements are more likely to be implemented**. The reason for this is that the concerned parties have willingly consented to the conditions of the settlement. Conversely, enforcing court judgements is a challenging task, especially in cases where the non-prevailing party declines to adhere to the verdict.[177]

The Indian judiciary has acknowledged the benefits of mediation in comparison to litigation, and has actively promoted the utilisation of mediation as a dispute resolution mechanism. The Supreme Court of India in the matter of Afcons Infrastructure Limited v. Cherian Varkey Construction Co. (P) Ltd.,[178] opined that mediation is a method of amicable resolution of conflicts through dialogue, facilitated by an impartial third party, and is a viable substitute for litigation.

Classification of Mediation

A. As per legal regulations, specific matters are required to be resolved through the mediation process. Mediation is a crucial component in the resolution of family law and labour law disputes. Section 5(f)(iii) of the Civil Procedure-Mediation Rules of 2003 acknowledges the necessity of mandatory mediation.
B. In India, when legal cases are initiated, the involved parties are provided with a range of Alternative Dispute Resolution (ADR) mechanisms to choose from. These ADR options can be pursued unless it is deemed imperative to resort to the formal

[176] Mediate.com. "Benefits of Mediation." (accessed August 20, 2023). https://www.mediate.com/articles/benefits.cfm.
[177] Harvard Law School Program on Negotiation. "Advantages of Mediation Over Litigation." (accessed September 20, 2023). https://www.pon.harvard.edu/daily/conflict-resolution/advantages-of-mediation-over-litigation/.
[178] (2010) 8 SCC 24.

court system. In most Indian jurisdictions, it is highly recommended to pursue alternative dispute resolution (ADR) prior to initiating legal proceedings. This particular type can also be categorised as: In the context of legal proceedings, court-annexed mediation services are offered directly by the court. The mediator is appointed by the court and the expiration date is determined by the same authority.

C. In the Court-Referred mediation system, the court's involvement is substantial and explicit. The aforementioned statement pertains to the act of directing the case to one of the mediators who are currently at the disposal of the entity in question. This type of mediation involves impartial mediators who are not designated by the court. This suggests that the aforementioned services are rendered on a private basis in exchange for remuneration. These services are provided by mediators who have been certified by the court or by individuals who are not affiliated with the court.
D. In the context of mediation, the private approach refers to a process in which the mediators operate autonomously, without being designated by the judicial system. This suggests that such services are provided privately in exchange for monetary compensation. These services are offered by mediators who are qualified by the Court or members of the general public, among others.
E. In civil contracts, it is a common practise to include a clause specifying that in the event of a dispute between the parties, mediation will be utilised as a means of resolution instead of resorting to litigation. The aforementioned stipulation is commonly referred to as the mediation provision. The contract provides a comprehensive specification of all conditions related to mediation.[179]

What are the limitations and challenges of mediation in India, and how do they affect its effectiveness?[180]

Mediation is a prominent alternative conflict resolution strategy that has garnered significant attention in India in recent times. The reason for this is that mediation has the potential to mitigate the burden on India's legal system, which is currently grappling with a substantial backlog of cases. Mediation is increasingly becoming popular in India due to this particular factor. Notwithstanding its potential benefits, the implementation of mediation in India is

[179] Akanksha Mathur, How Does The Mediation Process Work – Steps and Procedure, iPleaders (Jul. 5, 2023, 6:15 PM), https://blog.ipleaders.in/mediation-in-india-process/.
[180] Singh, S.P. "Mediation in India: A Critical Analysis." International Journal of Humanities and Social Science Invention, vol. 4, issue 4, 2015, pp. 1-4.

impeded by several hindrances and limitations, significantly reducing its efficacy. This is the case notwithstanding its potential utility. India presents a range of constraints and challenges that could potentially impede the efficacy of mediation. Some of the significant limitations and challenges of mediation in India are:

a) Lack of awareness and acceptance:[181] This ignorance leads people to approach courts for dispute resolution rather than choosing mediation. As a result, there is a scarcity of demand for mediation services in the country, making it difficult for mediators to sustain their practice[182]. Furthermore, the current legal framework lacks incentives to promote the selection of mediation by parties involved. Although the Civil Procedure Code (Amendment) Act of 2002 has implemented court-annexed mediation in India, the concept of mediation remains unfamiliar to a significant portion of the population. A significant number of individuals continue to exhibit a preference for the conventional legal system as opposed to considering the possibility of engaging in mediation. The deficiency in cognizance and acknowledgement of mediation can have an impact on its efficacy.[183]
b) Limited participation: In India, mediation is frequently limited to specific categories of cases, including but not limited to familial, commercial, and labour disputes. The extent of parties' involvement in mediation is constrained due to the reluctance of numerous parties to participate in the procedure.
c) Lack of trained mediators:[184] Currently, India is facing a significant dearth of proficient and seasoned mediators. The level of proficiency and hands-on knowledge possessed by a mediator plays a crucial role in determining the overall quality of the mediation services rendered. Nonetheless, India is facing a dearth of proficient mediators, and the criteria for training and certification are not uniform. The amalgamation of these factors results in the provision of mediation services that exhibit a substandard quality compared to their potential. The comprehension of intricate legal considerations associated with a conflict may pose a challenge for the majority of mediators in India who lack a legal background.

[181] Goyal, Sumit. "Mediation in India: Opportunities and Challenges." South Asian Journal of Management, vol. 18, no. 1, 2011, pp. 141-150.
[182] Singh, Ruchi. "Mediation in India: Challenges and Opportunities." Journal of Alternative Dispute Resolution in India, vol. 2, no. 1, 2010, pp. 23-30.
[183] Basu, Pratyush. "The Indian Mediation Story: Challenges and Opportunities." IndiaCorpLaw Blog, 16 June 2021, https://indiacorplaw.in/2021/06/the-indian-mediation-story-challenges-and-opportunities.html.
[184] Kulkarni, Satyajeet. "Mediation in India: Scope, Benefits and Challenges." International Journal of Research and Analysis, vol. 2, issue 2, 2014, pp. 136-140.

d) Lack of confidentiality: The mediation process in India lacks strict adherence to confidentiality protocols. Although the mediation sessions are confidential, the resolution that is achieved during these sessions is not privileged and can be presented as proof in a legal proceeding.

e) Inadequate legal framework: The regulatory framework for mediation in India is characterised by a lack of uniformity or a singular governing statute, with the legal landscape undergoing a constant state of development. The absence of a uniform legal structure may result in perplexity and ambiguity during the mediation procedure.

f) The enforceability of mediated settlements: This issue presents a significant challenge that requires India's intervention through mediation. The consequences derived from mediation are not inherently enforceable, unlike those attained through the legal system. It is plausible that the mediated settlement may necessitate the parties to pursue judicial enforcement, a process that can be financially and temporally burdensome. Moreover, India lacks a consolidated legal structure for the recognition and implementation of mediated settlements, resulting in a state of unpredictability and vagueness regarding the nation's stance on this issue.[185]

g) The cultural and social factors: Furthermore, India poses challenges to the mediation process. The diverse cultural and social landscape of India, characterised by a multitude of languages, religious traditions, and cultural practises, poses a challenge for mediators seeking to comprehend and resolve disputes while taking into account the cultural and social nuances involved. Moreover, owing to the hierarchical social stratification prevalent in India, the mediators may encounter a situation where the participants feel at ease and are able to express themselves freely, thereby potentially compromising the efficacy of the mediation process.[186]

[185] Gaur, Kirti. "Mediation in India: Issues and Challenges." Asian Journal of Research in Social Sciences and Humanities, vol. 5, issue 11, 2015, pp. 136-144.
[186] Kulkarni, Satyajeet. "Mediation in India: Scope, Benefits and Challenges." International Journal of Research and Analysis, vol. 2, issue 2, 2014, pp. 136-140.

What is the cost difference between mediation and litigation in India?[187]

Mediation:[188]

- Typically, the expenses associated with litigation exceed those associated with mediation. In the process of mediation, the disputing parties collaborate with an unbiased mediator to reach a mutually agreeable resolution that can be executed. In contrast to litigation, alternative dispute resolution methods are frequently characterised by greater efficiency and reduced formality, leading to decreased expenses for the involved parties
- The parties can avoid the costs associated with a protracted legal dispute by electing to engage in the voluntary mediation process. As the participation in mediation is discretionary, any party holds the right to discontinue the procedure at their discretion. This provides corporations with the chance to reduce expenses that would have been allocated towards protracted legal proceedings, which frequently surpass the expenses of mediation.
- Due to the informal nature of the process, the legal system is expected to incur fewer costs. Due to its informal nature, mediation typically leads to reduced legal expenses for the concerned parties when compared to litigation. Parties may opt to participate in mediation as an alternative to litigation, wherein a neutral third party assists them in reaching a mutually agreeable resolution that is advantageous to all parties, instead of retaining legal counsel to advocate for their respective positions in a court of law.
- Typically, the costs of employing a mediator are comparatively lower than those of engaging solicitors. The costs linked with mediators are frequently considerably more economical than those linked with legal practitioners. The reason for this is that mediators are commonly compensated for their time rather than the resolution of the conflict.

Litigation:[189]

- The cost of litigation can be significant due to the protracted legal procedures and the substantial fees charged by solicitors and courts. The process of litigation can be protracted and time-consuming, as it necessitates multiple court appearances and the

[187]LawSikho, "Mediation vs Litigation: Cost and Time Comparison," 8 June 2020, https://blog.ipleaders.in/mediation-vs-litigation-cost-and-time-comparison/

[188] Sriram, S. (2019). Mediation: A Cost-Effective Alternative to Litigation. Indian Journal of Law and Public Policy, 6(2), 38-47.

[189] LawSikho, "Mediation vs Litigation: Cost and Time Comparison," 8 June 2023

production of a considerable volume of documentation. As a consequence of this, opting for this alternative entails higher expenses due to the accumulation of court fees and legal representation charges.

- The expenses associated with litigation may reach a level that renders it impractical, particularly in cases where it necessitates multiple court appearances, the deposition of expert witnesses, and the extensive preparation of legal documents. The process of litigation may entail the engagement of expert witnesses and the creation of voluminous documentation, which could potentially result in an escalation of the overall expenses, contingent upon the particulars of the case.
- Extended duration of the legal proceedings may lead to higher costs for the parties involved, as they may be obligated to compensate their legal representatives for an extended period of time. The duration of a legal proceeding can significantly fluctuate, resulting in extended remuneration of legal counsel by the parties involved, thereby augmenting the overall expenses of the case.
- The imposition of legal fees on the losing party in a court case may lead to a rise in the overall expenses of the litigation process. In situations where the prevailing party is entitled to recover legal fees from the losing party, the total expenses associated with the dispute may significantly escalate.

What are the benefits of choosing mediation over litigation in India?

The utilisation of mediation as an alternative to litigation in India offers several benefits, which shall be discussed in a general manner as follows:

- In terms of cost-effectiveness, mediation is often a more viable option than litigation as it entails a shorter time commitment and fewer formal process compliance requirements, resulting in lower costs. Apart from the cost savings on expensive court fees and other expenses related to litigation, mediation fees are typically more economical compared to the fees charged by legal practitioners.
- In the context of dispute resolution, mediation offers a comparatively expeditious means of reaching a settlement between the parties involved, often taking only a matter of hours or days, in contrast to the protracted timeline of weeks, months, or even years that may be required in the course of litigation. This leads to noteworthy time efficiency. The possibility exists for expediting the resolution of conflicts and reducing the duration and emotional strain associated with protracted legal disputes.

- The mediation process is characterised by its informal nature and flexibility, as it is not legally binding and can be customised to suit the needs of the parties involved. Arbitration offers greater flexibility compared to litigation as it allows the disputing parties to work together towards a mutually agreeable solution, rather than relying on a court-imposed settlement.
- The mediation process empowers the parties involved to actively participate in the decision-making process and exert a significant level of influence over the outcome of the resolution. Agreements of this nature have the potential to result in settlements that are both more enduring and financially advantageous compared to those that are authorised by a court during a legal process.
- Mediation can prove to be beneficial in situations where the concerned parties are required to maintain ongoing relationships or connections, such as in cases of commercial or personal disputes, with the aim of enhancing the quality of their relationships. This may encompass situations where the involved parties are required to maintain persistent interactions. The mediation process facilitates the cultivation of collaborative conduct and civility, while concurrently enhancing communication and comprehension.

Cases Suited For ADR

The Supreme Court has recognised the significance of mediation and provided a list of instances where ADR can be utilised. Afcons Infrastructure Ltd. and Anr. v. Cherian Varkey Construction Co. Pvt. Ltd. and Ors.

Following is a list of instances where ADR is applicable:

1. Instances pertaining to trade, commerce, and contractual agreements-
    - Contractual disputes are conflicts that arise from agreements between parties.
    - The conflicts pertaining to the enforcement of a contractual obligation to perform a specific act or deliver a particular item.
    - The disputes that arise between landlords and tenants, as well as licensor and licensees.
    - The conflicts pertaining to the contractual agreement between the insurance provider and the policyholder.
    - The ongoing conflicts between financial institutions and their clientele.
    - All instances of disputes between suppliers and customers.

- The legal disputes that arise between developers/builders and customers.

2. Cases as a result of strained or soured relationships-

- The disputes relating to matrimonial causes, maintenance as well as the custody of children;
- The conflicts that arise due to partition among family members or co-parceners or co- owners a disputes arising out of a partnership, among partners.

3. Instances where the preservation of an ongoing relationship is crucial despite the presence of conflicts. Instances of disputes among neighbouring parties, such as disturbances and infringements.

- The issue of conflicts arising between employers and employees.
- Interpersonal conflicts within a given society, association, or community of flat owners.

4. The legal cases pertaining to tort liability, encompassing demands for damages in incidents involving motor vehicles and other types of accidents.

5. Consumer disputes encompass a wide range of conflicts, including those in which a trader, supplier, manufacturer, or service provider seeks to uphold their business or professional reputation, credibility, or product popularity. Enumerated herewith are the categories of conflicts wherein the utilisation of Alternative Dispute Resolution mechanisms may not be optimally appropriate.

- All lawsuits that fall under Order 1 Rule 8 of the CPC pertain to representative suits that involve matters of public interest or the interests of a large number of individuals.
- Any disagreement pertaining to elections or public offices.
- Legal proceedings pertaining to the issuance of probate or letters of administration in matters of inheritance.
- Controversies pertaining to significant and precise accusations of deceit, production of falsified records, counterfeiting, assuming another's identity, and exerting pressure.
- Legal cases that necessitate safeguarding by the court, such as litigation involving minors, divine entities, and individuals with mental disabilities.

- Contentious matters pertaining to the assertion of ownership rights vis-à-vis the state.
- Issues pertaining to the prosecution of criminal offences.[190]

Conclusion

In recent years, the popularity of mediation as a productive and efficacious alternative conflict resolution method has increased in India. The process of mediation presents a range of benefits to all parties involved in a given conflict. Mediation is becoming increasingly popular in India due to its cost-effectiveness, expeditious resolution time, adaptability, informal nature, and collaborative problem-solving approach. This can be attributed to the fact that India has a significant number of legal disputes. The objective of this research project is to examine the effectiveness of mediation as a means of resolving conflicts in India. One of the key advantages of utilising mediation as a method of resolving disputes is its affordability. In India, where legal disputes can result in substantial expenses, mediation presents a financially feasible alternative to litigation. Mediation can be a more cost-effective alternative to litigation due to its less formal procedural requirements and lower mediator fees compared to attorney fees.

The parties may potentially reduce the expenses associated with attending court and other legal fees. Mediation is a more time-efficient process compared to litigation, as it enables parties to reach a resolution in a shorter period. Litigation, on the other hand, may extend for several weeks, months, or even years. In the majority of instances, mediation can facilitate the parties' consensus at a faster pace compared to litigation.

Two further advantages of the mediation process are its adaptability and lack of formality. In comparison to litigation, which follows rigorous protocols and guidelines, mediation offers a less formal and more flexible setting where disputing parties can openly discuss and explore various potential solutions. Through the facilitation of constructive discourse, promotion of dialogue, and provision of support to the involved parties in identifying novel concepts that may not have been feasible within the confines of the legal proceedings, the mediator is capable of assisting the parties in uncovering inventive resolutions that would have been unattainable during the litigation process.

[190] Akanksha Mathur, How Does The Mediation Process Work – Steps and Procedure, iPleaders (Jul. 6, 2023, 11:25 PM), https://blog.ipleaders.in/mediation-in-india-process/.

Furthermore, mediation exhibits flexibility as the involved parties have the opportunity to engage in negotiations towards a settlement, as opposed to relying on a court judgement to resolve the conflict.

Furthermore, mediation affords the parties increased agency and participation in the proceedings. In the course of mediation, the involved parties are afforded greater agency in determining the outcome and are actively engaged in the decision-making process. In contrast, the outcome of a legal dispute is determined by the judge's decision, with minimal to no input from the involved parties regarding the course of the proceedings. The mediator facilitates a dialogue between the parties involved, encouraging them to express their respective desires, apprehensions, and objectives, with the ultimate goal of collaboratively devising mutually acceptable resolutions. This may result in agreements that are comparatively more gratifying and enduring than those that are enforced by a judicial authority in a legal process.

The mediation process further strengthens pre-existing relationships, thereby constituting another noteworthy benefit. The mediation process is characterised by a greater degree of consideration and collaboration, which serves to improve communication and foster greater understanding. The disputants possess the capacity to collaborate in order to arrive at a resolution to the dispute that satisfies their respective requirements, preferences, and apprehensions. This could prove advantageous in upholding connections amongst the individuals implicated, particularly in scenarios where the concerned parties are required to sustain cooperation or uphold ongoing associations, such as in a commercial conflict or a dispute involving a relative.

Although mediation offers numerous advantages, it also presents certain limitations. A potential obstacle that could arise during the process of mediation in India pertains to a deficiency in comprehension and reliance regarding the protocol. Many individuals lack knowledge regarding the benefits of mediation, while some may harbour doubts regarding the mediator's neutrality or the effectiveness of the method in expeditiously resolving disputes. Moreover, notwithstanding the commonly held notion that involvement in the mediation procedure is completely discretionary, it is plausible that certain parties may decline to participate, electing instead to present their conflict before a judge for the purpose of obtaining a verdict. An additional limitation of the mediation process pertains to the absence of an established legal framework for the management of agreements that are reached during the process. The Mediation and Conciliation Rules of 2004 provide a structure for mediation. However, the parties involved are not obligated to abide by the terms agreed upon during the mediation proceedings.

In the event that the parties opt to violate the agreements that were previously established through mediation, it is probable that this will lead to disputes and potentially, legal proceedings.

Despite the obstacles, mediation has emerged as a feasible alternative for resolving conflicts in India and has gained significant traction in recent times. The advantages of mediation have been recognised by both the executive branch and the judicial system, and they are currently making efforts to augment the quantity of cases that are settled through this mechanism. The inclusion of pre-institution mediation provision in the Business Courts Act of 2015 has resulted in a significant increase in the resolution of business conflicts through mediation. Furthermore, the significance of mediation has been emphasised by the Supreme Court of India, which has advocated for its implementation in numerous prominent cases. The court has endorsed and promoted the utilisation of mediation.

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The Quandaries of Refugee Predicaments in a Globalized Society: An Encumbrance on Supranational Agreements

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Abstract

"It is not possible to be in favour of justice for some people and not be in favour of justice for all people. Injustice anywhere is a threat to justice everywhere"– Martin Luther King Jr.

The basic concept of humanity itself is the sense of sharing common brotherhood and upholding the principle of fraternity throughout the world. It is the duty of each and every person residing all over the world to make a contribution towards the emancipation of the downtrodden sections of the society through the possible ways they can do. The principle of social-welfares is being deeply rooted by the idea of freedom, dignity and liberty which is being enjoyed by every citizen residing in a vast democratic nation like India and the core ideology is that there shall not be any sort of discrimination. Even after the 75th year of Indian independence, the nation is not fully free from various forms of discrimination which takes place impliedly or expressly in various parts of the nation but to an extent, the widespread impact of such evil practices has been considerably decreased after the gaining of independence from the British colonial administration. But the grey area which persists over here is that the nation is somewhat free from the social-evil of discrimination in between the citizens and not between the whole persons residing in this nation. The categorization of people residing in India includes citizens and non-citizens. The non-citizens are generally being categorized and termed as foreigners whereas no specific legislation makes a clear-cut definition to define who is a foreigner and what all are the conditions to be termed as a foreigner. The refugee problems and allied issues are always a topic for debatable discussion with regard to their treatment by various nations from time to time. India being such a vast nation does not have a codified set of rules and regulations in order to regulate the refugee policy and how to tackle the problems which may arise in connection to refugees and seeking

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of temporary asylums in India. This is considered to be one among the greatest nuances that India face where grey area of laws can be found and such vague as well as ambiguous legislations will deeply affects the basic, inherent and inalienable fundamental rights of the people who will be subjected to various sort of discriminations.

Keywords: Refugee Policy, United Nations, Global Compact on Refugees, Asylum, Citizenship, Foreigners, Human Rights

Introduction

Every nation will always provide predominant status to their own citizens and almost all the rights which is enshrined in the law of the said nation will be accessible to the citizens of that particular nation. This is because of the fact that, if the citizens are getting equal treatment and access to equal opportunities including the rendering of justice, they can only become a productive nation with innumerable and potential citizens who will be considered to be the backbone of the said nation. If we are focusing on the liberal-democratic ideology which is also being followed by our nation, deeply focuses on the importance of having a vibrant group of citizens with immense potential which will ultimately help in order to bring a strong and developed nation.[192] India being such a vast nation in terms of its population as well as demography, the nation is actually in a high need to make concreate laws in order to establish codified rules and regulations in this nation in order to guide and regulate the refugees who seeks asylums in this nation and how to distinguish a refugee who is in actual need of a temporary asylum in India for one reason or the other from that of the alien enemy who is also in a need to have an asylum in our nation. India is considered to be the largest democratic nation in the world which holds the true essence and spirit of constitutional morality and the good-old values of democracy. The inherent notion of Indian constitutionalism itself if the freedom and liberty provided to the citizens of this nation. Rather than the aforementioned freedom, the nation always upholds the value to treat everyone without any sort of discrimination including the foreigners. But the major problem arises over here is with respect to the classifications and the so-called segregation of people from one another. There is no clear-cut definition for the term foreigner anywhere in the Indian laws including the pre-constitutional and post-constitutional laws enacted over here. It is the need of the hour to analyze the impact of Global Compact on Refugees and the agreement which is being made

[192] Kevin Olson, University of California, "Constructing Citizens," *The Journal of Politics, The University of Chicago Press on behalf of the Southern Political Science Association,* Vol. 70, No. 1 (2008) pp. 40-53

between the signatory nations and how the United Nation and its allied organizations are treating these refugees or playing a crucial role in order to safeguard the rights of the aforementioned group as well as to provide adequate advice to the concerned ruling government of each and every nation in the world.

There comes the problem which is associated with the refugees who considered this nation as a temporary asylum in order to sustain their livelihood. On the one hand, at certain times, from the perspective of human rights values and inner morality, such temporary asylums in India by these refugees are quite acceptable but in most of the instances, it is considered to be a threat for the national integrity and security of our nation. Even after the 75th year of independence after India gains freedom from the British Colonial administration, the nation did not have any single or codified law in order to classify, define and specify the foreigners, migrants which include international migrants such as refugees and nation as well as domestic migrants. It is the high time for the government to look after the said matter and proper legislations as well as enactments must need to be passed by the parliament in order to safeguard the rights and liberty of these refugees as well as to protect the sovereignty, security and integrity of the nation as well. Thus, the democratic values of the nation must need to be upheld and it is the duty of the government to uphold the rights and liberty of the people residing in this nation including the citizens as well as the non-citizens.[193] There shall not be any form of discrimination between various communities or groups since it will discard the basic ideology and the constitutional morality which is enshrined in the Constitution of India by the founding fathers.

The democratic values enshrined in the Constitution of India is actually focusing upon the enforcement and upholding of the fundamental rights of the citizens. The government at every point of time should need to make concreate rules and regulations in order to guide the refugees who are seeking asylums in India for one reason or the other. If we are analyzing it in a critical perspective, both of the options are having its own merits as well as demerits.[194] On one hand, the nation is duty bound to protect the life and liberty of each and every nation residing in this nation including the citizens as well as the non-citizens which includes the foreigners, refugees, migrants and other aliens unless and until they are being considered to be a threat to the sovereignty, integrity and security of the whole nation.[195] It is clearly enshrined in the Constitution the provision of right to life and personal liberty enshrined under Article 21 of the

[193] Omar Chaudhary, "Turning Back: An Assessment of Non-Refoulement under Indian Law," *Economic and Political Weekly,* Vol. 39, No. 29 (2012) pp. 3257-3264

[194] V Vijayakumar, "Children in Humanitarian Emergencies and The Quest for Humanitarian Response: A Study" *Journal of the Indian Law Institute*, Vol. 54, No. 2 (2012) pp. 160-195

[195] The Indian Constitution., 1950, Art. 21

Constitution shall not be abridged or curtailed under any circumstance including the time when the nation goes through an Emergency as well.[196]

If we are expanding the ideology of the aforementioned basic, inherent and inalienable fundamental, it is clear that no person shall be deprived the aforementioned rights including the life and personal liberty which shows the importance to live with utmost human dignity. The problem which is being faced in the nation is that the refugees who seeks temporary asylums in India are unanimously considered to be the alien threats and enemies to the nation prima-facie by the government and concerned authorities and they will be charged with heinous offences such as offences against the national security and they will be imprisoned for such a long period which will even be unknown to the outsiders.[197] Even after the global compact on refugees as emerged by the United Nations through its subsidiary body of the United Nations High Commission for Refugees (UNHCR) is being signed by many of the mainstream developed and developing nations all over the world, to an extent, it is very clear that almost all the nations are not at all following even a single guideline as enshrined in the said agreement and protocol which is being made by the United Nations for the overall strengthening and safeguard of the refugees.

Refugee: An Alien Enemy or a Foreigner?

From time immemorial, the problem relating to international refugees and their encroachment over different nations is being considered to be a debatable topic. India being such a nation who has widespread laws and regulations on almost every law is not at all having a concreate law to regulate the refugees in India. The reason for the same can be drawn out from the tactics ruling government from time to time in order to show that the nation is not at all against global policies and global refugee policies but at the same time, even though India is also a signatory to the United Nation and allied bodies of UN who is taking part in refugee protection activities, the nation impliedly or expressly is not at all supporting the incoming and immigration of refugees towards India. If we are looking into the current scenario of our nation with respect to the treatment of refugee laws, it is very much clear that even if the nation is not at all expressly discriminating or causing harm to these refugees, our nation does not have any specific or codified law to regulate the affairs of these refugees and India does not have a codified refugee policy in order to ensure that such policies and guidelines are being followed by the government

[196] The Indian Constitution, 1950 part XVII., art 352.

[197] Eric A Ormsby, "The Refugee Crisis as Civil Liberties Crisis," *Columbia Law Review, Columbia Law Review Association, Inc.* Vol. 117, No. 5 (2017), pp. 1191-1229

to get prevention from further exploitations by these segregation among the people.[198] Another major criticism against the Indian approach towards the global refugees is that the judicial wing in India does not look after the matters of refugees promptly and the lack of judicial intervention in the said matter is considered to be one among the biggest failure from the side of Indian judiciary and the allied signatory bodies from India towards the said issue.

India will not at any cost provide the status of citizenship towards the refugees irrespective of whether they are considered to seek permanent or temporary asylum in our nation. The only matter which is being considered by the government will be the overall social security and welfare which must needed to be protected and upheld by this whole nation. But the grey area over here is that, as per the Citizenship Act of 1955,[199] a person who is born in India is considered to be an Indian citizen by satisfying the clause which is mentioned in the aforementioned legislations of our nation. Thus, as per the existing laws, the children and their off springs who had taken place their birth in India, shall need to be considered as the citizens of our nation while at the same time, due to the prevailing age-old evil and discriminatory practices, the government is not at all taking any radical step to overcome the challenges which are being faced by our nation over the past decade.[200]

No one include any political party stated that the said refugee community should need to be considered as the part of Indian Constitution and that is the reason why, even now, the children who are born and brought up in some other place, are considered to have variance and differences even due to the demographical structure and topographical changes. The government should need to be prudent enough to make concreate as well as codified laws in order to properly regulate the working and functioning of the refugee laws in India. This is because, India now became the largest nation in the whole world surpassing the Republic of China in the year 2023.[201] The basic strength of Indian nation lies with its energetic and enthusiastic young population comprises of so many youths, the government must need to have sufficient prudence in order the society with utmost peace and order by assuring guarantee to the protection and safeguards of their rights, including the fundamental rights as enshrined in our Constitution from time to time.

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[198] Saurabh Bhattacharjee, "India Needs a Refugee Law," *Economic and Political Weekly,* Vol. 43, No. 9 (2008), pp. 71-75

[199] Act of Parliament, Act No. 57 of 1955

[200] "The Refugee Children," Refugee Survey Quarterly, Oxford University Press, (1996), pp. 111-168

[201] The Hindu Bureau, "India's population to edge ahead of China's by mid-2023, says U.N.," *The Hindu* (New Delhi), 19th April 2023, Page 10

Refugees and their Displacement: The Global Scenario

India is considered to be one among the well-renowned liberalist nation in this whole world which provide sufficient liberty and freedom to the citizens as well as the non-citizens of this nation. The problem with regard to the same is that, India promotes the idea of equality, which is enshrined under the Constitution,[202] but does not do the same in actual practice. The criticism which is being raised against the nation even by the United Nations and its allied subsidiary organs which includes the United Nations Human Rights Commissioner's (UNHCR) office is that India being a signatory to the various conventions and agreements including the Global Compact on Refugees is not at all following the rules and regulations which is being enshrined under the said guidelines as listed by the United Nations from time to time. Another criticism which is always being raised against the Indian government as well the authorities and diplomats who represents the nation in the global scenario including those in the United Nation and its subsidiary organizations is that India does not even have any single codified policy for regulating the affairs of asylums.

It is actually a very complex situation which the government and the concerned authorities must need to take proper care and due diligence since the said matter in one way or the other affects the overall social security and welfare of the nation. This is because of the fact that, if the nation is having a refugee policy, then only, as per the global existing scenario, the nation is equipped with the right to prosecute or charge offences against the wrongdoers who will be a part of the aforementioned asylum or refugee groups who are residing in this nation.[203] After all, the nation is not at all having any law in order to demarcate who is a foreigner and who is an asylum who may come as a refugee to this nation. As per the existing law in the nation, it only makes only two broader categorizations, that is, the citizens of this nation who are residing either inside the Indian territory or those who are residing outside the territory of our nation with prior permission taken by the concerned authorities. While on the other hand, the next group is considered to be the non-citizens who will not be part of the citizens and thereby did not get the status and position of the citizens of this nation for which the non-citizens cannot step into the shoes of the original citizens. Here comes the problem ad lacunae as to which how to classify a non-citizen of this nation as a foreigner, immigrant, migrant, refugee or an asylum.[204] The nation promotes the idea of equality which is having a stark contradiction to

[202] The Indian Constitution, 1950, art 14.
[203] Pallavi Saxena, Nayantara Raja, "The imperative to offer refuge", The Hindu (New Delhi), 20 June 2018, p. 08.
[204] Oscar Mundia, "A place for all refugees under India's welfare umbrella", *The Hindu* (Mumbai), 21 November 2022, pp. 09.

what we have stated prior before. The government and the concerned authorities are actually segregating and demarcating the non-citizens as foreigners or refugees upon which criteria is very ambage and vague.

Such vagueness of law in a democratic nation like India who upholds the true spirit and essence of democracy is not at all good which will ultimately shatter the basic ideology of democracy which leads to the destabilization of the democratic principles and ultimate the whole strangulation of Indian democracy. The displacement of refugees is a constant area of conflict in the field of both domestic law of that particular nation as well as in the international law. This is because of the fact that in every nation, there are certain codified laws for regulating the domestic affairs as well as international relations of that particular state with another nation and likewise the law will clearly specify which all persons can be considered to be the citizens as well as the acceptable non-citizens in that particular nation after meeting the eligibility criteria as and so specified by the concerned government or the governing authorities from time to time. While the issues of the Rohingya refugees were in persistence, even the then President of International Federation of Red Cross and Red Crescent Societies (IFRC) clearly supported the Rohingya community and directed India not to forcibly return such suppressed community because they are seeking a temporary asylum in India in order to protect their life and livelihood.[205] This is a concreate example to show how a nation like India is also subject to the existing explicit as well as implied international laws which supports the movement and protection of refugees even if India does not have such a law to protect the said category of people. While looking the said instance through a critical perspective, there is a great imminent danger while allowing the refugees to stay in the nation because the government or even the local body members where the refugee stays will not have sufficient details about the whereabouts of those community who resides in that particular place as refugees.[206] This is an alarming situation for the government because if the government is trying to protect the human rights and international commitments as well as obligations with the foreign nation as well as foreign bodies including the United Nation and its allied organizations, it is actually threating the national integrity and security of the nation since these refugees may at any time became a potential threat to our nation since they are not at all having any sort of valid documents that they are not at all a part of the alien enemies to such a vast democratic nation like that of India.

[205] Jagriti Chandra, "Rohingyas must not be forced to return, says Red Cross President", *The Hindu* (London), 16 November 2018, pp. 13.

[206] Karen Jacobsen, "Refugees and global migration", *Great Decisions, Foreign Policy Association* (2019), pp. 13-24.

Thus, it is actually a high time for the government to revisit the existing refugee policies in India and the government should need to work on revising the procedures for accommodating refugees and collecting the whereabouts of the said category of people in a much faster phase in order to safeguard the rights of the citizens existing in our nation as well. It should need to be kept in mind by the government that the major objective of every democratically elected who rules the nation is to protect and safeguard the life and liberty of the citizens of India which should need to be the primary concern, duty and obligation and it shall only be secondary duty towards the other allied international relations and organized principles of the foreign bodies to uphold the international human rights and the so-called global relations and it should not in any way curtails of the common citizens who are residing in this nation.[207]

Humanitarian Emergencies: A Malediction to Refugees

Every nation is having the duty to uphold the fundamental principles and the constitutional morality enshrined in the basic law of the land, which is commonly termed as the so-called Constitution of that particular nation. If we are coming into the ambit of a democratic nation like India, every set of rules and regulations which is enshrined and enunciated throughout the country is based on the basic Grund norm which provides the backing and sufficient ground to other laws, enactments, statutes, rules as well regulations to withstand which can undoubtedly be termed as the Constitution of India. Thus, the changing government from time to time is duty bound to protect each and every principles as laid down in the Constitution without any fault since if the principles laid down under the Constitution get shattered, it shows how the true essence and spirit of democracy is being displaced and destabilized in such a vast nation like India who is having a high legacy in the administrative wing whereby India gains independence through their non-violent freedom struggle against the British administration during the mid-twentieth century.[208] If we are connecting the lives of the refugees in any nation including India, it clearly shows the miserable conditions through which they need to go through and how their life is being affected with the dispiriting attitude and ill-treatment by the government as well as the concerned authorities who are in charge of foreign affairs and international relations who must need to be well versed in both international as well as domestic laws.

[207] António Guterres, "Millions Uprooted: Saving Refugees and the Displaced", Foreign Affairs, Council on Foreign Relations, (2008), Vol. 87, No. 5, pp. 90-99.
[208] Mira L Siegelberg, "The Forty Years' Crisis: Refugees in Europe", *History Workshop Journal, Oxford University Press* (2011) No. 71, pp. 279-283.

The founding fathers of the Indian Constitution were having a clear vision on how to implement the global and international relations of India without hampering the domestic and regional laws as well as the common citizens who resides in this nation. According to them, it is the duty of the government to draw out a harmonious relationship between the government and the citizens, that is, the one who governs with that of the one whom is being governed by the concerned government. Likewise, the government and the people should need to have a vibrant, dynamic and effective relationship with that of the people who are residing even out of our nation, that is, the non-citizens which includes the foreigners, asylums, refugees and allied section of the society as well. But, if we are presently analyzing the contemporary scenario of our nation, it is crystal clear that the government as well as the diplomats of India in foreign nations are not at all taking any sort of responsibility or due diligence in order to provide a sufficient safeguard to those who seeks asylum in India, commonly the refugee communities. Even the current Minister of Foreign Affairs, stated that India should need to follow the principles laid down by Mr. MK Gandhi with respect to the matters like accepting refugees and giving asylums to them in India.[209] If we are analyzing the said statement by the Hon'ble Minister for Foreign Affairs in India, it is very much evident that the current ideologies and political agendas of the union government are in no way consonance with that of the ideology propounded by Mr. MK Gandhi. This is considered to be a mere political agenda in order to propagate that the government is actually in favour of those refugee community who are in need of care and well-being and the government is actually welcoming the aforementioned refugee communities who suffers so much hardship in their own nation in one way or the other where even their very basic, inherent, inalienable and uncurtailable fundamental rights are also being abridged.[210] Thus, the government is having the responsibility to protect the people even if they are citizens of this nation or not, in order to safeguard their basic fundamental freedoms and rights which shall be provided to each and every person who is residing in this nation irrespective of their status of citizenship or registration in any manner.

Global Compact on Refugees: The Hankering Law

The life of refugees and the allied problems which the refugees as well as the host countries where the aforementioned refugees seek the asylum are one among the constant topics on

[209] Press Trust of India, "Mahatma Gandhi's ideals must continue to guide actions in ensuring peace and stability around the world: Jaishankar", *The Hindu* (United Nations, Geneva) 15 December 2022, pp.14.
[210] V Vijayakumar, "Children in Humanitarian Emergencies and The Quest for Humanitarian Response: A Study", Journal of the Indian Law Institute, Indian Law Institute (2012), Vol. 54, No. 2, pp. 160-195.

which debatable discussions may arise among the well-prudent academicians, jurists, politicians, philosophers as well as critical thinkers all over the world. This is one among the reason for which the United Nations along with its subsidiary body United Nations High Commissioner for Refugees (UNHCR) implemented the Global Compact on Refugees in the year 2018 with a strong intention to implement the harmonization of international relations and the adequate need of international cooperation in order to promote and protect the existing refugee problems and refugee policies all over the world.[211] The major objective behind laying down such a law which is having worldwide recognition and accreditation is that in the so-called of age of globalization where supranational and transnational relations including the harmonization of laws in different countries with respect to the refugee must also need to go hand-in-hand.[212] The major impact on the society by such a Global Compact on Refugees is that the allied signatory nations with the United Nations and especially its subsidiary bodies like the UNHCR must need to follow the aforementioned agreement and due to the said reason, the existing laws and approaches by a particular nation towards the refugees and refugee policy will also get changed and they must also need to open their towards for those who seeks asylums in India if their basic fundamental rights are infringed or curtailed in their home nation and for the same reason, their life and liberty is being threatened or strangulated whereby they must need to move away from the that particular society.[213]

The government in every nation should need to have a codified and well-defined laws with respect to the immigration and migration of refugees which takes place in their nation from time to time. In the year 2017, the thematic session conducted by the United Nations with respect to the refugee problems and the policies which should need to be adopted by the signatory nations were being largely discussed and thus as a result of the same, the global compact of refugees was being enacted whereby the member countries became a signatory and has made tremendous efforts for the proper establishment and enactment of the said agreement in their own nation without any fail which will affects the integrity of the nation in front of the whole signatory members of the United Nation as well as the member countries in the UNHCR.[214] The Global Compact of Refugees was being implemented with various objectives

[211] Global Compact on Refugees – Booklet, *United Nations High Commissioner for Refugees (UNHCR), The UN Refugee Agency* <https://www.unhcr.org/media/global-compact-refugees-booklet> accessed on 03 August 2023.
[212] Maria Stavropoulou, "Displacement and Human Rights: Reflections on UN Practice", *Human Rights Quarterly, The Johns Hopkins University Press* (1998) Vol. 20, No. 3, pp. 515-554.
[213] Population Council, "The Global Compacts on Migration and Refugees: Endorsement and Dissent", *Population and Development Review* (2019), Vol. 45, No. 1, pp. 257-262.
[214] Asmita Parshotam, "The UN Global Compacts on Migration and Refugees: A New Solution to Migration Management, or more of the same?" African Institute of International Affairs (2017) pp.42-77.

which will certainly benefits both the refugees as well as the hist countries and to an extent, they have somehow managed in order to ensure the promised benefits after implementing the same in the allied signatory countries of this agreement. One among the major objective for the implementation of the Global Compact on Refugees is that it helps to ease the pressure and burden of the countries who can be termed as the host countries, which are responsible to look after the said refugees who seeks asylums in their nation.[215]

Being an international agreement having far reaching impacts on whole member nations all around the world, it helps to enhance the safety and protection of the refugees who are trying to seek asylums in the foreign nations in order to protect and safeguard their own lives and liberty. It is not only a matter for protecting and safeguarding their life and liberty but the member nations or the allied countries are also providing supportive measures and further back supporting facilities to look after these people who are deemed to be refugees. Even the third-world countries and the under-developed nations thus will get a major support from the global arena with respect to the protection and welfare of the refugees who seeks asylums in their nation. This can be considered to be one among the greatest initiative taken by the United Nations and its allied organizations and subsidiary bodies including the UNHCR as well.[216]

To an extent, it is very much clear that if the global compact on refugees are properly being implemented, there will be enough protective and safeguarded measures to emancipate the destitute and downtrodden refugees all over the world where they will find a host nation as their own nation to find their means to sustain their daily livelihood and the said host nation will also get sufficient economic and financial support globally in order to look after those refugees who did not have any further say in the global arena.[217] Thus, it is high time for each and every government of the member countries who signed this global compact on refugees to take sufficient steps and look after the matters concerning to the overall development of the refugees and those who seek asylums in the nation. Thus, these sorts of initiatives can be considered as a path or way in which we can attain the principle of social-welfarism by promoting the principle of equality and non-discrimination among all the people residing in this nation even without segregating to looking after the citizenship status which is being hold by these people residing over here.

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[215] Objectives of Global Compact on Refugees – United Nations, *United Nations High Commissioner for Refugees (UNHCR), The UN Refugee Agency* < https://www.unhcr.org/about-unhcr/who-we-are/global-compact-refugees> accessed on 05 August 2023.

[216] Smriti Kak Ramachandran, "India's refugee policy is an example for the rest of the world to follow," *The Hindu* (New Delhi) 03 January 2013, pp.08.

[217] Alemu Asfaw Nigusie and Freddie Carver, "The Global Compact on Refugees and the Comprehensive Refugee Response Framework," *Alemu Asfaw Nigusie and Freddie Carver, ODI* (2019), pp. 253-256.

Conclusion

India being the largest democratic nation in the whole world should need to be a role model for each and every nation who is in the path of development and growth. The nation is famous for the constitutional values and principles of morality which it upholds from time immemorial. Likewise, the government of this nation is also duty bound to follow and respect the ideologies of human rights and protection of the peace and liberty of the citizens all over the world. The problems and policies issues to the refugees in India and their regulations is just one among the reason for which India still cannot be considered as a developed nation who gave equal importance to each and every sector including the protection of the basic, inalienable and fundamental rights of the people residing in this nation which includes the citizens as well as the non-citizens. India should need to be open for several western laws and the regulations provided by the United Nations as well as UNHCR with regard to the implementation and regulation of the refugees and allied community groups residing in this nation.[218] These guidelines and principles also helps the nation in order to uphold the strong constitutional values which is being enshrined under the Constitution by interpreting the constitutional philosophies. Thus, the government by implementing the said regulations will analyze the nature in which the country is governed and the various measures by which the people residing in this nation can be emancipated and help them to come in the front arena by promoting the principles of equality and by avoiding the discriminatory practices which takes place in the whole nation.[219]

The strength of every nation lies within the coordination of people who are residing over there and a sense of common brotherhood will help to tie it in a much deeper way by promoting the spirit of fraternity among all the people which will ultimately help in the emancipation of the society by avoiding any sort of discrimination which is there all over the nation. The Global Compact on Refugees is one among the way in which the refugee policy can be revisited by the government of India and sufficient amendments can be made in the existing refugee policy and the treatment towards them by following the principles enshrined under the said agreement between the signatory parties including India. Thus, it is the high time for the government to look the matter thoroughly and proper measures should need to be taken by the government from time to time by protecting the principles of equality and liberty which is enshrined in our

[218] Jérôme Elie, "The Historical Roots of Cooperation between the UN High Commissioner for Refugees and the International Organization for Migration," *Global Governance, International Migration, Brill,* Vol. 16, No. 3 (2010) pp. 345-360.
[219] Architesh Panda, "Climate Refugees: Implications for India," *Economic and Political Weekly,* Vol. 45, No. 20 (2010) pp. 76-79.

Constitution as the cardinal principle. By emancipating the said group of downtrodden people, the whole society can be uplifted which truly helps in the development of such a vast nation like India which must need to be made by the application of these international laws in a very systematic approach.

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Anti- Defection Law- Hitherto Shifts and Challenges It Poses

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Abstract

Anti – defection law was first introduced in the Indian scenario in 1985 finally, after multiple bills were rejected through the years. The need for such law was felt post dealing with multiple defections, and when slogans like aaya ram Gaya ram gained prominence. Defection in the Indian politics had gained momentum as politicians want greater power and they readily switch to the party that offers them money or ministries .Even after the addition of the 10th schedule in the Constitution through the 52nd amendment the practice of changing political parties by the legislators continue unabated. The law has been amended through the years but yet has various drawbacks. It gives unlimited power to the speaker to decide in the cases of defection when there is a clear possibility the speaker might intend to make his decisions in favor of the party he belonged to. At the same time it bars the jurisdiction of courts to decide on the matter negating judicial review for the same which could lead to arbitrariness. On a different front this also stops an individual to give his free opinion that might not be in the party's interest thus curbing the legislator's freedom to oppose the wrong acts of the party, bad policies, leaders and bills. This paper focuses on the problems faced by Indian politics due to defection through the years, the drawbacks of this enacted law, the shifts and the challenges posed by it. It also proceeds to find measures to ensure a healthy, honest, and competitive political system.

Keywords: Anti- defection, disqualification, Tenth Schedule, Judicial Review, Voluntarily, membership

Introduction

An MLA from Haryana named Gaya Lal switched parties three times in a single day in 1967, and his catchphrase "Aaya Ram, Gaya Ram" became well-known. Defection is defined as

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"conscious abandonment of allegiance or duty."[222] One of the earliest cases of defection can be noted as the one where Mohammed Ali Jinnah had left and later on confronted congress in 1920's. He later went onto leading the Muslim league and making Pakistan a political reality.[223] 542 lawmakers and members of legislative parties changed political parties in the nation between 1957 and 1967. As many as 142 defections were reported in Parliament over the four years between 1967 and 1971, and 1,969 MLAs switched parties in state assembly all around the nation.[224]Following this, the necessity for an anti-defection provision was felt, and in 1985, the 52nd Amendment added the tenth schedule to the Indian Constitution. It is also referred to as the Anti-Defection Law. It became effective on March 1st, 1985. The justification for preventing such defections was that they threatened the values and foundations of Indian democracy.[225]

Even after the Tenth Schedule was added to the Constitution in 1985, parliamentarians in Indian legislatures are still prohibited from switching political parties while serving in office. Commonly referred to as the "Anti-Defection Law," it was created to stop lawmakers from switching their political allegiances while they were still in office.

A key factor in the downfall of popular administrations around the world has been defections. The fluctuating allegiances of the legislators caused political instability in several nations. For instance, governments in Sri Lanka fell as a result of defections twice, once in 1964 and again in 2001.India has around 1866 registered political parties in our country out of which around 56 are recognized as national or state parties[226]

Etymology of the term 'defection'

Defection refers to a person or a group's revolt, disagreement, or rebellion. Defection typically refers to resigning from one association to join another. When a member of a political party joins forces with other parties, it occurs in a political scenario. The term "floor crossing" has been used to describe this phenomena since the British House of Commons, where a lawmaker's allegiance would change when he crossed the floor from the Government to the Opposition side, or vice versa.

[222]Merriam-webster,https://www.merriam webster.com/dictionary/defection#:~:text=noun,cause%2C%20or%20doctrine)%20%3A%20desertion

[223] Ayub Dawood, Here Are 10 Political Defections That Left A Lasting Impact on India, The Scoop, (Dec 29, 2015 at 07:58 PM), https://www.scoopwhoop.com/news/political-defections-india-jinnah-bose-jp/ .

[224] Mayabhushan Nagvenkar, Goa's Early Trysts With Defection, The Outlook, (Sept. 14, 2022 6:37 PM), https://www.outlookindia.com/national/goa-s-early-trysts-with-defection-news-208789

[225] The Constitution (Fifty-Second) Amendment Bill, 1985, Lok Sabha, (January 24, 1985), http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/22_1985_LS_En.pdf.

[226] Political Parties: *EC, The Times of India* (10th Dec), https://timesofindia.indiatimes.com.

History

This defections phenomenon has also occurred in Indian politics. Defection has historically been a fertile ground for political instability and uncertainty in India, frequently tending to shift the emphasis from "governance" to "governments." The infamous "Aaya Ram, Gaya Ram" slogan was created in the 1960s in response to the constant defections of parliamentarians.

In truth, defections in India have a history that dates back to the Central Legislative Assembly, when Shri Shyam Lai Nehru switched sides from the Congress Party to the British side. Another example is Shri Hafiz Mohammed Ibrahim, who in 1937 switched from the Muslim League to the Congress after being elected to the Uttar Pradesh Legislative Assembly. The tendency of changing political parties for reasons other than ideological ones swept the Indian polity in the late 1960s.

However, this tendency of switching political parties first appeared in the 1960s. This widespread political defection occurred around the time of the 1967 election. The legislators in numerous states had a significant change in political parties during the 1967–1968 period leading up to the fourth general election. 438 of the 542 occurrences of desertion between the first and fourth general elections took place in the year from 1967 to 1968.

The Chavan Committee Report (1969) notes that numerous instances of legislators in several states switching parties during the brief time between March 1967 and February 1968, following the Fourth General Elections, characterized the Indian political scene. In the two decades between the First and Fourth General Elections, there were approximately 542 incidents, and at least 438 defections happened in only these 12 months. Out of the 376 elected Independents, 157 joined different parties during this time. The fact that 116 of the 210 defecting legislators from different States were included in the Councils of Ministers they assisted is evidence that the lure of office played a significant role in legislators' decisions to leave their respective parties.

Evolution of Anti-Defection Law In India

A private member's resolution introduced in the Fourth Lok Sabha on August 11, 1967 by Shri P. Venkatasubbaiah served as the impetus for the development of laws to address the defection crisis in India. The Lok Sabha debated his resolution on November 24 and December 8, 1967. The Lok Sabha unanimously approved the resolution in its final form on December 8, 1967. A Committee on Defections was established by the government in accordance with the viewpoints indicated in the resolution, and it was led by the then-Union Home Minister, Shri

Y.B. Chavan, and it submitted its report on February 18, 1969. The Lok Sabha's table was covered with the committee report.

A 1973 law known as The Constitution (Thirty-second Amendment) Bill the Constitution (Thirty-second Amendment) Bill, 1973 was introduced in the Lok Sabha on May 16, 1973, to constitutionally provide for disqualification on defections because the Y.B. Chavan Committee's recommendations were unable to adequately address the issue of defections. The Lok Sabha and Rajya Sabha both approved a proposal to refer the measure to a joint committee of the houses of parliament on December 13 and 17, 1973, respectively. The Joint Committee was abolished on January 18, 1977, when the Fifth Lok Sabha was dissolved.

The 1978 Constitution (48th Amendment) Bill Another attempt was made on August 28, 1978, when the Constitution (Forty-Eighth Amendment) Bill, 1978, was introduced in Lok Sabha. At the introduction stage itself, a number of lawmakers from the ruling party and the opposition parties rejected the Bill. The members raised major concerns about the alleged manipulation of facts in the Statement of Objects and Reasons of the Bill, which claimed that "the problem cuts across all parties" despite the fact that the members were not consulted over its provisions. It has been looked at after consulting with political party leaders. The Minister withdrew the motion for permission to present the Bill due to strong opposition.

A law against desertion, The Constitution (Fifty-second Amendment) Bill, 1985 The Constitution (Fifty-second Amendment) Bill, which the government introduced in the Lok Sabha on January 24 and which resulted in the addition of the Tenth Schedule and changes to Articles 101, 102, 190, and 191 of the Constitution, was the result. It lays out guidelines for Shri Venkatasubbaiah's Lok Sabha resolution, which reads as follows: "This House is of the opinion that a high-level Committee consisting of representatives of political parties and constitutional experts be set up immediately by Government to consider the problem of legislators switching their allegiance from one party to another and their frequent floor crossings in all its aspects and make recommendations in this regard. Main suggestions made by the Y. B. Chavan Committee-

- There should be a committee made up of party representatives in the legislature and state assemblies. It was established with the purpose of developing a code of conduct for political parties, specifically with regard to the issue of defections, and overseeing its implementation. No person shall be appointed as a Minister or Chief Minister if they are not a member of the lower House.

- The Committee recommended making this change to the Constitution without impacting the current officeholders.

On May 5, 2003, the Government presented the Lok Sabha with the Constitution (Ninety-seventh) Amendment Bill, 2003. The Bill was passed by the Lok Sabha and Rajya Sabha on December 16 and December 18, respectively, after the Standing Committee on Home Affairs, to which the Bill was referred, delivered its report. The Constitution (Ninety-first Amendment Act, 2003) was enacted on January 1, 2004, and on January 2, 2004, it was published in the Indian Gazette. The President gave his assent to the legislation on that day.

The Tenth Schedule to the Constitution's rule on splits was not included in the Act. It stated that a member who is disqualified under paragraph 2 of the Tenth Schedule shall also be disqualified from being appointed a Minister or holding a lucrative political position for the duration of the period starting from the date of disqualification until the date on which the term of his office as such member would expire, or, in the event that he contests an election to either the House of Parliament or the Legislature of a State, before the expiration of such period, until the date on which the election results are announced.

What are the Grounds for Defection?

- Voluntary Give Up:

If a political party membership is voluntarily renounced by an elected official.

- Violation of Instructions:
  - If he casts a vote or doesn't cast a vote in that House against the wishes of his political party or anyone else with that authority, without first getting consent.
  - His refusal to cast a ballot must not have been approved by his party or the designated person within 15 days of the incident in order for him to be disqualified.
- Elected Member:

If any independently elected member joins any political party.

- Nominated Member:

If any nominee joins political parties after the initial six months have passed.

Certain Incidents of Defection

One of the incidents where congress appeared as the single largest party after the elections in 2017, however BJP formed the government as 12 legislators defected to join the BJP government. The HC had not held the legislators not disqualified stating that it is particularly mentioned in the sec 4(2) that when more then 2/3rd members of a party chose to merge with

other would not be regarded as defections as mentioned in 10th schedule. While the opposition lays allegations that this judgment provokes and encourages the use of malpractices in elections where the party with greater income resources can easily defect the legislators in their favor.[227]
In 2015, Yogendra Yadav, one of the Aam Aadmi Party's founding members and a former close aide of Arvind Kejriwal, and Prashant Bhushan began to have issues with Kejriwal's autocratic behavior and his new inner circle. The dissent that emerged shortly after the party's stunning victory in the Delhi elections embarrassed everyone as the leader took to the streets to criticize Kejriwal. In March 2015, Yadav was expelled from the AAP after being voted out of the political affairs committee for engaging in "anti-party activities." Yadav and Bhushan founded the Swaraj Abhiyan, a new group, following what would turn out to be the first of many upheavals for Arvind Kejriwal.
There are several examples even where the prominent leaders have been defected. MLA Lalduhoma was removed from the Mizoram legislature in 2018 assembly elections for defecting to the Zoram People's Movement (ZPM) as he had first contested the election under no party names. He had earned the dubious distinction of being the first Lok Sabha MP to be disqualified under the anti-defection statute in 1988.[228]
In Maharashtra, the Shiv Sena, Nationalist Congress Party, and Indian National Congress formed a coalition government, however 40 of the party's 55 MLAs left. The MLAs who left the alliance afterwards formed the state's administration by forming a partnership with the main opposition Bharatiya Janata Party. Although more than two-thirds of the Shiv Sena's MLAs left the previous coalition, they did not afterwards join any other political party. Both parties' divisions now assert that they are the original Shiv Sena. The Election Commission prohibited both party sections from using just the name Shiv Sena and the election emblem of the original party in a temporary ruling.[229]
The state's government was overthrown in March 2020 in Madhya Pradesh as a result of the resignation of 22 Indian National Congress MLAs from the legislative assembly. Later, a number of these MLAs ran in and won by-elections on Bharatiya Janata Party platforms.[230]

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[227] Gerard de Souza, *Goa defections: Congress says HC order will encourage mandate reversal*,(Feb 25, 2022 10:54 AM)https://www.hindustantimes.com/india-news/goa-defections-congress-says-hc-order-will-encourage-mandate-reversal-101645766699698.html .
[228] *Mizoram MLA Lalduhoma Disqualified from Assembly For Defecting*, NDTV, (November 27, 2020 8:40 PM), https://www.ndtv.com/india-news/mizoram-mla-lalduhoma-the-first-lok-sabha-mp-to-be-disqualified-axed-again-for-defection-2331229.
[229] Commission's Interim Order dated 08.10.2022 in case of Dispute No. 1 of 2022 in regard with Shivsena, Election Commission of India, October 8, 2022, https://eci.gov.in/files/file/14449-commissions-interim-order-dated-08102022-in-case-of-dispute-no-1-of-2022-in-regard-with-shivsena/.
[230] MLAs resigning their membership in the 15 th legislative assembly, Madhya Pradesh Vidhan Sabha,

17 members of the Indian National Congress and Janata Dal (Secular), the state's ruling alliance, resigned from the Karnataka Legislative Assembly[231]. The Speaker, however, refused to accept their resignations. In the interim, a motion of confidence was required by the government to demonstrate its majority in the parliament. The administration was overthrown because the MLAs abstained from the vote. The Speaker then denied the MLAs' resignation and declared them unable to serve until the end of the assembly's current session. The Supreme Court overturned the order on the duration of the MLAs' disqualification but affirmed the Speaker's decision to remove them from office. A few of the MLAs who were disqualified joined the Bharatiya Janata Party and ran in the by elections.

Lacunae and Shortcomings

Defecting flouts the same mandate on which a member was elected, according to the National Commission to Review the Working of the Constitution, which observed this in 2002. Candidates are elected based on the party that handed them the ticket. The Anti-Defection Law was added to the Constitution for this reason, among others, according to the Statement of Objects and Reasons of the Bill.

Problem with merger- While Rule 4 of the Tenth Schedule appears to give some relief from members' eligibility in circumstances involving mergers, there appears to be a legal gap. Subject to the need that at least two-thirds of the members of the legislature party in question have approved such merger, the law tends to protect the members of a political party when the original political party merges with another party. The fault appears to be that the exception is determined by the quantity of members rather than the cause of the defection. Individual members' availability of lucrative office or ministerial positions with the opposing party appears to be the most typical motivation for their desertion. It is entirely reasonable to assume that the same reason might apply to the 2-3rd members who have agreed to the merger.

Expulsions- Due to the Anti-Defection Law's silence about the issue of members of political parties being expelled, there have been several challenges in the law's enforcement. The Anti-defection Law's fundamental flaw is that it has no provisions for handling the scenario that results from a member's expulsion from his political party. The lack of a provision in the Tenth Schedule regarding such members creates an anomalous situation in that the expelled member continues to be subject to the discipline and whips, etc., of the party but may no longer enjoy

https://mpvidhansabha.nic.in/15thvs_bielection.pdf.

[231] Shrimanth Balasaheb Patil v. Hon'ble Speaker, Karnataka Legislative Assembly and Others, Writ Petition (Civil) No. 992 of 2019, Supreme Court of India, November 13, 2019

the benefits of membership, even though political parties continue to have the authority to expel their members from the party under the provisions of their party constitution.

Voluntarily giving up of membership of a party- Rule 2(1) (a) of the Tenth Schedule¬ mentions that a member of the House is disqualified from the party if he voluntarily gives up his membership of the political party. However, it is not very clear from this paragraph whether indulging in acts like working against the interests of the party, supporting a candidate of other party in elections, etc., which, technically speaking do not amount to giving up the membership of the party may be considered as the member having voluntarily given up the membership of the party.

Giving up political party membership voluntarily is one of the grounds listed in the Tenth Schedule for being disqualified as a defector. However, the Schedule doesn't specify what exactly counts as voluntarily giving up party membership. According to the Supreme Court, voluntarily terminating membership has a much broader meaning than merely resigning from the party[232].

Even without leaving the party, a person can voluntarily renounce their membership. Even without tendering a resignation, a member's actions may be taken to infer whether he has freely renounced his party membership. This may imply that a legislative action taken both inside and outside of the House can be looked into to qualify as voluntarily giving up the party membership.

In a different instance, the Supreme Court ruled that even if a political party member is expelled after being elected, he may nevertheless continue to be a member of the party as an unattached member.[233]Such a member will be regarded as having freely renounced his membership in the first party if, after being ejected from the first party, he joins another political organization.

Wide power to the Speaker- the Chairman or Speaker of the House has broad and unrestricted authority to decide instances involving the disqualification of members on the basis of defection under Rule 6 of the Tenth Schedule. It should be noted, nevertheless, that the Speaker continues to be a member of the party that nominated him or her for the position of Speaker. It is difficult to anticipate that the Speaker will act impartially in issues involving his or her political party in such a situation. The Speaker's decision is definitive under the law, but he is not given a set amount of time to make it. A party may file a court motion, but only after the Speaker has made his choice public. The Dinesh Goswami Committee on Electoral Reforms

[232] Ravi S. Naik v. Union of India, 1994 Supp (2) SCC 641

[233] G. Viswanathan V. The Hon'ble Speaker Tamil Nadu Legislative Assembly, 1996 AIR 1060, Supreme Court of India, January 24, 1996

and the Election Commission advocated giving the President or the Governor of the State the authority to decide on the matter of disqualification under the Tenth Schedule, who shall act on the advice of the Election Commission. However, the Act has not been changed to implement these proposals.

Scope of judicial review- Rule 7 forbids judicial review of any matter related to a member of a House being disqualified, so all courts, including the Supreme Court under Article 136 and High Courts under Articles 226 and 227 of the Constitution, lack the authority to examine the Speaker's decisions in this regard. The Supreme Court has ruled in a number of decisions that the law is lawful in all other respects but that the issue of judicial review is unconstitutional. However, despite numerous judicial rulings supporting the Courts' ability to conduct judicial reviews, the Tenth Schedule has not been altered in this way.

No individual stand on part of members- Rule 2 of the anti-defection law confines legislators' ability to challenge the wrongdoings of the party, harmful policies, leaders, and laws by placing party members in a category of loyalty to the party whip and policies. In this sense, the political party governs its members, who aren't allowed to express their disagreement. In a manner, this goes against the idea of representative democracy, because members are compelled to follow orders rather than the wishes of the populace.

Law Commission Reports

We have also recommend the insertion of definition of "political party" in the Tenth Schedule to include a pre-election front or pre-election coalition. In such a situation, defection of a member of such constituent party of the pre-election front or of the constituent party as a whole from the pre-election front would be treated as defection attracting the provisions of the Tenth Schedule to the Constitution.[234]

Law Commission of India (1999) chaired by Justice BP Jeevan Reddy on 'Reform of Electoral Laws' recommended scrapping the provisions regarding splits and mergers.[235]

The Law Commission recommends a suitable amendment to the Tenth Schedule of the Constitution, which shall have the effect of vesting the power to decide on questions of disqualification on the ground of defection with the President or the Governor, as the case may be, (instead of the Speaker or the Chairman), who shall act on the advice of the ECI[236]

[234] One Hundred Seventieth Report On Reform Of The Electoral Laws , (1999), Law commission of India.
[235] Justice BP Jeevan Reddy , (1999) , Law Commission of India ,'Reform of Electoral Laws' . See also Justice MN Venkatachaliah, (2002), The National Commission to Review the Working of the Constitution.
[236] The 255th Law Commission Report On Electoral Reforms, (2015), Law Commission Of India.

The 4th report of the Second Administrative Reforms Commission (2007) chaired by Veerappa Moily suggested that the matters of disqualification for political defection should rest with the President or the Governor on the advice of the Election Commission of India, as the case may be.[237]

Should The Presiding Officer / Speaker Be Deprived Of The Power To Rule On Defection Petitions?

Numerous initiatives have been launched in the last few years to solve this issue, beginning with the Committee on Electoral Reforms led by Dinesh Goswami. The members of the committee suggested, in their report turned in on May 4, 1990 (Committee on Electoral Reforms 1990), that the Presiding Officer not make the decision on disqualification.

The President or the Governor, as appropriate, who will act on the advice of the Election Commission, should have the authority to decide the legal question of disqualification rather than the Speaker or Chairman of the House, to whom the question should be referred for determination as in the case of any other post-election disqualification of a Member.[238]

The following suggestions were made in January 1994 by a committee of presiding officers led by Hashim Abdul Halim:

1. The Supreme Court or the High Court, depending on the situation, may hear an appeal about the Presiding Officer's ruling.
2. In the case of the Lok Sabha and jointly in the case of the Rajya Sabha, an appeal against the Presiding Officer's decision may be made to the President.
3. A committee of senior members of the House may decide the case, and the presiding officer may hear an appeal[239].

- In *Babulal Marandi Vs the Speaker, Jharkhand Vidhan Sabha*[240]Court ruled that the Speaker is required to exercise the power for deciding if the question about disqualification is referred for such decision before him/ her. In other words, the Constitution has not conferred any powers on the Speaker to take suo motu decisions on the matter of disqualification under the Tenth Schedule.

[237]Veerappa Moily, (2007) , The 4th report of the Second Administrative Reforms Commission
[238] Dinesh Goswami Committee, (1990), Report of the committee on electoral reforms, Ministry of Law and justice
[239] *Dr. K. Gireesan, Mr. Chinmay Bendre, published Friday 16 September 2022,* Anti-Defection Law: A Review, Mainstream Weekly , VOL 60 No 39-42 last retrieved Wednesday, 22 Feb., 2023.
[240] 2021 SCC OnLine Jhar 170

- Applicability of anti-defection law in the absence of rules. In the case, *Madan Mohan Mittal Vs The Speaker, Punjab Vidhan Sabha*[241], the Punjab-Haryana High Court has placed on record that "in the absence of rules framed under Para 8 of the 10th Schedule, it is open to the Speaker, to adopt such procedure as s/he deems fit, proper, expedient and just in the circumstances of any particular case. The law remains silent also on the issue of the rendition of a petition by another representative
- In the case of *Ravi Naik*[242] (1991), Simon D'Souza, the acting Speaker of the Goa Legislative Assembly held that the respondent was not allowed sufficient opportunity for his defense and set aside the decision of his predecessor, Surendra Sirsat.
- In *Keisham Meghachandra Singh Vs the Speaker, Manipur Legislative Assembly*[243], the Supreme Court recommended that an independent tribunal can be appointed which will substitute the Speaker of the Lok Sabha and Legislative Assemblies to deal with matters of disqualifications under the Tenth Schedule to the Constitution.
- The Supreme Court (2020) has observed that while acting as a tribunal under the Tenth Schedule, the speaker is bound to decide disqualification petitions within a reasonable period. While what time period is reasonable will depend on the facts of each case, the Court held that disqualification petitions must be decided within three months from when they are filed.[244]

Incidents of Defection Decision Gone Wrong By the Speaker

When the Speaker of the Mizoram Assembly discovered in 1988 that one of the nine lawmakers who made up the "one-third" defector was abroad, it was assumed without any proof that the other eight were also defectors. This was sufficient for the Governor to fire the Ministry and dissolve the Assembly in order to establish President's control. The gang also stated that they had nine members, but the speaker made no attempt to verify this information. Later, it was discovered that the ninth member had not defected but rather had left the country. Therefore the speaker did not characterize it as a split instead imposed defection upon them.[245]

[241] 1997 SCC OnLine P&H 787 : (1997) 4 RCR (Civil) 597 (2) (FB) : PLR (1997) 117 P&H 374 (FB)
[242] Supra
[243] 2020 SCC Online SC 617
[244] Keisham Meghachandra Singh v.The Hon'ble Speaker Manipur Legislative Assembly & Ors., Civil Appeal No. 547 of 2020, Supreme Court of India, January 21, 2020
[245] J. Zahluna,(2018) Political Defection of Mizoram in 1988, Senhri Journal of Multidisciplinary Studies Vol. III No. 1 (January – June, 2018) ISSN 2456-3757 (pp : 96 – 111)

For the first time in history, Congress won elections in Nagaland in 1988. In the elections for the assembly, the party easily prevailed. In response, it seated renowned Naga chieftain Hokishe Sema in the chief minister's seat. Unfortunately, the party lost, and K.V. Krishna Rao, the governor general, suggested dissolving the Assembly. In the interim, 13 of the House's 60 members (or 13 out of 40) sent a combined letter of resignation to Speaker Chongsen, expressing their dissatisfaction with the chief minister's leadership. The Naga National Democratic Party (NNDP), which holds 17 assembly seats, was joined by the 13 MLAs, including four important ministers and the deputy speaker. But the biggest blow to the Congress was the speaker's decision to recognise the opposition coalition-the Joint Regional Legislature Party - as a new political party, thereby allowing the dissidents to bypass the Anti-Defection Law, and clearing the decks for a change in government.[246]

Incidents of Defection Decision Gone Right by the Speaker

No political party was able to win a clear majority in the 2017 elections for the 11th Manipur Legislative Assembly. With the backing of an MLA who was elected on the INC's platform, the Bharatiya Janata Party asserted a claim to form the state's administration. The Manipur BJP-led government even elevated the MLA to the position of minister. The minister was the subject of numerous disqualification petitions for changing parties after being elected to the House, but the speaker of the parliamentary assembly did not rule on any of them. The MLA was expelled from the state government and prohibited from participating in the legislative assembly by the Supreme Court in March 2020. Ten days later, the speaker disqualified the MLA.[247]

26 MLAs left opposition parties to join the Telangana Rashtra Samithi (TRS) at various stages after the TRS formed the state's government in Telangana in 2014. But until the legislature was dissolved prior to elections, the state's speaker of the legislative assembly did not rule on the disqualification petitions.[248]

In Andhra Pradesh, 23 YSR Congress legislators switched allegiances to the state's ruling Telugu Desam Party. The petitions to remove these MLAs from their positions as members of

[246] 2 Ramesh Menon, President's Rule imposed in Nagaland under the questionable circumstances, INDIA TODAY < https://www.indiatoday.in/magazine/indiascope/story/19880831-presidents-rule-imposed-in-nagaland-under-questionablecircumstances-797609-1988-08-31> Feb., 21 2023

[247] Keisham Meghachandra Singh versus The Hon'ble Speaker Manipur Legislative Assembly & Ors, Supreme Court of India, March 18, 2020 .

[248] "Speaker Stays Silent: KCR Formula to Beat Anti–Defection Law Sets Dangerous Example", News 18, , https://www.news18.com/news/opinion/opinion-speaker-stays-silent-kcr-formula-to-beat-anti-defection-law-sets-dangerous-example-1871363.html , (April 18th, 2023)

the House were not addressed by the speaker. In fact, the state government named four of these MLAs as ministers.[249]

An MLA who was elected on the Bharat Janata Party ticket in the West Bengal legislative assembly elections of 2021 was rumoured to have joined the governing All India Trinamool Congress. He was the subject of a petition to be expelled from the House due to defection that was presented to the speaker. The speaker, however, turned down the request to disqualify the MLA.[250] The Calcutta High Court ruled that the speaker had disregarded some of the documentation submitted in support of the MLA's disqualification petition. The Court determined that the speaker's commands were perverse and unjustifiable on these reasons. The Court instructed the speaker to reconsider the petition after carefully reviewing all pertinent papers.[251]

Conclusion

The anti-defection law in India has been an essential tool to maintain political stability and ensure party discipline. However, it has also posed significant challenges and criticisms that need to be addressed.

One of the major challenges of the anti-defection law is its potential misuse by political parties to suppress dissent and stifle democratic debate. The law's strict provisions, such as disqualification of legislators, have led to instances of party leadership controlling the voting behavior of their members. Additionally, the law has limited the ability of legislators to represent their constituencies and voice their concerns effectively. The law's provisions have forced legislators to toe the party line, even if it goes against their constituents' interests.

During the Conference of Presiding Officers of Legislative Bodies in India held in 1951 and 1953, where the powers of the Presiding Officer regarding political defection were hotly contested, a resolution was passed calling for the adoption of the British Convention, which prohibits political parties from fielding candidates against the Speaker during general elections. And the Speaker can stay in charge until something changes. By custom, the Speaker also renounces affiliation with his or her political party.

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[249] "YSR Congress to boycott Assembly over defection row", The Times of India, https://timesofindia.indiatimes.com/city/vijayawada/andhra-pradesh-ysr-congress-to-boycott-assembly-over-defectionrow/articleshow/65690123.cms., (April, 18th, 2023)

[250] Ambika Roy v. The Hon'ble Speaker, West Bengal Legislative Assembly and Ors., WPA(P) 213 of 2021, Calcutta High Court, April 11, 2022,

[251] Bengal Assembly Speaker rejects plea to disqualify Mukul Roy as MLA", Business Standard, https://www.business-standard.com/article/current-affairs/bengal-assembly-speaker-rejects-plea-to-disqualify-mukul-roy-as-mla122060800884_1.html. , (April ,18th, 2023)

Such conventions might be challenging to adopt in India. However, it can serve as a beacon for our legislators. Therefore, it is wise to make the case that the speaker or presiding officer should not have the authority to decide on defection petitions.

To address these challenges, there is a need to reform the anti-defection law. The law should be made more transparent and clearly defined to avoid confusion and ambiguity. The provisions should be more nuanced to ensure that legislators can represent their constituencies while maintaining party discipline.

Furthermore, there should be provisions to prevent the misuse of the law by political parties. The law should be amended to allow legislators to vote according to their conscience on issues of national importance while maintaining discipline on party-related matters.

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Republic Of Rhetoric: Right to Free Speech and Selective Prosecution

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Abstract

Free speech is a key tenet of democracy. The right to freedom of speech and expression is a fundamental component of a really progressive society since it fosters the exchange of ideas and inspires action. A culture that values many viewpoints can strengthen a country. In pluralistic cultures, a varied spectrum of perspectives shows societal development and peaceful cohabitation. As John Stuart Mill contends in his essay "On Liberty", even if only one individual holds a contrary opinion to the majority, it is unfair to silence that person's voice.

However, in recent times our nation's social fabric, as well as its unity and integrity, have suffered significantly as a result of inflammatory speeches lacking in logic, as well as incorrect ideas and behaviors that go against societal standards. As a result, while a country must guarantee its citizen the freedom of speech and expression, it is also crucial to make sure that this freedom does not interfere with others' rights to have their own thoughts, ideas, and beliefs, including religious beliefs. Although legal action should be taken against such speeches, it must be done fairly and in compliance with the law, avoiding selective prosecution.

In light of these considerations, this research paper conducts a descriptive examination of the right to freedom of speech. It also highlights recent instances of selective prosecution that violate our right to free speech and run counter to the rule of law. Finally, the authors offer suggestions to address the current crisis.

Keywords- Free Speech, Democracy, Selective Prosecution.

Introduction

We are living in an era of media sensitized world, fueled by the technological advancement in field of transport and communication. The lightning-fast speed of the 4G internet buttressing the hunch for information has transformed the whole system of information and mass-communication. With all this lightning-fast speed of the internet and social media, it has

[252] Lawyer
[253] Lawyer

become easy for everyone to express the views he owns, or have faith in. the proponents and supporters of social media as an effective tool argue that social media with all its might is the most democratic system evolved in the last few decades. It has the potential of revolutionizing the whole system of mass communication, and indeed it has. We are living in age of easy publication where a person can rise to national fame overnight, just by posting a video-footage or a person with all his fame and fan-boys land up in a two-sided controversy, resulting in a police complaint, social media hatred or even get to serve the Indian prisons.

In the November 2021, Vir Das, an internationally acclaimed comedian and stand-up artist of India while performing at the Kennedy Centre in Washington DC landed up in one such aforementioned controversy, wherein police complaints have been registered against the stand-up comedian, in different parts of country.[254] The monologue titled 'I come... from two India's' which basically talked about the paradoxical standing of a society, where the claims and idealism on the pamphlets fail to pass the reality test. The seven-minute clip divided the social media users into two factions, one side was cheering for the bravado, while other side was busy lamenting the artist for portraying India in bad light and few among them reached the police station for registering a complaint for hurting their sentiments.

A spokesman from the ruling dispensation said that he had lodged a complaint against the comic with the police, accusing him for making derogatory statements against women and India, while on the other side, third term MP from Thiruvananthapuram and a member of the Congress Party, Dr. Shashi Tharoor defended the comedian saying that "Vir Das spoke for millions and called him a stand-up comedian who knows the real meaning of the term stand up i.e., is not physical but moral."[255]

Following the backlash on the social media, the stand-up artist through his twitter post defended his performance as being a satire about the duality of India that do two different things.[256] The comedian in his own assumption was quite content with the fact that this clip is going to stir a nationwide debate, as this can be witnessed in his parting lines wherein he says that "I come from an India that is going to watch this and say {This isn't standup comedy, Where is the goddamn joke?} and yet I come from an India that will watch this and know there is a gigantic joke it just isn't funny."[257]

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[254] "Complaints Filed Against Comedian Vir Das for 'Defaming India's Image' in the US", *The Quint* (Nov. 17, 2021) available at <https://www.thequint.com/news/india/complaint-filed-against-comedian-vir-das-for-defaming-indias-image-in-the-us#read-more#read-more > (last visited on October 10, 2023).

[255] "Comedian Vir Das causes a stir with 'two India's' monologue", *BBC* (Nov. 17, 2021) *available at* <https://www.bbc.com/news/world-asia-india-59323282> (last visited on October 10, 2023).

[256] *Ibid*

[257] "Comedian Vir Das causes a stir with 'two India's' monologue", *BBC* (Nov. 17, 2021) *available at*

Observers and journalists even considered the backlash against the comic as an echo of the recent case of comedian Munawar Faruqui, who was imprisoned for more than a month, till the time Hon'ble court granted him bail. Faruqi was booked for allegedly making indecent remarks about Hindu gods, thereby hurting their religious sentiments, while doing his rehearsals behind the stage.[258]

Few months later, Vir Das again stirred the controversy by uploading a video post on his Instagram account. Commenting upon the kind of treatment a comic and his art gets in India, the comedian says in his clip from one of his shows that "*comedians in India get punished for hurting sentiments. You come to an Indian comic, you tell us a comedian got slapped, we don't ask by who? We ask by what?* He then adds*, "Sedition, defamation, hurting sentiments. What did they get slapped with?"*[259]

If we follow this controversy and the respective contentions of the parties, then we will find that the definition of free speech lies at the center of the debate. Lawyers, civil rights activists and courts are often posed with the question of legality of a speech. The critics of the existing prosecution practice often say that the constitution guaranteed the freedom of speech and expression, but failed to protect the freedom after speech. The question around the concept of free speech and line of demarcation often seems too blurred to be recognized.

Right Of Freedom Of Speech: A Conceptual Discussion

"*Freedom of expression is a supreme condition of mental and moral progress*." [260]- Bury

Given the high positioning to the right of free speech, it can be said that the right to freedom of speech is one of the most basic human rights, which inheres in every mankind. As it has been observed by noted historian Bury, it is the supreme condition for mental and moral progress. Our founding fathers while drafting the constitution gave due importance to the most cherished human rights, especially when they themselves were denied the right to free speech, during the colonial regime.

If we read the constitutional text, then we will find that one of the fundamental freedoms protected by the Indian constitution is the freedom of speech and expression. All people of India enjoy the right to freedom of speech and expression, according to Article 19(1)(a) of the

<https://www.bbc.com/news/world-asia-india-59323282> (last visited on October 10, 2023).

[258] *Ibid.*

[259]"Vir Das says comedians in India are slapped with 'sedition, defamation', stirs massive controversy", *Times Now* (July12, 2022) *available at* <https://www.timesnownews.com/entertainment-news/vir-das-says-comedians-in-india-are-slapped-with-sedition-defamation-stirs-massive-controversy-article-92820852 > (last visited on September 10, 2023).

[260] Bury, *History of Freedom of Thought* 239 (1st edition, 1913).

Indian Constitution. The definitions of speech and expression in article 19(1)(a) are too plain to require any further explanation, however, for the purposes of judicial interpretation, perhaps no word is too simple.[261] The fundamental freedom of speech and expression is a concept that is difficult to define precisely. The scope of fundamental rights is very broad, thus justifications that are appropriate in one situation may not be appropriate in another.

Similarly, the explanations which are apt in one case may not deem fit in another case as the ambit of fundamental rights is very vast. The definitions which were apt in past may require new dimensions to enshrine with the present requirement, and upon this point it's imperative to mention Hon'ble Supreme Court's remarks on the interpretation of fundamental rights in the leading *Kesavananda Bharti's case*. The court observed, "*fundamental rights themselves have no fixed content and attempt of court should be to expand the ambit of these rights. Most of the fundamental rights are like empty vessels into which each generation must pour its content in the light of experiences.*" [262] The United States Supreme court, in *Lowell v Griffin* explained the freedom of speech and expression as:

"…. freedom of speech and expression means the right to express one's own conviction and opinions freely by words of mouth, writing, printing pictures or any other mode. It thus includes the expression of one's ideas through any communicable medium or representation, such as, gesture, signs and the like."[263]

The scope of Article 19(1)(a) is broadened to include several areas that are enumerated rights, which are also called invisible rights. Since there is no separate guarantee for freedom of the press but still it is a crucial component of freedom of speech. The freedom of speech and expression extends to the freedom of silence as well.

Although the freedom of speech and expression is regarded as the foundational principle of liberty and the mother of all liberties, but at the same time our Constitution imposes reasonable restriction upon this right, as there cannot be unlimited or unrestrained freedom because this would result in social anarchy and turmoil. [264]

Though the ambit of Article 19(1) of the constitution of India is very vast, and guarantees numerous freedoms regarding the freedom of expression, but the next clause i.e., Article 19(2) imposes certain restrictions upon the free speech and expression. It says that, nothing in 19(1)(a), shall affect the operation of any existing law, or prevent the State from making any

[261] *Express Newspapers v UOI*, AIR 1958 SC 578
[262] *Kesavananda Bharti v State of Kerela*, AIR 1973 SC 1461.
[263] *Lowell v Griffin (*1939) 303 US 444.
[264] *A.K. Gopalan v State of Madras*, AIR 1950 SC 27.

law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by 19(1)(a). Article 19(2) says that reasonable restrictions can be imposed in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

Right to freedom of speech and expression enjoys a pivotal place in the panoply of fundamental rights. But if we look at the post-independence prosecutions which has been initiated at the behest of the state or the citizens, against those holding a dissenting view/opinion, then we will find that, although the constitutional drafters incorporated the noble idea of fundamental right to freedom of speech under Article. 19(1)(a) but they failed to provide freedom after speech. The restrictions provided under

Constitutional Limits of Right to Freedom of Speech

Noted author and advocate Gautam Bhatia in his book "Offend Shock or Disturb" argues that, "*statues regulating free speech oftentimes suffers from two basic infirmities, i.e., over-breadth and vagueness*".[265] So before proceeding forward we need to understand what these two infirmities mean. A statue can be said to be overbroad when it has the tendency to prohibit both kind of speech, first one which state is constitutionally entitled to restrict, and the second one which state is not constitutionally entitled to restrict.

Constitutionally speaking this infirmity is closely connected with the reasonable requirement under Article 19(2) of the Constitution, which will be discussed in this chapter. Another infirmity pointed by the learned author is the vague character of the prohibiting statue. Vagueness means uncertainty about the situation, i.e., the person or citizens are unable to know that what has been prohibited.[266]

Our constitution in clause 2 of Article 19 mentions about reasonable restriction upon the fundamental right to free speech. Part III of the constitution is the soul of our constitution and it is in consonance of the basic human rights recognized and accepted across the globe in various existing democracies. These are the basic rights, but it needs to be said that these rights are neither uncontrollable nor without restriction. The state under Article 19 (2) has been entrusted with the power to regulate and restrict the enjoyment of rights within the parameters as set out in Article 19.

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[265] Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* 29 (Oxford University Press, 1st edition, 2016).

[266] *Grayned v. City of Rockford*, 408 US 104

So before going into the issue of on what grounds the speech can be restricted or when such restrictions can be imposed, we need to understand what constitutes restriction, and how it can be imposed?

Restriction means limiting the length of enjoyment of any given right, be it over object or fundamental right. The important aspect in this restriction is that it must be reasonable. What constitutes a reasonable restriction is to be tested on the parameters of reasonableness. The test of reasonableness has to be viewed in the context of the issues, which faced the legislature.[267]

For a restriction to become a valid restriction, following conditions must be satisfied:

a. It must be imposed by law
b. Such law must be made by state
c. Such law must be valid
d. The restriction must have some proximate nexus with the grounds as specified under Clause 2, of Article 19
e. The restriction so imposed by the law must be reasonable.

Liberty Crisis and Selective Prosecution of Penalized Speech

"The constitution does not provide for first- and second-class citizens." – Wendell Willkie[268]

Penalizing speech have been the epicenter of major headlines and politically motivated accusations. Interestingly Sedition and laws penalizing Hate Speech has gained much attention of the law critics and the constitutional courts as well.

One such instance of criticism concerning the use of sedition came from the Apex Court wherein the current Chief Justice N.V. Ramana, while questioning the continuity of the sedition law, expressed his concern over its misuse. He said: "*The use of sedition is like giving a saw to the carpenter to cut a piece of wood and he uses it to cut the entire forest itself*."[269]

Another such issue and sense of apprehension in regard to liberty crisis can be witnessed in the responses of Kaleeswaram Raj (Lawyer and Author) to his latest interview to The Leaflet. The author was asked to comment on the arrest of civil society members for alleged hate speech during the anti-CAA and denial of bail for years, while one the other right-wing leaders arrested recently for delivering communal hate speech on multiple actions are let off easily on bail? While answering this question, he says that the troubling question is the selective application

[267] D.D. Basu, *Commentary on the Constitution of India, Volume 3* 3263 (Lexis Nexis; 9th Edition 2014).
[268] Fali S Nariman, *God Save The Supreme Court* 219 (Hay House India, 1st Edition, 2018).
[269] Meher Manga, "Sedition law: A threat to Indian democracy?", *Orfonline* (July 26, 2021) *available at* https://www.orfonline.org/expert-speak/sedition-law-threat-indian-democracy/ (Last visited July 27 2023).

of laws. He further says that we won't be able to approach the issue as a simple legal issue, rather he suggested that the question of hate speech, is a political question rather than a legal question.[270]

There are valid reasons for the kind of answers given by Kaleeshwaram Raj, and one such reason can be witnessed in the Hon'ble Apex Court remarks in another hate speech issue, wherein the ruling party spokesperson was an accused for allegedly making derogatory remarks against the Prophet Mohammad. Justice Kant while disposing her quashing of multiple FIR petition remarked that *"the accused was not arrested despite the case against her and this reflected her clout. What if she is the spokesperson of a party? She thinks she has back up power and makes any statement without respect to the law of the land."* The court further asked the government counsels that "*when you register a FIR against someone then they are arrested but not you. This shows your clout,"*[271]

While another such case involving the issue of hate speech was the arrest of Mohd. Zubair, for allegedly posting inflammatory tweet on the micro blogging website. In this case the Hon'ble Supreme Court observed that, Zubair was trapped in a vicious cycle of the criminal process where the process had itself become the punishment.[272] In this case certain dormant First Information Reports (FIRs) from the year 2021 were activated upon new FIRs, compounding his difficulties.[273]

So, from the aforementioned examples, it can be said that the argument of Kaleeshwarm Raj has certain genuineness, or it can be said that there exists some firm ground for reaching such conclusion. The issue of selective prosecution lies at the core of this liberty crisis.

1. Understanding Selective Prosecution

Selective prosecution is the enforcement or prosecution of criminal laws against a particular class of persons and the simultaneous failure to administer criminal laws against others outside the targeted class.

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[270] Kaleeswaram Raj, Hate Speech and hate crimes: Law and politics, *The Leaflet* (May 17, 2022) *available at* <https://theleaflet.in/hate-speech-and-hate-crimes-law-and-politics/> (Last visited September 27 2023)

[271] "Supreme Court slams Times Now, Nupur Sharma over Prophet remarks", *News Laundry* (July 1, 2022), *available at* <https://www.newslaundry.com/2022/07/01/supreme-court-slams-times-now-nupur-sharma-over-prophet-remarks> (Last visited September 27 2023)

[272] "In Zubair's case, process itself had become the punishment: Supreme Court" *The Leaflet* (July 25, 2022) *available at* <https://theleaflet.in/in-zubairs-case-process-itself-had-become-the-punishment-supreme-court/#:~:text=Zubair%20was%20granted%20regular,petitioner%20to%20persist%20any%20further>(Last visited September 28, 20203)

[273] Ibid.

During 1880 in USA, most laundry businesses in California were owned and operated by Chinese immigrants. The city of San Francisco passed an ordinance saying that anyone who operated a laundry in a wooden building needs to obtain a permit for operating the same. The board members who were supposed to issue the permit used their discretion and discriminated against Chinese laundry owners. It further made the laundry business by the Chinese immigrants' illegal for them to operate and they were fined for doing so.

One Sang Lee, the owner of Yick Wo Laundry was also fined for operating the laundry without a license. They sued Sheriff Hopkins of San Francisco when he entered the laundry to arrest Sang Lee for operating without a permit. The question posed to the court was, "*whether the unequal enforcement of the city ordinance violate Yick Wo and Wo Lee's rights under the Equal Protection Clause of the Fourteenth Amendment*?" The court answering the issue in affirmative said yes, a law that may appear to be nondiscriminatory on its face can be discriminatory in how it is applied.[274]

Moving further, the American Supreme Court in *United States v. Armstrong*,[275] ruled upon the requirements of the claim for selective-prosecution. The court ruled that claimant must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose. To establish a discriminatory effect the claimant must show that similarly situated individuals were not prosecuted. The court while ruling upon the merits of the federal statue ruled that the claim of selective prosecution is a claim not upon the merits of the case, rather it is an independent claim based upon the prosecutorial misconduct, or say discriminatory intent.[276]

1.1 Timing of Claim for Selective prosecution:

People v. Carter,[277] prescribes the timing of the plea of selective prosecution. It says that the claim of selective prosecution must be raised at the outset, otherwise it will be deemed to have been waived.

1.2 Burden of Proof in Claim for Selective prosecution

In order to succeed in a claim of a selective prosecution challenge, a defendant must make a prima facie case showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not been prosecuted. In *State v. Rogers*,[278] a

[274] *Yick v. Hopkins*, 118 U.S 356
[275] *United States v. Armstrong,* 517 U.S. 456
[276] Ibid
[277] *People v. Carter*, 450 N.Y.S.2d 203
[278] *State v. Rogers* 68 N.C. App. 358,

defendant alleging selective prosecution must establish discrimination by a clear preponderance of proof.

Justice Jackson, of the American Supreme court recognized the problem of selective prosecution as the most dangerous powers given the prosecutor as it enables the prosecutor to pick-choose people he wishes to, be it arbitrarily or on a rational basis. As it has been mentioned previously, as per the United States, apex court ruling in the celebrated case of United States v. Armstrong, selective prosecution refers to the application of criminal laws to one class of people while failing to apply them to other groups that are not part of the targeted group. According to the U.S. Supreme Court, selective prosecution occurs when a criminal law is *"directed so solely against a particular class of persons... with a mind so unequal and oppressive that its implementation effectively denies equal protection of the law."*[279]

The constitutional principle of equal protection under the law is affected by the issue selective prosecution. The Due Process Clause under the Fifth Amendment to the United States Constitution contains the provision for equal protection at the federal level. The 14th amendment extends this right to the states. According to the equal protection doctrine, people with comparable situations must be treated equally by the law.

2. **Indian Constitution and Equal Protection of Laws**

Article 14 of the Indian constitution says that *"the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."*[280] The interpretation of these two words, "equality before law" and "equal protection of laws" has been defined differently in the past. In the initial years, two of the early cases which the Hon'ble Supreme court had the opportunity to hear, were related to pre constitutional statues violating the protection under article 14. The first one was the leading case of Anwar Ali Sarkar v tate of west Bengal,[281] wherein the petitioner challenged the validity of West Bengal Special Courts Act 1950, on the basis of article 14, claiming that the law violates their fundamental right. In this case the court by a majority of 6:1, ruled that according to the prohibitive mandate of article 14, it only forbids class legislation, however the test of article 14, allows reasonable classification.[282]

[279] *United States v. Armstrong*, 517 U.S. 456
[280] The Constitution of India, 1950, art. 14.
[281] *West Bengal v. Anwar Ali Sarkar*, 1952 AIR 75
[282] Ibid

In a companion case which was decided just a month later, i.e., *Kathi Rani Rawat v. State of Saurashtra,*[283] J. Bose in his minority dissenting opinion observed that Article 14 cannot be confined to the confines of classification test, as expounded in Anwar Ali judgment, and the real test was the test of judicial conscience of the court, of which Sr. Advocate and an internationally acclaimed jurist, Fali S Nariman in book writes as "a cry in wilderness"[284]
However, before moving to the concept of equality which is corollary to the Equal Protection clause of American Constitution, it's imperative to mention that the concept of selective prosecution is different from what was held constitutional in the Anwar Ali Judgment.

2.1 Anwar Ali Sarkar versus Yick Wo

It need be mentioned that both the issue of selective prosecution and class legislation traces their origin in right to equality and the principle of non-discrimination. However, it need be mentioned that the issue of class legislation deals with the legislative discrimination while the issue of selective prosecution deals with the procedural/prosecutorial infirmity.
In *State of West Bengal v. Anwar Ali Sarkar*,[285] the West Bengal Government enacted a law named West Bengal Special Courts Act with an object to ensure speedier trial for certain kinds of offenses. Section 3 of the act empowered the state government to establish the special courts for the purpose of this act and section 5 enabled the trial of the class of cases which are determined and notified by the state government.
The court by a judgment of 6:1 majority noted that section 5(1) gives an unrestricted power to the state government to refer as many cases to the special court as it deems fit, and hence such unbridled powers is discriminatory and against the scheme of Article 14.

2.2 Equality: An Antithetic to Arbitrariness

According to the Supreme Court's ruling in the Royappa case[286], Article 14 now has a new meaning and serves as a safeguard against arbitrariness. The court ruled that it is impossible to restrict equality inside conventional and dogmatic bounds since it is a dynamic notion with various facets and dimensions. According to a positivist, equality is the antithesis of arbitrariness. In actuality, arbitrariness and equality are sworn adversaries; one is associated with the rule of law in a republic while the other is associated with the whim and caprice of an

[283] *Kathi Rani Rawat v. State of Saurashtra*, 1952 AIR 123
[284] Fali S Nariman, *God Save The Supreme Court* 227 (Hay House India, 1st Edition, 2018).
[285] *State of West Bengal v. Anwar Ali Sarkar*,1952 AIR 75
[286] *E. P. Royappa vs State Of Tamil Nadu*, 1974 AIR 555

absolute monarch. A violation of Article 14 occurs when an act is arbitrary because it is inherently unequal under both political reasoning and constitutional law.

Similarly, this concept was further substantiated by Justice Bhagwati in the celebrated Maneka Gandhi Judgment, wherein it was observed that Article. 14 assures justice and equality of treatment and combats state conduct that is arbitrary. The principle of reasonableness, which is a necessary component of equality or non-arbitrariness both legally and philosophically, permeates Article 14 like a brooding omnipresence, and the procedure contemplated by Article 21 must pass the reasonableness test in order to be in compliance with Article 14. It must be legitimate, fair, and just; it cannot be capricious, irrational, or harsh.[287] So, on the similar lines it can be said that the concept of claims for protection against the selective prosecution can be imported into the Indian constitutional law jurisprudence in order to protect the citizens who have been pick-choose by the prosecution agencies, either working at the best of the executive commands or as per the directions of the political masters.

Conclusion and Suggestions

Right to freedom of speech and expression is one the most cherished rights which provide the ground to flower the civil rights in any given democracy. It is this right to free speech, which allows the public discourse about the working of state machinery, where the state's claim of good governance is challenged by the dissenters, who think it otherwise. It is this right which forms the basis of free marketplace of ideas.

The framers while drafting the basic and the most important document for the newly independent nation, i.e., constitution, they reflected the views of Madison who was the leading spirit behind the First Amendment of the Federal Constitution". As per Madison "*it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigor of those yielding the proper fruits*". Similar opinion was laid by Justice Bhagwati in the case of *Maneka Gandhi v. Union of India*[288], Justice Bhagwati observed:

"*…. democracy means government of the people, by the people then it is necessary that every member must be entitled to take part in democratic process and to enable him to intellectually exercise his right of making choice, it is essential to provide free and general discussion of public matters*."

[287] *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.
[288] *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

The right to freedom of speech and expression has been protected under Article 19(1)(a) of part III of the constitution, but at the same time it needs to be mentioned that that rights, so conferred under Article 19(1)(a) is not absolute. Rather reasonable restrictions can be imposed upon the rights under the aforementioned article.

So, from the aforementioned discussions and deliberations it's sufficiently clear that our constitution, which reflects the spirit of our founding fathers provides a right to freedom of speech and expression which entails various invisible rights. However, it is equally noticeable that the founding fathers engrafted restrictions, which was later decided by the amendment to be reasonably put, over the use of these rights. The question which remains here that what sort of restrictions can be imposed, by the parliament?

In this regard we would like to conclude with a quote of Gurudev Rabindranath Tagore, taken from his book "On Nationalism" wherein Tagore writes "*.in ancient days Sparta paid all her attention to become powerful, and she did so by crippling her humanity, and she died of the amputation*." Having been in agreement with the Supreme Court's observation "*...liberty has to be limited in order to effectively possessed, and one while enjoying the freedom guaranteed under article 19(1)a must not encroach the rights of others.*"[289] We would suggest that those who have been empowered to impose restriction should draw a fine balance like the one which finds its place in observation of Canadian Supreme Court, which says that:

"...the concept of right postulates the interrelation of individual right in society all of whom have the same right. Thus, the right of a person to drive along the highway is limited to the right of others persons to pass along that highway. Hence it is the duty of state to impose restrictions in order to prevent accident to other vehicles or to passerby".[290]

Instances of prosecutions initiated in the name of penalized speech at the behest of the state or the instrumentality of state, is an important issue which the authors have outlined in the scheme of this essay. In this regard the authors find that the idea of free speech is on a constant decline since the inception this republic of India. Dissenters or government critics of the contemporary regime have always been the prime accused.

The authors find some weight in the apprehensions of civil rights activists and legal experts echoing the criminal prosecution in the name of penalized speech as being selective to silence the critics. Recently a former Supreme Court Judge, Hon'ble Justice Madan B. Lokur in his speech, at a webinar organized by the Campaign for Judicial Accountability and Reforms

[289] *Lily Thomas v UOI*, AIR 2000 SC 1650

[290] D.D. Basu, *Commentary on the Constitution of India, Volume 3* 3293 (Lexis Nexis; 9th Edition 2014).

(CJAR), echoing the similar apprehensions said that, "*State can curb and check speech in a constitutional manner. But the state is using sedition as an iron hand to curb speech. Suddenly, you have a lot of cases being filed charging people of sedition*."[291]

In regard to subtle solution to the issue of liberty crisis emanating from the selective prosecution the authors propose to import the doctrine of "*claim of protection against the selective prosecution*" which was laid down in the case of *Yick v Hopkins,* with little variations. In order to protect the civil liberties of the citizens, we need to borrow the concept of claim of protection against selective prosecution in our criminal and constitutional jurisprudence at the cognizance stage of the trial along. Such right at the cognizance stage of the trial would help the accused who has been selectively prosecuted. Other suggestions in regard to the solve the liberty crisis is the development in the bail jurisprudence, making the offences relating to penalized speech bailable, provided it doesn't lead to violence.

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[291] Bhadra Sinha, "Government is using sedition as an iron hand to curb free speech, says Justice M.B. Lokur", *The Print* (September 14, 2020) *available* at <https://theprint.in/judiciary/government-is-using-sedition-as-an-iron-hand-to-curb-free-speech-says-justice-m-b-lokur/502477/> (last visited October 7 2023).

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A REGULATOR FOR REGULATORS: NEED FOR CENTRAL REAL ESTATE REGULATION AUTHORITY

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Abstract

Real estate is a very crucial sector for economic growth and employment generation as evidenced by data contributing 11% to Gross Value Added (GVA) growth since 2011-12. The responsibility of regulating the sector is given to respective state real estate regulation authorities which include administrative, quasi-judicial, penal, regulatory, compliance, advocacy, awareness programs, and making necessary recommendations to the government. As the real estate regulation authority regulates such an important sector and exercises a wide range of functions its working must be analyzed critically. The enactment of legislation and establishment of real estate regulation authority has resolved various problems existing in the real estate sector and has strengthened the position of buyers but there are a few problems like slow disposal of disputes, delay in the approval of the project, etc. which requires in-depth analysis and immediate action. Also, there exists a lack of uniformity in law and interpretation across the country as each state has its own regulating body. Many a time appointment of officials becomes the subject of criticism. The paper will try to find whether the establishment of a central authority for regulating state real estate regulation authority can help in solving these problems. It will also discuss the cost-benefit and challenges in establishing the central authority. The research will also try to suggest the structure, power, and functions of the central regulator. This research may help while considering reform in the existing structure and future course of action in the real estate sector.

Keywords

Regulation, Central Authority, Uniformity, Challenges, Cost-Benefit

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Introduction

Despite its exponential growth, the real estate industry in India has been unregulated for many years. This industry has been troubled by a variety of issues at the transactional or operational level like legal regimes that differ between states and ambiguous enforcement methods used by different State Governments. Even though it has a substantial share in the National Income, the real estate sector nevertheless faces challenges because of widespread irregularities that have undermined investor and buyer confidence. The need to regulate and promote transparency in the real estate sector is more crucial than ever as India continues growing and becoming increasingly urbanized.

The enactment of the statute in 2016 was a major step toward regulating the sector and easing the business of both builders and consumers. The Ministry of Housing and Urban Poverty Alleviation, Government of India 'MHUPA' in its press release dated June 5, 2013, clarified that RERA has been prepared in pursuance of the powers of the Central Government under entries 6, 7, and 46 of the Concurrent List of Seventh Schedule in the Constitution of India, as RERA governs the contractual understanding between developers and buyers of units.[293] The legislation came into force on May 1 but only 52 sections were notified out of a total of 92 sections. The rest of the provisions were made effective on and from May 1, 2017. Since implementation, 30 states/UTs have established a Real Estate Regulatory Authority with at least 5 of them being interim.

The legislation provides for the establishment of regulating authority for every state which would regulate the sector and make policies. The legislation was aimed at making a uniform legal regime for the country but different interpretations of laws by various states have created many issues also the absence of a watchdog over the regulator has affected the efficiency of state regulators. This paper will discuss the need for a central regulating authority as a watchdog over state regulators and their functions.

Background

The real estate industry in India is one of the significant sectors that has a crucial role in the development of the economy of the country. In India, the real estate sector's growth started late but is now growing rapidly. Housing, retail, hospitality, and commercial are its four sub-sectors. The expansion of the business environment and the demand for office space, as well

293 Admin (2020) Rera: A uniform regime, Shardul Amarchand Mangaldas & Co. Available at: https://www.amsshardul.com/insight/rera-a-uniform-regime/ (last visited on 10 May 2023).

as for housing in urban and semi-urban areas, are excellent complements to the growth of this sector.

By 2040, the real estate market will grow to Rs. 65,000 crore (US$ 9.30 billion) from Rs. 12,000 crore (US$ 1.72 billion) in 2019. The real estate sector in India is expected to reach US$ 1 trillion in market size by 2030, up from US$ 200 billion in 2021, and contribute 13% to the country's GDP by 2025.[294]

Development of the sector can be ensured when there occur smooth transactions between the buyers and promoters of the project. As mentioned earlier, in India the growth of real estate started late, this was due to multiple reasons but a major contributor was the lack of specific legislation that could regulate this sector. Before specific legislation, the problems that existed in this sector were:

- No recourse available to the homebuyers and the developers for the speedy redressal of the dispute between them. They had to seek remedy under laws such as the Indian Contract Act, of 1872 and the Consumer Protection Act, of 1986 which involved a lengthy process.
- Even after the full payment of the cost of the project by the homebuyers, the developers did not complete the project and deliver the homes within the time stipulated in the agreement. Many times cases of diversification of funds by the developers were reported. They used to invest the money collected from the homebuyers in other projects.
- The agreement formed between the buyer and the developer used to be generally inclined in favour of the developers. The buyer had to pay more interest than the developers in cases where they failed to perform their obligations.
- The developers used terms like "*Super build-up area, carpet area, covered parking area"* etc. arbitrarily. This gave scope for cheating by the developers in the actual usable area available to the buyers. The actual usable area given to the buyers by the developers was much less.
- Agents in this sector were not regulated under any law and because of this they committed fraud against innocent homebuyers.

294 Indian real estate industry: Overview, market size, growth, investments...IBEF India Brand Equity Foundation. Available at: https://www.ibef.org/industry/real-estate-india ((last visited on 10 May 2023).

- For the initiation of the construction of the project the developer had to seek a large number of sanctions and approvals through a very complex process and this resulted in delaying the completion of the project.[295]

To regulate the sector and to provide solutions to the problems faced by buyers and promoters, the central government enacted legislation named The Real Estate (Regulation and Development) Act, 2016 (RERA). This act came in 2016 but the process for enacting this law started in 2008 when a concept paper was prepared. Due to some reasons, the law did not come in that year and the work for this legislation was again started in 2014. In March 2016, this law finally came in 2016 after passing this legislation through both houses of parliament in March 2016. Certain sections of this statute were notified with effect from 1 May 2016 and the remaining sections from 1 May 2017.

The RERA was enacted under Entry 6 and Entry 7 of the concurrent list by the Parliament of India.[296] The main purpose was to improve the condition of buyers and promote investment in the sector. The act requires, every state government to form a State Real Estate Regulating authority and this authority would start the regulation of real estate projects before their commencement. RERA's primary goals are to advance the real estate industry, effectively ensure transparency in real estate project transactions, protect consumers' interests, create a consumer-friendly environment, and expedite the resolution of disputes that may arise from transactions[297].

The main features of the RERA are:

- Prior Mandatory registration of real estate projects with the Regulatory Authority. The promoter will have to register his project with the real estate regulating authority. In cases of ongoing projects at the time of the commencement of this act, if the completion certificate is not issued, then the project needs to be registered. Such ongoing projects should be registered within 3 months from the commencement of the act. In cases of projects where the area to be developed is less than 500 square meters or no more than 8 apartments are to be developed, encompassing all phases, registration is not necessary. Also, in case of projects involving repair, renovation, and re-development registration is not required.[298]

295 Reforms in real estate sector MOHUA Available at: https://www.mohua.gov.in/upload/uploadfiles/files/RERA_eng(1).pdf (last visited on 10 May 2023).
296 The Constitution of India, 1950, List III, Entries6,7.
297 The Real Estate (Regulation And Development) Act, 2016, Preamble (In an efficient and transparent manner).
298 S. 3 The Real Estate (Regulation and Development) Act, 2016(Act 16 of 2016).

- It transfers the risk from the customers to the developers by including the liability of the developer, promoter, builder, agents, etc.
- The real estate agent also needs to be registered under section 9[299] of this act and without registering themselves they cannot sell or buy on behalf of the promoter in this sector.
- Compliance with a separate bank account and the same 70% of the amount deposited by the customer should be maintained and only 30% of the amount may be appropriated for other projects.[300] This clause is intended to prevent the promoter's issue with finance diversification, which will guarantee the completion and delivery of the projects in a bound manner
- The promoter should disclose every piece of information related to the project like its registration details, area to be developed, etc. and the same should be available on the website of the specific projects.
- The rights and the obligations of the promoter, and allottee are mentioned and in case of default on their obligation they would have to pay compensation. The interest that would be paid in case of compensation is equal for both the promoters and allottees.
- The definition of carpet area is provided in the act and this would prevent the case of cheating by promoters against the customers about the exact usable area.
- The regulatory authority is empowered to create a single window clearance system which would prevent the excessive delay caused in getting the approval and will ensure speedy completion of projects and timely delivery of the same to the customers[301].
- For the speedy resolution of disputes, there is the provision for the formation of adjudicating authority and the establishment of a '*Real Estate Appellate Tribunal'*. If a party is aggrieved by the decision of the authority, he can appeal to this tribunal. If he is not satisfied with the decision of the Appellate tribunal, he can go to the high court.

In the case of ***Neelkamal Realtors Suburban Pvt. Ltd. and Anr. Vs. Union of India and Ors[302],*** the constitutional validity of the provisions of RERA was challenged by the various Developers and Promoters on the ground that, its provisions are discriminatory against them. The Division Bench of this Court was pleased to consider all the provisions of the RERA in their entirety and after having regard to its 'Objects and Reasons', held that "*The RERA law is not to be considered as an anti-promoter. It is a law for the regulation and development of the real estate*

299 S.9, The Real Estate (Regulation and Development) Act, 2016(Act 16 of 2016).
300 S. 4(2) (l)(D) The Real Estate (Regulation and Development) Act, 2016(Act 16 of 2016).
301 S.32 The Real Estate (Regulation and Development) Act, 2016(Act 16 of 2016).
302 2017 SCC OnLine Bom. 9302.

sector. Under the scheme of the RERA*, the promoter's interests are also safeguarded and there is a reason for the same. Unless a professional promoter making genuine efforts is not protected, then the very purpose of development of the real estate sector would be defeated".*[303] The enactment of the RERA played a significant role in solving the problems existing in the sector but there are some problems that the RERA is still not able to solve. Problems that persist in the sector even after the enactment of the legislation are:

- No rule for the delay in the project approval. When an agreement is made between the promoter and the allottee for the real estate project and in the agreement the time is mentioned within which the promoter should complete the project and deliver the same to the allottee. The promoter has to pay compensation to the allottee till the time he delivers the house if he fails to execute the problem on time. However, this delay may be the result of the promoter's error or a delay in receiving the authority's approval for the project's start date. No system was able to determine who was at fault, which caused the delay.
- Lack of single-window approval mechanism

Real estate developers need to get permission from various authorities to commence their projects. Timely granting of permission is required for the timely completion of the project. Taking permission from various authorities takes a lot of time and makes the approval process complex. For instance, the national government must approve environmental clearance while the state government must issue encumbrance certifications. This causes a lot of issues for developers.

- Ambiguity over state-specific content

Some sections in various State RERA drafts are not entirely clear. States like Haryana, Delhi, Karnataka, and others haven't specified the format or content of audit certifications issued by engineers, architects, and other professionals. There will be a great deal of uncertainty regarding the appropriate format for the audit certificate. The re-execution of agreements in cases where the deed has already been signed is likewise unclear. While some states demand re-execution others do not.

- Lack of technical know-how

Even though real estate project registration is now done online, many buyers and developers are still unaware of the technology. The lack of understanding of the provisions of the RERA among developers is another factor for the delay in registering

[303] *Id.*

the project with the regulatory body.

- Lack of strict deadlines

After the enactment of RERA in 2016, the central government notified all the states and the union territories to make state-specific RERA rules and guidelines keeping in mind the modal rules of RERA which was enacted in 2016. As of now, All States/UTs have notified rules under RERA except Nagaland, which is in the process of notifying the rules. 30 States/UTs have set up Real Estate Regulatory Authority (Regular - 25, Interim - 05). Jammu & Kashmir, Ladakh, Meghalaya, Sikkim, and West Bengal have notified the rules while yet to establish Authority. 28 States/UTs have set up the Real Estate Appellate Tribunal (Regular -24, Interim – 04). (Arunachal Pradesh, Jammu & Kashmir, Ladakh, Meghalaya, Mizoram, Sikkim, and West Bengal are in the process of establishing). Regulatory Authorities of 27 States/UTs have operationalized their websites under the provisions of RERA. (Arunachal Pradesh, Assam, and Manipur are in the process of operationalizing[304].

- Tedious process of registration

There will be an issue for the developers in states where there are two RERAs and there are variations in the application form for registering RERA projects under various authorities. In some cases, this may also cause misunderstanding and delays in the project's completion. Haryana is the only state which has 2 Regulatory Authorities i.e. one for Gurugram and the other at Panchkula for the rest of Haryana[305].

- RERA vs Consumer forum

After the enactment of the statute, the allottees, and the promoter have two different forums for the resolution of disputes. They can go for any one of the forums. If one party goes to the consumer forum and the other party goes to RERA and in case both forums give different judgments, then it would be a problem regarding which forum's judgment should be considered relating to the same matter. A single forum would be better for better resolution of the disputes.

Need For Central Real Estate Regulating Authority

It can't be denied that the enactment of the statute in 2016 brought a drastic change in the real estate sector by resolving the problems that existed before the enactment of RERA but it was

304 Nagaland Gets SC Notice Over Failure To Establish RERA, available at :https://nagalandpage.com/nagaland-gets-sc-notice-over-failure-to-establish-rera/(last visited on May 9, 2023).
305 Haryana Real Estate Regulatory Authority ,https://haryanarera.gov.in/ (last visited on May 8, 2023).

not completely successful in solving the existing problems. Apart from the existing problems, there are hurdles in the proper implementation of the statute. Due to these issues, reform is required in the RERA and a central authority needs to be established. The establishment of a Central regulating authority can be justified as it will provide solutions to the existing problems in the real estate sector. Some of the existing challenges in this sector even after the enactment of the statute are:

- No regulation for the delay in Project approvals

As mentioned above there is no such rule which can check why the project is delayed, whether the authority is at fault or the developer. Now if the regulating authority is at fault for the delayed approval of projects which results in the delayed completion of the project and because of which the developer had to pay compensation to the allottee. Now, if the state regulating authority is at fault, then why should the developer pay the compensation? The one who makes the mistake should pay the price for the same. For supervision of the process of approval by the state regulating authority, a superior body at the central level is needed. So, the establishment of the Central authority is justified.

- Lack of Single window clearance system

The developer needs to get permission from different government authorities to commence the project. As the project documents have to pass through different authorities to get permission, it takes a lot of time for the developer who has to deliver the buildings, and houses to the allottee within the time agreed between parties. For the commencement of the project, the developer has to get permission from both the central government and the state government which kills time. Now, if the developer will have to get permission from a single authority that could grant them permission for every document that will save his time and such an authority can only be established at the central level which could cater to the needs of all the states. That's why establishing a centralized real estate regulating authority is required.

- Ambiguity over state-specific content

The case of ambiguity arose because the RERA Act, 2016 allowed the different states to formulate different RERA rules and Regulations for their state. If there would have been a single authority that could have framed rules and regulations for the whole country, no ambiguity would have arisen. This also ensures that there is a need for a central real estate

regulating authority.

- Tedious process of registration

The process of registration becomes complex if the party has to follow two processes for the completion of a single work. This happens in the case where two RERA authorities are established in a single state. In Haryana for Gurugram one RERA authority is established while for the rest of the state, another RERA authority has been established. If a central regulating authority is there, it can supervise the process of registration rectify the shortcomings in the registration process, and provide relief to the developers.

Another major requirement for the establishment of a central regulating authority can be deducted from one of the purposes of the enactment of RERA which is to attract foreign investors to India. A foreign entity will invest in certain projects at some place if it is easy for him to get project approvals and clearances. Due to the different RERA rules of different states, it would be a very complex and time-consuming process for a foreign entity to get timely approvals which will make foreign investors reluctant to invest in the Indian Real estate sector and will restrict the full-fledged development of real estate sector.

Proposed Central Regulating Authority: Power & Function

Every consumer forum has a state and a national forum for complaints, as well as councils that reach the Supreme Court. However, we do not observe such cascading forums in the authority for real estate regulation. The establishment of a regulatory authority at the central level seems to be a way to make real estate regulation authority a more effective and efficient regime. We have witnessed that whenever a regulator is appointed for a sector, like SEBI, IRDAI, TRAI, etc., it widens the sectors.[306]

Section 41[307] provides the central government may, by notification, establish with effect from such date as it may specify in such notification, a council to be known as the central advisory council which is already set up by the union government from the notification on 20 Nov 2017. However, the powers of the advisory body are limited to advising the central government on matters relating to the implementation of the act, questions of policy, protection of consumer interest, fostering growth and development of the real estate sector, and other matters as may

306 Real estate (regulation and development) act,2016(RERA)(July 2017) <https://www.icsi.edu/media/webmodules/REAL_ESTATE_REGULATION_AND_DEVELOPMENT_ACT.pdf >accessed (last visited on 9 May 2023.

307 S.41The Real Estate(Regulation and Development) Act, 2016(Act 16 of 2016).

be assigned to it by the central government.[308]

Power

The Union should give the Central Advisory Council additional power to regulate the state regulators and declare it as the watchdog over the state real estate regulation authority. It should have the power as an appeal authority for the aggrieved party from the state regulator for any dispute before going to the real estate regulation tribunal and high court. It should have quasi-judicial power similar to state real estate regulation authority together with appellate jurisdiction. it shall also be vested with the power to issue direction which should be binding for state real estate regulation authority in any matter. it should be entrusted to have the power to make policies to have growth of the sector.

Functions

It can be entrusted with functions like fixing uniform specified fees to be levied on promoters, agents, or allottees, ensuring the enforcement of the duties cast upon the promoters, real estate agents, and allottees. Ensure compliance with the rules and regulations made in exercising its powers. It should aim towards providing greater clarity and clarifying the functions of the regulator. It should also be entrusted with the function of formulating policies for the growth of the sector.

A thorough database of projects, developers, and agents that have registered with RERA may be kept up to date. Since this data is open to the public, prospective buyers may confirm the legitimacy of the developers and the projects they are interested in. Additionally, quality criteria for construction may be established and enforced, encouraging the use of premium supplies and building methods.

Benefit Of Establishing A Central Real Estate Authority

In the current scenario, many states have different interpretations of the law which confuses the stakeholders. The biggest achievement of establishing a central regulatory authority is the uniformity of the law in the sector which will facilitate the growth of the sector. uniformity and clarity in law due to a single regulating authority will set the expectation of the investor. certainty in law will directly affect foreign investment in this sector as we know real estate is an international sector and foreign capital inflows into the Indian real estate market has a big

308 S.42 The Real Estate(Regulation and Development) Act, 2016(Act 16 of 2016).

share. it jumped three-fold to $ 23.9 billion during the 2017-21 period when compared with the previous five years[309] and can be expected to rise in upcoming years. As noted above, the real estate sector has huge foreign investment hence there is a need for policies according to the international economic condition, and a central authority at the national level can help in formulating policies accordingly.

The statute does not fix a time for the disposal of the dispute by the state real estate regulation authority which many a time led to delays in solving the dispute one example is the Karnataka real estate regulation authority which in the first week of April 2023, of 54 orders passed by it, at least 32 cases took a year or more to be disposed of. About eight cases took two years or more and 12 took three years or more.[310] Only two cases took less than a year. Also till July 2022, the Karnataka Revenue Department had recovered only about Rs. 26 crore from builders in the state as compensation or refunds to homebuyers for delayed delivery of apartments and an amount of more than Rs 245 crore is still pending. of 683 recovery orders passed by the money has been collected from builders in only 84 cases. [311]A watchdog over regulating authorities can help in speedy and efficient work as they will be liable to answer.

It is evident from the data provided above that real estate is very crucial for the economy but it is natural for every sector to suffer from the business cycle. That means phases of growth and recession need to be dealt with carefully and in the case of such an important sector this job becomes more delicate as any change in the sector may affect the whole economy. a central authority can analyze the ups and downs in the sector at the national level and formulate policies to tackle any such changes in the sector.

Implementation of The Real Estate (Regulation and Development) Act 2016, was done by different states at different points in time also right now real estate regulation authority regime is not developing equally some states have done a wonderful job in regulating the sector while few are still lagging. a central authority with the power to enforce will lead to quick implementation of adoption of any policy formulated by them which are necessary for the growth of sector all over nation.

309 The rise of foreign investment in Indian Real Estate (no date) Legal Developments. Available at: https://www.legal500.com/developments/thought-leadership/the-rise-of-foreign-investment-in-indian-real-estate/#:~:text=According%20to%20a%20Colliers%20%E2%80%93%20FCCI,with%20the%20previous%20five%20years. last visited on (May 8, 2023).

310 Moneycontrol. Available at: https://www.moneycontrol.com/news/business/mc-exclusive-real estate regulation authority-for-homebuyers-but-who-watches-over-real estate regulation authority-10484361.html (last visited on May 8, 2023).

311 Id.

A sensible and careful regulation results in positive outcomes one such example is the telecommunication industry the telecom boom of the 1990s was only possible due to a powerful partnership between the telecom regulator Trai, operators, and associated industry stakeholders[312] demanded central regulatory authority just after the success of TRAI.

Challenges

The biggest backdrop in the centralization of the sector is the unequal growth and the diversity of the country. The real estate sector is not equally developed in every state it is in different phases in different states. for instance, real estate in Bihar contributed around 8 percent of GVA in 2019-20[313] but Maharashtra contributed nearly 25% of Maharashtra's GVA[314] hence different states needed different policies. Also looking at diversity in climatic regions across the country it is difficult for every state to have similar policies same level of attention toward this sector.

Conclusion & Suggestion

This research paper deals with the need for a regulator that could regulate each state's regulating authority. After analyzing the problems in the real estate sector and problems that create hurdles in the proper implementation of the RERA Act, the author suggested the reform of the existing RERA Act by entrusting powers to a Central Advisory council that could supervise the actions of a state Regulating authority and in cases where the state RERA is at fault, it can rectify the mistake of state regulators.

Mostly all the problems dealt with the delayed approval of the project due to getting clearance for the project from various authorities and this problem can be easily solved by setting up a central real estate regulating authority. The establishment of a Central authority will widen the scope of the real estate sector and can become an authority that can provide a safeguard mechanism to the developers from the wrongful act of the state regulating authority.

The central authority should have supervisory quasi-judicial and policy-making powers together with functions of ensuring compliance with policies and laws. The establishment of a

312 Ramachandran, T. (2020) Financialexpress, The Financial Express. Available at: https://www.financialexpress.com/opinion/why-deny-broadcasting-telecom-like-success-trai-must-shed-intensive-regulation/1824490/ (last visited on 10 May 2023).

313 Economy of Bihar (no date) Economy of Bihar - StatisticsTimes.com. Available at: https://statisticstimes.com/economy/india/bihar-economy.php (Accessed: 10 May 2023).

314 FICCI : Industry's voice for policy change. Available at: https://ficci.in/spdocument/23044/FICCI-ANAROCK-Real-Estate-Report-2018-ficci.pdf (last visited on 10 May 2023).

central Authority will bring uniformity in law, and processes efficient and speedy. It will help in policy framing, easy regulation, and quick implementation of policies at made at the central level. The most important challenge while establishing a central real estate regulating authority is that not all states can get benefit from this reform as the development level of all states is not the same.

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