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DEHRADUN law REVIEW

(A Peer Reviewed Journal)

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EDITORIAL

For an avowed optimist, obstacles always create opportunities. In the contemporary phase of globalised pandemic where the world seems to have come to a standstill, Dehradun Law Review, an epitome of our intellectual quest, has achieved a series of breakthroughs. At the outset, the journal got enlisted in U.G.C-CARE and subsequently got indexed in Google Scholar as well as in ICI (Indian Citation Index). In response to the challenges that has cropped up because of the pandemic, many radical changes have occurred in the socio-legal and judicial spheres affecting both, the statics and dynamics of legal spectrum. Legal academia and scholars would find the journal accommodating those changes in the current issue of the journal to their satisfaction.

Our scholastic sojourn continues to stride unhindered even in these difficult times which has witnessed considerable devastations at the global level due to COVID-19 pandemic. We have constantly endeavored to uplift the quality of journal with all our tilt and potentials and recognition of U.G.C-CARE is the testimony of the fact.

It gives us immense pleasure to bring up this current issue of Dehradun Law Review, Volume 12, Issue 1, a Law Journal of Uttaranchal University annually published by its offshoot, Law College Dehradun. We feel immensely honored to receive articles from legal scholars and jurists from across the world. Issues like quest for competent expert evidence in the light of recent decision in Griffiths v. TUI U.K. Limited, Human Rights of Migrant Workers, Copyright Protection for Cinematograph Films, Indian Disability and Railways Jurisprudence in the Prism of Rail Journey for the Specially-Abled passengers, White Collar Crime, Exercise of Discretionary Powers by Administrative Authorities, Aarogya Setu App and Right to Privacy, Life of Sex Workers during COVID - 19 and Corporate Environmental Responsibility have been thoroughly discussed and analyzed offering paradigmatic insights in the various sub-disciplines of Law.

Barrister David S. Boyle in his research paper titled "On the Tensions of Fairness And Proportionality: The Quest For Competent Expert Evidence and the Recent Decision in Griffiths V TUI U.K. Limited" has evaluated the complexities that arise in fairness and proportionality in the judicial trials and ordinary legal system.

Prof. S. D. Sharma in his article "Comprehensive Look on Human Rights of Migrant Workers: An International Width" has analyzed the Human Rights of Migrant Workers in the international context.

Dr. Rajnish Kumar Singh in his paper titled "Indian Approach on Copyright Protection for Cinematograph Films" has analytically examined the Indian approach on copyright protection for cinematograph films. He has also highlighted the judicial lapses and uncertainty in the position of law on copyright protection.

Mr. Rudranshu Singh in his research article titled "Indian Disability and Railways Jurisprudence in the Prism of Rail Journey for the specially - Abled Passengers" has attempted to explain the sociological importance of railways in India and its failure to protect the self-esteem of differently-abled persons.

Mr. Harishchandra Pandey in his paper titled "Re-visiting the Definition of White Collar Crime" has philosophically analyzed Professor Edwin Sutherland's concept of White-Collar Crime.

Dr. Girish R. in his article "Fundamental Freedoms in India and Exercise of Discretionary Powers by Administrative Authorities: A study on Judicial control Through Supreme Court Decisions" has elucidated the aspects of fundamental freedoms in India that reduce the chances of arbitrariness in the exercise of administrative discretion.

Dr. Rajesh Kumar Dube in paper titled "Aarogya Setu App: Issues Regarding Right to Privacy" has made an epistemological analysis of Right to Privacy in the context of Aarogya Setu App.

Co-authors, Dr. Sanjeev Kumar Chadha and Shailesh Mishra, in their research paper "Life of Sex Workers during COVID - 19: Pain and Grief "have extensively analyzed the plight of sex workers during this pandemic period.

At length Dr. Lakshmi Priya Vinjamuri in her articled titled "Institutionalizing the Draft Corporate Environment Policy (CER) through Corporate Environmental Responsibility - A perspective" has attempted to analyze the need to implement an effective policy to enhance corporate environmental responsibility.

Though we believe in perfection but certainly aware of the possibility of inconsistencies and errors. Hence, accepting the same with humility, we sincerely look forward to constructive criticisms of our readers. I, also, take this opportunity to offer our special gratitude to the contributors of articles and expect their constant encouragement in this academic pursuit.

God Speed!

Prof. Rajesh Bahuguna
Editor-in-Chief

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ON THE TENSIONS OF FAIRNESS AND PROPORTIONALITY: THE QUEST FOR COMPETENT EXPERT EVIDENCE AND THE RECENT DECISION IN GRIFFITHS v.TUI UK LIMITED[1]

David S. Boyle MA (Cantab)*

boyle@deanscourt.co.um
Deans Court Chambers
24 St. John Street
Manchester
M3 4DF

Abstract

This paper evaluates the complexities arise in fairness and proportionality in the judicial trails and ordinary legal system. As the time has progressed, the procedure of the courts equally complexes and those concepts which one upon a time considered as simple and straight, now become critical and twisted. Recent development in English judicial system where courts have been facing the problem of adhering with the statutory mandate along with the juridical responsibility of ensuring the reasonableness, fairness and justice. This paper while pointing out the situations of dilemma face by the courts, forward some suggestions as way out.

Key words

Fairness, proportionality, Court

INTRODUCTION

For the academic, it is all too easy to think of the Law as existing in a vacuum; its myriad complexities forming esoteric patterns worthy of study in themselves. For the busy legal practitioner, the Law shifts to become a tool: an occasionally simply, but often overly-complex, jig or frame on which to hang the evidence, so that the judicial observer, and, indeed, the litigant himself, might cast his eye down the line to consider in what shape the case might be. In many cases, that evidence is predominantly factual, and the litigant not only understands it, but personally provides it, explaining what happened, who did what, and when, and how. There may, of course, be a conflict of evidence, and much of the trial process is spent analysing the strength and cogency of the layman's perception of events, testing it by cross-examination, both for internal consistency and by reference to the other evidence available.

* The writer is a Barrister at Deans Court Chambers, Manchester, UK specialising in Personal Injury law. He is a visiting lecturer at numerous Universities and Post-Graduate Institutions, provides training for Medical Consultants undertaking medico-legal work, and is the author of various books including *On Experts: CPR35 for Lawyers and Experts*, Law Brief Publishing, 2016.

[1] [2020] EWHC 2268 (QB)

Much has been written on the subject of the judicial interpretation and assessment of a witness, a classic example being Lord Pearce's commentary in the case of *Onassis and Calogeropoulos v Vergottis*[2] :

'Credibility involves wider problems than mere demeanour which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness, and motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process and in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.'

That analysis is aimed, of course, at lay witness evidence, but there is another type of evidence that goes before the Court: the opinion evidence of an expert. Indeed, when the Court admits opinion evidence, only the opinion of an expert is admissible.

The Duties of an Expert and CPR35

The starting point on the duties of an expert (in both civil and criminal matters) is still, in many jurisdictions, the guidance of Cresswell J in *The Ikarian Reefer*[3] which, in turn, formed the basis of Part 35 of the Civil Procedure Rules 1988 and the accompanying Practice Direction:

"The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation. CPR35.3(2) and 35PD.2.1
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate. 35PD.2.2

[2] [1968] 2 Lloyd's Rep 403, HL

[3] [1993] 2 Lloyd's Rep 68, 81 cited (without case citations) in *Kennedy v Cordia (Services) LLP* [2016] UKSC 6

3. An expert witness should state the facts or assumption on which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion. **35PD.2.3**

4. An expert witness should make it clear when a particular question or issue falls outside his expertise. **35PD.2.4(a)**

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report. **35PD.2.4(b)**

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court. **35PD.2.5**

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports. **35PD.3.2(2)**"

CPR35 goes further of course, but of particular note are the following provisions:

35.1 Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.

35.4 (3A) Where a claim has been allocated to the small claims track or the fast track, if permission is given for expert evidence, it will normally be given for evidence from only one expert on a particular issue.

35.5 (1) Expert evidence is to be given in a written report unless the court directs otherwise.

(2) If a claim is on the small claims track or the fast track, the court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice.

35.6 (1) A party may put written questions about an expert's report (which must be proportionate) … [which]

(c) must be for the purpose only of clarification of the report;

unless in any case -

(i) the court gives permission…

The Practice Direction to CPR35 sets out the requirements of Form and Content of an Expert's Report and, in particular:

3.2(6) where there is a range of opinion on the matters dealt with in the report [the report must] (a) summarise the range of opinions; and (b) give reasons for the expert's own opinion.

It follows that in low-value litigation[4], the courts will not only limit the number of experts to one per issue (almost inevitably the expert instructed by the Claimant), but that report will be received by the Court in writing, without the opportunity to cross-examine the expert. Indeed, the only challenge normally permitted to such evidence will be 'proportionate' written questions for the sole purpose of clarification of the report.

Low-value litigation

In personal injury litigation, those expert reports are by and large medical reports, or to give them their full title, medico-legal reports. In certain types of litigation, protocols exist which identify the nature of the 'expert' to provide that first opinion, and they are often (but not always) provided by General Practitioners: Physicians (rather than surgeons) who do not specialise in any particular branch of medicine, but who treat a wide variety of relatively minor medical conditions and refer patients on to more specialist doctors if the need arises. In some cases, a General Practitioner will diagnose and treat. In some, diagnosis is followed by a referral for treatment. In others, a referral is necessary to obtain the diagnosis. Within a community based practice, each General Practitioner might have particular interests, so that patients with a given type of problem, particularly if chronic, might be assigned to an individual with additional knowledge or experience of that particular condition, but as a starting point, the General Practitioner is a jack of all trades. It is that very breadth of experience which renders them useful.

In uncomplicated, low-value litigation, such 'expertise' might well suffice, but, inevitably, as the health issues in question become more complex, so too does the need for particular expertise become more salient. It would be comforting to think that every doctor[5] knew the limits of their expertise and experience. In the medical context, the treating doctor will normally have a reasonable idea of the risks that they face if they get it wrong. They have a patient before them, making a complaint about their health, and their very function is to listen to that patient, assess their complaint, make such investigations as are necessary and provide treatment. In the medico-legal scenario, however, they are being paid to opine, not treat, and whilst one would hope that any opining doctor would know that, it is inevitably easier to pass a patient on to someone more qualified (and get paid to do so) than to express one's ignorance having previously put oneself forward as an 'expert' capable of expressing a medico-legal opinion.

Perhaps the fact that in the medico-legal scenario a patient's health is not the primary concern makes it easier for a reporting doctor to overstep their expertise, particularly if they are aware that theirs is going to be the only opinion in the case. CPR35 questions which go beyond mere clarification (such as those which might suggest that they only ever opine for Claimants and only ever reach supportive conclusions) can be batted back as inappropriate, and rather than accepting their inadequacies, reporting doctors are, whatever their nominal obligations, aware of the need to protect both their clients (not patients) and their own medico-legal reputation.

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[4]The small claims track and fast track encompass the majority of claims where the damages at stake are up to £25,000.

[5]The same could be said of nearly every profession.

The problem does not manifest solely in General Practitioners. Consultants, whilst (and perhaps because) they are aware of their limitations are nevertheless still at risk of the Dunning-Kruger: the cognitive bias leading an individual to assess their cognitive ability as greater than it is. Whilst it is plausible to suggest that some experts are highly conscious that they are opining beyond their expertise, the more likely scenario is that they genuinely believe that their experience and qualifications allows them to offer an opinion, because the alternative is to admit their ignorance.

There are, however, regulatory difficulties which await those who step beyond their expertise, with the General Medical Council occasionally censuring members who choose to opine in cases where discretion would have been the better part of valour. *In Dr Richard Pool v General Medical Council*[6] , the High Court upheld a finding by a Fitness to Practise Panel constituted by the GMC, that the Appellant, a consultant psychiatrist in the private sector working in a secure hospital environment, was not an expert in the field of general adult psychiatry, and should not have offered an opinion on the fitness to practise of a paramedic, "A" in respect of whom he had been asked to opine. Whilst the initial decision to suspend him for 3 months was deemed inappropriately harsh, the decision of his wrongdoing was upheld.

Whilst *Pool* is a salutary warning to doctors about the subject matter on which they might each choose to opine, there are undoubtedly significant financial rewards to producing high volumes of medico-legal reports, particularly when others with similar levels of qualification and expertise are undertaking similar work, and the Protocols in place mandate the type of doctor who should report.

What, then, is a Defendant to do when faced with an opinion with which they do not agree, particularly if it is central to the case (e.g. if it goes to the question of liability)? In a high value claim, it may well seek its own evidence, taking the view that the additional costs to be incurred are warranted, if only to explore alternatives to the views expressed by the Claimant's expert. The Court is, of course, mandated by **CPR1.1(1)** to ensure that litigation is conducted justly and at proportionate cost, and in a high value case, where the evidence goes to the heart of the valuation, a second opinion will normally be justified.

In low-value litigation, however, what is "just" as between the parties may not, of course, be the most cost-effective manner of conducting the litigation and there is an inevitable tension thus created. A Defendant has to decide, in any given case, whether to seek their own evidence (which is not only costly in circumstances where one will probably not recover the costs from the Claimant even if successful, but potentially also leads to an arms race as the Claimant seeks to improve on the existing instruction by getting a more qualified second expert) or seek to undermine the Claimant's doctor by whatever means. Even then, the Court will make a determination of what is 'necessary' under CPR35.1, and, being a Case Management decision (with a wide range of discretion available to the District Judge), such decisions are almost impossible to appeal. In the majority of low-value cases, the cost benefit analysis often falls in favour of attacking the Claimant's poor quality expert evidence, rather than seeking to put forward a positive case the other way.

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[6][2014] EWHC 3791 (Admin), Lewis J.

The Challenges to Expert Evidence

The case of *Kennedy v Cordia (Services) LLP* examined in some detail the potential challenges to expert evidence, and in particular its admissibility. The key section of that judgment, starting at paragraph 38, addresses both the admissibility of the evidence *per se* and the approach that the Court might take to its weight.

As to admissibility, the relevant section starts at paragraph 43:

43. Counsel agreed that the South Australian case of *R v Bonython* (1984) 38 SASR 45 gave relevant guidance on admissibility of expert opinion evidence. We agree. In that case King CJ at pp 46-47 stated:

"Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area[7], and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. **The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.**" (emphasis added)

44. In *Bonython* the court was addressing opinion evidence. As we have said, a skilled person[8] can give expert factual evidence either by itself or in combination with opinion evidence. There are in our view four considerations which govern the admissibility of skilled evidence:

(i) whether the proposed skilled evidence will assist the court in its task;

(ii) whether the witness has the necessary knowledge and experience;

(iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and

(iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

All four considerations apply to opinion evidence, although, as we state below, when the first consideration is applied to opinion evidence the threshold is the necessity of such evidence.

In considering the first of those considerations - whether the evidence will assist the court in its task - their Lordships addressed the question of whether the evidence had weight:

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[7] A superficially more generic definition than that set out at section 45 of the Indian Evidence Act, 1872 (last updated 13 March 2020) which references "a point of foreign law, or of science, or art, or as to identify of handwriting [or finger impressions]".

[8] *Kennedy* is a Scottish case, where 'experts' are known as 'skilled people'.

48. An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or "*bare ipse dixit*" carries little weight, as Page 16 the Lord President (Cooper) famously stated in *Davie v Magistrates of Edinburgh* 1953 SC 34, 40. **If anything, the suggestion that an unsubstantiated ipse dixit carries little weight is understated; in our view such evidence is worthless.** (emphasis added) Wessels JA stated the matter well in the Supreme Court of South Africa (Appellate Division) in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352, 371:

"[A]n expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert."

As Lord Prosser pithily stated in *Dingley v Chief Constable, Strathclyde Police* 1998 SC 548, 604: "As with judicial or other opinions, what carries weight is the reasoning, not the conclusion."

In short, the subject matter of the opinion has to be outwith the experience of somebody without instruction or experience of those matters, the individual expressing the opinion has to have knowledge (howsoever acquired) which renders his opinion of value in resolving the issues, and the opinion has to be reasoned rather than mere *ipse dixit*[9] .

The question of whether the issue warrants expert evidence, whilst central to *Kennedy* is normally relatively straightforward. The real issues are firstly whether the expert is, in fact, an expert in the matter on which he is opining, and secondly whether that opinion is legitimately expressed.

On the question of expertise, whatever the legal niceties, there is, for the opposing party (normally the Defendant), a practical problem: How does one prove that an 'expert' is not, in fact, an 'expert' before they give evidence and are cross-examined? CPR35 questions which seek to undermine the expert's ability to opine at all are hardly 'mere clarification', and if the doctor refuses to answer (and why would they make those admissions), a Defendant is left with having to make an application which can be won or lost (with additional cost consequences), all within a potentially tight timetabling of the litigation process. A Court is inevitably going to be wary of making any such finding, particularly if it serves to debar a professional from earning money, without giving that professional the opportunity to speak in their own defence. The Court may well harbour the normally legitimate notion that such individuals will act with integrity: after all, to be asked to opine in Court proceedings as an expert should, *prima facie*, be an honour. As with the erection of statues, is it not better that the question asked is why it does not occur, rather than why it does?

Even with compelling evidence to suggest that an expert has overstepped the mark, the Courts are exceedingly loathe to deem their evidence inadmissible at an interlocutory stage. Rather, they much prefer the issue to be determined at trial.

[9]Or, in the language of playgrounds all around the world, "Because I say so."

From a Defendant's perspective, there is a further practical problem: If the Court can be persuaded that the first expert is not, in fact, competent to opine, then the Claimant will almost inevitably seek to substitute an expert who is.[10] The idea of a Pyrrhic victory where one neither defeats the litigation, nor saves money, is not an attractive one.

The alternative, then, is to challenge the quality of the report at trial. This is, to some extent, a high-risk strategy: One of the great variables of civil litigation is, after all, the identity of the trial judge. That said, with a paper report, one can prepare a submission based on its failings (and shamefully few reports actually comply with the full requirements of CPR35), the evidence is unlikely to change against you during the course of cross-examination and might even change in your favour. Defendant advocates have, for years, honed their forensic skills on just such tasks, picking apart the evidence and relying on the burden of proof being on Claimants to prove their case. Submissions can be made to undermine the standing of the writer of the report, and the methodology, and the internal inconsistencies, and the judge can perform the judicial function of weighing up the evidence and making a decision.

This then was the accepted methodology for challenging expert evidence until the decision of Martin Spencer J in *Griffiths v TUI UK Limited*[11], a decision which has potential repercussions not just for the entire system of low-value litigation in England and Wales but for the wider treatment of expert evidence by the Courts.

Holiday Sickness litigation

By way of background to the *Griffiths* case, in January 2017, the Court of Appeal delivered judgment in the case of *Wood v Travel plc t/a First Choice*[12]. The Claimants in that matter sought to recover damages from the Defendant tour operator for gastric illness suffered whilst on a package holiday to the Dominican Republic. Because this was a package holiday, it was subject to the provisions of The Package Travel, Package Holidays and Package Tours Regulations 1992, which make the tour operator liable to the consumer in the UK for any breach of contract by the provider of those package services, even though that provision was in a foreign country. The Claimants successfully argued that the food and drink provided as part of the package had to be of a 'satisfactory' standard, by reason of the term implied by section 4(2) of the Supply of Goods and Services Act 1982[13]. If such food were contaminated so as to make the Claimants ill, that was a breach of contract, irrespective of 'fault' on the part of the Hotel or, critically, the Defendant.

Whilst the Court of Appeal dismissed the Defendant's appeal, both Burnett LJ (as he then was) and The President of the Queen's Bench Division (Sir Brian Leveson), made strong obiter remarks which provided significant solace to tour operators facing a deluge of such claims for compensation, where the costs involved far outweighed the damages at stake.

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[10] c.f. *Edwards-Tubb v JD Wetherspoon plc* [2011] Civ EWCA Civ 313

[11] Handed down on 20 August 2020

[12] [2017] EWCA Civ 11

[13] Now section 9 of The Consumer Rights Act 2015.

At paragraph 29, Burnett LJ said this:

"29. Underlying this appeal was a concern that package tour operators should not become the guarantor of the quality of food and drink the world over when it is provided as part of the holiday which they have contracted to provide. Mr Aldous spoke of First Choice being potentially liable for every upset stomach which occurred during one of their holidays and the term "strict liability" was mentioned. That is not what the finding of the judge or the conclusion that he applied the correct legal approach dictates. The judge was satisfied on the evidence that Mr and Mrs Wood suffered illness as a result of the contamination of the food or drink they had consumed. Such illness can be caused by any number of other factors. Poor personal hygiene is an example but equally bugs can be picked up in the sea or a swimming pool. In a claim for damages of this sort, the claimant must prove that food or drink provided was the cause of their troubles and that the food was not "satisfactory". It is well-known that some people react adversely to new food or different water and develop upset stomachs. Neither would be unsatisfactory for the purposes of the 1982 Act. That is an accepted hazard of travel. Proving that an episode of this sort was caused by food which was unfit is far from easy. It would not be enough to invite a court to draw an inference from the fact that someone was sick. Contamination must be proved; and it might be difficult to prove that food (or drink) was not of satisfactory quality in this sense in the absence of evidence of others who had consumed the food being similarly afflicted. Additionally, other potential causes of the illness would have to be considered such as a vomiting virus.

30. The evidence deployed in the trial below shows that the hotel was applying standards of hygiene and monitoring of their food which were designed to minimise the chances that food was dangerous. The application of high standards in a given establishment, when capable of being demonstrated by evidence, would inevitably lead to some caution before attributing illness to contaminated food in the absence of clear evidence to the contrary."

In a similar vein, the President at paragraph 34 said:

"34. Neither do I accept the floodgates argument which Mr Aldous advanced. I agree that it will always be difficult (indeed, very difficult) to prove that an illness is a consequence of food or drink which was not of a satisfactory quality, unless there is cogent evidence that others have been similarly affected and alternative explanations would have to be excluded."

Whilst one might have expected such words to dissuade litigation, Claimants have, since Wood, pursued their claims with renewed vigour, with supportive 'opinion' from a variety of specialisms (General Practitioners, Gastroenterologists, General Surgeons and the like, although rarely Microbiologists or specialists in Tropical Disease). Undeterred by the lack of positive test for a pathogen in the vast majority of such medico-legal cases (and, indeed, it is probably the modal result in medical investigations too), the argument often advanced that because the majority of cases of Travellers' Diarrhoea where the pathogen is identified are bacterial in origin, and bacterial pathogens are acquired by consumption, on the balance of probability it was food which made Claimants ill in any given case irrespective of the fact that no pathogen was identified on this particular occasion.

Defendants reacted either by seeking to introduce their own evidence, or seeking to undermine the Claimants' experts, either in writing by CPR35 questions, or in cross-examination, or, as set out above, in submission at the end of the trial.

Griffiths v TUI UK Limited

In *Griffiths* the situation was slightly different. The Claimant had tested positive for various pathogens and both parties were given permission to obtain and rely upon expert evidence from both a Gastroenterologist and a Microbiologist: this was not a standard, low-value claim where only one expert was permitted, and the matter was allocated to the Multi Track as having both some value and some complexity. As it happened, the Defendant elected not to rely on Microbiological evidence in the case, and, having found itself in default of the Court's directions for service of their Gastroenterological report, were debarred from relying upon any medical evidence at all.

Nevertheless, the Defendant perceived significant flaws in the Claimant's medico-legal evidence and the case went to trial where, in accordance with CPR35.5, the evidence of the Claimant's Microbiologist, Professor Pennington, was received on paper, consisting both of his report and his answers to CPR35 questions. In effect, whilst the case had threatened to metamorphose into a full-blown fight between experts, it had then retreated in to the entirely typical situation of the Claimant's chosen expert producing a supportive report, the Defendant asking questions which served (they believed) to emphasise the weaknesses in his report, and the evidence being admitted on paper, subject to submissions as to the weight which one could attach to that evidence.

Whilst HHJ Truman was prepared to find that the Claimant had been ill as alleged, she proceeded to dismiss the claim on the basis of a series of criticisms[14] of Professor Pennington's report[15], including the fact that it did not set out the range of opinion. The Defendant asserted that the report's inadequacies meant that it was insufficient to prove causation. They relied, in effect, on the statement of Lord Prosser in *Dingley*: "As with judicial or other opinions, what carries weight is the reasoning, not the conclusion."[16] If the reasoning was the subject of legitimate criticism, they said, then so too was the conclusion, and the Court was the ultimate arbiter.

The Claimant appealed to the High Court, asserting that because the Defendant had not put up any evidence to counter that of Professor Pennington, and had not called him, no matter what criticisms were made of that report it was, in actuality, 'uncontroverted' in the sense referenced by Wessels JA in the *Coopers (South Africa)* case[17]. They drew the Court's attention to the decision of the Court of Appeal in *Coopers Payen Limited v Southampton Container Terminal Limited*[18], where Clarke LJ contrasted the position where an expert (for example a single joint expert) is the only witness on a particular

[14]The Defendant's submissions are set out at paragraph 16 of the Appeal judgment, whilst the Judicial findings are at paragraph 18.

[15]The Claimant did not seek to rely on the reports of Dr Thomas, Gastroenterologist, on the issue of causation.

[16][1998] SC, 548

[17][1976] 3 SA 352

[18][2004] Lloyds Rep 331, 338

topic with the position where the expert's opinion is only part of the evidence. Whilst in *Coopers Payen* there was lay evidence called by the Defendant to controvert the expert, here, they said, there was no other evidence against which to weigh that of Professor Pennington and it should therefore have been accepted. Indeed, the effect of their argument was that it had to be accepted, no matter what its flaws, because it was 'uncontroverted'.

In response, the Defendant submitted that only in specific circumstances should the Court be required to accept expert evidence as uncontroverted[19] : "It is accepted that if agreed or unopposed expert evidence is: (a) complete, in the sense that it addresses all relevant issues which require to be considered, (b) sufficiently reasoned so that its conclusions can be understood, and (c) there is no factual evidence which contradicts or undermines the basis of it, there would need to be good reason for not accepting it."

Martin Spencer J, discussing the law, referenced paragraph 48 of *Kennedy* with the following (abridged) analysis:

"29. In general, where an expert's opinion is disputed, that opinion will carry little weight if, on proper analysis, the opinion is little more than assertion on the part of the expert….

30. In the present case, Professor Pennington's conclusion is said by the Defendant to come so abruptly, and with so little reasoning, and with so many issues left in the air and unresolved, that his opinion contained within that conclusion amounts to no more than bare *ipse dixit*. In those circumstances, it is contended that the conclusion is worthless. If that is correct, it would mean that the evidence adduced by the Claimant was never capable of proving his case on causation: before the matter ever came to trial, the Defendant could have applied for summary judgment on the basis that the Claimant's case, taken at its highest, could not succeed."

Pausing there, it is far from clear how that analysis sits with the line of authority about what constitutes 'no real prospect of succeeding on the claim or issue' [20]. The hearing of an application for summary judgment is not a summary trial and does not involve the Court conducting a mini-trial[21] . There are clear statements of authority in *Three Rivers District Council v Bank of England (No.3)*[22] and one is inevitably drawn to the words of Lord Hobhouse: "The criterion which the judge has to apply under CPR Pt24 is not one of probability; it is the absence of reality."

Leaving aside the cost and time implications of making an application for summary judgment in each and every case where the expert evidence was so poor that the Claimant was never capable of proving his case on causation, the law simply does not permit the Court to engage in the sort of mini-trial and assessment of the evidence which *Griffiths* suggests as a solution.

Martin Spencer J continued:

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[19]Paragraph 23 of the judgment.

[20]CPR24.2

[21]Per Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91.

[22][2001] 2 All ER 513, HL

"31. … In those circumstances, in my judgment there are two questions to be answered: first whether a court is obliged to accept an expert's uncontroverted opinion even if that opinion can properly be characterised as bare *ipse dixit* and, if not, what are the circumstances in which a court is justified in rejecting such evidence; and, second, whether, in any event, Professor Pennington's report could in fact properly be described as no more than bare *ipse dixit* entitling the learned judge to reject it despite being uncontroverted.

32. In the extract from the judgment of Lords Reed and Hodge in *Kennedy v Cordia* quoted at paragraph 29 above, there is an internal inconsistency or ambiguity. On the one hand, their Lordships suggest that an unsubstantiated *ipse dixit* is worthless. On the other hand, they cite, with approval, Wessels JA in the South African *Coopers* case where he said that an expert's bald statement of his opinion is not of any real assistance except possibly where it is not controverted. So, where it is not controverted, is it worthless or not? In my judgment, the answer is to be found, as submitted by the Claimant, in the judgment of Clarke LJ in *Coopers Payen Limited v Southampton Container Terminal Limited* [2004] Lloyds Rep 331 at paragraph 42 where he said:

"… the joint expert may be the only witness on a particular topic, as for instance where the facts on which he expresses an opinion are agreed. In such circumstances it is difficult to envisage a case in which it would be appropriate to decide this case on the basis that the expert's opinion was wrong."

If Mr Stevens' test is correct, namely that, to be accepted, the expert report must be (a) complete, in the sense that it addresses all relevant issues which require to be considered, (b) sufficiently reasoned so that its conclusions can be understood, then **it would be all too easy to envisage a case in which it would be appropriate to decide the case on the basis that the expert's opinion was wrong** (emphasis added)."

Again, pausing there, that is precisely the point. If justice is to be done at a proportionate cost, surely it is better that the Court should listen to what is said and determine whether the evidence before it is logically consistent, taking that evidence as part and parcel of the case as a whole, and then exercising the judicial function to do justice between the parties? The alternative is that in addition to incurring the costs of representation at trial, the parties must also secure the attendance of the expert to ensure that the Court can decide to reject that evidence. Not only does that incur disproportionate costs, but it also requires the Defendant to force the Claimant to prove his case, rather than relying on the burden which underpins all civil litigation - that the Claimant bears the burden of proving his case on the balance of probability. To oblige a Defendant to force the Claimant to strengthen a case which is simply not strong enough is to place an unrealistic burden on each and every Defendant. It requires the Defendant not only to engage and analyse the evidence in every case, no matter how limited its value, but to take costly steps in the litigation with no hope of recovering those costs. The very heart of civil litigation is proportionality, and that falls to be set aside.

Martin Spencer J, however, took a very different approach:

"32… It seems to me that Clarke LJ must have had in mind a narrower test than this and I cannot think that, in so stating, Clarke LJ was assuming that the report would satisfy Mr Stevens' test. Indeed, that test would mean the court rejecting Wessels JA's proviso

"except possibly where it is not controverted" in the case of a report which is a bare *ipse dixit*, despite the Supreme Court's apparent approval of Wessel JA's dictum.

33. In the absence of direct authority on the issue, I take the view that a court would always be entitled to reject a report, even where uncontroverted, which was, literally, a bare *ipse dixit*… what the court is not entitled to do, where an expert report is uncontroverted, is subject the report to the same kind of analysis and critique as if it was evaluating a controverted or contested report, where it had to decide the weight of the report in order to decide whether it was to be preferred to other, controverting evidence such as an expert on the other side or competing factual evidence. Once a report is truly uncontroverted, that role of the court falls away. All the court needs to do is decide whether the report fulfils certain minimum standards which any expert report must satisfy if it is to be accepted at all."

He then went on to consider what the 'minimum standards' might be, by reference to the requirements of 35PD and concluded that:

36. It is, in my judgment, of significance that the Practice Direction goes not just to the form, but also the content, of an expert's report. Despite this, it is no part of the Practice Direction that an expert, in providing a summary of the conclusions reached, must set out the reasons for those conclusions and it would be harsh indeed for a court to find that, despite the terms of the Practice Direction, a report failed to meet the minimum standards required for the report to be accepted in evidence because it did not set out the reasoning leading to the conclusions. In my judgment, the law does not so require. Of course, a failure to set out the reasoning might diminish the weight to be attached to the report but, as I have stated, at this stage the weight to be attached to the report is not a consideration: that only arises once the report is controverted.

37. For the above reasons, in my judgment the learned judge was not entitled to reject the report and evidence of Professor Pennington for the reasons that she did. However strong the criticisms of Professor Pennington's report, and I accept that those criticisms were strong, they went to an issue with which the learned judge was not concerned, namely the weight to be ascribed to the report, that being an issue which would only have arisen if the report had been controverted in the sense set out in paragraph 10 above.

38. … I take the view that the court below was not entitled to reject the report because of its perceived deficiencies. However … I accept that there were serious deficiencies in Professor Pennington's report as identified by the learned judge which might well have caused the Professor serious embarrassment had the report been controverted…

…It is true that he did not set out his full reasoning, nor explain how he was able to reach that conclusion …

… I am conscious of what the Supreme Court said in *Kennedy v Cordia* (see paragraph 29 above). But, in that dictum, their Lordships referred to the opinion being a bare or unsubstantiated one, thus amounting to an *ipse dixit*. In my judgment, Professor Pennington went a long way towards substantiating his opinion by his consideration of the matters referred to above and his opinion was not a bare *ipse dixit* as it would have been had it been a single sentence as envisaged in paragraph 33 above. In fact, I doubt whether any report and opinion from an expert which substantially complies with the Practice Direction to CPR Part 35 could ever justifiably be characterised a mere *ipse dixit*."

The first question is then 'what is substantial compliance with the Practice Direction?' It is clearly different from 'compliance' with the Practice Direction which, it should be noted, is in mandatory terms. 'Substantial compliance' must necessarily be a lower level than 'compliance'; but if compliance is mandatory, how then can 'substantial compliance' suffice? Clearly, the judgment acknowledges that there is a spectrum of putative compliance, ranging from a bare *ipse dixit* with no attempt at explanation, through to a half-hearted attempt or logically inconsistent attempt, well before one gets to compliance. How, then, is one to determine what is 'substantial'? Will anything more than nothing at all suffice?[23]

The vagaries of whether the attempt at compliance is sufficiently substantial would then determine whether the trial judge is even permitted to analyse the report. In other words, if an 'expert' report substantially complies then even if the report, on forensic analysis, is the subject of such strong criticism that it would seriously embarrass the writer to be cross-examined on it, the judge is still not allowed to look behind the conclusion. What if the flaws in the analysis go to whether or not there is substantial compliance? When is that decision to be made?

That, in turn, causes a very real, practical problem, because these issues of compliance or adequacy can only be determined before trial, at an interlocutory stage. Each case is the subject of some judicial scrutiny early in the proceedings when directions are given, but in low-value, standard form, litigation, that scrutiny is most often undertaken on the papers, without the legal representatives or the parties present. That saves cost and time, both of which are at a premium in the quest for proportionate litigation. If the Court gives directions on paper, the dissatisfied party has to pay a Court fee to apply for those directions to be reconsidered, judicial time and lawyer time then has to be expended to determine what should happen. A detailed analysis of whether any given expert report falls to be considered to have been controverted at the time of the directions is impossible. Directions are nearly always made before witness statements are exchanged, or even disclosure of documents has occurred, and will predate any questions under CPR35. One would have to consider whether the report was controverted:

1. Before witness statements were prepared (because the decision to prepare a statement might be made by reference to the need to controvert); and again
2. Before CPR35 questions fell to be asked (because why would one ask questions to allow an expert to strengthen an otherwise fatally weak report?); and then again
3. After those questions has been asked and (possibly) answered.

Returning to the analysis in paragraph 33 of the judgment, there is another practical issue which does not appear to be part of the analysis. Until the factual evidence has been called, it is impossible to determine whether the expert report is uncontroverted or not. How is a Defendant to know whether a Claimant will come up to proof? Is a Defendant to be forced to call law evidence to controvert the Claimant's evidence, not

[23] And at what point does the expert run the risk of being sued by his own client, having lost his immunity from suit after *Jones v Kaney* [2011] UKSC 13?

knowing whether the Court will accept or reject the Claimant's case? The judgment in *Griffiths* does not, on its face, address those issues, but if it is correct, then in order to assess the merits of a case before allowing it to go to Court, a Defendant will have to undertake the following secondary analysis:

1. Is the Claimant going to come up to proof, in circumstances where there is every likelihood that the witness statement is a *pro forma* exercise carefully scoped to consider, and hopefully prove, the necessary *facta probanda*? How can one assess the credibility before one goes to Court?

2. Is the Defendant going to call lay evidence in response? Is there now a burden on a Defendant (who must secure and serve his witness evidence well before trial) to investigate and provide some sort of rebuttal to the Claimant's evidence?

3. If the Court prefers the Claimant's evidence to that of the Defendant, does that mean that there can be no controversion of the Claimant's expert's evidence? How, then, before closing the lay evidence in the case, are the parties to know whether or not the expert report, which could legitimately be criticised in its content if it is deemed controverted, can be subjected to criticism or not?

4. Does that mean that in any given the case the expert must be called to be cross-examined, notwithstanding the limited circumstances envisaged by CPR35.5(2), in circumstances where we do not know until the lay evidence has been concluded whether his attendance will be required to controvert his report or not?

It matters not what the issues in the litigation might be. These questions will fall to be asked in respect of every single expert report, whether the litigation pertains to personal injury, a commercial dispute, or into the family or criminal arenas. How is either party to assess whether critical forensic analysis of expert evidence is going to be permitted not just by the parties, but by the Court? And how can such fluidity and ambiguity in the evidence ever be just? The immediately obvious answer would involve disproportionate cost, with both sides potentially getting experts in every case, or the Claimant's expert having to attend for cross-examination. Either scenario obliterates the rationale behind CPR35.

The alternative would lie with the experts themselves, actually complying (and not merely substantially) not just with the letter of their obligations under the Protocols and the Practice Direction but with the spirit of their obligations, supposedly enshrined in CPR35. Those provisions are over 20 years old, and there has been little suggestion that experts are seeking to embrace their obligations of neutrality. And if the Court is not permitted even to investigate the failings of their reports, why should they?[24]

[24]The Defendant has now sought permission to appeal the decision in *Griffiths*.

COMPREHENSIVE LOOK ON HUMAN RIGHTS OF MIGRANT WORKERS: AN INTERNATIONAL WIDTH

Prof S D Sharma*

Abstract

Inherent dignity and inalienable rights of human beings are basic and fundamental natural freedoms. These are sources for justice to all, essential for social progress, promotion for individual dignity and strengthening brotherhood in human society. All the human rights are for the betterment of human beings without considering religion, race, caste, sex, descent, and place of birth, residence, colour, political opinion, association, ideology or any of them. These rights are related to life, liberty, equality and dignity of individual guaranteed by the Constitution or embodied in international laws as enforceable by the Courts of law. Human rights of migrant workers and families of migrated workers are related to their livelihood and health. In some sectors of employment workers are not organized, they are unable to exercise their democratic rights. They have no collective voice, no approach in proper legal forum. In this paper all the burning issues in this context are being discussed.

Key words

Human Rights, Migrated workers, Life, Hardship, Dignity and Livelihood

Prologue

If a person for searching livelihood without prior fix source of earning migrates from one place to another place is called a migrated worker. In the another words, if any person moves from own home state to another state for prior settled occupation is called migrated person for labour as source of livelihood. Migrants' workers and their families are facing many challenges like- stability, safety, remuneration, daily wages, care of children, care of parents, shelter, pure water, protein food, respect, dignity, social behavior, timely payment, clothing and other essential facilities.

Today an estimated 86 million persons are working in a country other than their own country of birth.[1] Migrant workers accounted for approximately 59 percent of the world's international migrant population.[2] Migrant workers normally leave own country

*Professor & Director, Dr Rajendra Prasad Law Institute Kumaun University, at present SS Jeena University Almora 263601 Uttarakhand, Recipient of President of India Award (A National Award) in Legal Research, Member Uttarakhand Legal Services Authority, Former Dean & Head, Faculty of Law, Kumaun University SSJ Campus Almora, Former Professor Head, Department of Law, Assam University (A Central University) Silchar, Former Professor of law BBA University (Central University) Lucknow and Former member of Evaluation Committee for Award to Authors, Ministry of law & Justice Government of India, New Delhi.

[1]IOM International Organization for Migration, https://www.iom.int Last visited on 17th September 2020.

[2]International Labour organization Report 2018

because of economic inequality, political and other social crisis. Due to the position of migrant workers, chances for disturbances of demographics with ageing populations in some parts of the country. All migrant workers whether they are employed or unemployed want to return back in their countries. Moreover, it is a matter of international law to settle the issue of migrated workers. As a matter of fact, migrated workers related quest are population, necessity, culture, societal trend, administrative practice, and habit of worker.

International Instruments for the Protection of Migrated Workers- Provisions for the protection of human rights of the migrant workers are prescribed under the Charter of United Nations,[3] Universal Declaration of Human Rights,[4] International Covenant on Civil and Political Rights,[5] International Covenant on Economic, Social, and Cultural Rights,[6] Convention of Rights of Children,[7] Convention on the Elimination of All Forms of Discrimination against Women,[8] and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Relevant gists of the provisions of these international legal instruments are essential to be discussed in the following captions.

I Charter of United Nations- It is the source of all human rights.[10] Preamble of the United Nations Charter speaks that "we the people of United Nations determined to reaffirm faith in fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women and nations larger and smaller". The reflection, object and goal of the Charter of United Nations have complete faith and acceptance of human rights and fundamental freedoms which is related to human dignity and worth. Migrant worker's human rights and fundamental freedom are protected from any kind of exploitation.

One of the basic and fundamental organs of the United Nations is General Assembly and functions of this organization are to protect and promote human rights. To fulfill this function by the General Assembly as duty is prescribed under the Article 13 (1) (a) that "General Assembly shall initiate study and make recommendation for the purpose of promoting international co-operation in the economic, social, cultural, educational, and

[3]United Nations Charter came into force on 24 October 1945

[4]Adopted and Proclaimed by the United Nations General Assembly Resolution 217 A (III) of 10 December 1948

[5]Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with the Article 49

[6]Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with the Article 27

[7]Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with the Article 49

[8]Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979, date of entry into force September 1981, in accordance with the Article 27

[9]Adopted by General Assembly Resolution 45/158 of 18 December 1990

[10]It was drafted on 14th August 1941. In 1945, representatives of 50 countries met in San Francisco at the United Nations Conference on International Organization to draw up the United Nations Charter. Those delegates deliberated on the basis of proposals worked out by the representatives of China, the Soviet Union, the United Kingdom and the United States at Dumbarton Oaks, United States in August-October 1944.

health related field and assisting the realization of human rights and fundamental freedoms, for all without distinction as to race, sex, language, or religion" etc.[11] Chapter X of the UN Charter is related to the Economic and Social Council, It's Article 68 provides that the economic and Social Council set up commissions in economic and social fields and for the promotion of human rights and such other commissions as may be required for the performance of its functions.[12] Article 62 (2) of the Charter says that Economic and Social Council may make recommendations for the purpose of promoting respect for and observance human rights and fundamental freedoms for all.[13] Commission and now Council established by the Economic and Social Council. A tremendous job is done by this institution for the promotion and protection of human rights and fundamental freedoms.

II Universal Declaration of Human Rights- The goal of Universal Declaration of Human Rights, 1948 (here in after referred as UDHR) is to provide international legal provisions for the recognition of equal and inalienable rights of all members of human families including the migrated workers, human rights of all should be protected by rule of law. It means for the protection of rights of migrated workers, law should be made by the member states. In the same way, this is also the goal of UDHR for the progress of the society, it is essential to recognize equal rights of men and women including migrated workers.[14] Social security of the migrated workers is the subject matter of protection of human rights. Thus, Article 22 of the UDHR speaks about the duty of every nation and international community that "economic, social and cultural rights shall be recognized for the full development of the personality of every human being". Apart from this social security, especial rights of the workers are prescribed under Article 23 that "everyone has right to work, to free choice of employment, to just and favorable conditions of work and

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[11]United Nations Charter was signed on 26th June 1945 in San Francisco, at the conclusion of the United Nations conference on International organization, and came into force on 24th October 1945. The Statute of the international Court of the justice is an integral part of Charter. It is published in the language of Arabic, Chinese, English, French, Russian, and Spanish.

[12]The functions of Economic and Social Council of United Nations is prescribed under the Charter from Articles 62 to 66, one of the most function is to initiate study and report with respect to economic, social, culture, education, and health, human rights and fundamental freedoms may make recommendations with respect to any such matters to the General Assembly to the Members of the United Nations, and to specialization agencies concern

[13]The term "human rights" has written seven places in the United Nations founding Charter. It is the key of human rights protection and promotion. Initially High Commissioners for Human Rights (OHCHR), now after 60 years it has been replaced on 15th March 2006 by United Nations Human Rights Council. On 13th October 2020, and news published in 14th October, UNHRC election conducted for the four seats out of 47 members Council, Pakistan got 169 votes, Uzbekistan got 164, Nepal 154, China 139, and Saudi Arab 90 votes, out of 193 member states vote, and finally Pakistan, Uzbekistan, Nepal and China became members of the UNHRC, USA has started debate about the violation of human rights of some countries became the member of the UNHRC. The head quarter of UNHRC is in Geneva. United Nations human rights programme started as a small division at UN head quarter in 1940 in New York City and later it has shifted to Geneva and upgraded to the centre for Human Rights in the 1980. The Vienna Declaration and Programme of Action, adopted at the world conference on Human Rights (14-25 June 1993). This document is called for the establishment of High Commissioner for Human Rights by the General Assembly, which subsequently created the post 20 December 1993 (Resolution A/RE/48/141).

[14]Preamble of Universal Declaration of Human Rights 1948; this instruments adopted and proclaimed by the United Nations General Assembly resolution 217 A (III) of 10 December 1948.

protection against unemployment".[15] Everyone without the discrimination has the right to equal pay for the equal work.[16] Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.[17] In the same way, everyone has right to make and joint trade union.[18] These rights to the same person who has migrated from one place to another place as worker, moreover, how this is possible, because shortages of work and sufficient number of workers, it can be said that more workers and shortage of work. Migrated worker are trying to get the labour not to protect the rights, thus, it is suggested that first of all whenever a workers migrated from one place to another place, he should be registered in government agency only than work should be provided by private agency, work should be given through the agency, this should be strictly followed for the protection of the rights of the workers.

Migrant workers are also entitled to enjoy every right as available to the other workers of the particular country like rest and leisure, including reasonable limitations of working hours and periodical holidays with wages. However, it has found that owner of the worker is not providing any wages of holidays. This is a matter of serious concern, a complete attention is required on this issue for the benefit of the deserve class i.e. worker.

III International Covenant on Economic, Social and Cultural Rights- The object of the International Covenant on Economic, Social and Cultural Rights, 1966 (here in after referred as ICESCR) is to fulfill mandate of the Charter of United Nations that to recognize the inherent dignity, and maintain the inalienable rights of all members of the human family as a foundation of the justice, freedom and peace in the global society. Another goal of this Covenant is that to follow the principles of Universal Declaration for strengthening the every kind of rights of human beings including right to enjoy economic, social, cultural, civil and political rights. In the same way, fundamental spirit of the this Covenant is also that to promote the responsibilities, duties and recognize the rights of the others as he is expect that his right shall be recognized by others.

It is categorically states that all the state parties shall recognize the right to work of every human being based on the choice of worker as an opportunity to get his livelihood.[19] This right of the worker includes training programme for getting skilled and expertise knowledge of work.[20] Though this is a provision for the safety and recognizing the rights of the workers but workers word includes labour and labour includes migrated labours,

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[15]UDHR 1948 Article 23 (1)

[16]Ibid, Article 23 (2)

[17]Id, Article 23 (3)

[18]Id, Article 23 (4)

[19]International Covenant on Economic, Social and Cultural Rights 1966, Covenant adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966; Entry into force: 3 January 1978, in accordance with Article 27; This Article says that "the present Covenant shall enter into force three month after the date of the deposit with Secretary-General of the United Nations of the thirty fifth instrument of ratification or instrument of accession and after that the present Covenant shall into force after the three months, after the date of the deposit of its own instrument of ratification or instrument of accession.

[20]Ibid, Article 6(2)

whose rights shall be protected under the provision of this Covenant. Article 7 of the Covenant states that duty of state party is to provide the just and favorable condition of work, minimum and fair wages, equal remuneration for the equal work, women shall be protected and treaded equally, safety and health working conditions, rest and leisure, limitation of working hours and periodic holidays etc.[21] This provision is equal to the provision of the Article 23 of the Universal Declaration of Human Rights.

Trade Union right is also recognized by the ICESCR 1966[22] to the workers, though this right is only possible to grant the workers of organized sectors, however, unorganized sector workers may also enjoy this right by giving special legal status by the member parties. After the Second World War, World community is living in the modern civilization, thus, every human being has the right to enjoy every right as recognized in the UN Charter, Universal Declaration, and Covenants as well as National laws. In the light of these laws migrated labours are entitled to enjoy forming trade union as organized association; it should be given the awareness to them, so that they may be able to protect themselves.

One of the main aspects of the rights of the migrated workers is that there should be social security of the labour[23], for the purpose, insurance of the every worker is essential. In some governmental sector there is a provision for the insurance of worker but individual private work, study shows that there is no insurance of all the workers properly.

IV Convention on Elimination of All Forms of Discrimination against Women- A special international law for the equal rights of women in all the fields of life is framed for protection and promotion of the human rights of women. The object and goal of the Convention on Elimination of All Forms of Discrimination against Women 1979 (here in after referred as CEDAW) is to implement the provisions of UN Charter, UDHR, ICESC and other international legal instruments of human rights.[24] Prior to this Convention, it has been found that world women are not at par of men in all respect of human rights including work, dignity, status, education, health, economy, enjoyment of culture and social status etc. Henceforth, the poverty in women is more than men. This Convention has given legal directions to the state members for eliminating all kinds of discrimination by making the law in the interest of the half population of the society. The work either in the form an expert or labour by women is very essential to make social position strong in order to get economy by the women, so that equity and justice will contribute significant role towards the promotion of equality between men and women.

Protection and promotion of human rights pertaining of work and labour of women is prescribed under Article 11 of the CEDAW that "state parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on the basis of equality of men and women, these rights are right to work, right

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[21] Id, Article 7 (a), (b), (c), & (d)

[22] Id, Article 8

[23] Id, Article 9

[24] Adopted and opened to signature, rectification and accession by United Nations General Assembly Resolution 34/180 of 18 December 1979; date of entry into Force: September 1981 according to Article 27.

to employment, right to free choice of profession, right to job security, favorable and beneficiary conditions of service, right to receive training, right to equal remuneration, right to social security, right to paid leave, right to protection of health, right to maternity leave, right to child care, protection during the pregnancy etc. These rights shall be reviewed periodically in the light of scientific and technological knowledge."[25] This provision of law includes every kind of rights equal of men to the women related to the labour and work. The problem is not in the public sector where women are working as employee but the safety of health, equal remuneration, maternity benefits and other protection is not available in the daily wages worker to women workers. The provisions provided under Article 11 of CEDAW are itself complete for the protection of the women workers, but the problem of its implementation and extension.

The acquit problem with the migrant domestic women workers, leading to violation of their human and work rights. These violations are in every spheres of the work of the domestic workers, like- passport, employment through agencies, language, social, cultural, lack of advance, and accurate information on terms and condition of employment etc. Apart the provisions of CEDAW 1979, International Labour Organization enter into the Convention for the global strategy to support its Constituents in achieving decent work for domestic workers. As part of the legal safety migrant labours can also enjoy expend of knowledge, raise awareness, promote exchange, and dialogue and develop policy tools for the protection of migrant domestic women workers.[26] Most of the migrant domestic women workers are either from developing and un-developing countries e.g. Bangladeshi women for domestic work in Jordan and Lebanon. In the same way, Nepali women are in other countries.

V Convention of the Rights of Child- The preamble of the Convention on right s of child herein after referred as CRC[27] reaffirm the object of the UN Charter for equality, freedom, justice and the peace and provides the protection to the fundamental freedom and human rights, in the dignity, worth of human person, determine to promote social progress and better standard of life of every human being. The preamble further proclaims that to recognize provisions of UDHR and human rights Covenant set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Internationally it is clear that child hood is entitled to special care and assistance. Take care of every child for all round development including education, health, and social security, and proteins food, mental and spiritual development. Recognize the safety of the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection before and after birth.

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[25]Convention on the Elimination of all Forms of Discrimination against Women 1979 Article 11 (1) (a) to (f), (2) (a) to (d) and (3)

[26]Convention Concerning Decent work for Domestic workers 2011 (No. 189) and recommendations No-201;

[27]Convention on the Rights of the Child 1989 adopted and opened for the signature, rectification and accession by General Assembly Resolution 44/25 of 20th November 1989, entry into force 2nd September 1990 in accordance with the Article 49. Article 49(1) says that "the present Convention shall enter into force on the thirteenth day following the date of deposit with the Secretary General of the United Nations of the twentieth instruments of rectification or accession. Article 49 (2) prescribes that for each state ratifying or acceding in the Convention after the deposit of the twentieth instrument of rectification or accession, the Convention shall enter into the force on the thirtieth day after the deposit by such state of its instruments of ratification of accession.

If a child is in the womb of the mother, the protection and safeguard of mother is very necessary from the labour and regular medical checkup and during the pregnancy a balance diet, rest, proper exercise, and social safety should be provided. After the birth, it is also essential that child and mother should also be protected from the social exploitation including injurious and inherently dangerous work and labour.

The first issue is that who is the child? According to Article 1 of CRC child means every human being below the age of eighteen years under the law applicable to the child, majority is attained earlier". This provision indicates that ordinarily definition of child says that a human being less than eighteen years of age is child but if any law provides that before the eighteen years child has became major for certain purpose he may not be child and he should be treated a major.

In the situation of the child if the child is engaged in play and recreational activities, he is entitle for the rest and leisure.[28] Though the rest and leave in all the physical and mental activities is the legal mandate for the protection of human rights of the child, but at the same footing it is also the inherent and fundamental human right of the child that participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activities.[29] This is the duty of the member state to make the law for the purpose.

The most protected right relating to worker and migrated worker is prescribed under the Article 32 of the CRC which says that it is the legal duty of the state parties to recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to harmful to the child's health or physical, mental, spiritual, moral, and social development[30]. At the time of immature age for the development of mental capacity, education shall be given to all the tangier age of child and any kind of labour shall be avoided.

International legal provisions including CRC clearly states that "all the member state shall take steps for the minimum age for employment, working hours, conditions of employment, and other administrative, legislative, and social measures for the development of child. It shall also be the duty of member state to make the penal legal provisions in case of violation of the norms laid down by the state".[31] Social security like education, entertainment, safety and security of health to the children is fundamental human rights for better future of the nation because today's child is the ideal future citizen.

VI Convention on Migrant Workers- The International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families herein after referred as connention is the mile stone for the protection and promotion of the human rights of uncertain work and searching of livelihood by the human being. The General Assembly

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[28]Convention on the Rights of the Child 1989, Article 31 (1)

29Ibid, Article 31 (2)

30Id, Article 32 (1)

[31]Id, Article 32 (2) (a), (b), (c)

of United Nations adopted this Convention by resolution No 45/158 on 18th December 1990.[32]

The preamble of the Convention recognized UN concern human rights, UDHR,[33] ICESCR,[34] ICCPR,[35] CEDAW,[36] CRC,[37] Elimination of All forms of Racial Discrimination against Women (EAFDR) and other legal system of International labour Organization like- Convention of Abolition of Forced Labour and Convention against Discrimination in Education, Scientific, and Cultural Organization. The object further says that prevent all form of discrimination in the way that migrant workers may fully enjoy as equal status, dignity and protection of human rights.

Convention is applicable on all member states for the protection of human rights of migrant workers and their families without any discrimination of any kind such as sex, race, colour, language, religion, or convention, political or other opinion, national, ethical, or social origin, nationality, age, economic position, property, marital status, birth or other status.[38] This has wide object which covers all the international legal efforts for the protection and promotion of the human rights of the migrant workers and their families.

The enforcement and application of the Convention is for the entire period of migration of workers and their families. Though, the definition of the migrant worker already given in the begging of this research paper, moreover, it is also relevant to quote here the various words used in the Convention for the purpose of the meaning of these words in the different sense, these are migrant worker,[39] frontier worker,[40] and seasonal worker[41] seafarer[42] worker on offshore installation[43] itinerant worker[44] project tied worker[45] specified employment worker[46] and self employed worker[47] etc. One of the essential

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[32]Another effort of the General Assembly for the same purpose was on 1 July 2003, which entered in to force on 1st October 2005.

[33]1948

[34]1966

[35]1966

[36]1979

[37]1989

[38]The International Convention on the Protection of Rights of All Migrant Workers and Members of their Families 1990, Article 1.

[39]Refers to a person who is to be engaged, or has been engaged in a remunerated activity in state of which he and she is not national.

[40]If any person is habitual residence of neighboring state and from which he or she returns every day or at last once a day in a week.

[41]A migrant worker who's by its character is depending on seasonal conditions and is performed only during the part of year.

[42]It includes the fisherman, refers to a migrant worker employed on board a vessel registered in a state in which he and she is not national.

[43]Worker under the jurisdiction of another Nation

[44]Worker travelled in another state for short period.

[45]Migrant worker admitted to a state of employment for definite period to carry out the project.

[46]Engage by employer for certain period to complete the particular assignment.

[47]Engage in remuneration activities other than the control of employment.

aspect as definition is related to the meaning of families, it includes, persons married, equivalent to marriage, relationship according to application of law, produces effects, as well as their dependent children and other dependent persons who are recognized by the application of law, bilateral or multilateral agreements between the state concerns.[48] These definitions are applicable on migrant workers for the implementation of this Convention.

The most important part of the Convention is related to the human rights of the migrant workers and members of their families.[49] These human rights are free to leave any state and enter into own state at any time,[50] they have right to life protected by law[51] protection against torture, cruel, inhuman, or degrading treatment or punishment[52] prevention of slavery or servitude, no forced and compulsory labour[53] freedom of thought, conscience and religion[54] right to education of children of migrant workers, children have also the right of religious and moral education,[55] right to hold opinion without interference,[56] right to freedom of expression, including seek, receive, and impart information,[57] right to privacy, family, home, correspondence, or communications, protection from unlawful attacks on honors and reputation and interference,[58] right to liberty, security, protection against violence, physical injury, threats and intimidation, right to identification according to law, right against arbitrary arrest and detention. Right to get information about the arrest and charge in the language of understand, after arrest right to produce before the Magistrate, in case of custody and prison, right to information of the ground of arrest and custody,[59] right to consular and diplomatic authorities of the origin of state[60] right to communication, right to get help from the legal representation,[61] in case of arrest to produce before the court,[62] in case of unlawful arrest and detention right to compensation,[63] right to treat humanity with dignity, separate treatment from the nationalist in case of deprived from liberty in case of arrest,

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[48]Supra Note 38, Article 4

[49]Ibid, Part III of the Convention Articles 8 to 35.

[50]Id, Article 8

[51]Id, Article 9

[52]Id, Article 10

[53]Id, Article 11

[54]Id, Article 12, this right has limitations on the grounds of public safety, order, health, or morals, or other's fundamental rights and freedoms.

[55]Id, Article, 12 clause, 3 &4

[56]Id, Article 13 clause 1

[57]Id, Article, clause 2, clause 3 (a) to (d) prescribes that limitations on this right can be imposed by making the law on the ground of respect and respect of others, national security, public order, public health and public morals, purpose of prevention of any propaganda for war, preventing any advocacy of national, racial or religious, hatred that constitutes incitement to discrimination, hostility or violence.

[58]Id, Article 14, this is an absolute and complete right, there is no exception of this right.

[59]Id, Article, 16 clause 1 to 7

[60]Id

[61]Id, clause 7 (a) to ©

[62]Id, Clause 8

[63]Id, clause 9

full rights of juvenile, during the trial separate from the conviction, no violation of equality, protection of liberty during arrest, and right to not bear any cost during arrest,[64] during the trial right to equality, right to be innocent, right to understand of language, right to defense, trial without delay, take legal assistance, examine the witness, produce own witness, help from the interpreter, right to self incrimination, right of juvenile, right to review of the sentence of conviction, in case of illegal confinement right to compensation, right to protection against double jeopardy,[65] offence only according to law, application of humanitarian law,[66] right to contractual obligation, right to authorized work and residence,[67] right to keep valid document of stay and no interference on that document,[68] right against expulsion without provision of law, right to receive decision in own language, right to appeal, right to opportunity of reasonable hearing, right to take asylum, not bear any cost in case of expulsion, right to get claims,[69] right to have consular and diplomat[70] right to recognize person everywhere before law,[71] right to equal remuneration, equal right of labour laws, right to equality, right to equal employment in private contract, right to application of all the rights,[72] right to form, join, seek aid and assistance of trade union,[73] equal treatment in employment, right to equal remuneration,[74] right to receive medical assistance[75] child have right to name, registration of birth and nationality[76] child also have right to education[77] right to respect cultural identity[78] right to transfer of earnings[79] right to be informed of origin[80] right to recognize cultural identity[81] and right to regularization in the employment on the basis of work.[82]

The International Convention on the Protection of Rights of All Migrant Workers and Their Families 1990 is a comprehensive International legal instrument for the all round development and complete protection of the migrant workers along with their families.

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[64]Id, Article 17, clause 1 to 8

[65]Id, Article 18, Clause, 1, 2, 3(a) to (g), 4, 5, 6, & 7

[66]Id, Article 19, clause 1&2

[67]Id, Article 20, clause 1&2

[68]Id, Article 21

[69]Id, Article 22, clause 1 to 9

[70]Id, Article 23

[71]Id, Article 24

[72]Id, Article 25 clause 1 (a)&(b), clause 2 & 3

[73]Id, Article 26, clause 1 (a) to ©, clause 2 provides that on this right "No restriction except the provision of law, this restriction may be interest of national security, public order, protection of rights and freedom of others.

[74]Id, Article 27, clause 1&2

[75]Id, Article 28

[76]Id, Article 29

[77]Id, Article 30

[78]Id, Article 31

[79]Ibid, Article 32

[80]Id, Article 33

[81]Id, Article 34

[82]Id, Article 35

It prescribes various dimensions of the human rights and fundamental freedoms with dignified life and full enjoyment of civilized principles of human society. These rights are unique for the protection of liberty, life, speech, livelihood, education, health, equal opportunity, employment, right to hearing, application of proper law, benefits of all the criminal laws, benefits of all labour laws, social security, help from the consular and diplomat, right to return their homes, equal status, enjoyment of dignified life and treat equally as nationalist are being treated equally.

VII Conclusion and Recommendations- Migrant workers and their families are facing lot of problems pertaining to protection and promotion of human rights. Legal frameworks for the safeguard of migrant workers human rights are available in international legal instruments, however, problem of its implementations and enforcements are in the every country of member states. Most of the signatories on the International Convention on the Protection of the Rights of all Migrant Workers and their Families 1990 have not applied the fundamental principles of said Convention in its letter and spirit. The worthy dignity and inherent rights of all the workers are the same as the rights of the national workers. Due to the economic problem of livelihood workers are migrating from one country to another country for searching bread and batter, moreover, they have the human rights to recognize as human being in everywhere and secure their rights including food, shelter, health, entertainment, social security, relationship, privacy, education, good behaviors of others, right to join assembly, association, freedom of speech and expression etc.

Educational rights to the children of migrant workers as prescribed under International Convention shall be given priority and primary emphasis by the member states to fulfill the object that "**life of joy and happiness is possible only on the basis of knowledge and science**". Fundamental goal and purpose of human rights is to provide happiness to the all human being of the society including workers generally and migrant workers particularly. Human rights for everyone are the necessary foundation for the development of capacity building through knowledge economy. In this context, **Mahatma Gandhi** rightly observed that "**new world and human order must breath with universal compassion and egalitarian beauty that is truth," he further said that "recall the face of poorest and weaker man and ask yourself, if the step one will contemplate, for the up-liftment of those persons who really in need, that will be the help to whole society".** Practically this is an appropriate statement for the betterment and full enjoyment of real deserve class, they are workers, in real sense they are the builder of particular well-managed society. The following basic and essential suggestions may be considered by the member states for real application of universally inherent and dignified life of migrated workers and their families-

1. Economic opportunities should be provided to workers in their own countries according to needs of their families as per the provisions of law.
2. All the provisions of related to International laws of migrant workers and other workers should be followed by member states after the observation of due process of law.
3. Economic and Social Council of United Nations continuously should review the existing international legal provisions for the promotion and protect of human rights and fundamental freedoms of human beings in global society.

4. Human rights should also be increased according to need, circumstances, civilized principles and demand of society and for the purpose international as well as national legal instruments should be amended time to time in the interest of migrated worker.
5. Registration in government agency of migrated workers should be observed strictly and for the implementation of same process, inspection, and enquiry is essential.
6. Registrations of migrated workers should be done mandatorily.
7. UNHRC members should work without prejudice and bias in fair and impartial manner for the promotion and protection of human rights.
8. Insurance of every migrated worker is essential, though, in this regard, law also exists, but it should be followed strictly and in case of any fault on the part of employer, heavy fine should be imposed on employer.
9. The provision of Article 11 of CEDAW 1979 for the protection of women shall be enforced by all member states for the purpose that law should be enacted by the all countries.
10. Social responsibilities should also be determined according to the provisions of due process of law.
11. Wages of holidays should be given to the migrated workers, for the purpose law should be changed. Awareness to all migrated workers in their interest should be legally mandatory as a duty of the government about the existing international and national legal provisions.

INDIAN APPROACH ON COPYRIGHT PROTECTION FOR CINEMATOGRAPH FILMS

Rajnish Kumar Singh

Abstract

"Cinematograph film" is any work of visual recording and includes a sound recording accompanying such visual recording including any work which is the result of any similar process of recording and also a video film. The confusion as regards protection of cinematograph film under copyright law emerges from the possible understandings prevailing about the subject. One is that only medium and not the content belongs to the producers of cinema and thus narrow protection is required. On the other hand, the recent trend in various decisions of courts favour content bases approach according to which a film is considered to be copied if there is substantial similarity between the defendant's film and the plaintiff's film, to be judged according to look and feel test. The current state of protection of cinematograph films is in favour of producers of films because the remakes of an original film cannot be made without the authorization of its producer. Although no part of the recording is copied in making remakes. It is in this background that the present paper examines the various decisions to evaluate the merit in the two approaches. The judicial flip-flop and the resulting uncertainty in the position of law on copyright protection for cinematograph films has been highlighted.

Key words

Copyright, Cinematograph film, Medium based approach, Content based approach, Film copyright, Producer of cinematograph film.

I. INTRODUCTION

The protection for cinema and the issue of cinema piracy came to fore mainly in the post TRIPs Agreement era. Liberalization of economy coupled with the advent of WTO led countries including India to make important changes in the intellectual property laws including addressing the issue of cinema piracy.[1] There has been a very significant growth in the entertainment sector in India in recent past particularly the film industry. The industry has kept growing despite the periods of economic slowdown.[2] According to Shubha Gupta in the early years of films the laws of censorship and finance were considered more important, however, later the issues of intellectual property generally

*Associate Professor, Faculty of Law, Banaras Hindu University, Varanasi, India.

[1]Shubha Ghosh, "A Roadmap for TRIPS: Copyright and Film in Colonial and Independent India", 1(2) *Queen Mary Journal of Intellectual Property*, 2011, pp.146-162, at 157.

[2]The worth of Entertainment Industry of India in 2010 was about US$ 14.4 billion. It registered a growth of 11 % over 2009. It was expected to grow at 14 % in subsequent years.

and copyright law particularly came to become more important legislations.[3] It is relevant to note that now a days almost all film production companies are bound to handle intellectual property issue as a major concern in the process of film production.[4]

"Cinematograph film" is any work of visual recording and includes a sound recording accompanying such visual recording including any work which is the result of any similar process of recording and also a video film.[5] 'Visual recording'includes any recordings from which moving images may be obtained, it also includes storing the recording in any electronic medium.[6] Therefore, the recorded work with moving visuals/images is considered as a cinematograph film.[7] It is relevant to note that traditionally it is the recording which is thought to be included in the definition as the content belongs to the content creators.

Cinema or the work of audio visual fixation present the most difficult and complicated questions for municipal laws of various countries.Under the laws of the common law countries, employers enjoy the copyright of "cinematographic work". In the copyright legislation of the civil law system, "co-authors" enjoy the copyright of cinematographic works. According to paragraph 3 of Article 89 and paragraph 1 of Article 93 in the *Copyright Law of Germany*, the content of the cinema which include the story, music *etc* are not considered part of the audiovisual work. According to Article 16 of the *Copyright Law of Japan*, "the authorship of a cinematographic work excludes authors of novels, scenarios, music or other works." According to Article L. 113-7 of the *French Intellectual Property Code*, "the original work constitutes an audiovisual work and authorship of an audiovisual work belongs to persons who have carried out the intellectual creation of the work." According to Article 15 of the *Copyright Law of China*, "the scriptwriter, director, cinematographer, lyric writer, composer of the work shall enjoy the right of authorship."[8] Although in France courts were initially reluctant to protect cinematographic productions as works, in 1905 it was held that a cinematograph film was worthy of protection as a series of photographs. In the U.K., although the first case to classify a cinematograph film as a series of photographs was decided in 1912, it was widely

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Available at:

http://www.indiainbusiness.nic.in/industryinfrastructure/service-sectors/media-entertainment.htm, cited from "Indian Film Industry September: Tackling Litigations" 2013, at 1, available at:

http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Indian%20Film%20Industry.pdf (last visited on 9-10-2020)

[3]Shubha Ghosh, supra n. 1, at 149.

[4]Helena Axelsson and Andreas Knutsson, "New Challenges for IP in the Film Industry: A Study on how the Swedish Film Industry manages Copyrights", at 11, available at:

https://pdfs.semanticscholar.org/d425/89a1b03c64875a348e5d98c8c12fc0589293.pd f (last visited on 9-10-2020)

[5]The Copyright Act, 1957, Section 2(f).

[6]Id., Section 2(xxa).

[7]Available at:*http://copyright.gov.in/Documents/Manuals/CINEMATOGRAPH_MANUAL.pdf.* last visited on 9-10-2020

[8]Li Weimin, "Study on the Relationship between the Original and the New Cinematographic Works", 6 *China Legal Sci.*, 2018, at 58.

acknowledged before the Copyright Act of 1911 that this should be the case.[9] Under the 1908 Act of the Berne Convention a dual system for the protection of cinematographic productions existed: original cinematographic works were protected as an independent subject matter and unoriginal cinematographic productions as a series of photographs.[10] It is believed that the judicial opinion in India has been in favour of allowing the cinema which is only inspired from other protected works to be non-infringing, such cinema are held to be non-infringing of any copyright. The law of infringement of copyright revolves around the concept of substantial taking/copying. Thus, if the defendant can prove that the copying is not substantial and his treatment of the work is different from the way plaintiff has treated the work no case of infringement is proved.[12] The present paper examines the shift in the approach of Indian courts on the issue of copyright protection for cinematograph films from medium based protection to content based protection and also examines the basis for the shift. The possible missing links have also been identified.

II. THE MEDIUM BASED APPROACH

The issue of film copyright came in discussion when Bambay High Court decided the case of *Star India Private Limited v. Leo Burnett (India) Pvt. Ltd.*[13] .The court proceeded on the understanding that cinema is the visual recording of the content and therefore it is only the recording which belongs to the producer and not the content. The content is generated by the content creators and thus in favour of the producer the protection only extends to medium i.e. the fact of recording. A similar logic applies to phonograms also. It is relevant to note that in case of both cinematograph film and sound recording the approach was to protect only the fact of recording and not the content in favour of the producer. While explaining the position of law on protection of cinema, the court established the distinction between clauses (d) and (e) of section14 one hand and clauses (a), (b) and (c) of the section on the other hand. In the case of literary, artistic, dramatic and musical works provided under clauses (a), (b) and (c) the right holder has a clear reproduction right i.e. the right to reproduce the work. This right is not mentioned in clauses (d) and (e) which provide for rights in cases of cinema and phonograms. The right to make copies of the cinema and phonogram means that the owner of rights can stop others from copying the recording and nothing more. Therefore, making of a cinema by any person, other than the producer of original cinema, which is same in content does not mean violation of copyright in original cinema. Infringement takes place only when it is actually copied by the process of duplication or when the fact of recording is copied. The making of another film by independently shooting the film does not violate the right to make copies as provided in clause (i) of section 14(d) even if the film resembles the first

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[9]Pascal Kamina, "Film Copyright in the European Union 19, 2002" at 12 cited from Makeen F. Makeen, "The Protection of Cinematographic Works under the Copyright Laws of Egypt and Lebanon", 55 *J. Copyright Soc'y U.S.A.*, 2008, at 228.

[10]*Id.*, at 229. Makeen F. Makeen

[11]Rachana Desai, "Copyright Infringement in the Indian Film Industry", *Vanderbilt Journal of Entertainment Law & Practice*, 2005, at 269.

[12]*Ibid.*

[13](2003) 27 PTC 81 (Bom).

film. Thus the protection for the owner of right in cinema and phonogram exists only on the surface *i.e* the fact of recording. The position for other works *viz*, literary, artistic, dramatic and musical works is different in the sense that deeper protection on the content is also provided. Court identified the reason for the narrow protection for film and phonogram to be the absence of the requirement of originality for protection. Stronger protection is givent to those subject matter which pass stringent test of copyrightability.

Again in the case of *Zee Entertainment Enterprises Ltd v.Gajendra Singh and Others*[14] the Bombay High Court observed on similar lines. Court contrasted clauses (d) and (e) from clause (a), (b) and (c) and held that in case of works other than film and phonogram the right holder can stop others from reproducing the work in any material form. However, this aspect is not mentioned for cinema producers and phonogram producers. The exclusive right for cinema lies only in the recording and therefore producer of cinema cannot stop others from making a cinema having the same content. He can stop others only from making actual copy by the process of duplication. The same justification for such an interpretation as given in *Star India Private Limited* was reiterated.

It is apparent that an audiovisual work gets protection against unauthorized copying only by the process of duplication which is a mechanical process. The theme, plot, format, relation between different aspects of the film etc. are not protected.In the light of above opinions one may conclude that the skill part of the film which included camera techniques and editing etc. which may transform a mediocre work into a classic piece are not covered by protection under the law.[15]

III. BEGINNING OF THE CONTENT BASED APPROACH

In *Shree Venkatesh Film v.Vipul Amritlal Shah,*[16] the court observed that copyright in cinema is infringed by making remakes provided the condition of substantial similarity between the works is established. The position is true even if the law defines cinema to be recording of content created by others. The requirement of similarity here means similarity in scenes. It means that even if the film is not a carbon copy it may still be a case of infringement. The Court also explained the meaning of "carbon copied" and observed that in case of films apart from the type of copying as implied in section 14(d) i.e.where the physical form of the film is duplicated or carbon copied, there are other forms of copying of film other than carbon copy which is possible under the provision. The Court gave the word 'copy' a broad meaning, which according to court is in line with the scheme of the Indian law. Thus, the court held that a film will be called as a copied work if considered as a unit the film is substantially similar to some other film which can be judged by applying the test of 'a person of ordinary prudence' which means by applying look and feel test.

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[14]2007 (6) Bom CR 700.

[15]Chintan Chandrachud, "A Dual System of Copyright Protection for Films: Should India Go the *Norowzian* Way? 5(3) *Journal of Intellectual Property Law & Practice*, 2010, at 164.

[16]Civil Suit No. 219/2009, Calcutta High Court, 1 September 2009.

In England, the carbon-copy aspect was applied in the first *Norowzian v. Arks*[17] but it was not approvedby the Court in the second *Norowzian v. Arks*[18] when it was observed that an audiovisual work will get film copyright as well as protection as dramatic work.[19] In the first case the issue was whether the story line of film Joy is also under protection under the definition of dramatic work and if it is protected can it be said that the dramatic work has been copied. The court held that the film itself has not been copied thus it is not a case of violation of copyright in film.On the issue of story behind the film and the question whether it is protected by copyright as a dramatic work,the court found against the claimant.[20] The court held that a film is different from a dramatic workit can incorporate the dramatic work but cannot be a dramatic work itself. The Court of Appeal, however,reversed the opinion.According to Lord Justice Nourse, for the purpose of the English law of 1988 a film can be considered as a dramatic work. The ordinary meaning of a dramatic work is that it is a work of action which is capable of performance in the sense that it can be performed. This according to him is the meaning according to section 1(1)(a) of the Act. Applying the definition to a cinema the Judge observed that a cinema, in most case, is a work of action and it can be performed thus it can validly fall within the definition of a dramatic work. Thus he disapproved the opinion expressed in first *Norowzian v. Arks* in which cinema was excluded from the definition of dramatic work.

It is clear from the foregoing that as a result of the decision of court in the *Norowzian* case in England films get stronger protection against unauthorized duplication which includes protection as film as well as protection as dramatic work.[21] On the other hand it is also relevant to note that *Norowzian* presents the possibility in favour of directors of cinema who employ creativity and related skills in various dimensions of the cinema including synchronizing the sequence and editing etc. to claim copyright on the subject in the dramatic work category. It may be mentioned here that such a possibility existsonly in relation to cinema which may be considered creative. Thus routine videos will not qualify for the protection.

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[17]The factual matrix of the case was that a film was shot using simple steps by a stationary camera was transformed by employing some editing technique into a film which was significantly different from the film which was actually shot. This film of plaintiff inspired the defendant and he also created a film using the same technique and the result was that the final film contained performance by actor which is humanly not possible and was against the law of nature. [1998] EWHC 315 (Ch).

[18]1999 FSR 79.

[19]The English law on protection of cinema has altogether different elements than other European Union countries. Where other countries protected cinema as work of authorship so as to comply with the requirements of Berne Convention, the English law protected it as a subject matter of neighbouring rights or related rights but at the same time it had to treat cinema as authorial work for the purpose of Berne requirements. The decision in second Norowzian presents the justification on the basis of which compliance of English law with Berne requirements can be established which is to treat the creative aspects of film to be part of the definition of dramatic work. Available at:

https://www.pbookshop.com/media/filetype/s/p/1366698014.pdf (last visited on 10-10-2020)

[20]*Norowzian* v. Arks Ltd & Anor (No. 2) [1999] EWCA Civ 3014, available at:

http://nipclaw.blogspot.com/2008/09/copyright-norowzian-v-arks-ltd-anor-no.html . (last visited on 8-10-2020)

[21]P. Kamina, Film Copyright in the European Union (Cambridge University Press, 2002) at 37 cited from Chintan Chandrachud, supra n. 15, at 166.

The views of the English court does not seem to apply in India because the definition of dramatic work under section 2(h) of the Copyright Act, 1957 expressly exclude cinematograph film from its scope.[22] The Calcutta High Court in Shree *Venkatesh Film* has held films to be authorial works, but the judgement nowhere recognizes the film to be a dramatic work. The opinion seems to be in accordance with the Berne Convention on the ground that the Convention obliges the members to protect cinema as a work of authorship.[23] Thus, the two clear outcomes of the Calcutta High Court decision are *firstly*, cinematograph film deserves the same level of protection which any other work of authorship gets, however, the observation is not supported by any clear statutory scheme. The *Norowzian* view of considering cinema as a dramatic work could provide the necessary justification or else the court could have found the requirement of originality in cinematograph films within the framework of the Copyright Act. *Secondly*, no observation as regards requirement of originality for protection of films was made which means it is not a requirement for protection. Thus, a new interpretation primarily on the basis of expansion in the meaning of 'copy' has been provided by the court.

A 'cinematograph film' is mentioned under Section 13(1) of the Act, 1957 as a work in which copyright subsists. Further, Section 13(4) of the Act, 1957 stipulates that there is separate copyright in the underline content of the film and it is independent of the copyright in the film.It is pertinent to mention that the Copyright Bill, 1955 was referred to a Joint Committee. In its report, the Committee specifically stated that a cinematograph film is an independent work which will enjoy copyright apart from its component parts. The Statement of Objects and Reasons of the Copyright Act, 1957 specifically states thata cinematograph film will have a separate copyright apart from its various components namely, story, music *etc*.

IV. THE CONTENT BASED APPROACH: FILM IS ORIGINAL WORK OF AUTHORSHIP

The law on protection and the extent of protection of cinematograph film remained out of discussion for many years after the Calcutta High Court decision till very recently when two decisions over the issue came to fore. As pointed above the law on the point of film copyright evolved from purely medium based approach to contentbased approach, although the theoretical justifications were missing. In *MRF limited v. Metro Tyres Limited*[24] the court observed thatdespite the fact that the word "original" is not expressly mentioned before the word cinematograph fil in Section 13(1)(b) of the Indian Act it is stilla requirement by virtue of sub-section (3)(a). It becomes more clear when section 13 of the Act is read in the light of the definitions of 'cinematograph film' and 'author' under clauses (f) and (d) of section 2 of the Copyright Act respectively. Explaining the phrase"to make a copy of the film" in Section 14(d)(i), the court observed that the expression does

[22]According to Section 2(h) of The Copyright Act, 1957, the definition of 'dramatic work'has an inclusive part which includes any piece of recitation, choreographic work or entertainment in dumb show, and it has an exclusive part which provides that dramatic work does not include a cinematograph film.

[23]Arpan Banerjee, "Film Copyright Infringement: Bypassing the 'Carbon Copy' Handicap", 5(1) *Journal of Intellectual Property Law & Practice*, 2010, at 17.

[24]*MRF limited v. Metro Tyres Limited*, CS(COMM) 753/2017, 1st July, 2019.

not only mean to make a physical copy of the film by duplication. Further, the court held that in case of cinema also the test of *R.G. Anand's case*[25] would applyas the scope of protection for cinema is same as that forany other original work. Accordingly, the court proposed to compare the substanceof the two works to decidewhether it is a case of copying or not. The court was of the view that the decision of Bombay High Court in *Star India Private Limited v. Leo Burneet (India) Pvt. Ltd.* recognized a narrow scope of the rights of the producer who owns the copyright in a cinema, further, it is not in accordance with the Berne Convention because the decision has the effect of not treating cinematograph work as original work.

The above opinion is further substantiated by the Delhi High Court in the decision of *Yash Raj films Pvt Ltd v. Sri Sai Ganesh Productions &Ors*[26] . The case relates to a cinema called "Band Baja Barat".In this case the plaintiff contended that the story, the plot of the film, and the way in which the theme has been presented in the originalfilm had been completely copied. It was contended that thetheme, concept, plot, character sketches, story, script, form and expression etchave been copied and the similarities between the works is substantial. Such an act of blatant copying amounts to copyright infringement. It was argued by Plaintiff that those who have seen both the cinema will form an unmistakable impression that the defendant's work is copy of the plaintiff's work. Thus the requirements of test of *R.G. Anand* is fulfilled to decide infringement. The Delhi High Court was of the view that the defendants have infringed plaintiff's copyright in the film.

The decision re-affirms the decision of the case of *MRF limited* presenting a new interpretation different from the earlier Bombay High Court decisions. The approach has shifted from medium based protection to content based protection for cinematograph films. The foregoing indicates that the current state of protection of cinematograph films is in favour of producers of films because even remakes of films (provided such film is original) cannot be made without the authorization of its producer. Although no part of the recording is copied in making remakes. It is not out of context to mention that in the case of *Gramophone Co. of India v. Super Cassettes Industries Ltd.*[27] the Delhi High Court, in relation to cover versions of published sound recordings, has observed that remixes which may also be called as cover version is recording of any existing song which is already published. The version is made by employing different voice and new musicians.Therefore, cover versionis not considered as reproduction of the original recording". Going by the above observation and deriving analogy from the same one may argue that remakes of films must also be allowed as neither copying nor infringement.

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[25]The Supreme Court in *R.G. Anand v. M/s. Delux Films*, AIR 1978 SC 1513, laid down the safest test to determine infringement of copyright. It is called the look and feel test. The test can also be called as a prudent person's test in which a person who has seen or read both the works will be asked if he form an impression that the defendant's work appears to be a copy of the plaintiff's work. It is also true in cases of infringement of copyright by changing the form of the work.

[26]CS(COMM) 1329/2016, 8 July, 2019.

[27]2010 (44) PTC 541 (Del).

V. CONCLUSION

The above discussion on film copyright indicates the shift in approach of the courts in India in protecting a cinematograph film, however, it is relevant to note that the content base approach goes beyond protecting the recording in favour of producers of cinema to include even the content of the film which is essentially not owned by the producer of the film in the way it is understood in the copyright law. It is also evident from the provision of the Act which distinguishes the copyright in film from the copyright in the underlying content. The recent high court decisions have laid down the criteria of originality for protection of films which means that non-original films (e.g. film on wild life, non-creative interviews shot in routine manner) will not get protection. This does not seem to be a good proposition because as such films also deserve protection at least on the basis of medium based approach. Further, if at all protection for films has to be expanded a dual protection regime including protection of cinema under dramatic work category on the line of English law may be explored. This must be done keeping the larger aspect of the fundamental difference between entrepreneurial works like cinema and phonogram on one hand and other works on the other hand.

INDIAN DISABILITY AND RAILWAYS JURISPRUDENCE IN THE PRISM OF RAIL JOURNEY FOR THE SPECIALLY-ABLED PASSENGERS

Rudranshu Singh*

Abstract

The differently-abled people need railways for transportation to pursue education, employment and even for medical treatment. But their beleaguered social status plays out during rail travel as well. During rail travel they have to interact with strangers in a crowded space which adds to their anxiety. This anxiety interacts negatively with their different physical appearance, which faces the brunt of prejudicial social attitudes of co-passengers. The commonly-abled (non-disabled) passengers carry a misconception that rude behaviour for the specially-abled people is nothing inappropriate and comes with impunity. This article is an attempt to explain the sociological importance of railways in India, the sociology of railways system including railway stations and trains and how the railway laws lack the ability to protect 'the self-esteem' of differently-abled person as we currently believe that 'pro-disability reasonable accommodation' is restricted to concessional travel or few facilities of assistance such as wheelchairs etc.

Key words

Differently abled persons, Transport, Law

INTRODUCTION

The railroads have been a critical element in several of the social metamorphosis of postcolonial India into a developing nation.[1] Indian Railways has been there to serve India as a synonym for nation-building, to carry coal, steel, fertiliser, and to help the 'happy and carefree peasants'[2] as well as general people. 'Mobility is perceived as a living human right, yet in mundanity, it runs conforming with class, racism, gender, and disability-based segregation in public space, in nationality, and the means of mobility at all scales'. In several ways, mobility justice is an inherently mobile doctrine, with a magnitude that it deems justice as an unpredictable arrangement that travels across scales and domains.[3] Railways in India has had British roots and has subtly maintained

* The author is an Advocate at the High Court of Rajasthan (INDIA) and a Disability rights enthusiast. LL.M in Air and Space Law from the Institute of Air and Space Law, McGill University Canada and a PhD Scholar at University of Lucknow.

[1]Gurdial Singh Khosla,A HISTORY OF INDIAN RAILWAYS (Ministry of Railways: Railway Board Government of India- A.H. Wheeler & Company- Allahabad, 1988) p. vi.

[2]S.R. Malhotra, THE EMERGENCE OF THE INDIAN NATIONAL CONGRESS. 112. (Vikas Publications- New Delhi, 1971)

[3]Mimi Sheller, Mobility Justice: THE POLITICS OF MOVEMENT IN AN AGE OF EXTREMES 20 (Verso Books- London, 2018)

its feudal legacy.[4] National Platform for the Rights of the Disabled (NPRD), had filed public interest litigation (PIL) before the Delhi High Court in 2019. The petition had alleged that the Indian Railways was issuing separate identity cards to differently-abled people for availing of travelling concession. It has not been accepting Unique Disability Identity Card issued by State Governments or the Ministry of Social Justice Government of India.[5]

We need to appreciate the fact that the capacity for humans to move about, whether to gather, hunt, and fish, or to communicate, trade, and celebrate together, or to hang out, 'loiter' and 'lime,' pre-exists European colonisation and enclosure.[6] Transportation obstacles undeniably render the differently-abled least employable, and it creates little sense to protect persons from discrimination in employment if they have less than satisfactory, accessible public transportation services.[7] Transportation law and policy for differently-abled people is one of the most critical access issues. To plainly put it: 'Without economical and useful transportation (that is, mass transportation), the specially-abled will remain homebound or institutionalised and unemployed or underemployed.[8]

Why We Need Transportation Equity

Transportation mobility is a symbol of full-fledged membership in a society. The new phases of discrimination and segregation operationalise discriminatory practices that openly limited transportation access and movement of people representing vulnerable groups, including the differently-abled. The effects of limited transportation mobility persist, as the lack of mobility helps establish ghettos, *de facto* segregated schools, and

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[4]"These hopes and priorities of Indian Railways were not realised as serious problems relating to the absorption and gradation of staff were created and these took years to resolve."*See* G.W. Macgeorge,WAYS AND WORKS IN INDIA: BEING AN ACCOUNT OF THE PUBLIC WORKS IN THAT COUNTRY FROM THE EARLIEST TIMES UP TO THE PRESENT DAY 221(Archibald Constable and Company- Westminster, 1894)

[5]*National Platform for the Rights of the Disabled vs Ministry of Railways and Others* W.P.(C)5208/2019 in the Delhi High Court. Accessed athttp://delhihighcourt.nic.in/dhc_case_status_list_new.asp on 22nd June 2020. *See* also Soibam Rocky Singh 2019.Plea in High Court Claims Railways Not Accepting UDID Cards. *The Hindu*, 11th March. 162 Accessed at https://www.thehindu.com/news/cities/Delhi/plea-in-high-court-claims-railways-not-accepting-udid-cards/article26490146.ece on 22nd June 2020.

[6]See Supra Note 3 (Sheller)

[7]Jayna Kothari, THE FUTURE OF DISABILITY LAW IN INDIA: A CRITICAL ANALYSIS OF THE PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT 1995. 136 (Oxford University Press-New Delhi, 2012)

[8]James J. Weisman, Book Review- *Institutional Disability, the Saga of Transportation Policy for the Disabled.* 4(1) NYLS Journal of Human Rights, 347, 350 (1986). *See* also Section 41(1) The appropriate Government shall take suitable measures to provide, -(a) facilities for persons with disabilities at bus stops, railway stations and airports conforming to the accessibility standards relating to parking spaces, toilets,

ticketing counters and ticketing machines.(b) Access to all modes of transport that conform the design standards, including retrofitting old modes of transport, wherever technically feasible and safe for persons with disabilities, economically viable and without entailing major structural changes in design.(c) Accessible roads to address the mobility necessary for persons with disabilities.(2) The appropriate Government shall develop schemes programmes to promote the personal mobility of persons with disabilities at an affordable cost to provide for, -(a) incentives and concessions.(b) retrofitting of vehicles; and(c) personal mobility assistance. *See* THE RIGHTS OF PERSONS WITH DISABILITIESACT, 2016 (NO. 49 OF 2016).

housing, cementing social and community isolation-the central leaderships of society, have long-standing promises to cure these evils. These promises, together with guarantees of life filled with equity and human rights, to replace that destroyed in 'blight clearing' projects, often remain adjourned *sine die*. The commonly-abled (non-disabled) in the suburbs have predetermined physical mobility for social cohesion, while beleaguered social groups, neither have mobility nor social cohesion.

Endeavours to defy discrimination, segregation, and inequitable transportation policies have become sophisticated enough to incorporate abroad range of interlinked social impacts. The term transportation equity alludes to a spectrum of strategies and regulations that intend to address inequities in the nation's transportation planning and project delivery system. Across the country, community-based organisations of low-income and differently-abled citizens that organised to enrich their communities are acknowledging the crucial duty of transportation in moulding local prospects and their diversification. Though the definition of transportation equity may differ from place to place, most of the specially-abled would say yes that an equitable transportation system should:

- Guarantee prospects for consequential public participation in the transportation planning process, especially of the differently-abled who tangibly feel the effect of disability transportation projects or subsidised choices.
- Be subject to a decent benchmark of public accountability as well as financial transparency.
- Distribute the advantages and liabilities emanating from transportation projects proportionally across all income levels and social segments.
- Provide good-quality services-underlining access to economic opportunity and essential mobility-to the whole society, but with an emphasis on transit-dependent people.
- Equally prioritise efforts both to revitalise the specially-abled population and to boost the transport infrastructure.

On a broader level, transportation equity exemplifies metropolitan equity and the appropriate distribution of resources. These doctrines symbolise a progression of the relationship between civil rights and transportation and the degree of their inter-linkages-mainly when we revisit the former cases involving labour transport and the events precipitating race-based anti-discrimination bus boycott in the United States in the 1950s.[9] It means that transportation has a tangible stake in anti-discrimination jurisprudence *vis-à-vis* disability rights.[10]

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[9]Thomas W. Sanchez and Marc Brenman,THE RIGHT TOTRANSPORTATION: MOVING TO EQUITY 7-8 (Routledge Publication- New York, 2017)

[10]Transportation rights have always travelled through the prism of sociological jurisprudence. As on 13th November 1956, the U.S. Supreme Court had affirmed the District Court's decision on Browder vs Gayle. Wherein, it was held that "a reaffirmation of the principle of segregated facilities are inherently unequal, and that the old Plessy Doctrine of separate but equal is no longer valid, either sociologically or legally." This decision augurs very well for disability-based transportation rights as it subtly says that transportation should be operated in a manner that it eliminates the social evil of discrimination. See Aurelia S. Browder vs William A. Gayle, 352 U.S. 903 p. 425.

Be that as it may, this segment of the Rights of Persons with Disabilities Act, 2016 (after this: Disability Act 2016)pertaining to access to public transport has obtained unexpectedly scant attention notwithstanding the significance of accessibility issues. With improved prospects in education and employment for differently-abled people, there has been comparatively no improvement made for adapting transport for use by persons with special needs. Access to education or jobs is meaningless if a differently-abled person cannot commute to the school or work because accessible transportation is absent.[11] But the question of economic and technical viability has remained intact. This mischievous lacuna of financial sustainability is a carry forward from the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 (after this: Disability Act 1995). When the implementation of disabled-friendly transport is contingent upon availability of funds, it will always remain susceptible to political arbitrariness. In simple English, these provisions will not become a tangible reality and will remain in the cold storage under the garb of economic constraints.[12]

Neither for Indian criminal justice system nor for Indian railways Seating the differently-abled railway passengers on the upper berths of railway coaches, attract NO legal sanctions. As the phraseology of 'subject to availability of accommodation; the computerised Passenger Reservation System provides for allotment of only *one lower berth* to the differently-abled person,' that itself exposes the stoicism of the railway reservation system and its incompetence to accommodate the differently-abled travellers.[13] The disability legislation ought to have specified the period during which the concerned agencies could have met their obligations to deliver accessible transport, keeping the expenses in mind.[14] Numerous disability legislations have encompassed the imposition of a time-frame for operational sing pro-disability accessible transportation. As exemplified through, the Disability Discrimination Act in the UK, which mandated every bus to be fully accessible by 2016 and double-deck buses to become available by 2017 and the present accessibility regulations apply only to new vehicles coming into service and so is the situation for trains.[15]

Similarly, the Americans with Disabilities Act (here in after referred as ADA 1990) mandated all new buses or rail vehicles beseeched for purchase or lease by public entities must be 'readily accessible to and usable by individuals with disabilities, including wheelchair users.' Thus, new buses and rail systems must have lifts or ramps and fold-up seats or other wheelchair spaces with appropriate securement equipment.[16] Such transportation departments are also required by law to facilitate the on-demand

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[11]Sharon Rennert, *All Aboard: Accessible Public Transportation for Disabled Persons*,63 New York University Law Review 360, 361 (1988).

[12]Ibid.

[13]Annual Report & Accounts, 2012. Indian Railways: Directorate of Statistics and Economics, Ministry of Railways, (Railway Board) Government of India p. 109.

[14]*See Supra* Note 11 (Rennert) p. 362.

[15]Elaine Mackie, Design for Public Transport. Chapter 5 in Mike Tovey eds., *Design for Transport: A User-Centred Approach to Vehicle Design and Travel* (Routledge Publishers- London, 2016) p. 140.

[16]Bonnie P. Tucker, *The Americans with Disabilities Act of 1990: An Overview*, 22(1) New Mexico Law Review, 13, 51 (1992).

'paratransit' service to differently-abled people in case they are unable to take advantage of the standard public transit.[17]

Before ADA, Section 504 of the Rehabilitation Act of 1973, was the source of legitimacy for pro-disability accessible transit which permitted public transportation arrangements the option to either out?t their ?eet with accessible buses or to provide an exclusive, distinct transportation program for persons with disabilities.ADA made both accessible transit and complementary paratransit an obligation.[18] Section 504, as mentioned above, decrees reasonable accommodation resulting inconsequential access to a programme or assistance to cure the conduct producing discrimination for the differently-abled population.[19] Therefore, a transport agency must reasonably adjust its operations to allow disabled-friendly tangible access to the transit systems.[20] At least part of standard train fleets must be accessible to passengers with disabilities to ensure concrete comfort.[21] Mainstreaming disabled-friendly transportation is 'the easiest and best' way to provide mobility to the specially-abled but as an essential mode of avoiding discrimination against them within this domain.[22]

The ADA mandates one coach per train to be mandatorily set aside for the individuals with disabilities. Acquisition of new buses or trains or vehicles after the operational dates stipulated in the statute are to be ADA-compliant, and the deadlines for compliance of every organisation providing public transport are specified. Furthermore, the US Department of Transport offers detailed regulations of access to be served in all vehicles.[23] Lack of fixed implementation dates is a major statutory lacuna for the Indian

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[17]Paratransit is a facility where individuals who are unable to use the standard transit system independently (because of a physical or mental impairment) are picked up and dropped off at their destinations. *See* Ibid.

[18]Robert Alan Olason, *Accessible Raleigh Transportation A Paratransit System Using Trip-by-Trip Eligibility Determination and Two-Tiered, User-Side Subsidy*, 1760 Transportation Research Record, 121- 123 (2001).

[19]*Alexander vs Choate*, 469 U.S. 287, 288 (1985).

[20]"A human-friendly transport means- at least ones used for public purposes, a certificate may be made mandatory so that its accessible to people with all disabilities, i.e., it hasprovision for ramps, low-flooring, Braille signals for the blind, and audio instructions on opening/closing of gates, etc." *See* Tushti Chopra, *Expanding the Horizons of Disability Law in India: A Study from a Human Rights Perspective*, 41(4) The Journal of Law, Medicine & Ethics, 807, 817 (2013).

[21]*See Supra* Note 11 (Rennert) p. 363, n. 21.

[22]Henry S. Richardson, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 108 (Oxford University Press- New York, 2002)

[23]The US Department of Transport Regulations mandates that vehicles already accessible to the differently-abled remain accessible and gave specific directions as to how wheelchair lifts should be maintained; stipulate that paratransit fares may not exceed twice the fixed- route fare for a comparable ride; forbid paratransit providers from imposing limitations on priorities based on an individual's trip purpose; mandate that certain key bus stops should be announced for specially-abled passengers; provides that where numerous bus routes serve one bus stop, transit systems shall provide means by which visually impaired individuals may identify the proper vehicle to enter; require that disabled passengers be allowed to travel with portable oxygen supplies and service animals; mandate that specially-abled passengers be provided with satisfactory information about public transportation; mandate that specific bus and train seats be designated as priority seating for the passengers with special needs; and set forth means of administrative enforcement of the ADA.*See* 49 U.S. Code of Federal Regulations PART 37 (49CFR37) pp. 412- 501. Accessed at https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/part-37-transportation-services-individuals-disabilities on 24th June 2020.

disability-rights legislation vis-à-vis transportation and a perfect breeding ground of socio-administrative apathy.[24]

A statutory implementation approach could have served the transportation jurisprudence better while enacting the Disability Act 1995 and 2016, respectively. That is, to impose a date in the future within which time-table every one of public buses, trains, and aircraft would be made accessible to specially-abled people as it necessitates resources. Prerequisite of a time-frame based implementation was Constitutionally placed under Article 45, in the context of primary education. It was made free and compulsory with a completion time-frame of 10 years from the Constitution's commencement. That provision kept in mind the resources needed for making such a right real.[25] Indian disability and railway laws have been unable to induct travelling rights into their human rights regime.[26] Disability jurisprudence in the context of transportation rights walks a very tight rope because ambiguity creeps in easily as the process of reasoning was on two vague ends. On one end, it has to make transportation systems accessible to the especial passengers and avoiding discrimination against them is on the other. Combining those *two* distinct goals in such a way as to give rise to a new end, that of mainstreaming the differently-abled into existing transportation systems has been an enduring challenge.[27] This challenge becomes steeper when the disability-based facilities are put on hold due to economic considerations.

We need to appreciate that availability of disabled-friendly transport because it is not an isolated right, but a means to other rights.[28] Thus, accessible transport vehicles for differently abled persons is a hardcore human rights issue, and hence economic considerations must not stymie these facilities. The Disability Act's anxiety for costs under Section 41 weakens the jurisprudential resolve to eliminate discrimination and the creation of an inclusive society.[29]

The Tumultuousness of Accessibility in Transport

Section 41 of Disability Act, 2016 merely mentions the pro-disability facilitative travel or examples of adapt railway coaches etc. It remains mute on any standards as to what

[24]The jurisprudential approach of a specified time-based implementation 'must' have been a part of thestatutory scheme of disability law in India. The voluntary nature of execution will undoubtedly leave thetransportation rights of the specially-abled Indians in peril, because "corruption and hypocrisy ought not to be inevitableproducts of democracy, as they undoubtedly aretoday." *See* C. Raj Kumar, *Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India*, 17(1) Columbia Journal of Asian Law, 31, 32 (2003).

[25]"State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of *fourteen* years." *See* Article 45 of the Constitution of India, 1950.

[26]Abhinav Rajput 2017. Wheelchair-Bound Para-Athlete Says She Was Forced to Sleep on Floor of Train. *The Hindustan Times*, 11th *June*. Accessed at https://www.hindustantimes.com/delhi-news/no-one-showed-sympathy-wheelchair-bound-para-athlete-forced-to-sleep-on-floor-of-train/story-5UDptWItp9Qbw20mxhAYDO.html on 24th June 2020.

[27]*See Supra* Note 22 (Richardson) p. 108.

[28]Ibid.

[29]*See* Disability Act 2016, Section 41(1), *supra* note 9.

type of adjustments maybe necessary for easy access for persons with diverse kinds of disabilities. Legislative lacunae procreate administrative arbitrariness.[30] By exclusively aiming at making buses and trains accessible for wheelchair users, it would not satisfy the requirements of all differently-able individuals. For example, people with acute vision impairments cannot utilise regular trains and buses without assistance if they are travelling in unusual locales.[31]

Railways establish new socialites and transform people's senses of self. They procreate new forms of spectatorship.[32] That viewership revamps how bodies are sensed and perceived in the landscapes that they moved through,[33] now witnessed as a speedily passing vista. At the same time, this 'parcelling' of travellers hurled through the terrain at high speed spawns various social and bodily anxieties, disclosed most acutely in accounts that underscore fears for personal safety and concern of criminal activity and 'railway spine'.[34] The railway gathers new, mobile publics, expecting the differently-abled passengers to develop new skills to negotiate with crowds and handle strangers.[35] The quality of those skills is dependent upon 'extraordinary' preparation on the part of especial travellers vis-à-vis their disabilities to accomplish their journeys.[36] Undeniably, the space of the train carriage is a place where social relations amongst unacquainted gentry are bargained and redrawn.[37]

Soft national legislation drives the rights system for differently-abled travellers that is ineffective at bringing about change because specially-abled people are not accustomed to asserting or even requesting their rights. The inefficiency of these laws reflects the fact that trains and stations lack the disabled-friendly construction with no attention to the needs of passengers with disabilities. Apart from that, both technology and trained professionals who can take pro-disability facilitative action are absent from the system. The government and non-governmental organisations should work together to raise levels of public awareness and improve facilities.[38] Because the commonly-abled

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[30]"Legislation is necessary to assure the opportunity to attain civil rights goal, since experience has proven the unfortunate fact that 'no civil right has ever been secured without legislation'." *See* Bonnie P. Tuckerand Bruce A. Goldstein, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW 2 (Volume 1, LRP Publications- Pennsylvania, 1991)

[31]Michael Lewyn, *Thou Shalt Not Put a Stumbling Block before the Blind*, 52(5) Hastings Law Journal, 1037, 1065 (2001).

[32]Lynne Kirby, PARALLEL TRACKS: THE RAILROAD AND SILENT CINEMA 105 (Duke University Press- Durham, 1997)

[33]David E. Nye, NARRATIVES AND SPACES: TECHNOLOGY AND THE CONSTRUCTION OF AMERICAN CULTURE (Columbia University Press- New York, 1997) pp. 180-181.

[34]Ralph Harrington, *On the Tracks of Trauma: Railway Spine Reconsidered*, 16(2) Social History of Medicine, 209, 223 (2003).

[35]Orvar Lofgren, *Motion and Emotion: Learning to be a Railway Traveller*, 3(3) Journal of Mobilities, 331, 332- 335 (2008).

[36]Jack Simmons, THE RAILWAY TRAVELLER'S HANDY BOOK OF HINTS, SUGGESTIONS AND ADVICE: BEFORE THE JOURNEY, ON THE JOURNEY AND AFTER THE JOURNEY 62 (Lockwood and Company- London, 1862)

[37]Peter Thomas, Railways. Chapter 20 in *The Routledge Handbook of Mobilities 215* (Taylor & Francis- New York, 2014)

[38]D. Nanda, 1998. ACCESSIBILITY OF PEOPLE WITH PHYSICAL DISABILITIES IN INDIAN RAILWAYS. In 8th International Conference on Transport and Mobility for Elderly and Disabled People Loughborough University of Technology, pp. 797-802.

(non-disabled) people have parochial ways of interpreting disabilities. They often contemplate disability to be a synonym for wheelchair usage, which automatically leaves millions of masses without any access to transportation. The transportation system has to assimilate the doctrine of 'reasonable accommodation for disability rights'. The transport laws have to encompass the adaptable vehicles as well as architectural designs of the railway stations, platforms, lifts, wheelchair handlers and baggage moving trollies for even the mofussil towns as an obligatory disability-based service with a legally defined timeline for implementation as discussed above.[39]

"It is not enough to provide wheelchairs without dignity as the commonly-abled (non-disabled) have the habit of staring at the differently-abled person as if he/she is an alien. Eliciting his familiarity with the New Delhi station, Doctor 'S' said, "I am myself a person with a disability and was waiting for the battery-operated car deployed for the differently-abled, but it was nowhere traceable. Astonishingly, there are no lifts at the railway station'. Singh said he also discovered to his horror that whenever a wheelchair user arrived, in the absence of a lift, coolies lifted them onto the escalator. 'The Prime Minister called us divine. But the dignity of differently-abled people has regularly been compromised with perfect impunity.' The government spent over 1,000 crore rupees on its two-year bash but had it contributed 1% of the amount for the benefit of the differently-abled, and they would not have to face this kind of humiliation."[40]

- Whenever I seek help in crossing the road from other pedestrians, they hold me by my collar or my shirt sleeve and 'haul' me across the road, making me feel exceedingly small and insignificant" says a visually impaired man.
- Polio afflicted person complained that his feet terribly ache while standing. But when travelling on buses, all his requests for a seat fall on deaf ears, if it is an overcrowded bus.
- A differently-abled woman living in Mumbai says she never travels in local compartments reserved for the specially-abled. Why? "Drunkards and other suspicious characters always occupy it, and I feel very unsafe. I would rather go to a crowded ladies compartment where I am physically uncomfortable but at least mentally secure." [41]
- The coach for the differently-abled passengers is located at the end of the train just behind the engine, which is exceptionally inconvenient for the special passengers.

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[39]Rajiv Ranjan, 2017. I Have Cerebral Palsy: Indian Railways Is Indifferent to My Train Travel. *New Delhi Television Ltd: Every Life Counts Series, 24th July*. Accessed at https://everylifecounts.ndtv.com/cerebral-palsy-indian-railways-indifferent-train-travel-15571 on 28th June 2020.

[40]Gaurav Vivek Bhatnagar, 2016. Railways Fails to Treat Persons with Disabilities with Respect and Care: Doctor with disability exposes the lack of sensitivity at New Delhi railway station - a wakeup call ahead of India's bid to modernise hundreds of its stations. *The Wire,* 02nd *June*. Accessed at https://thewire.in/rights/railways-fails-to-treat-persons-with-disabilities-with-respect-and-care on 28th June 2020.

[41]Samir Ghosh, 2015. The Disabled Die Young Due to Neglect and Apathy of Society. *Nagpur Today, 22nd March*. Accessed at https://www.nagpurtoday.in/the-disabled-die-young-due-to-neglect-and-apathy-of-society-says-samir-ghosh-unesco-advisor/03220914 on 28th June 2020.

The Dignity of Differently-Abled Travellers

The dignity of differently-abled passengers is severely compromised when adults with disabilities are hauled in the luggage porter's lap or when they are helped in crossing the platform by their shirt's collar. For wheelchair users, the core issue is the toilet experience for urinating, which they described as painful and humiliating.

Inconvenience and humiliation *vis-à-vis* differently-abled rail travellers have two elements: the way from the seat to the toilet and the difficulty in entering the toilet cabin. Getting to the washroom is a Herculean task, wherein, the co-passenger must carry a wheelchair as the coach attendants are generally ill-behaved and less educated, as the room is almost always too small for a wheelchair. Consequently, the specially-abled travellers try to avoid going to the toilet by using catheters or by fasting before long voyages. In contrast, some even use a diaper, a bottle or hygroscopic bag. Such insurmountable hardship to enterthe toilet lead to accidental defecation. In others, cases the unique travellers have to urinate or defecate in a diaper, that exemplifies a great sense of humiliation and personal suffering due to the resultant stench and stares of other passengers.[42] Such indignities come with tightly knitted inconvenience and pathetic sanitary hygiene.[43] Travelling also becomes undignified for passengers with disabilities because they are financially vulnerable and cannot jounce the market forces as their well-placed commonly-abled counterparts.[44] Dignity is as essential for the specially-abled as it is for commonly-abled people. The Delhi High Court, while deciding upon the role of disability legislation in India in accruing dignity for the people with disabilities, pronounced as follows-

"The said Disability Act came into being to give effect to the United Nations Conventions on the Rights of Persons with Disabilities, to which India was a signatory. The Preamble to the said Act does not permit for any deviation from the stated objective, namely, to accord respect for the inherent dignity, individual autonomy, freedom of choice, right against non-discrimination, full and active participation in society. Equal opportunities in all walks of life, as eloquently elaborated therein, to differently-abled persons."[45]

Such behaviour amounts to indirect discrimination and is a tangible onslaught on the dignity of 'person' of the differently-abled.

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[42]Yaniv Poria et al, *The Flight Experiences of People with Disabilities: An Exploratory Study*, 49(2) Journal of Travel Research, 216, 221 (2010).

[43]"The toilet technology used in the railways is not in line with the overall ethos of the sanitation campaign which is trying to eliminate open defecation to derive maximum health benefits. With the introduction of *Total Sanitation Campaign and Nirmal Gram Puraskar*, many villages are becoming open defecation free but the railway lines crossing through the district or panchayat bring undisposed excreta for such rural areas which is sufficient to increase their health risk." See Kumar Alok, SQUATTING WITH DIGNITY: LESSONS FROM INDIA 348 (Sage Publications- New Delhi, 2010)

[44]Gareth Shaw and Tim Coles, *Disability, Holiday Making and the Tourism Industry in the UK: A Preliminary Survey*, 25(3) Journal of Tourism Management, 397, 402 (2004).

[45]Tina Sharma (Minor) through Bhagwati Prasad Sharma vs Union of India & Others (2018). Accessed at http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=181678&yr=2018 on 17th June 2019. *See* Paragraphs 19 and 20, respectively.

Importance and Universality of Dignity

Due to its significant centrality in both the United Nations Charter and the Universal Declaration of Human Rights, the concept of 'human dignity 'now plays a crucial role in the human rights debate. The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civiland Political Rights (ICCPR) both state that all human rights develop upon the intrinsic dignity of the human person. Self-Esteem or dignity has become a commonplace legal phenomenon in the texts providing for human rights protections in many jurisdictions.[46] In bucolic societies, dignity was often confused with the snobbish value of royal lineage or holding a high public office.[47]

Dignity lacks mathematical or theoretical quantification,[48] but it may undoubtedly serve as an impeccable argument.[49] Despite all its vagueness, courts have resorted extensively to the concept.[50] It is a constitutional right in Germany, Hungary, Israel, and South Africa, among others, while in the European Convention on Human Rights the Prohibition of "inhuman and degrading treatment" may be seen as a negative formulation of the right to dignity. In some of these jurisdictions, dignity may serve as the springboard for a series of rights. Dignity is a guiding principle in other constitutions and international human rights law.[51]

Breach of Dignity: An Indirect Discrimination

The Judiciary has time and again considered that right to life a right filled with human dignity.[52] In doing so, the Judiciary has not even shown keenness to procure evidence of bias, or a discriminatory state of mind or any malign purpose. The Courts tend to believe that hardcore proof is needless to establish a claim for indirect discrimination. Nor is corroboration of the non-existence of such intention builds up any defence or excuse for

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[46]Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19(4) The European Journal of International Law, 655, 656 (2008).

[47]"The concept of *dignitas hominis* in classical Roman thought largely meant 'status'.Honour and respect should be accorded to someone who was worthy of that honour." *See* Ibid.

[48]Roger Gibbins, *How in the World Can You Contest Equal Human Dignity? 'A Response to Professor Errol Mendes'* "*Taking Equality Into the 21st Century: Establishing the Concept of Equal Human Dignity*", 12(1) National Journal of Constitutional Law- Canada, 25, 30 (2000).

[49]Dietrich Ritschl,Can Ethical Maxims be Derived from Theological Concepts of Human Dignity?Chapter 5 in David Kretzmer and Eckart Klein eds. *The Concept of Human Dignity in Human Rights Discourse* (Columbia University Press- New York, 2002) pp. 87-98.

[50]David Feldman, *Human Dignity as a Legal Value- Part 1* Public Law: The Constitutional and Administrative Law of the Commonwealth, 682, 689 (1999).

[51]Rory O'Connell, *The Role of Dignity in Equality Law: Lessons from Canada and South Africa,* 267, 269 (2008). "The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the humanrights into one whole. It ensures the normative unity of human rights." *See* Aharon Barak, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT (Cambridge University Press-UK, 2015: Translated by- Daniel Kayros) while quotingMiriam Naor: former President of the Israeli Supreme Court pp. 103-104. *See* also *Jeeja Ghosh vs Union of India and Others*, Others (2016) 7 SCC 761, 762-763.

[52]Jiby P. Chacko vs Principal, Medicity School of Nursing & Another, 2002 (2) ALD.

the conduct that amounts to indirect discrimination.[53] Life without dignity loses its purpose, resolve, and the spark of intelligence starts evaporating, which reduces the social productivity of an individual.[54] For example, a differently-abled commuter while on the train is misbehaved with, can have a poor performance in his official duties.[55] Therefore, 'reasonable accommodation' for a unique traveller must envelop the protection of her self-esteem and those assisting or accompanying them. During incidents of disability-based intimidation, even the family members helplessly tolerate the disgrace of watching their loved ones being the subject of abuse as railway passengers. That fear of indignity gets transmitted to all those who object to disability-based harassment. It makes them refrain from any intervention to stop the impugned bullying. Co-passenger related to the victim of the hostility, generally remain silent and do not retaliate on behalf of the specially-abled victim, even if she or he is a relative. It is also noteworthy that although the co-passenger might not be the primary target of abuse, those escorting the differently-abled person were themselves, victims of emotional upset.[56]

Observations and Recommendations

Any name-calling or hostile behaviour should be able to attract strictures and appropriate punishments under the Railways Act 1989, instead of exclusively depending on the Disability Act 2016 or/and the Indian Penal Code. There must be a disability help desk on every railway station, whether local or national. The train ticket examiner (TTE) shall be re-designated as the 'Coach Superintendent.' His powers and authority shall be defined appropriately in case of differently-abled passengers. There is an urgent need to amend Section 145 of the Railways Act 1989. That Section states as follows-

Drunkenness or nuisance. -If any person in any railway carriage or upon any part of a railway-

(a) is in a state of intoxication; or

(b) commits any nuisance or Act of indecency or uses abusive or obscene language; or

(c) wilfully or without excuse interferes with any amenity provided by the railway administration to affect the comfortable travel of any passenger,

he may be removed from the railway by any railway servant. He shall, in addition to the forfeiture of his pass or ticket, be punishable with imprisonment which may extend to six months and with fine which may extend to five hundred rupees:

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[53]Hugh Collins and Tarunabh Khaitan, Indirect Discrimination Law: Controversies and Critical Questions. Hugh Collins and Tarunabh Khaitan eds. Chapter 1 in Foundations of Indirect Discrimination Law 11 (Bloomsbury Publishing- London, 2018)

[54]Francis Coralie Mullin vs Administrator, Union Territory of Delhi and Others, AIR 1981 SC 746.

[55]"Indirect discrimination while travelling includes verbal abuse, such as name-calling, behaviour such as graphic and written statements, or conduct that is physically threatening, harmful or humiliating." See Michele A. Paludi,PSYCHOLOGY FOR BUSINESS SUCCESS 123 (Volume 1 Juggling, Balancing and Integrating Work and Family Roles and Responsibilities- Praeger Publication- Oxford, London, 2013)

[56]David Wilkin, DISABILITY HATE CRIME: EXPERIENCES OF EVERYDAYHOSTILITY ON PUBLIC TRANSPORT 59 (Springer Nature Publications- New York, 2019)

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the court, such punishment shall not be less than-

(a) a fine of one hundred rupees in the case of conviction for the first offence; and

(b) imprisonment of one month and a fine of two hundred and fifty rupees, in the case of conviction for a second or subsequent offence.

The Section mentioned above should carry specific provisions to 'intimidating differently-abled passengers with rude or abusive or any disrespectful behaviour must attract a significant monetary fine or/and imprisonment, which have a deterrent value. The subsequent offences if committed for the *third* time, must be treated as a cognisable offence, and the quantum of punishment shall be *seven* years along with a permanent prohibition on rail travel for every convicted offender.[57] 'Reasonable Accommodation' for the special passengers means a 'journey with dignity' and not mere charitable concessions.

[57]The Railways Act 1989. Accessed at http://legislative.gov.in/sites/default/files/A1989-24_0.pdf on 01st July 2020.

RE-VISITING THE DEFINITION OF WHITE COLLAR CRIME

Harishchandra Pandey*

Abstract

This research article analyses Professor Edwin Sutherland's concept of White-Collar Crime. The main feature of the concept is that it is an economic crime committed in the course of a profession by a respectable person and a high social status. While the idea of White-Collar Crime by Edwin Sutherland has educated sociologists, criminologists, and experts in management, the definition may have confused prosecutors, judges, and politicians in the newly emerged information-age. Now, economic crime through computer-system or internet posing challenge to the definition of white-collar crime given by Sutherland. This paper highlights criticism of his definition and why in this information age, there is a need to change the mindset regarding the concept of white-collar crime.

Key words

White collar crime, criminality

I. Introduction

Conventional crime theories described poverty, homelessness, underemployment, inadequate health care, poor housing, mental illness, alcoholism as the root causes of crime. Currently, though it has steadily increased in number, these crimes remain on the statute book only as a small fraction of all criminal offences. Another type of crime known as White-Collar Crime has arisen with industrialisation and urbanisation. White-Collar Crime are relatively new crimes that have been developed in many social and economic domains, such as education, trade, taxes and public health. White-Collar Crime includes securities fraud, misappropriation, company fraud, and money laundering. The dangerous nature of White-Collar Crime and its pattern of combining with activities considered legal have led some to say that white-collar criminals present a much more significant threat to society than those of conventional crime.[1] This article argues that all financial fraud is included in the phrase White-Collar Crime. Fraud is described as deliberate deception, trickery, or cheating in order to gain an advantage. In current perspectives on White-Collar Crime, the idea of deception is fundamental.

* LL.M., LL.D., Assistant Professor, Faculty of Law, DDU Gorakhpur University, Gorakhpur (UP).

[1] Earl R. Quinney, "The Study of White Collar Crime: Toward A Reorientation in Theory and Research" 55 J. Crim. L. Criminology & Police Sci. 208 (1964).

II. White-Collar Criminality

Since World War II, a most significant and recent development in criminology has been the emergence of the concept White-Collar Crime. The term White-Collar Crime was first coined by Edwin Sutherland in the year 1940.[2] Sutherland used this term to impress upon the need to expand the boundaries of the study of crime to include the criminal acts of respectable individuals committed in the course of their occupations. He labelled these crimes for the apparent lack of a better name, "White-Collar Crime," and thus was born a term soon to become an established part of the vernacular of criminology. Sutherland defined White-Collar Crime as "*a crime committed by a person of respectability and high social status in the course of his occupation*".[3] His study of White-Collar Crime was prompted by the view that criminology had incorrectly focused on social and economic determinants of crime, such as family background and level of wealth. Sutherland excluded many crimes of the upper class, such as murder, adultery, and intoxication, because these are not customarily part of the occupation procedures. Likewise, he excluded con games operated by "wealthy members of the underworld, since they are not persons of respectability and high social status".[4] Later on in his book Sutherland modified his earlier definition in the following way: "White-Collar Crime may be defined approximately as a crime committed by a person of respectability and high social status in the course of his occupation."[5] At last, Sutherland offered the most straight forward definition in the following way: "the white-collar criminal is defined as a person with high socio-economic status who violates the laws designed to regulate his occupational activities."[6]

"White-collar" in his study includes, "respected," "socially accepted and approved," "looked up to." His research aimed to accomplish two goals: (1) "to present evidence that members of the upper socio-economic class commit many crimes and that these crimes should be included in the general theories of criminal behaviour;" and (2) to present a theory that explains all criminal behaviour, namely that of "differential interaction."[7] For various reasons, Sutherland's definition of white-collar crime was very influential. First, there is Sutherland's contribution to criminology's ignorance of the kinds of crime being committed by the powerful and influential elite members of society. Second, is the degree of white-collar crime-related impact. Sutherland highlighted the disproportionate amount of harm caused by the wealth's crime as compared to the poor's much-researched and widespread emphasis on crime, and the similarly disproportionate degree of responses to social control.

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[2]Lars Gunnesdal and Petter Gottschalk, White-Collar Crime Research. In: White-Collar Crime in the Shadow Economy 12 (Palgrave Pivot, Cham, 2018).

[3]Edwin H. Sutherland "White-Collar Criminality" 5(1) American Sociological Review 1(1940).

[4]James Helmkamp, Richard Ball, et. al., (eds.), Definitional Dilemma: Can and Should There be a Universal Definition of White Collar Crime? 89 (National White Collar Crime Centre, Morgantown, West Virginia, 1996).

[5]Ellen S. Podgor, "Corporate and White Collar Crime: Simplifying the Ambiguous" 31 American Criminal Law Review 391(1993).

[6]Gilbert Geis, "White-collar Crime What is it?" 3 Current Issues in Criminal Justice 13 (1991).

[7]Supra note 2 at 7.

III. Characteristic Features of White Collar Crimes

Over 79 years since it was first coined in 1939, the complexities of even describing the word White-Collar Crime have eluded the scholarly and law enforcement communities, and the debate continues to this day. Prior to Sutherland, scholars like W.A. Bonger (1916) EA Ross (1907) Sinclair (1906) and Steffens (1903), emphasised the misdeeds by businessmen and elites. Sutherland's work was focused at separating and defining the differences in blue-collar street crimes such as murder, burglary, theft, assault, rape, vandalism, so on and so forth which are often blamed on psychological, associational, and structural factors. Instead, he evaluated that white-collar criminals are opportunists, who overtime look for the opportunity to take advantage of their circumstances to accumulate financial gain. They are educated, intelligent, affluent, confident individuals, who were qualified enough to get a job which allows them the unmonitored access to often large sums of money. Many also use their intelligence to convince their victims into believing and trusting in their credentials. Thus, in simple words, White-Collar Crime is an unlawful act or series of unlawful acts or legal acts to achieve an unlawful goal committed by any person through non-physical and/or non-violent means and guile, to wrongfully gain money or property or to avoid payment of legal duties to retain money.

IV. Criticism

Sutherland's study of white-collar crime was prompted by the view that criminology had incorrectly focused on social and economic determinants of crime, such as family background and level of wealth. Sutherland was of a view that crime is committed at every level of society and by persons of widely divergent socio-economic backgrounds. In particular, according to Sutherland, crime is often committed by persons operating through large and powerful organisations.[8] White-Collar Crimes, as Sutherland concluded, have a greatly underestimated impact upon our society.[9] However, his definition of White-Collar Crime was vehemently criticised, and some writers even questioned whether a White-Collar Crime is a crime in the real sense of the term. His definition includes within its boundaries such behaviours only which are indulged in during one's occupational activities, and it fails to recognise that there are many such behaviour which, no doubt, can be placed within the category of White-Collar Crime. However, they bear no relation to the offender's occupations. There are many criticisms and strong objections to Sutherland's stipulation that White-Collar Crime must occur in the course of an offender's occupation. They argue that such a definition excludes crimes such as filing false income tax returns, making false claims for social security benefits, buying on credit with no intention or capability of paying and variety of other offences that he felt should be included under the White-Collar Crime. These and similar criminal behaviours are now studied under White-Collar Crimes, although these are not committed during occupational activities.

Another essential element of Sutherland's definitions is that white-collar criminal must be a person of respectability, and at the same time, he must be enjoying high social

[8]Abdul Latif Wani, "White Collar Crime-Its concept" 6 Kashmir University Law Review (1999).

[9]Supra note 2.

status. These elements seem to be more doubtful.[10] The high social status and the element of respectability taken together also has led to more confusion. It has been argued that it is entirely possible to be highly respectable and illiterate on the one hand, or a member of the upper-class, yet held in disapproval by the general society on the other. There can, indeed, be a person of a high social status indulging in white-collar criminality who are not respectable or vice-versa. Thus, Sutherland's concept of 'high social status' is far too vague to be of much use within a social system as complicated as that of modern society.

V. Emerging White Collar Crimes

Conventional properties as we used to think are movable and immovable property in physical units. However, in recent years the value of any property is not attached to physical units. It is now attached to information or information products. Sensitive information is now stored on servers of the company or organisation. Additionally, computers connected with the Internet have become an essential part of business and daily life. People using the Internet are becoming a victim of financial crime. The criminals committing financial crime over the Internet are interestingly not highly placed officials but any ordinary person knowing computers-system. Moreover, Internet provides inexpensive and anonymous means to reach thousands of potential victims. Therefore, the challenge which scholarly and law enforcement agencies are now facing to define the term White-Collar Crime due to the evolving nature of computer and Internet-related crime. Without an appropriate definition of White-Collar Crime, it is not possible to measure the impact of White-Collar Crime in the society. The future is full of challenges to deal with this evolving field of criminality.

VI. Concluding Observations

Sutherland's approach to the definition of White-Collar Crime was offender-related. He had paid so much attention to the nature of the offender that actual criminal behaviour had gone unexamined. It is an apt time to reconsider the definition of White-Collar Crime, keeping in view the emergence of computer and Internet-related financial crime. Assessment of causes of crime and mode of doing these crimes by any person instead of the status of the criminal is more critical for criminologist to unlock the nature of the White-Collar Crime. So, Sutherland's offender-related approach had to make way for offence-related approach.

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[10]Gerald Cliff & Christian Desilets, "White Collar Crime: What It Is and Where It's Going" 28 Notre Dame J.L. Ethics & Pub. Pol'y 481(2014).

FUNDAMENTAL FREEDOMS IN INDIA AND EXERCISE OF DISCRETIONARY POWERS BY ADMINISTRATIVE AUTHORITIES: A STUDY ON JUDICIAL CONTROL THROUGH SUPREME COURT DECISIONS

DR. GIRISH R*

* Dr. Girish.R, Assistant Professor of Law, Gujarat National Law University, Gandhinagar, Gujarat.

Abstract

Changing times have brought about a need for a change in the essential governance of a country, The modern society has coined the need for conferring of judicial and legislative power on the executive; and conferring of the same in the hands of the administration. The genesis of new fields of law gives rise to the need for new procedural safeguards and interpretation of the Constitution in a way it's never been done before. Administrative authorities have acquired vast discretionary power with the evolution of society from a laissez faire state to a welfare state. Generally, these discretionary powers are left to the subjective satisfaction of the officers of the administration carrying out these functions. This study deals with Administrative Discretion and there are those times when the administration takes a yard when given a foot, creating the need for various safeguards. Tackling this illegality and arbitrariness is best done by the Constitution. Fundamental rights ensured by the Constitution are a perfect deterrent to the above and it is in this knowledge that this project has been made, to understand how Fundamental Rights work together in lessening the chances of the presence of excessive, arbitrary administrative discretion.

Key words

Fundamental Freedoms, Discretionary Power, Law

Introduction

Modern Government is impossible without discretionary powers. A discretionary power is one which is extensible by its holder in his discretion based on subjective satisfaction or based on objective satisfaction. Most powers under public law are discretionary. A significant phenomenon in the present-day administrative process in modern democracy is the conferral of large discretionary powers on the administration to make decisions from case to case. A discretionary power may be vested in the government, a minister, an official or an instrumentality constituted to discharge some functions of the State.

The idea underlying such a power is to give a choice of alternatives to the decision maker, he has a range of options at his disposal and he exercises a measure of personal judgment in making the choice. It is usually conferred by a statutory provision which is

broadly worded and hardly imposes any substantive or procedural safe guards on the exercise of power. So, a discretionary power inherently has the potentiality of being abused or misused by the holder of the power. But as the state regulation of human affairs keeps increasing the vesting of large discretionary powers in the government and its officials has become inevitable one. Administrative authorities are conferred with wide discretionary powers ranging from simple ministerial functions like maintenance of records to detention of a person on the subjective satisfaction of the executive authority. As a general rule, courts have no power to interfere with the actions taken by administrative authorities in exercise of their discretionary powers.[1] This, however, does not mean that there is no control over the discretion of the administration. In *Sharp v.Wakefield*[2] , Lord Halsbury observed that discretion is not to be arbitrary, vague and fanciful, but rather legal and regular and hence, there is a need for judicial review. The purpose of judicial review is not to take away any discretionary powers conferred upon administrative authorities, but to ensure that it is properly exercised, in accordance with law.

While exercising discretionary power, it is the duty of the administrative authority to apply its mind to the facts and circumstances of the case at hand. Without this condition being satisfied, there would be clear non-application of mind and the thus failure to exercise due care and caution and hence, discretion and the action would be bad.

Lord Diplock in *Secretary of State for Education & Science v. Tameride Metropolitan Borough Council*[3] has defined it as "the very concept of Administrative Discretion involves a right to choose between more than one possible courses of action upon which there is a room for reasonable people to hold differing opinion as to what may be preferred."

In the leading case of *Sussanah Sharp v. Wakefield*,[4] Lord Halsbury stated "Discretion means when it is said that something is to be done according to the rules of reason and justice, not according to private opinion … according to law and not humour. It is to be, not arbitrary, vague, fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to discharge of his office ought to confine himself."

Examining these definitions we can say that the decision is taken by the authority not only on the basis of evidence but also based on its discretionary power.[5] The word discretion can commonly be defined as choosing from amongst the various available alternatives without reference to any predetermined criterion, no matter how fanciful that choice may be. But when the term discretion is preceded or qualified by the word Administration it has an entirely different meaning. In this sense the word discretion means the choosing from available options is on the basis of rules of reasons and justice

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[1]Small v. Moss, (1938) 279 NY 288; DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 296 (1995); A.K. Gopalan v. State of Madras, AIR 1950 SC 27.

[2](1891) AC 173 (179).

[3]Secretary of State for Education & Science v. Tameride Metropolitan Borough Council, [1976] 3 All ER 665.

[4]Sussanah Sharp v. Wakefield,(1886-90) All ER Rep 651.

[5]CK TAKWANI, LECTURES ON ADMINISTRATIVE LAW 287 (2017).

and not on the personal whims and fancies of an individual. Such exercise is not to be arbitrary, vague and fanciful, but legal and regular.[6]

Society and law are two completely different notions but are nonetheless strongly and irrevocably bound to each other. Thus, it is no surprise that, with the development and elaboration of society and law, the disciplines of law have also broadened. Because of the existing complex societies, it has come to be that in the general working of the organs of the state that is the executive, legislature and the judiciary, and the running of the country by the government, a lot of extended functions and discretion fall into the hands of the executive and the administration. This has been coined to be a necessary characteristic of a modern society. Administrative authorities need discretionary power to optimally make use of the power to take control of situations. For example, in case of emergency situations where quick action is needed to be taken, it would not be possible for the authority to wait for directions because that would render them useless. Instead, the authority needs to take quick decisions to handle the situation and hence such discretionary power is needed by them.

When the legislature, through procedure, confers power on the executive, the legislation granting such power is usually drafted in broad and general terms. This means that the administration is left with a large area of choice of when and how to apply the law to real, specific situations because the legislation does not distinctly specify the conditions and circumstances and norms, subject to which the executive must use the powers that have been conferred on it.

The gist of the problem is the accepted notion that broad and uninhibited powers give room for the rise of arbitrariness. It thus becomes necessary to make proper safeguards against such an eventuality. The judiciary plays the most important role in the course of controlling the functioning of the administration. It is in this attempt that the fundamental rights guaranteed by the Indian Constitution come powering through.

Exercise of Discretion in India and Judicial Review

In India, Part III of the Constitution contains the fundamental rights, where the underlying idea is that any legislative or administrative action which infringes any fundamental right is invalid. The Indian Constitution, in all its sovereignty, assures the people of this land, certain Fundamental Rights which constitute a limitation on the legislative and the executive powers of the Government, and consequently, these rights also go hand in hand in providing for control over administrative discretion.

The Courts can exercise their power over administrative discretion through Fundamental Rights in two ways:

1) By testing the validity of the law in question on the touchstone of Fundamental Rights, the Courts, to a large extent, can control the conferral of administrative discretion by declaring it unconstitutional. For this purpose, the Courts can look into both the procedural and substantive aspects of the law in question. At times, the Court can entail certain safeguards into the law to hold it constitutionally valid.

[6] Sharp v. Wakefield, 1891 AC 173.

2) The Courts can control the actual exercise of any law in force, by invoking Fundamental Rights into the picture, especially Art. 14 of the Constitution

This paper deal with analysis of exercise of discretionary powers and how it affects rights conferred under Articles 19(1)©, (d), (e) and (g) of the Constitution of India and how juridical control is exercised.

It is a well-found position under the Constitution of India that Article 19(1) contains certain freedoms from 19(1)(a) to (g). These are however not absolute freedoms as clauses (2) to (6) of Article 19 permit the imposition of reasonable restrictions thereon by law for various stated purposes. Whether the restriction is reasonable or not is to be looked upon by the courts and for this purpose, the courts take into consideration both substantive as well as procedural aspects of the law in question.

Freedom of Speech and Expression and Exercise of Discretion

Art. 19(1) (a) guarantees to all citizens the right to freedom of speech and expression. According to clause (2) however, the State may make a law imposing reasonable restrictions on this freedom in the interest 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.*"[7]

The common principle or belief is that unrestricted or unguided discretion for the administration without any procedural safeguards or legislative policy should not be given to an administrative officer to regulate the freedom of speech and expression. What is also to be remembered is that any discretion wanting to be exercised against this provision has to be only for the purposes mentioned in Art 19(2). This principle was illustrated in the case of *State v. Baboo Lal*[8] where under the Dramatic Performance Act 1876, the district magistrate was authorized to prohibit public dramatic performances of, scandalous or defamatory nature, corrupting persons or arousing or likely to arouse feelings of disaffection towards the Government. The Act made no provisions for the Magistrate to give reasons for his decision and neither was there any provision for a higher authority to review or reconsider the order passed by the Magistrate. Plus, the aggrieved party was not provided with an opportunity to make a representation against the prohibitory order. In the light of all these ambiguities and arbitrariness in the provision, the Act was struck down as unconstitutional.

At the same time, the court can issue certain safeguards against improper use and make a law good as against being too broad to impose restrictions on freedom of speech. In *Virendra v. State of Punjab*[9], Sec. 2(1) (a) Punjab Special Powers (Press) Act, 1876 empowered the State Government to prohibit the publication of any matter relating to a particular subject for a maximum period of two months in any issue of the newspaper if the Government was satisfied that "such an action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of communal harmony affecting or likely to affect public order." The aggrieved party could make a

[7] MAHENDRA PAL SINGH, V.N. SHUKLA'S CONSTITUTION OF INDIA 148 (2017).

[8] State v. Baboo Lal, AIR 1956 All 571.

[9] Virendra v. State of Punjab, AIR 1957 SC 896.

representation against the order to the government which after considering the same could modify, confirm or rescind the order. This provision was challenged on the grounds that it gave very broad powers to the Government to curtail the freedom of speech, and that the discretion conferred on the executive was uncontrolled and arbitrary and so unreasonable under Article 19(2) of the Constitution. The Supreme Court held that the law was enacted for preserving the safety of the State and for maintaining public order in the context of the serious tension existing amongst various communities in the State. It also stated that the Government was charged with the preservation of law and order in the State, and being in possession of all the material facts was the best authority to take anticipatory action for preventing any threatened breach of peace. Sec 2(1)(a) was held to be valid as the powers was to be exercised for the specific purposes mentioned in the section and the restrictions to be imposed if any, was to be for a limited period and was also reviewable.

State of Bihar v. K.K Misra[10] is an example of how presence of safeguards in a provision can be the deciding factor of it being valid or invalid. Under sec. 144 of the Criminal Procedural Code, in cases where, in the opinion of a district Magistrate or any other Magistrate (not being a third class Magistrate) especially empowered by the State Government or the District Magistrate, there is sufficient ground for proceeding under that section and immediate prevention or speedy remedy is desirable, he may, by a written order stating the material facts of the case direct any person to abstain from a certain act if the Magistrate considers that such direction is likely to prevent a disturbance of public tranquility or riot or an affray. The Magistrate may annul or alter the order on the application of a member of public after giving him an opportunity of hearing. If such an application were to be rejected, the Magistrate had to state his reasons for doing so and such an order would remain in force for two months at the most.

The concerned section was upheld to be valid by the Supreme Court[11] citing that the guidelines in the provision aimed at removing arbitrariness and not encouraging it. However as stated before, in *State of Bihar v. K.K. Misra*, the Supreme Court quashed the provision as under the said provision, the State Government could extend the life of an order passed by the Magistrate under sec. 114(1) beyond two months of it was necessary for preventing danger to human life, health and safety or a likelihood of a riot etc. The power of the government was characterised as "an independent power" which was not to be exercised judicially and was thus "open to be exercised arbitrarily." Additionally, there was no provision for the party to make a representation against the order and nor was the order temporary in nature. Consequently, the Supreme Court held the provision unconstitutional Art. 19(1) (b) and (3): The Right to Assemble

Art. 19(1) (b) guarantees freedom to assemble peacefully and without arms, but clause (3) provides for impositions of reasonable restrictions on this right by law. However, this does not validate conferring of uncontrolled discretion on the administration to regulate freedom of assembly.

[10]State of Bihar v. K.K. Misra. AIR 1971 SC 1667.

[11]Madhu Limaye v. S.D.M.Monghyr, AIR 1971 SC 2486.

Himmat Lal v. Police Commissioner,[12] gave rise to the question of validity of a certain provision which provided that no public meeting would be held on a public street without the written permission of the authorized officer. There were no safeguards laid down for the exercise of power of the concerned officer. The provision was struck down by the court as there was an absence of guidelines to the concerned officer as to the circumstances under which he could refuse permission to hold a public meeting. Lack of procedural safeguards against misuse of power and room for arbitrariness on part of the officer in charge also played the deciding factor in the concerned law being struck down by the court on grounds of excessive delegation of arbitrary power.

Freedom to form Association under Article 19(1)© and restrictions under 19 (4)

The right to form associations is the life blood of democracy because without such a right, it may become impossible to form political parties in the country. So, it is guaranteed as a fundamental right under Article 19(1) (c) subject to reasonable restrictions as being imposed thereon, in the interest of public order or morality under clause (4) of Article 19. As the right to form association is the most valuable right in democracy, the Supreme Court has been more scrutinizing as regard legislations conferring power on the executive to restrict this right.

The important case where the Supreme Court acted to protect the right to form association by controlling the discretionary power in the name of public order and morality is *State of Madras v.V.G.Row herein after referred as V.G. Row.*[13] In this case, an order of the Madras State Government declaring a society was challenged. The State Government declared by virtue of Section 15(2)(b) of the Indian Criminal law Amendment Act, whereby an unlawful association is one which is declared to be unlawful by the Government under the power thereon conferred. The respondent argued that the impugned order infringes the fundamental right guaranteed on him by Article 19(1) (c) of the Constitution of India to form associations and unions. Also the law in question obligates the Government to place the materials on which it acted before an advisory board and to be bound by its decision. But the court held that such summary and largely one sided review by an advisory board could not be substitute for judicial inquiry. The Supreme Court pointed out that the right to form association had a very wide and varied scope for its exercise and its curtailment was fraught with serious potential reactions in religious, political and economic fields. Therefore, regarding freedom of association only in very exceptional circumstances that too within very narrow limits, the formula of subjective satisfaction and its review by an advisory board is to be permitted.

At times the Government recognition of an association may affect the right to form association. In such situations, Article 19(1) (c) would control the power of the Government to recognize associations. In *Ramakrishnan v President, District Board,*[14] a Government Order empowering the Director of Public Instructions to recognize any teachers Union, or to forbid its existence and perverting the teachers in municipal

[12]Himmat Lal v. Police Commissioner, AIR1973 SC 87.

[13]State of Madras v. V.G.Row, AIR 1952 SC 196. [hereinafter, VG ROW]

[14]Ramakrishnan v President, District Board,AIR 1952 Mad 253.

service not to form an association without the previous permission of the municipality as held bad as the exercise of the fundamental right to form association could not be made subject to discretionary control of administrative authorities.

Subsequent to the Supreme Court's decision in *V.G. Row*,[15] the parliament enacted the Unlawful Activities (Prevention) Act, 1967 conferring power on the central Government to declare an association unlawful subject to the safeguard of assessment by a tribunal whether there is sufficient cause for declaring the association unlawful.

In *Jamat-E-Islami Hind v. Union of India*[16], the ban against the Jamaat-E- Islammi Hind by the Tribunal was challenged before the Supreme Court. The Supreme Court however quashed the order on the ground that there was no objective determination of the factual basis for the notification that banned the association.

Again, when VHP was declared unlawful in 1995 by the Unlawful Activities (Prevention) Act, the ban was negative by Tribunal. It ruled that the notification has been issued on extraneous consideration; it was issued for collateral purposes and not for the purpose of maintaining peace and tranquility in society.

Thus, from the decisions of the Supreme Court and the Tribunals, we can infer that the court has given utmost importance and has taken stringent measures to protect the freedom to form associations from being curtailed by the authorities by virtue of their discretionary power.

Freedom to move freely and Right to settle in any part of India under Article 19(1) (d) and 19(1) (e) and Discretionary Power

Article 19(1) (d) gives to every citizen the right to move freely throughout the territory of India and Article 19(1) (e) guarantees to every citizen the right to reside and settle in any part of India. The reasonable restrictions are contained in Article 19(5), where the State can make a law imposing reasonable restrictions on these rights in the interests of general public or for the protection of the interest of any scheduled tribes.

States commonly pass laws authorizing the executive to extern a person from a particular area in the interest of public peace and safety. Analysing such laws passed under Article 19 (1) (d) or (e), we find. In some cases, the person whose activities are dangerous to public peace can be externed, but in others, the category of persons who could be externed is specified. Then, in some cases a person externed from an area is free to choose any other place for his stay, but in others the place to which he could go may be specified by the executive. The scheme of the statutes is usually such that an externment order can be made only for a limited period.

In *Dr. Khare v. Delhi*[17] the Law which authorizes the District Magistrate could order externment of a person from any area on being satisfied that such an order was necessary to prevent him from acting in any way prejudicial to public safety or maintenance of public order was challenged. The Supreme Court ruled that a law

[15]VG ROW, supra note 13.

[16]Jamat-E-Islami Hind v. Union of India,(1995) 1 SCC 428.

[17]Dr. Khare v. Delhi, AIR 1950 SC 211.

providing for externment was not bad merely because it left the desirability of making an externment order to the subjective satisfaction of a particular officer, because like preventive detention, externment was largely precautionary and based on suspicion.

In *Gurbachan v. State of Bombay,*[18] the Supreme Court held that the provision of the statute empowering Commissioner of Police to serve an externment order for a period of 2 years to a person, if in his opinion the movement or acts of a person concerned were expected to cause danger or harm to a person or property.

In *Hari v. Deputy Commissioner of Police*[19] , Sec. 57 of the Bombay Police Act was challenged. It authorized any of the officers specified to extern certain convicted persons from the area within his jurisdiction if he had reason to believe that such a person was likely to commit an offence similar to that of which he was convicted. It was contended that the law stood vitiated as there was no advisory board to scrutinize the action of the police officer and also that the case was initiated by the police itself and they itself judged the matter and thereby contended the violation of Principles of natural justice. But the Supreme Court rejected all these arguments by holding that there was no universal rule that the absence of an advisory board would necessarily make such decision unconstitutional and also found that the case could be initiated by the inspector and order of externment could be made by the Commissioner of Police. In this case, the court held that Section 57 of the impugned Act is plainly meant to prevent a person who has been proved to be criminal from acting in a way which may be a repetition of his criminal propensities. In doing so, the State may have to curb an individual's activities and put fetters on his complete freedom of movement and residence in order to secure the greatest good of society.

Examining a few contrary judgments, in *State of Madhya Pradesh v. Bharat Singh*[20] , the Supreme Court invalidated a statutory provision which gave power to an executive authority to specify the area where an externee was to stay, because of the absence of procedural safeguard of hearing. Under the Act, a District Magistrate, or the State Government, could extern a person from any place in the State and require him to remain in a specified place in the State if the authority concerned was satisfied that his activities were likely to be prejudicial to the security of State or maintenance of public order. This particular law was subject to the safeguard that the grounds for making the order were to be given to the person concerned and there was an advisory council and the Government was required to act in accordance with its opinion. The Supreme Court found that no hearing was provided for selecting the place where the externee was to reside. In the Court's opinion, the person concerned may not be able to get means of livelihood in the specified place and the statute made no provisions for the same

It is clear from the case above, the existence of judicial rethinking of its earlier liberalism towards the laws concerning externment of persons. The strict approach in the matter of externment depicted in Bharat Singh is apparent in the later Supreme Court case of *Prem Chand v. Union of India*[21]. In this, Court emphasized that mere apprehension of any police officer is not enough, and there must be clear and present danger based upon credible material which makes the movements and acts of persons in question

[18]Gurbachan v. State of Bombay, AIR 1952 SC 221.

[19]Hari v. Deputy Commissioner of Police, AIR 1956 SC 559.

[20]State of Madhya Pradesh v. Bharat Singh, AIR1967 SC 1170.

[21]Prem Chand v. Union of India, AIR 1981 SC 613.

dangerous. The court portrayed externment of a person to "economic hara-kiri and psychic distress". The court strongly stated that externment provisions have to be read strictly and that "any police apprehension is not enough. Some ground or other is not adequate. There must be a clear and present danger based upon creditable material which makes the movements and acts of the person in question alarming or dangerous or fraught with violence".[22]

We can infer from the above cases that while a law may authorise the executive to extern a person in its subjective satisfaction, the law, to be valid, needs to contain some vital procedural safeguards These include providing grounds for externment, and an opportunity to appeal against thereof. After proper scrutiny of the whole situation, it is safe to say that the Supreme Court has permitted the Legislature to concede a large amount of discretion to the Executive as far as imposing restrictions on this right goes.

However, in the more recent scenario, referring to cases like *State of Madhya Pradesh v. Baldeo Prasad*[23] and *Bharat Singh* case, it is inferred that off late, in the case of right association, the existence of an advisory board has been found to be inadequate and there has been insistence on reference to a judicial tribunal for declaring an association unlawful. It is conclusively safe to say that the fundamental right to movement and residence requires better protection than it has received so far.

Discretionary Powers and Freedom of Trade and Commerce

Article 19(1)(g) guarantees to all citizens the right to practice any profession or to carry on any occupation, trade or business. The area of trade, commerce and business is at present under rigorous administrative regulation. Broad powers to regulate trade and commerce have been conferred on administrative authorities through statutes and rules. These powers include licensing, price fixing, requisitioning of stocks, or regulating movement of commodities, Article 19(1)(g) empowers all the citizens of India to practice any profession, or to carry on any trade, commerce or business. At the same time, Art. 19(6) empower the State to make any law imposing reasonable restrictions on the exercise of this right, in the interest of the general public.

In *M/S Dwaraka Prasad Laxmi Narain v. State of Uttar Pradesh*, clause 4(3) of the UP Coal Control order, 1953 which conferred absolute power on the licensing authority to grant or refuse to grant, renew or reuse to renew, suspend, revoke, cancel or modify any license was challenged. The general principle in this connection is that the power conferred on the executive should not be arbitrary, unregulated and it "*should not be left entirely to the discretion of any authority to do anything it likes without any check or control by a higher authority. A law or order which confers arbitrary and uncontrolled power on the executive in the matter of regulating trade or business in normal available commodities cannot but be held to be unreasonable.*"[24] This case is probably the first leading case which laid down the proposition that a law conferring arbitrary and unguided powers on the administrative authorities will be invalid under Art.19 (1) (g). Clause 4(3) of the impugned order authorized the licensing authority to grant, refuse, renew or refuse to renew, suspend, cancel revoke or modify any license for reasons to be recorded, but clause 3(2) (b) was held to be invalid because grounds on which an exemption could be

[22]Id.

[23]State of Madhya Pradesh v. Baldeo Prasad,AIR 1961 SC 293.

[24]Dwarka Prasad v. State of U.P., AIR 1954 SC 224.

given were not mentioned thus giving the controller unrestricted and arbitrary powers to make exemptions.

The question as to how much discretion can be conferred on the executive to control and regulate the right of trade and commerce has been raised in a number of cases. Generally speaking, discretion is not unregulated or arbitrary if the circumstances in, or the grounds on, which it can be exercised are stated, or if the law lay down the policy to achieve which the discretion is to be exercised, or if there are enough procedural safeguards in the law to provide security against the misuse of the discretion. In case of trades which are illegal, dangerous, immoral or injurious to health and welfare of the people, same standards do not apply as to, and a greater discretionary authority may be left with the executive to regulate such trades than is permissible.

In *Krishan Chand Arora v. Commissioner of Police*,[25] the appellant applied to the commissioner for a license to run an eating house. The commissioner rejected the application. The appellant challenged the order of the commissioner by claiming exercise of uncontrolled powers of the commissioner by claiming that Section 39 of the Calcutta Police Act, which conferred naked and uncontrolled powers on the commissioner to grant or refuse a license is violative of Article 19(1)(g), the court held that an unqualified discretion cannot be conferred on an authority to grant or refuse to grant license.

In *Union of India v. Ammam Ramalingam*,[26] a provision of the Gold Control Act was challenged on the ground of violation of fundamental freedom trade, but court found that the Act provides safeguards for proper exercise of discretion. But in the absence proper criteria or guidelines discretion is given then it is liable to be struck down was held in *A.N. Parasuraman v. State of Tamil Nadu*.[27]

Looking at a differing judicial approach, in *C. Lingam v. Union of India*[28] certain control orders were issued under Sec. 3(2) (d) of the Essentials Commodities Act, 1955 that introduced a permit system for the sale of rice and paddy. This was challenged on the grounds that it conferred arbitrary powers in the matter of issuing or withholding of permits and there was no provision for appeal or revision against refusal to grant a permit. Rejecting the argument, the court stated that the permits were to be issued by the State Government or District Collectors who were expected to discharge their duties on a responsible manner. The Dwarka Prasad case was distinguished on the ground that there the power of licensing could be conferred on any person. The absence of a provision for repeal was held not to be bad because an affected person could always approach the State Government to review the matter when a permit was refused by the District Collector.

It is clear from the above case that if safeguards are provided against arbitrary exercise of power, the law may be upheld. On the same note, statutory provisions often confer power on the executive to fix prices of essential commodities.

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[25]Krishan Chand Arora v. Commissioner of Police, AIR 1961 SC 705.

[26]Union of India v. Ammam Ramalingam,AIR 1985 SC 1013.

[27]A.N. Parasuraman v. State of Tamil Nadu,AIR 1990 SC 40.

[28]C. Lingam v. Union of India,AIR 1971 SC 474.

In *Union of India v. Bhanamal Gulzarimal* [29], a very wide power to fix prices of iron and steel was actually upheld. Clause 11-B of the Iron and Steel Control Order, 1941 authorized the controller to fix maxi um prices for the sale of the commodity. The prices could differ for iron and steel obtainable from different sources and could include allowances for contribution to and payment from, an equalisation fund established by the controller. The Controller's power was upheld to be valid as opposed to being unbridled or arbitrary as the policy had been laid down in Section 3 of the Parent Act, the Essentials Commodities Act, under which the order was made. The argument put forth was that while in Dwarka Prasad, there was a price fixing policy, there was no such policy. The Court held that it would be unreasonable to suggest that, in the absence of such a provision as were to be found in Dwarka Prasad., clause 11-B of the Iron and Steel Control Order, 1941 should be struck down.

On the whole, it seems that in the matter of price fixing, the administration enjoys a good deal of flexibility and it is extremely difficult to challenge a price-fixing order in court. Wide and vague factors laid down in the statutory provisions for the guidance of the administrative authority has been upheld Even a general statement of policy in the parent Act was accepted in Bhanamal as providing a sufficient safeguard against administrative discretion. However, a law that gives unchannelized power to an authority on the whole on its subjective consideration, without provision for review by a superior authority, has been held to be an unreasonable restriction and consequently, been struck down as bad law by the courts on several occasions as we have seen in cases above. One can infer that the basic reason for this division in approach by the Courts is probably because areas in price fixing are mainly economic in nature which the courts can evaluate only superficially and most of the times, as we have seen, they concede to administrative judgment in this regard. Plus, there is the added notion that there is less danger of abuse of power by the executive and of administrative discrimination in cases of price-fixing orders as compared to an order of general applicability where administrative action in individualized.

Although the doctrine of Separation is a part of the basic structure, yet the Rule of law cannot be brushed aside so blatantly. To uphold the Doctrine of Separation of Power, the law still gives wide discretion and autonomy to the Executive to exercise its functions without undue interference from the Court. In the 2005 judgment of *Sidheswar Sahakari Sakhar Karkhana Ltd. v. Union of India*[30] the court upheld the view that it will not interfere in an administrative decision unless it is contrary to law, arbitrary, unreasonable or inconsistent with the Constitution. Subsequently in, *Sukh Dev Kumar and Ors v. State of Himachal Pradhesh and Ors*[31] also the Supreme Court relied on this position of law. Thus we can see that there is a great amount of freedom given to administrative authorities to exercise their discretion unless it is in contravention of fundamental freedoms or fundamental rights.

Conclusion

All the fundamental freedoms under Article 19 are better protected by the judiciary. But on an analysis we can see that there is no uniformity in judicial attitude towards the protection of various fundamental freedoms. In some cases, the courts demand better

[29]Union of India v.Bhanamal Gulzarimal, AIR 1960 SC 475.

[30]Sidheswar Sahakari Sakhar Karkhana Ltd v. Union of India, (2005) 3 SCC 369.

[31]Sukhdev Singh v. State of Himachal Pradesh, (2015) 580 DB 167.

procedural safeguards than in others. In cases of freedom of trade, speech and association, the courts have insisted on more substantial safeguards than in case of freedoms of movement or residence. As far as conferring of unregulated and unguided discretion on administration is concerned, the judiciary has remained consistent in its course of rejecting orders and laws by declaring them invalid especially in areas concerning fundamental freedom contained in Articles 19.

There have been times however, when this approach of the Judiciary has been diluted by the courts while accepting and upholding broad and unclear policies contained in statutes conferring administrative discretion bordering the lines of being unregulated. Additionally, many a times, the so called standard to be laid down by the executive finds itself within the folds of the preamble to the statute, and not in the substantive clause that confers discretion on the authority. This tends to raise the question as to how much imposing of standards can be done to control the executive.

Another interesting aspect of the judicial attitude is with regard to the need for existence of an advisory board as a control mechanism over the exercise of administrative discretion. In cases of right of association, it was held by the Supreme Court that since there is an advisory board preventive detention cases, it does not mean that it will also be sufficient in case of restraint on the right of association whereas in cases of restraint on the right to movement or residence, the Supreme Court has decided that an advisory board was necessary in such cases. This dichotomy may be due to the fact that in a democracy right to association needs better protection as it forms the basic element of the entire democratic process, it being the basis of organization of political parties, while right of residence or movement only affect the concerned individual personally. Thus, in cases of freedom of association, the court have shown a disinclination to leave the matters finally in the executive hands without judicial control.

There are no standardized set of procedural safeguards under different fundamental freedoms. However, as far as upholding of law conferring discretionary power on the administration is concerned, the Judiciary seems to be persistent about having more procedural safeguards in cases such as freedom of speech trade and association as compared to other Fundamental Rights such as freedom of movement and residence. The weakest link in the chain is the Right of Movement where the Judiciary has seemingly found it unnecessary to insist on such a safeguard such as that of an advisory board for externment of a person from a local area. The concept of an advisory board is probably the minimum amount of safeguard that the Judiciary should impose keeping in mind the term "reasonable" within the corners of fundamental freedoms.

Fundamental freedoms are of such character and hold so much ambiguous authority for the Judiciary, that if exploited to their full use, can go a very long way in wiping out the dangers of administrative discretion; a recent development which is cause a good deal of anxiety among the people. Fundamental freedoms are as real as the air we breathe, substantial, and independently and jointly, a powerful force to reckon with while dealing with something that is anything as remotely close to arbitrary. It all depends on how the Judiciary chooses to interpret the same. We live in a democratic country and for the purpose of the same, it is important that a balance be struck between Governmental control and individual freedom. Fundamental Rights, prudently used, can go a long way in ensuring the same.

AAROGYA SETU APP: ISSUES REGARDING RIGHT TO PRIVACY

Rajesh Kumar Dube

Abstract

COVID-19 pandemic is a disaster against humanity. This catastrophe caused great human sufferings and substantial loss of life globally and is of such a magnitude as to beyond the coping capacity of the community. In order to mitigate the risk of COVID-19 disaster, the Central Government of India has launched Aarogya Setu mobile application aimed to fight against pandemic by contact tracing of persons infected with COVID-19 and to take proactive medical intervention. This app collects demographic data, contact data, self-assessment data and location data of the individuals and stored on the server managed by the Central Government. There is an issue of violation of right to privacy while sharing of such personal data on server. In this paper the researcher's endevour is to examine the issue "Whether there is any infringement of right to privacy of the users of Aarogya Setu App while sharing personal data on the server."

Key words

Aarogya Setu App, COVID-19 pandemic, Right to Privacy and Disaster Management.

I. INTRODUCTION

"Download the Aarogya Setu mobile app to prevent the spread of the corona infection. Inspire others to download the app as well."

-Prime Minister Narendra Modi.

The beginning of the Year 2020 witnessed a very contagious pandemic known as COVID-19 which has threatened the very existence of human kind. On March 11, 2020 the World Health Organization has declared COVID-19 epidemic disease as global pandemic which is very infectious disease caused by a novel Corona virus. This virus was first reported at Wuhan in China.Being, a very virulent in nature, this virus has taken within her sweep the whole world in very short time. We are also suffering with the havoc of this pandemic. The first case was reported in India on January 30, 2020 and till July 28, 2020 the number of confirmed COVID-19 cases is1483157.[1] However, 952743 cases have been recovered but 33425 deaths have been reported.[2] The Government of India has developed Aarogya Setu mobile application which is a useful technological solution for making easier contact tracing of persons infected with Covid-19 in order to take effective

[1]Available at: mygov.in/covid-19 (Accessed on 28th July 2020).

[2]Ibid.

measuresand to mitigate its further spread.[3] This Bluetooth enabled mobile applicationwas launched on 2nd day of April 2020 for containing COVID-19 infection and also for the purposes of depicting probable hotspots.[4] By 28th day of July 2020, there have been 14.68 Crore Indians, who are using Aarogya setu App.[5] This mobile application records the details of the individuals who have come in contact with any other individual in their usual course of activities, so that if one of them, at later point of time, test positive for COVID-19, the individual can be informed which would enable him to take proactive steps for medical intervention.[6] The details of the individuals include demographic data,[7] contact data,[8] self-assessment data[9] and location data[10] which are collectively called as "Response Data". The National Informatics Centre has been assigned with the task for collection, processing and managing response data collected from the Aarogya Setu App.[11] This mobile application has certain key features like automatic contact tracing,[12] self-assessment test,[13] and to furnish information if someone has turned COVID-19 positive.[14]

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[3]Available at https://static.mygov.in/rest/s3fs-public/mygov_159051652451307401.pdf (Accessed on 15 July 2020).

[4]Ibid. Aarogya setu is now an open source;

[5]Aarogya Setu Mobile App FAQs (Accessed on July 18, 2020).

[6]Ibid.

[7]The demographic data includes name, mobile number, age, gender, profession and travel history of the individual; Available atSupra note 3.

[8]It implies data relating to any other individual that a particular individual may have come in close juxtaposition with any other individual which include time span and geographical location of the contact; Ibid.

[9]It implies the feedback data given by the individual by self-assessment test on Aarogya Setu App; Ibid.

[10]It implies data relating to the particular individual's latitudinal and longitudinal geographical positioning; Ibid.

[11]Supra note 3.

[12]Aarogya Setu App by using Bluetooth of the user detects other devices having the same App, securely exchanges a digital signature of any other users including time, proximity, location and duration and in case, any of the people that the user came in contact within last 14 days tests positive for COVID-19, this App calculates the risk of infection based on recency and proximity of the user's interaction and recommends suitable action on the screen of the user. Available at: Aarogya Setu Mobile App FAQs (Accessed on July 18, 2020).

[13]The self- assessment test is based on ICMR guidelines, evaluates the likelihood of COVID-19 infection based on self-reported symptoms and other relevant information like recent travel, age and gender of the users of the Aarogya Setu App. If, based on self-reported information of the users, there is probability that the user may be infected; the App will seek the consent of the users for uploading and sharing the results of the self- assessment of the users, so as to enable the Government of India for taking appropriate medical and administrative measures. Ibid.

[14]Aarogya Setu App does not allow any users to mark themselves as COVID-19 positive. When someone is tested COVID-19 positive, the ICMR approved testing laboratory shares this information with Indian Council of Medical Research (ICMR) - the nodal government agency for COVID-19 testing. Then, ICMR, through a secure Application Program Interface (API), shares the list of COVID-19 positive persons to the Aarogya Setu server and the users of the App will be updated with the current status and it will be helpful in contact tracing as well. Ibid.

There is an issue regarding right to privacy of the users of the Aarogya Setu mobile application:

"Whether while sharing with the "Response Data" consisting of demographic data,[15] contact data,[16] self-assessment data[17] and location data[18] of the user to the server of the Central Government, there would be any violation of the right to privacy which has been established as a fundamental right?"

Before getting into this issue, we shall discuss the genesis and other related aspects of the right to privacy as a fundamental right, in order to resolve the issue appropriately.

II. GENESIS OF RIGHT TO PRIVACY AS A FUNDAMENTAL RIGHT

The Unique Identification Authority of India (here in after referred as UIDAI), a statutory authority was established on 12 July, 2016, under the provisions of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, hereinafter referred as Aadhaar Act, and now it is under the Ministry of Electronics and Information Technology.[19] The main objective of the UIDAI, is to issue Unique Identification numbers (UID), popularly known as Aadhaar Number, by collecting and compiling both demographic and biometric data of all residents of India. So far, more than 124 Crore people of the population got their Aadhaar Numbers.[20] The main objective of the aforesaid Aadhaar Card Scheme is to provide good governance; efficient, transparent and targeted delivery of subsidies, benefits and services to individuals residing in India.[21]

One of the grounds of the objection against the Aadhaar Card Scheme was that the very collection of demographic and biometric data for such scheme was violative of the fundamental "Right to Privacy". The Attorney General of India contended that the existence of a fundamental right of privacy was in doubt as it was held in *M. P. Sharma v Satish Chandra, District Magistrate, Delhi*,[22] hereinafter referred as M. P. Sharma, decided by a Bench of eight judges and another, in *Kharak Singh v State of Uttar Pradesh*,[23] hereinafter referred as Kharak Singh,decided by a Bench of six judges. The main issue was whether Right to Privacy was fundamental right or not? The matter was heard by a Bench of three judges of the Supreme Court and they opined that the case involved the "far reaching questions of importance involving interpretation of the Constitution."[24] They observed that if the ratio settled in the M. P. Sharma and Kharak Singh isaccepted then the robustness and liveliness of the fundamental rights would be

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[15]Supra note 7.

[16]Supra note 8.

[17]Supra note 9.

[18]Supra note 10.

[19]About UIDAI, https://uidai.gov.in/ (Accessed on 19 July, 2020).

[20]Ibid.

[21]Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016: Preamble.

[22](1954) SCR 1077.

[23](1964) 1 SCR 332.

[24]Justice K S Puttaswamy (Retd.) and Anr. v. Union of India and Ors. SC Writ Petition (Civil) No. 494 of 2012; Date of Judgement: Aug. 24, 2017(para-1; as per R.F. Nariman, J).

denied.[25] The matter was referred to a Bench of five judges of the Supreme Court and the same was heard by them on July 18, 2017, and was thereafter, referred to nine judges in view of the fact that the judgement in M.P. Sharma which was decided by a Bench of eight learned Judges of the Supreme Court. The Bench of nine Judges had sole issue as follows:

"Whether Right to Privacy was Fundamental Right or not?" The important pertinent question which is inherent in this issue, if the right to privacy is fundamental right, then what is the extent and ambit of this right? Whether the aforesaid right is absolute or limited? If it is not absolute but limited, what are those limitations? These are very important questions which are to be resolved, as to the validity of the Aadhar Card Scheme lies on those issues."[26]

The Bench of nine judges considered the issue whether right to privacy is a fundamental right? They held that the right to privacy is an essential and integral part of right to life and personal liberty under Articles 21 and 14 & 19.[27] The Court also overruled the M P Sharma and Kharak Singh's ruling.[28]

On behalf of himself and three more Judges, D. Y. Chandracuhd, J. observed that the right to privacy is the constitutional core of human dignity and has both normative and descriptive function.[29] Normative function substantiates those values which are the basis of the right to life, liberty and freedom whereas descriptive function incorporates various entitlements and interest which are the roots of ordered liberty.[30] The right to privacy cannot be enumerated but certain rights like sanctity of family life, personal intimacies, marriage, procreation of children, sexual orientation etc. are the important one but not exhaustive.[31] The right to privacy has very wider dimension touching all the aspect of human life which are concerned with human dignity and emanates from personal liberty under Article 21. It cannot be cribbed cabined and confined within four walls of the fundamental right jurisprudence.

As per S. A. Bodbe, J. the right to privacy is interwoven within the texture of the human liberty in such a manner that the same cannot be separated and has been reflected under various provisions of the part III specifically and residue lies under article 21.[32] As per Sanjay Kishan Kaul, J. the right to privacy is an inherent fundamental right but subject to specified restrictions under the part-III.[33] As per Abhay Manohar Sapre J. the right to privacy has many facets and the same would be considered on case to case basis whenever any grievance will be raised regarding alleged infringement of the right.[34]

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[25]Ibid.

[26]Ibid.

[27]Supra note 24; (page no. 3 of the Order).

[28]Ibid.

[29]Supra note 24; Conclusion-para 3 (E); (as per D. Y. Chandrachud, J. and others).

[30]Ibid.

[31]Ibid.at para 3(F) and 3 (G).

[32]Supra note 24; para 47 b; (as per S. A. Bodbe J).

[33]Supra note 24; para 83; (as per Sanjay Kishen Kaul J).

[34]Supra note 24; para 36; (as per Abhay Manohar Sapre J).

Therefore, it may be observed by the judicial opinion expressed by the Hon'ble Judges of the Supreme Court that the right to privacy is an integral part of the Right to Life and personal liberty under Article 21 and as a part of the freedom guaranteed under Part III of the Constitution.

III. RIGHT TO PRIVACY IS NOT ABSOLUTE RIGHT

The fundamental right to life or personal liberty under Article 21 is itself not an absolute right but is subject to procedure established by law. The procedure must be just fair and reasonable and not arbitrary, fanciful or oppressive.[35] In other words a person may be deprived of his/her personal liberty if the procedure established by law applicable for such deprivation is just fair and reasonable. The right to privacy is one of the species of the genus personal liberty. As the personal liberty is not absolute right the right to privacy cannot be absolute. The right to privacy may be encroached by a law and the same must qualify the test of the restriction specified under part-III.[36] The Supreme Court endorsed the established rule that invasion of right to privacy under Article 21 may only be justified by a valid law which fulfills the criterion of justness, fairness and reasonableness.[37] On behalf of himself and three more Judges, D. Y. Chandracuhd, J. observed that right to privacy is like other fundamental freedoms under part III is not absolute right.[38] S. A. Bobde, J. observed in total consistency with *R. C. Cooper v. Union of India* that it is very established that right to privacy permeates with all kind of freedom under part III besides right to life and personal liberty under Article 21 and therefore, any interference with the right to privacy by the state must satisfy the test of reasonableness of restrictions under part III as well as that under Article 21.[39] Chelmeswar, J. observed that none of the legal right may be absolute and therefore, fundamental right to privacy cannot be absolute and is subject to certain limitation depending upon the nature the right.[40] Abhay Manohar Sapre, J. observed that right to privacy is very much part of the fundamental rights under part III and obviously will be subject to reasonable restrictions and state is lawfully authorized to impose such restrictions if in the opinion of State, there would be social moral and compelling public interest exist.[41]

The aforesaid observations made by learned judges made it explicitly clear that right to privacy is not absolute right. It is limited right and subject to reasonable restrictions and the same must be in conformity with the permissible limit under part III of the Constitution of the India.

IV. RIGHT TO PRIVACY IS UNDER CERTAIN REASONABLE RESTRICTIONS

Right to privacy is one of the attribute of liberty. Liberty implies the responsible enjoyment of freedom in any politically organized society which is being governed under

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[35]Maneka Gandhi v Union of India AIR 1978 1 SCC 248 at para 48.

[36]Supra note 24; Para 183; (as per D. Y. Chandrachud, J. and others).

[37]Ibid.

[38]Ibid.

[39]Supra note 24; Para 46; (as per S. A. Bobde, J.)

[40]Supra note 24; Para 42;(as per Chelameswar J.).

[41]Supra note 24; Para 36; (as per Abhay Manohar Sapre J.).

rule of law without interfering with the legitimate rights of the others. In any civilized legal system, the liberty or freedom of the people cannot be unrestricted, as unfettered liberty would create a chaos and disorder in the society and the same would not be desirable in the democratic society like India. We the people of India, have our constitutionally protected liberty of thought, expression, belief, faith and worship.[42] But the aforesaid liberties are not absolute and are subject to reasonable restrictions.It has been well settled that right to privacy is not absolute right and it may be encroached by the State by a law which may sustain the touchstone of permissible restrictions on fundamental rights.[43] The permissible restrictions on fundamental rights by a law depriving any person of his/her fundamental right under certain circumstances must satisfy the test of reasonableness. Chelmeswar, J. classified the operation of various kind of reasonableness under part III which may be explained as follows.[44] First kind is of Article 14 type reasonableness and for this restrictions have been expressly provided under Article 19; Second kind is of a just, fair and reasonable basis type which may be termed as substantive due process and restrictions are as per Article 21 and Thirdly, blended variety of reasonableness consisting of just, fair and reasonable standard under Article 21 and "amorphous standard of 'compelling state interest'."[45] There is no definite test to adjudge reasonableness of restrictions and for accomplishing the same the following factors are usually considered by the Court the duration and extent of the restrictions; the circumstances under which and the manner in which, that imposition has been authorized.[46] In view of the aforesaid discussion it may be inferred that right to privacy is an integral part of the fundamental right which has been guaranteed under part III of the Constitution, however it is not absolute right and is subject to reasonable restrictions and the State is authorized to impose reasonable restrictions on the basis of social, moral and compelling public interest in accordance with the provisions established under law.[47]

V. PRIVACY POLICY OF AAROGYA SETU APP

The Central Government has framed a privacy policy for securing personal data of individuals.[48] Such data collected from the users of the Aarogya Setu App are securely stored on a server operated and managed by the Central Government.[49] The demographic data[50] provided by the users are stored on the aforesaid server and a unique digital id, (hereinafter referred as DID), is generated which are used as a virtual identity of the user and all future informations are uploaded along with the DID of the users.[51] The users shall have right to access their profile as well as to modify their

[42]The Constitution of India, 1950: Preamble.

[43]Supra note 36.

[44]Supra note 40at para 43.

[45]Ibid.

[46]M.P. JAIN, Indian Constitutional Law982 (Fifth Edn.Wadhawa and Company Nagpur 2003).

[47]Supra note 24; Para 35; (as per Abhay Manohar Sapre J.).

[48]Supra note 3.

[49]Ibid. Information collected and manner of collection;

[50]Supra note 7.

[51]Supra note 49.

personal informations.[52] The location data[53] are also updated on the server, whenever, self-assessment is done by the user and the duration of stay of the user is for 15 minutes at any place.[54] When Bluetooth enabled registered users come in contact with each other, the Aarogya Setu App will exchange their DIDs with their GPS location and time.[55] If any user test positive for Covid -19 or the self-assessment test is either YELLOW or ORANGE, the information will be securely uploaded along with the DID of the users.[56] The personal data provided by the users will be used by the Government in anonymized form for the purpose of Covid-19 management and the users will be communicated for any medical and administrative interventions if necessary, whether there is existence of disease cluster in any location, likelihood of the users being infected with Covid-19 etc.[57] The App is furnished with excellent security system and personal data is uploaded in encrypted form and would not have any accessibility by the others.[58] All data will be retained on the mobile device for 30 days and if it is not uploaded on the server, the same will be removed from the App and if it has been uploaded the same will be removed from the server after 45 days but in case the user was tested positive with Covid-19 the same will be removed after 60 days after being cured from disease.[59] Now, we shall examine the issue whether by sharing Response data[60] to the server of the Central Government, there would be any violation of right to privacy.

VI. INVASION OF RIGHT TO PRIVACY: TRIPLE TEST

As it has been established that right to privacy is not absolute right and the same may be invaded by the State under certain circumstances after testing under triple test as laid down by the Supreme Court. In right to privacy case, on behalf of himself and three more Judges, D. Y. Chandracuhd, J. observed that the right to life or personal liberty may be invaded by fulfilling three requirements. Firstly, 'legality' which implies there must be existence of valid law; Secondly, 'need' of such law in order to fulfill the legitimate state aim; and thirdly, 'proportionality' for ensuring reasonable nexus between the object which is required to be achieved and the means for achieving the same.[61] We shall test the privacy policy of the Aarogya Setu App under triple test criteria.

(A) The Existence of Law

There shall be existence of valid law for invading right to privacy. The COVID-19 pandemic is a disaster means a catastrophe or calamity or grave occurrence in India

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[52]Ibid.

[53]Supra note 10.

[54]Supra note 49.

[55]Ibid.

[56]Ibid.

[57]Use of Information; Ibid.

[58]Ibid.

[59]Ibid.

[60]The "Response Data" is collection of Demographic data, Contact data, Self-Assessment data and Location data of the Aarogya Setu Mobile App users.

[61]Supra Note 24; para 180 (as per D. Y. Chandrachud, J. and others).

arising from natural or man-made[62] and substantially affected human life and caused human suffering physically, psychologically, socially and economically and is of such a nature or magnitude as to be beyond the coping capacity[63] of the Indian community. There is a valid law to deal with such a disaster, enacted by the Parliament named as the Disaster Management Act, 2005,[64] (hereinafter will be referred as DM Act, 2005). This Act empowers the National Authority[65] to lay down the policies, plans andguidelines for managing with COVID-19 pandemic like disaster.[66] The Central Government shall constitute a National Executive Committee[67] to assist the National Authority.[68] The National Executive Committee would be responsible for implementing the policies and plans of the National Authority and ensure that the directions issued by the Central Government for managing the COVID-19 like disaster are being complied withinthe country.[69] The National Executive Committee has in exercise of her power under the DM Act, 2005 and for the purpose of COVID-19 pandemic management in the country provided a useful technological solution in the form of the Aarogya Setu Mobile Application.[70] The Central Government by Orders[71] constituted Empowered Groups under the DM Act, 2005 for identification of problem areas regarding COVID-19 pandemic and to suggest working solutions therefor. The National Executive Committee for managing the COVID-19 pandemic under the Act of 2005 has created a Technology and Data Management Empowered Group.[72] The aforesaid empowered group issued several directions regarding collection, protection and systematic utilization of "response data"[73] for mitigating and redressing Covid-19 pandemic by Aarogya Setu Mobile Application.[74] The Central Government is empowered under the Epidemic Diseases Act, 1897[75] to prevent the outbreak of epidemic disease or the spread thereof

[62]Covid-19 pandemic may be man-made as investigation is under process. Chinese are suspects.

[63]Covid-19 pandemic is beyond the coping capacity as there is neither any medicine nor any vaccine against this Novel Corona virus.

[64]Act No. 53 of 2005.

[65]National authority means National Disaster Management Authority established under Section 3 of the Disaster Management Act, 2005 consisting of the Prime Minister of India, who shall be Chairperson, ex officio and other members not exceeding nine.

[66]Under Sub- Clause 2 of Section 6 of the Disaster management Act, 2005, the National Authority may lay down policies, approve the National plan, laydown guidelines to be followed by the State Authorities and take such measures as would be necessary for the prevention and mitigation of Covid-19 pandemic.

[67]Under Section 8 of the Disaster Management Act, 2005, the Central Government shall constitute a National Executive Committee consisting of the Secretary to the Government of India who shall be Chairperson, ex-officio; the Secretaries to the various Ministries or Departments like agriculture, energy, drinking water supply, environment and forest, finance (expenditure), health, power, rural development, science and technology, telecommunication etc. for assisting National Authority.

[68]Ibid.

[69]The Disaster Management Act, 2005 (Act No. 53 of 2005) s. 10.

[70]Vide Orders No. 40-3/2020-DM-1(A) dated 29.03.2020 and 01.05.2020.

[71]Ibid.

[72]Ibid.

[73]Supra note 60.

[74]Supra note 70.

[75]Act No. 3 of 1897.

and may take special measures.[76] The DM Act, 2005 has been enacted with an objective to tackle the COVID-19 like disaster in effective manner. The Aarogya Setu Mobile Application fulfilled all the requirement of the DM Act, 2005. Therefore, the privacy policy of the Aarogya Setu qualifies the first test that it is backed by the valid law.

(B) Need of such Law on the basis of the Legitimate State's aim

The second test is the need of such law on the basis of the legitimate aim of the State. The legitimate aim of the of the State is to protect the life and health of the people against the COVID-19 pandemic and for that purpose the DM Act, 2005 enables the State to provide technological solution in the form of Aarogya Setu mobile application againstsuch pandemic. The nature and content of the DM Act, 2005, which enables the Central Government to collect response data[77] through Aarogya Setu App, is in consonance with the provisions of Article 14 of the Constitution of India and within the ambit and extent of the required reasonableness. One of the requirements of the legitimate State aim is that the law through which the privacy has to be invaded should not suffer from apparent arbitrariness[78] and the DM Act, 2005 fulfill such requirement. In order to manage COVID-19 there will be requirement of continuous process of planning and implementation of effective measures like prevention, mitigation or reduction of risk, capacity building, preparedness to deal, prompt response to deal with, assessment of the magnitude and rehabilitation of the affected people with COVID-19 disaster.[79] The Aarogya Setu mobile application is efficient mechanism for managing the COVID-19 pandemic by tracing of infected persons and for taking timely medicalintervention and other effective measures for mitigating its spread.The COVID-19 pandemic has potential to cause loss of human life,[80] socio-economic sufferings,[81] and social sufferings.[82] The State has its legitimate aim to take effective measures against such sufferings.

(C) Proportionality Test

The third test is proportionality test which is insurance against arbitrary action of the State and it ensures that the nature and quality of the curtailment of right to privacy is not disproportionate to the purpose of the DM Act, 2005.[83] In *Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheris, Lands and Housing*,[84] the Privy Council held that in order to test the proportionality of any law for abridgement of fundamental

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[76]Ibid. S. 2A.

[77]Supra note 60.

[78]Supra note 61.

[79]The Disaster Management Act, 2005 (Act No. 53 of 2005), s. 2.

[80]Many people have been died in India due to COVID-19 pandemic. This is great loss of human resources of the Country. It is prime duty of the State to save precious life.

[81]Due to lock down many people have been unemployed or jobless which causes socio-economic sufferings.

[82]COVID-19 pandemic caused sufferance of the people against socialization as it prevents social gatherings etc.

[83]Supra note 61.

[84][1999] 1 AC 69.

rights, the following important points to be considered: (i) the objective of the law should have ample justification for curtailing fundamental rights; (ii) there must be rational nexus with objective of the law and the law itself and (iii) the means to infringe the right or freedom should not be more than necessary to achieve the objective of the law.[85] The 'compelling state interest' accompanied with 'narrow tailoring'[86] is another criteria for determining the proportionality test. It was observed by the Supreme Court: "*When the compelling State interest standard is to be employed must depend upon the context of concrete cases*."[87] The strictest scrutiny should be the guiding standard for compelling State interest criteria regarding proportionality of Law.[88] The extent of proportionality is also important considerable factor. The Supreme Court observed that the extent of interference by law must be proportionate to the need for such interference and which should be backed up by the procedural guarantees against the abuse of such interference.[89] The proportionality test of the DM Act, 2005 has to be carried under the aforesaid criteria. The Objective of the DM Act, 2005 to manage COVID-19 pandemic like disaster and the curtailment of right to privacy by collecting response data collected from the Aarogya Setu mobile application users may be amply justified by the fact that the purpose of such collection is to save the life and protection of the health of the people of India. There is rational nexus with objective of law i.e. effective management of COVID-19 like disasters and the provisions of the DM Act, 2005. The means to infringe right to privacy by collection of response data of the Aarogya Setu users are not more than necessary to achieve the objective of law. As far as test regarding narrow tailoring of the DM Act, 2005 is concerned; it is being clarified by the privacy policy[90] of the Central Government is committed to protect the personal data collected from the users of the Aarogya Setu App and would be purged from the server after certain specified days. There are compelling State interest to protect the life and health of the people of India which justifies the curtailment of right to privacy. Therefore, from the aforesaid discussion it may be established that laws relating to the Aarogya Setu App qualifies the proportionality test.

[85]Ibid.

[86]"The 'narrow tailoring' means that law must be narrowly framed to achieve the objective" cited from Supra note 24; para no. 45; (as per Chelameswar, J.).

[87]Supra note 24; para no. 45; (as per Chelameswar, J.).

[88]Ibid.

[89]Supra note 24; para no. 71; (as per Sanjay Kishan Kaul, J.).

[90]Supra note 3; Aarogya Setu Privacy Policy.

VII. CONCLUSION

Aarogya Setu mobile application is very useful technological solution for containing COVID-19 pandemic. This pandemic has potential to cause irreparable loss to the most populous and densely crowded country like India. Our health infrastructure is not sufficient enough to sustain the catastrophic situation of the pandemic at the time of peak level. Prevention is better than cure. Aarogya Setu App provides a proactive solution by contact tracing of the infected people with COVID-19, so as to provide timely proactive interventions. In order to have optimaland effective operation of the Aarogya Setu App, it shall be used by maximum number of the people in India so that the tracing of the potentially infected persons can be done and preventive measures may be taken against further spread.

The response data (consisting of demographic data, contact data, self-assessment data and location data) collected from the Aarogya Setu App of the users will have to share to the server of the Central government for processing and other purposes of the mobile application. The issue that by sharing of the response data to the server of the Central government would violate the fundamental right to privacy of the users of Aarogya Setu App, in this regard it is submitted that such right is not absolute right and like other fundamental rights are subject to reasonable restrictions andit may be invaded under certain circumstances by observing triple test as laid down by the Supreme Court in "Right to Privacy Case"[91]

In this case, the Court has held that for invading right to privacy, there shall be existenceof a valid law; such law is needed for fulfilling legitimate aim of the State and there shall be reasonable nexus with the objective of the law and the law itself for sufficient justification of the invasion of right to privacy i.e. proportionality test. The Aarogya Setu App has been created by the Central Government by exercising its power under the Disaster Management Act, 2005, an existing valid law for managing disasters like COVID-19. The State has legitimate aim to manage such disaster for protecting the life and health of the people of India. This law also satisfies the proportionality test regarding invasion of right to privacy. Therefore, we may conclude that by sharing response data collected from the users of the Aarogya Setu mobile application, there will not be any violation of fundamental right to privacy.

[91]Supra note 24.

LIFE OF SEX WORKERS DURING COVID-19: PAIN AND GRIEF

Dr. Sanjeev Kumar Chadha[1]
Shailesh Mishra[2]

Abstract

"One can hear all that's going on in the street. Which means that from the street one can hear what's going on in this house."

-Jean Genet, The Balcony

As the coronavirus spreads in the world, it threats in multiple ways to sex workers. This virus has destroyed the only job of sex workers. They are forced to live in fear of covid-19. This covid-19, a pandemic, has dramatically changed the social life of human being. Sex workers are also part of society and the healthy life is their right too, like another human. The constitution of India has enshrined numerous rights within it for their people and right to equality is one of them. Irony is that even though sex workers are citizen of this country although their basic human rights are not protected by the government. They are neglected, discriminated and helpless. Apart from constitution of India, Indian legislature has also adopted bundle of laws, to protect the rights of sex workers, like ITPA etc. even though their rights are not protected. In this war like situation they are left alone to feel the pain of grief.

Key words

Covid-19, Pandemic, Sex workers, ITPA, Human rights.

WHAT IS A COVID-19?

The disease covid-19 emerges suddenly in 2019-20 from China's Wuhan city and spread to whole of the globe suddenly which has created confusion about the meaning of the word "pandemic". This covid-19 causes millions of deaths and number is going on. Health sector has destroyed by covid-19 very badly. All the governmental as well as non-governmental organisation are fighting to control this deadly virus which has now taken the shape of pandemic [3].

There are several human corona viruses like as other types of human viruses. Before this corona virus there were only six type of corona virus which could affect human body but covid-19 is specific corona virus which is liable the current pandemic. It is seventh one

[1]Associate Professor Law, Department of Law, SLS, BBAU, Lucknow, sk.chadha123@gmail.com,9456789777.

[2]Research Scholar, Department of Law, SLS, BBAU, Lucknow, adv.shaileshmishra@gmail.com, 9205979481.

[3]A Pandemic is an epidemic occurring on a scale which crosses international boundaries, usually affecting large number of people. Pandemic can also occur in important agricultural organisms or in another organism for example Smallpox, tuberculosis. The only current pandemic was HIV/AIDS which started in the 1980 but now covid-19 has also joined it.

and latest that is why also known as novel corona virus. In February 2020 World Health Organization has given a name to this novel corona virus that is 'Severe Acute Respiratory Syndrome Coronavirus-2'[4] .Covid-19 is the name of the respiratory disease caused by 'SARS-CoV-2'.[5]

This covid-19 outbreak is not first pandemic for the world, throughout the history there have been many pandemics has been recorded like smallpox, tuberculosis and black death which had killed more than seventy-five million people. The Spanish flu which was occurred in 1918, caused by H1N1 virus, killed more than fifty million people world-wide. Before this covid-19,only active pandemic was HIV/AIDS, which has also caused millions of deaths.

WHO IS SEX WORKER?

The term "sex worker" was first time introduced by Carol Leigh in 1978[6] and become popular in mid-1978.[7] According to Oxford English Dictionary "sex worker" means 'a person who works in sex industry.'[8] In India the terms "sex worker" and "prostitute" are used as synonymous to each other."Sex worker" is conceived as a non-stigmatizing term, without the taint of the word's 'whore' and 'prostitute'. This term shows the professionalism of the sex worker rather than lack of worth as seen by society.

The term "Sex work" has been defined as the provision of sexual services for money or goods and "sex worker" has been defined as women, men or transgender people who receive money or goods in exchange for sexual services, and who consciously define those activities as income generating even if they do not consider sex work as their occupation.[9]

The term prostitute (sex worker) was defined in *Emperor v. Lalya Bapu Jadhav*[10], Justice Mirza explained so in the following words:

"The idea underlying prostitution was that a woman should surrender her body for a monetary consideration to someone not legally entitled to have sexual intercourse with her." Immoral Traffic Prevention Act, 1986 terms 'prostitute' is a gender-neutral term and males as well as females both are included under it since incidents of male sex workers do not reported that much hence this articlewill mainly focus upon females as sex workers.

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[4]Hereinafter 'SARS-CoV-2'.

[5]Hereinafter WHO.

[6]Carol Leigh coins the term sex work, GLOBAL NETWORK OF SEX WORK PROJECTS, (June 26, 2020, 11:15 AM) https://www.nswp.org/timeline/event/carol-leigh-coins-the-term-sex-work.

[7]Its use became popularized after publication of the anthology, Sex Work: Writings by Women in The Sex Industry in 1987.

[8]Oxford English Dictionary, second edt. 1989.

[9]Cheryl Overs, Sex Workers: Part of The Solution, An Analysis of HIV Prevention Programming to Prevent HIV Transmission During Commercial Sex in Developing Countries 2 (2002), (June 29, 2020, 10:13 PM) http://www.who.int/hiv/topics/vct/sw_toolkit/115solution.pdf. Last visited on 11-06-2020.

[10]Emperor v. Lalya Bapu Jadhav, AIR 1929 Bom 266.

COVID-19 AND ITS IMPACT UPON SEX WORKERS:

This is one of the most pathetic time of human civilization. Each and every class of society are losing their job, business and other means of livelihood. This covid-19 pandemic has made everyone's life vulnerable. People are fighting for their survival. Every country imposing lockdown to break the chain of covid-19infection. Sometime it looks like the world is going to be end. In such pathetic time government of all the nations are coming forward and helping their vulnerable classof people but there is one vulnerable class which is not getting attention from their government that is sex workers. Either they are totally neglected or getting very little help from their government. There are very few sex workers who are doing this work because of their choice and free will and most of the sex workers join this work due to some force or coercion and many of them do it for looking after their families. In this global pandemic sex workers are finding them self isolated and helpless. It is very hard to find out the exact number of sex workers but according to the Joint United Nations Programme on HIV and AIDS there are more than 6.5 million active sex workers in India.[11] However unofficial figures place these numbers far higher.

According to report submitted by the International Committee on the Rights of Sex Workers in Europe[12] sex workers are living in the "economic margins" and often have less savings and government support to fall back on. They are also rarely getting benefit from pandemic response and recovery plans."[13]

Sex workers are totally depending upon their work to provide sexual services to customer which is also known as prostitution. Physical contact is one of the essential termsof their work and as known to all covid-19 spread by physical contact which makes their work perilous. During this global pandemic when government has asked to their people to stay in home and follow the social distancing norms but sex workersare force to work due to lack of support from government and putting their life in peril. Sometime it becomes hard to get customer due to covid-19 infections fear they are force to beg. According to a study done by Harvard Medical School and the Yale School of Medicine there could be over 400,000 infections and 12,000 deaths among red light area in the next one year if they are reopened.[14] Most of the sex workers are forced to live in red light area which are very crowded and makes nearly impossible to keep social distancing.Redlight area provides desirable environment to covid-19to spread easily.

In this covid-19 pandemic period they are depriving from their basic right like right shelter, right to food, right to medical assistance and many more other important rights.

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[11]Key Population Atlas, UNAIDS (July 3, 2020, 10:30 PM)https://kpatlas.unaids.org/dashboard.

[12]Hereinafter ICRSWE.

[13]Preeja Prasad, Dosas, fish, flowers: Sex workers look to other means of livelihood amid COVID-19 pandemic, THE NEW INDIAN EXPRESS, (July 8, 2020, 10:30 PM), https://www.newindianexpress.com/states/karnataka/2020/jul/08/dosas-fish-flowers-sex-workers-look-to-other-means-of-livelihood-amid-covid-19-pandemic-2167105.html

[14]Prashasti Awasthi, If reopened, there could be over 400,000 Covid-19 infections red-light areas in India: Report, THE HINDU BUSINESS LINE(July 5, 2020, 11:30 PM),https://www.thehindubusinessline.com/news/if-reopened-there-could-be-over-400000-covid-19-infections-red-light-areas-in-india-report/article31943976.ece. Last visited on 11-06-2020.

The Supreme Court of India in *Olga Tellis case*[15] recognised right to livelihood as fundamental right which comes under the aegis of Article 21[16] of constitution of India and Supreme Court also held that Right to life doesn't mean merely animal existence but living with human dignity.[17]

Sex workers are also the citizen of India and Apex Court of India in *Budhadev Karmaskar Vs. State of West Bengal*[18] clearly manifest his opinion in this regard and accepted the same. Recently a PIL was filed in Delhi High Court to exempt sex workers from rent to ease their hardships. The Delhi High Court dismissed the petition and said that the central and state governments have already brought out several schemes and "the persons for whose benefit this petition has been filed are also entitled to such schemes and the benefit of the directions and it is not the case that they are being discriminated against".[19] In nutshell sex workers has same fundamental and constitutional right as the other citizen of India inherent.

INDIA'S ANTI-SEX WORKERS LEGAL REGIMES

India is a signatory to numerous international agreements on the rights of woman[20] and also given very special protection under its constitution like article 14[21], 15(3)[22], 19(l)(g)[23], 21[24], 23(1)[25], 39(e)[26] and 39(f)[27]. In addition, there are statutory provisions that guarantee these rights, such as the 1976 Equal Remuneration Act and the 1976 Maternity Benefit Act and many provisions of Indian Penal Code 1860, but somewhere government failed

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[15]Olga Tellis v. Bombay Municipal Corporation and others, AIR 1986 SC 180.

[16]INDIAN CONST. art 21, "No person shall be deprived of his life or personal liberty except according to procedure established by law."

[17]Francis Coralie Mullin V. The Administrator, Union Territory of Delhi & others, AIR 1978 SC 597.

[18]Budhadev Karmaskar Vs. State of West Bengal,15 Sep. 2011: CRIMINAL APPEAL NO. 135 OF 2010.

[19]Anurag Chauhan v. Union of India, 2020 SCC Online Del 584.

[20]More than 20 international human rights agreements have been signed by India, including the twin International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women.

[21]Supra note 16. art 14, "The State shall not deny to any person equality before the law or the equal protection of law within the territory of India".

[22]Id. art 15 cl. (3), "Nothing in this article shall prevent the State from making any special provision for women andchildren".

[23]Id. art19 cl.(1)(g), "Right to practice any profession, or to carry on any occupation, trade or business."

[24]Id. art 21, "No person shall be deprived of his life or personal liberty except according to procedure established by law."

[25]Id. art 23 cl. (1), "Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law."

[26]Id. art 14, 39 cl. (e), "The health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength."

[27]Id. art 39 cl. (f), "That children are given opportunities and facilities to develop in a healthy manner and inconditions of freedom and dignity and that childhood and youth are protected against exploitation andagainst moral and material abandonment."

to protect the right of woman specially sex workers. According to Jeremy Bentham, an English philosopher, the purpose of law is 'minimising the pain and maximising the pleasure' but when the same law started vice-versa then it became necessary to expose the bad element of law and raise the such issue before the authority for correction. In the case of sex workers, the exact same thing happens, the law which mean to protect them has become tool of harassment. This section is going to discuss how Indian law on sex workers which mean to protect their right now haunting them.

Global World had adopted mainly two approaches toward the sex workers, first one considered sex work as immoral and sex workers should be forcible remove from sex industryand restraints on entry into sex work and according to second approach sex work should be legalised so that sex workers rights can be recognised as other workers.[28] India has adopted mixed approached toward the sex work.[29] On the One hand Indian legal regimes considered that sex work is immoral, that the sex work is exploitative, and on the other hand it considered sex workers rights need to be protected.[30]

The name of the major legislation relating to sex work in India isthe Suppression of Immoral Traffic in Women and Girls Act, 1956[31] with the very purpose of protecting the right of sex workers in India. This act was passed in pursuant to the 1949 United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. This same convention advocates abolishing sex work but SITA does not make sex work illegal in India and allow itif sex work is practice privately and independently.[32] The main reason behind not criminalising sex work in India is article 19 of Indian constitution which gives freedom to practice an occupation of choice.[33] The SITA was amended in 1986 to enhance certain penaltiesand renamed as the Immoral Trafficking (Prevention) Act of 1986.[34] Its aims, objectives, logic and premises remain fundamentally unchanged. The Act continues to remain heavily weighted against the sex workers and lacks any serious attempt to give teeth to the implementation structure.

As discussed earlier, sex work is not illegal in India but criminalizes many of the activities necessary in order to do sex work. This act punishes anyone maintaining a brothel,[35] living off the earnings of prostitution,[36] procuring or detaining a woman for the sake of prostitution,[37] and seduction of a person in custody.[38] The Act also punishes any

[28]Geetanjali Mishra, Ajay Mahal, et.al., Protecting the Rights of Sex Workers: The Indian Experience 5(1) Health and Human Rights 95 (2000).

[29]Id.

[30]Id.

[31]Hereinafter SITA

[32]Suppression of Immoral Traffic in Women and Girls Act 1956 § 7,8.

[33]Supra note 16. art 19 cl. (g), "Right to practice any profession, or to carry on any occupation, trade or business."

[34]Hereinafter ITPA.

[35]Immoral Trafficking (Prevention) Act 1986, Section 3

[36]Id., Section 4

[37]Id., Section 6

[38]Id., Section 9

person who solicits or seduces for the purpose of prostitution[39] or who carries on prostitutionin the vicinity of public places.[40] Moreover, Section 15 allows the police to conduct raids on brothels without a warrant, based on the mere belief that an offense under the ITPA is being committed on the premises.

This act was made for the protection of sex workers but it has many ill effects too. ITPA has given lots of discretionary power to police and police is using it in very negative manner. They use ITPA as legislation to harass sex workers, demand unnatural favour and money etc. According to report commissioned by the National Human Rights Commission found that the soliciting statute was the primary law used in ITPA and observed, "It is disturbing to note that out of almost 14,000 persons arrested every year underITPA, approximately 90% are women."[41] Rescue and rehabilitation is one of important aspect of ITPA act but irony is that on the name of rehabilitation sex workers treated violently and kept in jail like condition. This act does not allow to maintain brothel and police has power to raid any time brothel[42], which itself violating the right to privacy.[43] Another most criticised provision of ITPA is section 20.[44] According to this section, a magistrate can order the removal of a prostitute from any place within his jurisdiction if he deems it necessary to the general interest of the public.[45]

The Contagious Diseases Act of 1864, which legislated mandatory testing of sex workers for venereal disease and restricted their movement and practice to specifically allocated areas, offers one example of conferring a "legal" status on sex work.

As is clear from the above discussion the Indian government's approach has not been very successful in protecting the rights of sex workers or improving their condition even in normal circumstances, now imagine their condition during this covid-19 pandemic. This pandemic has shaken every class of society. Sex workers belong to vulnerable category and already lost their faith in Police and other governmental authority which makes their life more vulnerable in this pandemic.

HUMAN RIGHTS LAWRESPONSE TO SEX WORKERS IN THE TIME OF COVID-19

Human rights law emphasises that all human rights are inalienable, universal,

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[39]Supra note 35, Section 8

[40]Id., Section 7

[41]National Human Rights Commission, "A report on trafficking in women and children in India 2002-2003"(2002-2003).

[42]Supra note 35, Section 15

[43]In Justice K. S. Puttaswamy (Retd.) and Anr. vs Union of India And Ors. Writ Petition (Civil) No 494 of 2012., In this case Supreme Court of India has declared that Right to privacy is Fundamental Right.

[44]State of Uttar Pradesh v. Kausalya, AIR (1964) 4 S.C.R. 1002. In this case, six appeals, filed before the Full Bench of five Justices of the Supreme Court by the state government of Uttar Pradesh, raised the question of the contravention of these constitutional provisions by Section 20 of SITA the Supreme Court did not agree with the High Court and set aside its judgment, holding that restrictions imposed by Section 20 are "... reasonable restrictions imposed in the public interest."

[45]Supra note 35, Section 20

interdependent and indivisible.[46] Anyone can claim them and it is obligation of the government to provide them without any discrimination, including, indeed especially, in times of emergency like covid-19. There may be some limitation upon the rights but such limitation cannot be arbitrary and without due process of law. Whenever any pandemic introduced in the society, it becomes duty of government to protect those people who are vulnerable in our case sex worker and as human rights law mandates government are duty bound too.

Following are some important rights of sex workers which are must be protected in response to covid-19:

Right to Life, Liberty and Security

Right to Life, Liberty and Security is a fundamental right guaranteed to all persons including the sex workers under various international instruments. Article 3[47] of the Universal Declaration of Human Rights expressly provides that everyone has the right to life, liberty and security. Again, Article 6[48] of the International Covenant on Civil and Political Rights provides that every human being has the inherent right to life and this right shall be protected by law and cannot be arbitrarily deprived of. Article 9[49] of the same convention also provides that everyone has the right to liberty and security of person. Article 6[50] of the Convention on the Rights of the Child expressly upholds that every child has the right to life and thus provides protection to the children of sex workers.

Right to Participation

Participation is one of the fundamental principles of human rights. All government policy and action must allow for the direct and meaningful participation of communities, specially who are affected and most vulnerable, which presupposes transparency in information and decision-making. Only then government policy and response will reach to venerable class. The right to participation is recognised in the International Bill of Human Rights for instance article 25[51] of ICCPR.

Right to Equality and Non-Discrimination

Governments must refrain from acting in a manner that either directly or indirectly discriminates against individuals or groups, including avoiding unintended

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[46]OHCHR, what are human rights? 8:30PM),https://www.ohchr.org/en/ issues/pages/whatarehumanrights.aspx. Last visited on 12-7-20

[47]Universal Declaration of Human Rights, art. 3" Everyone has the right to life, liberty and security of person", [hereinafter UDHR]

[48]International Covenant on Civil and Political Rights, art. 6 para 1. "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." [hereinafter ICCPR]

[49]Id., art. 9 para 1. "Everyone has the right to liberty and security of person…",

[50]Convention on the Rights of the Child, art. 6 para,1 "States Parties recognize that every child has the inherent right to life.",[hereinafter CRC]

[51]Supra note 48, art. 25, "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions…."

consequences of policies and programmes and protecting against third party discrimination. Article 1[52] of the UDHR provides that all human beings are born free and equal in dignity and rights. This puts displaced persons at par with other human beings with respect to having a dignified life.

Discriminatory rights can be effectively used to protect the rights and interests of the people particularly the sex workers who are more vulnerable among the world population. The UN Charter seeks to achieve international assistance in solving international problems and promoting human rights and fundamental freedom for all without any distinction as to sex, race, language or religion as among one of the purposes of UN under article 1 paragraph 3[53] of the UN Charter. This was also further upheld under article 2[54] of UDHR and again recognized under article 2, paragraph 1 of the ICCPR. Besides it, right against discrimination forms the fundamental code in the Convention on the Elimination of All Forms of Discrimination against Women where Article 1[56] intricately defines discrimination against women and article 2[57] imposes obligation upon the state parties to condemn discrimination against women in all its forms. Special protection against discrimination can be also provided to the sex workers children under Article 2[58] of the CRC.

Right to Freedom of Residence

Right to freedom of residence within the borders of each state has been guaranteed to all persons including the sex workers. But very often in case of sex workers this right has

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[52]Universal Declaration of Human Rights, art. 1 "All human beings are born free and equal in dignity and rights ..."

[53]United Nations Charter, art 1, para 3, "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.",

[54]Supra note 52, art. 2 "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.",

[55]Supra note 48, art. 2 para 1. "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status ."

[56]Convention on the Elimination of All Forms of Discrimination against Women, art. 1, "For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". [hereinafter CEDAW]

[57]Id., art. 2, "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake...",

[58]Supra note 50, art. 2, "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind...",

been exceptionally violated just because of their work. This right has been fundamentally safeguarded under Article 13[59] of the UDHR and Article 12[60] of the ICCPR, which guarantees everyone including the sex workers, the freedom to choose his residence.

Right Against Torture and Cruel, Inhuman and Degrading Treatment

States have an obligation under human rights law to protect their people from torture and other cruel, inhuman or degrading treatment. This includes the obligation to prohibit torture and other forms of ill-treatment and to provide redress for such acts. The failure to investigate and bring to justice perpetrators of torture is itself a breach of international human rights law. Furthermore, the use of forced anal examinations contravenes the prohibition against torture and other cruel, inhuman or degrading treatment. These rights are guaranteed by article 5[61] of the Universal Declaration of Human Rights, article 7[62] of the International Covenant on Civil and Political Rights and article 2[63] of the Convention against Torture.

Right to Health

In this pandemic health is biggest concern for sex workers. They are one of the most vulnerable class who are not getting adequate health services. It is relative Governments obligation to provide health services to them. The right to health includes not only ensuring accessible, acceptable, available and quality health services and information, but also that the necessary public health infrastructure exists and is adequately resourced to meet the health needs of the community, including in the prevention, treatment and control of pandemic. This right is guaranteed by article 25[64] of the Universal Declaration of Human Rights, article 12[65] of the International Covenant on Economic, Social and Cultural Rights

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[59]Supra note 52, art. 13 "Everyone has the right to freedom of movement and residence within the borders of each state."

[60]Supra note 48, art. 12, "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

[61]Supra note 48, art. 5 "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

[62]Id., art. 7, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

[63]Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2,"Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

[64]Supra note 52, art. 25, "Everyone has the right to a standard of living adequate for the health ..."

[65]Supra note 48, art. 12, "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

CONCLUSION

Sex workers are belonging to vulnerable class of society. Their work is already stigmatized and they are facing lots of inhuman problem already, now the attack of covid-19 makes it more venerable. The covid-19 pandemic has affected them very badly. Due to this pandemic they lost their only job, now they are facing problem of livelihood, shelter, food and health etc. Even they are not getting adequate support from the government. Indian laws and policy are not much supportive to sex workers. Anti-sex workers laws in India are designed not to stop sex work but to regulate and control sex workers and their bodies. Many provisions of ITPA act is uses by police and other authority to harass them. It is the right time to protect their basic human rights and provide them adequate relief without any discrimination.

Governments have to ensure the legal protection of the rights of sex workers and to remove the legal barriers that block their access to governmental scheme. To meet this challenges, international and national law reform is needed. This is war like situation and by mutual help and assistance human race can win this war too. Helping hands can reduce the problem of sex workers in this pandemic whether it from government or from individuals.

SUGGESTIONS

- sex work should be recognised as an occupation. It will be more helpful to protect the rights of sex workers.
- Government should ensure that commercial sex can take place under healthy environment.
- Sex workers should have access to all the governmental beneficial scheme like health, life insurance etc. and their basic human rights of life, liberty, and security, including their right to health care and freedom from violence and atrocities should be recognised by government.
- Sex workers privacy should be maintained at all times. Governments shouldprovide guidance to the media, law enforcement and others that people'sidentities.
- Government should insure that COVID-19 diagnostics and care must be accessible, available, affordable to the sex workers and their children.

INSTITUTIONALIZING THE DRAFT CORPORATE ENVIRONMENT POLICY (CER) THROUGH CORPORATE ENVIRONMENTAL RESPONSIBILITY - A PERSPECTIVE

Lakshmi Priya Vinjamuri[1]

Abstract

The environment concerns are today at the world's development agenda and the Government of India is taking cue from such developments as it wants its corporate sector to be in synchrony with all the applicable standards which is meritorious and a much needed initiative that needs to be put into practice in the current context.

The economy of a nation is driven by the environmental, natural resources and continued sustainability efforts. To create a balance between the human needs and holistic environmental protection and conservation has been at the forefront on SD debate.

The well known NEP (National Environmental Policy, 2006 of the MOEF) to strengthen the constitutional provisions for environmental protection, the judicial interpretation of Article 21 by addressing main stream environmental concerns of conservation protection from degradation of the livelihood resources and the NVC (Non-violation complaints) on SERB (Science and Engineering Research Board) notified by the Ministry of Corporate Affairs focusing on the framework guidelines for voluntary responsible conduct of business, irrespective of the size, sector or situation and investment in India are presently operational.

The paper is an attempt to analyze the need to implement a policy whereby the corporate environmental responsibility (CER) is enhanced simultaneously spearheading the sustenance of the much debated sustainability.

Key words

National Environmental Policy; Corporate Environmental Responsibility; Sustainability; NVC on SERB

INTRODUCTION

The institutionalization of the corporate environmental responsibility requires not a standalone law or legislation that mandates such a requirement but a proactive, progressive and environment conscious work force right from the top-management.

It is but common knowledge that the policy exists and the bare minimum required compliances are seldom met with and this phenomenon is a global occurrence of the various means and methods resorted to flout or find a way around, often looking for the loop-hole in the laws that govern such a responsibility by the corporate sector. The HSE (health, safety and environment) norms which are stipulated for the employee welfare

[1]Dr. Lakshmi Priya Vinjamuri, Associate Professor, Law College Dehradun, Uttaranchal University

and wellbeing are not a charity service by the employer but a fundamental right of the employee imbibed in one's basic right to life.

The corporate environmental responsibility[2] (CER) is the way ahead and a big learning curve for most of us in the current era of the global pandemic which is somewhere and somehow related to the environmental negligence by the corporate sector, in handling of the microorganism which led to a wide-spread chaos claiming more lives globally than imagined.

The author shall not deviate into the probability of the occurrence of the same owing to the backlash of a certain specific sector, perhaps the pharmaceutical industry as debated upon nor delve into the permutations and combinations of the world econometrics and the conflict of interest between the warring or yet to be warring global super powers.

Corporate Environmental Responsibility CER

The institutionalization of a policy on the environmental responsibility to be taken up by the corporate in all the sectors irrespective of the size and return of the industry is quintessential in prioritizing life at the grass-root and environment at large.

The present crisis (pandemic) of 2020 and the global lockdown is an eye opener on global environmental cleaning. Human life has been at stake and danger at the hands of a virus for which a vaccine is in the making. However, the eye opener is that the anthropocentrism of the human race was forced to open its eyes once again to the need and importance of eco-centrism where in we witnessed within two months the largest Ozone hole being healed, completely closed.[3]

We as world citizens have been globally spending on environmental protection right from the Earth Summit, hosting a myriad of conventions, signing multitude of protocols and yet without cleaning and cleansing our surrounding which went into an auto-repair mode with minimalistic human interference.

What we lost in two months economically perhaps we gained environmentally with the complete cleaning of the ecosystem which almost became an automated process. The Economic Data analysis on this aspect would be a study in itself. On a lighter vein, may be owing to this proven fact it may strongly be suggested that there shall be an annual Global lockdown for two months for a sustainable healthy planet. The idealism may however be extended through the Corporate Environmental responsibility as a policy.

The policy on Corporate Environmental Responsibility (CER) is proposed to streamline the process and enhance, envisage and enrich the postulates of the existent policies pertaining to the safeguard and enrichment of the environment so as to strengthen environmental actions and access & identify, monitor & assess, document and analyze the impact of various business activities spread across a myriad of sectors inclusive of

[2]Shihong Zeng, Yujia Qin and Guowang Zeng , Impact of Corporate Environmental Responsibility on Investment Efficiency: The Moderating Roles of the Institutional Environment and Consumer Environmental Awareness, MDPI, Sustainability 2019, 11, 4512; doi:10.3390/su11174512 www.mdpi.com /journal /sustainability;21 August 2019

[3]https://atmosphere.copernicus.eu/copernicus-tracking-record-breaking-arctic-ozone-hole. Last visited on 8-9-2020

the various operational functionalities in manufacturing, logistics and supply chain, education and medicine in the international domain in general and the country in specific.

The proposed Corporate Environmental Responsibility (CER) policy guideline[4], focusing on the 3 S i.e. size, scale and scope of the organization, gives room for fine manipulations as it does not impose or mandate but suggests integration and promotion of self regulation of the legal aspects of environmental regulations, compliances and laws with a commitment for allocation of funds and personal for its implementation, aligning the organizations promotion as being environmental complaint to enable perhaps the ease of acquisition of global certification such as ISO 14001 and OHSAS 18001.

The environment ministry in India has firmed up guidelines that will require every corporate seeking green clearance to set aside up to 2% of its capital investment for Corporate Environment Responsibility (CER).[5]

In 2018, the guidelines made it mandatory for companies to set aside funds for CER over and above what is required for executing the environment management plan in a project affected area.[6]

While Brownfield (expansion) projects would be required to earmark 0.125% to 1% of additional capital investment for CER purposes, the slab for green-field projects ranges from 0.25% to 2% of the capital investment. The exact quantum, officials said, will be decided for every project by the Expert Appraisal Committee when it comes up for green clearance.

Much debated and deliberated upon by the members of the corporate affairs and commerce, the corporatization or rather institutionalisation of the environmental responsibility has a direct and tremendous impact on the environment impact assessment procedures which need to be robust and mandated failing which there cannot be an efficient and effective enforceability of the policy pertaining to the environmental responsibility thrust on the corporate sector irrespective of the industrial functionality.

Environment is a global concern and the norms for safe, secure and sustainable environment ought to be treated with the fundamental right to life as decided in many an Apex Court judgment[7] and should not be based on the 3S philosophy. The defined targets for reduced emission, discharges and treatment of generated wastes should be regularly monitored for efficiency and performance.

In *Subhash Kumar vs. State. of Bihar (1991) 1 SCC 598* the Supreme Court held that right to life is a fundamental right under Art. 21 of the Constitution and it include the right to

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[4]http://environmentclearance.nic.in/writereaddata/public_display/circulars/OIEBZXV J_CER%20OM%200105 2018.pdf Last visited on 10-10-2020

[5]F.No. 22-65/2017-IA.III Government of India Ministry of Environment, Forest and Climate Change Impact Assessment Division

[6]https://economictimes.indiatimes.com/news/economy/policy/pay-2-of-capital-investment-for-green-clearance-environment-ministry-to-corporates/articleshow/ 64008830.cms?utm_source =contentofinterest&utm_medium=text&utm_campaign=cppst. Last visited on 10-10-2020

[7]Subhash Kumar vs. State. of Bihar- (1991) 1 SCC 598

enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws a citizen has recourse to Art.32 of the Constitution for removing the pollution of water or air which may be detrimental to life.

In *Shanti Star Builders vs. Narayan Totame*,[8] the Supreme Court held that right to life is guaranteed in a civilized society would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in.

There have been many cited instances where in the criminal corporate liability was established by the Indian Courts with respect to the environmental damage, destruction and degradation. This aspect has been established in many a judgment of the various Courts in India.

Not delving deep into the individual decisions in the cases of the *Uttar Pradesh Pollution Control Board v. Mohan Meakins Ltd.*[9] , *UPPCB v. Modi Distellery and others*[10] , *K.K.Nandi v. Amitabha Banerjee*[11], *Mohmud Ali v State of Bihar*[12], *N.A.Phalkiwala and another v. M.PPradushan Niwaran,*[13] *Haryana State Board v. Jai Bharat Wooleen Furnishing Works*[14] the individual presiding courts in India have slapped notices and fines where in the corporate criminal liability was established. This throws light on the re-enforcement a mandated policy would receive in the law of the land where by the principles of environmental jurisprudence and justice are imbibed in the constitutional framework.

SUGGESTIONS & CONCLUSION

The policy should be tweaked and so drafted such that the awareness of the repercussions on acts against the environment is to become an inherent belief in the organization. The organizations, through the implementation of the policy, with the required amendments, should comprehend the extent, nature and scope of the damage on the non- compliance to specified standards while focusing not only on the local occupational health and safety but the global impact of the act. The Hindustan Polymer gas leak in Visakhapatnam[15], on the 7th of May 2020, during the peak of the COVID-19 pandemic, the latest of the incidents to be added to the many criminal negligent acts of the management and the non-compliance of the standards leading to not only wide-spread damage to the environment along with hazard to life at large are an index that reflect on the lack of seriousness on the legal enforceability mechanism and hence this can be brought about by a mandated policy that ensures such accidents or incidents to be precise do not occur.[16]

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[8]Shantistar Builders v Narayan Khimalal Totame, Civil Appeal No. 2598/1989. Cited as: (1990) 1 SCC 520

[9]Special Leave Petition (crl.) 3978 of 1999

[10]1988 AIR 1128 1987 SCR (3) 798 1987 SCC (3) 684 JT 1987 (3) 221 1987 SCALE (2)208

[11]1983 CriLJ 1479

[12]AIR 1986 Pat 133, 1986 (34) BLJR 154

[13]N.A. Palkhivala v. M.P. Pradushan Niwaran Mandal, Bhopal (1990) ILR MP 466

[14]1993 77 CompCas 386 P H, 1993 CriLJ 384

[15]https://www.deccanherald.com/national/south/vizag-gas-leak-from-hindustan-polymers-to-lg-chem-three-ownerships-in-six-decades-834787.html last visited on 8-06-2020

[16]https://www.hindustantimes.com/india-news/andhra-pradesh-gas-leak-ngt-slaps-interim-penalty-of-rs-50-cr-on-lg-polymers-india/story-M1Djsf1TjLlvSCvJFqy9uN.html last visited on 8-06-2020

The draft CER policy can be an excellent initiative on the part of the government only if it is prudently implemented with transparent policies for review, repair and regeneration.

For environment safe guard, incorporation of the requirement of a facility manager should not be confined to the representation on the organizational structure but should be a ramified act of incorporating regular monitoring measures for improvisation and incorporation of changes, so as to conserve energy and preserve the environment.

The proposal is a proactive and viable solution to many as an environmental concern but is evident by the constraints, challenges, its implementation and its back of power of prosecution against crimes committed against the environmental dis-incentivization and review of non- compliances have to be mandated for an effective Corporate Environmental Performance (CEP) that ought to be incorporated in the annual report of the organization. The compliance to guidelines may be made mandatory but monitoring and thorough implementation of the same is subject to acquisitions of certifications, which necessarily may not be through transparent means.[17]

Mere identification of information on non- complying aspects of efficiency and effectiveness, vain promises of future action and formulation of policies on paper with little or no practical implementation may be the attire donned by the CER policy for projects and activities of the corporate sphere; it is being an offshoot of the fiasco CSR. The draft CER policy to be proposed and implemented may not see this result, if required non diplomatic and unbiased amendments were incorporated with judicious prudence.

[17]http://environmentc0learance.nic.in/writereaddata/public_display/circulars/OIEBZXVJ_CER%20OM%2001052018.pdf last visited on 8-06-2020

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Dehradun, Uttarakhand (India)
Phones : 0135-2771461, 2771405
e. : lcddlr@uttaranchaluniversity.ac.in
w. : www.uttaranchaluniversity.ac.in

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