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RETROACTIVE OPERATION OF PRECEDENTS: TRACING THE DECISIONS OF COURTS IN REFERENCE TO SECTION 65B OF INDIAN EVIDENCE ACT

Dr. Nagarathna. A.* & Mr. Sachidananda. K.**

“I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motion”¹

- Holmes J.

I. Introduction

Holmes J., while passing dissenting Judgment in the Southern Pacific case made the above famous statement indicating that when legislation leaves gaps and a case requires filling up of such gaps, it's the judges who must fill such gaps and legislate in real sense. Constitutional Courts are laden with demand of interpretation of statutes and to stand by its decisions for stability. Generally appellate laws have developed not just out of vagueness of statutory text and context but also out of vagueness and generality of judicial decisions themselves.² When the Supreme Court passes a judgment it will generally be declaratory in nature and binding throughout the country. Here the Latin phrase “*stare decisis et non quieta movere*” applies which literally means “to stand by things decided and not to disturb settled points.”³ While compliance to *stare decisis* on one hand brings certainty to law, on the other hand if it's mechanically extended to all decisions at all situations it might adversely affect justice system.

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¹ Southern Pacific v. Jensen 244 U.S. 205, 221 (1917).

² See: Baxi, Upendra. “On How Not To Judge The Judges: Notes Towards Evaluation Of The Judicial Role.” Journal of the Indian Law Institute, Vol. 25, No. 2, 1983, pp. 211–237. Available on JSTOR, www.jstor.org/stable/43950873, accessed last on 22nd July 2021.

³ Black's Law Dictionary 1443 (8th edn).

Hon'ble Justice Gopal Gowda with reference to the retrospective effect of a statute in a case, rightfully remarks as follows:⁴

"....the position in law would be different in the matters which relate to procedural law but so far as substantive rights of parties are concerned they remain unaffected by the amendment in the enactment. We are, therefore, of the view that where a repeal of provisions of an enactment is followed by fresh legislation by an amending Act such legislation is prospective in operation and does not affect substantive or vested rights of the parties unless made retrospective either expressly or by necessary intendment. We are further of the view that there is a presumption against the retrospective operation of a statute and further a statute is not to be construed to have a greater retrospective operation than its language renders necessary, but an amending act which affects the procedure is presumed to be retrospective, unless amending act provides otherwise ".

Generally, a statute especially the one that has an adverse impact on rights of parties do not get retrospective effect. However, when courts make laws in form of precedents, with adverse effect on parties, there is no express bar on providing retrospective effect to such judge made laws. At times this may affect parties in dispute in specific or society at large. One such concern has arose due to judicial interpretation on Section 65B of the Indian Evidence Act which came with retrospective effect due an Apex Court decision in *Anvar P.V v. P.K. Basheer & Ors.*⁵

Normally the judicial precedent has retroactive operation as the intermediate transactions occurred based on earlier precedent which was overruled by a new ruling will be discredited.⁶ The rules of stare decisis govern the extent to which precedent controls a subsequent judicial

⁴Karnail Kaur & Ors v. State Of Punjab & Ors (2015 (3) SCC 206).

⁵ 2014 10 SCC 473.

⁶ Cardozo J., in *Great Northern Railway v. Sunburst Oil & Ref. Co.*, observed: *"This is not a case where a Court in overruling an earlier decision has come to the new ruling of retroactive dealing and thereby has made invalid what was followed in the doing. Even that may often be done though litigants not infrequently have argued to the contrary.... This is a case where a Court has refused to make its ruling retroactive, and the novel stand is taken that the Constitution of the United States is infringed by the refusal. We think that the Federal Constitution has no voice upon the subject. A state in defining the elements of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may be so that the decision of the highest courts, though later overruled, was law nonetheless for intermediate transactions.... On the other hand, it may hold to the ancient dogma that the law declared by its Courts had a platonic or ideal existence before the act of declaration, in which event, the discredited declaration will be viewed as if it had never been and to reconsider declaration as law from the beginning.....The choice for any state may be determined by the juristic philosophy of the Judges of her Courts, their considerations of law, its origin and nature."* See for details: <https://www.law.cornell.edu/supremecourt/text/287/358>, last accessed on 10th July 2021.

decision maker.⁷ A rule of methodological *stare decisis* would require the Court to employ the same interpretive method in a huge category of cases (e.g., all cases involving the Constitution), which would generate unpredictable results in many cases could not reasonably anticipate, thus aggravating the draw backs of *stare decisis*.⁸ Thus precedent though is an important source or law, its effect lies in extending its *stare decisis* part to future similar cases. Such extension however must suit new cases and changing scenarios, if not it may affect effective discharge of justice administration.

II. Introduction to Section 65A & 65B of the Indian Evidence Act, 1872

Pursuant to the enactment of Information Technology Act, 2000, several sections were inserted into Indian Evidence Act, 1872⁹ in order to enable the effective utilization of the Information Technology Act and to also take care of the concerns relating to evidences including relating to the admissibility of electronic records in the court of law. Hence Section 65A & 65B were inserted, as special provisions specifically relating to ‘electronic records and admissibility of computer outputs’.¹⁰

Section 65 A of the Indian Evidence Act being an enabling provision reads: “The contents of electronic records may be proved in accordance with the provisions of section 65B”. Section 65A paves way to Section 65B of the Act which prescribes the procedure to be complied with, in order to get the admissibility of computer output apart from laying down certain conditions essential to get such admissibility. According to this provision, a computer output must be considered as a ‘document’ and receive documentary evidentiary value, even if it is in the form of an electronic record, even when such record is converted into a soft copy or hard copy format for such formats being considered as ‘computer output’. Hence, Section 65 B also lays down the procedure to elevate the admissibility of contents of such electronic format of a document including those produced in form of a paper print out or a soft copy that is, electronic records stored in optical or magnetic media produced by a computer.

⁷ Fisch, Jill E., “Retroactivity and Legal Change: An Equilibrium Approach” 110 Harvard Law Review 1055, (1997).

⁸ Old father, Chad. M, “Methodological Stare Decisis and Constitutional Interpretation” – Precedent in the United States Supreme Court, 2013, Volume 33.

⁹ By virtue of Act 21 of 2000, Section 92 and Sch. II (w.e.f. 17.10.2000). The amendments were made to take care of issues relating to admissibility of electronic records along with paper based documents.

¹⁰ See: Provisions (8) of Schedule II of Section 92 IT Act, 2000.

According to Section 65-B (1), “Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.” Even though sub-section (1) of Section 65 B makes an electronic document produced as evidence, as admissible yet it lays a rider insisting for fulfillment of some conditions with respect to the computer in issue as well as its content or the information from such computer. These conditions are laid down in Sub-section (2) to (4) of Section 65B. The mandatory precondition for the admissibility of the electronic record is the requirement of a Certificate signed by the person “occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities”¹¹ Such certificate is insisted to provide admissibility to electronic records which are in form of ‘computer output’ as they will be helpful in establishing the authenticity of the contents of such electronic records.

III. Legal quandary of the requirement of certificate under Section 65- B (4)

The foremost case which had dealt with Section 65- B(4) by Hon’ble Supreme Court was in the *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru and others*¹² in which when the question relating to the validity of printout of the call records of the accused were raised for not having produced the 65B certificate, the court while determining the validity of the printouts taken from the computer held that when 65B certificate is not available, there is no bar in adducing secondary evidence under the other provisions of the Evidence Act such as Section 63 and 65. So Supreme Court identified that if there is no certificate as mandated under new provisions of Section 65- B, it will not act as a bar to adduce secondary evidence as per the provisions of Evidence Act. Heavy reliance was placed on observations of the House of Lords in *R. v. Shepard*¹³ wherein it had been observed that when a witness who is familiar in the working

¹¹ Sub-Section 4 of the 65(B) of Indian Evidence Act, 1872.

¹² (2005) 11 SCC 600.

¹³ The Court in *Navjot Sandhu* case, quoting from 1993 AC 380, stated: “*The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will*

of the computer testifies about the proper functioning of the computer it would be relevant and admissible. Further it was held that the when there is regularity and continuity Court can draw presumption that the system was functional and the output was produced by the computer in regular use, whether this fact was specifically deposed to by the witness or not.¹⁴

The various High courts followed the above precedent laid down by *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru and others*¹⁵. In *Madan Gopal and Another v. State*¹⁶, the Hon'ble Delhi High Court relied upon the statement of Nodal Officer of the Telecom Company and documents produced through him as sufficient material and evidence to implicate the perpetrator following the above guidelines of the Supreme Court. The Hon'ble Rajasthan High Court in *Bhanwar Singh v. State*¹⁷ while acquitting the accused, relied upon the Supreme Court judgment and held that in case where neither the certificates as required are produced nor the testimony of person acquaint with computer system giving output is examined and when no material are available to establish continuity and regularity of the system giving nothing is available on record to establish as to how such identification was made, then such evidence is quite doubtful and the call details produced too are not at all sufficient to satisfy their acceptance.

Hence, Navjot Sandhu's case gave umbrella interpretation of the Section 65-B of the Indian Evidence, wherein, even in cases of absence of 65B Certificate, if the prosecution was able to prove the electronic records as per section 63 and 65, then such evidence was made acceptable. This precedent was widely accepted and followed by many Courts and was highly relied upon by investigation agencies as well. This led to filing of many charge sheets that had evidences in form of computer outputs including Call data Records in many cases but was not accompanied with 65B certificates.

Thereafter, nearly a decade later, the Supreme Court's three Judge Bench in the case of *Anvar P.V v. P.K. Basheer & Ors*¹⁸ set aside the above precedent that was laid down in Navjot Sandhu's case saying that the same does not lay down the correct legal position with respect to

inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly."

¹⁴ Supra 12, para 15.

¹⁵ Supra 12.

¹⁶ Criminal Appeal No. 1275/2010 Judgment dated 29 April, 2014.

¹⁷ D.B. Criminal Appeal No.166/2008 judgment dated 14 December, 2011

¹⁸ (2014) 10 SCC 473.

Section 65- B. The Court in Anvar case held that “The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B.”¹⁹ The Supreme Court further held that Section 65 B being a special provision has to be mandatorily followed and application of the rules of secondary evidence laid down under Section 63 and 65 cannot be permitted. In unequivocal terms it laid down the law by saying “An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.”

After the passing of the Anvar’s case Section 65 B certificate was made mandatory. Anvar’s judgment did not have any prospective effect of judgment. Whether a decision announces a new rule for prospective application only, or makes it retroactive, the problems of transition are not always neatly resolved in a transitional case.²⁰ The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.²¹ Hence, the procedure followed by the investigators based on the Navjot Sandhu’s case in producing electronic evidence without certificate became bad in the eye of law as it was overruled by Anvar’s case. This situation was followed with cases resulting in rejection of evidentiary value of computer outputs that didn’t accompany with a 65B certificate. Some cases even lead to discharge and acquittal of accused. These cases also included the criminal cases related to which charge sheets were filed between the order of Sandhu case law that came in 2005 and Anvar case law that came in 2014. These cases were the once that lacked 65B certificates since the law then applicable was Sandhu case which didn’t insist for 65B certificate.

¹⁹ Ibid at Para 22.

²⁰ Roger J. Traynor, “The Well Tempered Judicial Decision, 21 ARK. L. Rev. 287 (1967).

²¹ *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982).

In *Manoj v. State of Karnataka*²², Hon'ble High Court of Karnataka while appreciating the electronic evidence held that : even according to the prosecution, that there is no certification made by the competent person, who generated those documents, regarding the time of the printouts of the documents that were taken out from the computer/CC TV camera. In view of this admitted factual aspect and as per the decision of the Hon'ble Supreme Court, the prosecution has not complied with Section 65B's requirements. Thus, the secondary evidence of electronic record are not admissible in the present case and hence, "the electronic records cannot be looked into by the court while appreciating the case of the prosecution." The case resulted in acquittal of the accused.

The Hon'ble High Court of Bombay in the case of *Kamlesh @ Babla @ Bablya Shankar v. The State Of Maharashtra*²³ said" "...it was mandatory for the prosecuting agency to produce the certificate in terms of Section 65-B obtained at the time of collecting document (CDR) without which the secondary evidence pertaining to electronic record is inadmissible. Thus, in view of the mandate of Section 65-B of the Evidence Act and in the absence of its compliance the evidence of CDR produced by the prosecuting agency in respect of the three aforesaid mobile phones is fully inadmissible in evidence."

In *Tomaso Bruno v. State of U.P.* ²⁴ the Supreme Court's three judge bench, while appreciating the Navjot Sandhu's case, highlighted the need of the electronic evidence in criminal trials and held that : "The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by Section 65B of the Evidence Act. Sub-section (1) of Section 65B makes admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfillment of the conditions specified in sub-section (2) of Section 65B. Secondary evidence of contents of document can also be led under Section 65 of the Evidence Act." But strangely it did not make any reference of Anvar's case, which had already overruled the Navjot Sandhu's case.

Later in *Sonu v. State of Haryana*²⁵, the Supreme Court decided on the admissibility of the electronic record which was not accompanied by Section 65 B (4) certificate, but which was marked as exhibit without objections. Keeping in mind the mandatory need of Section 65 B (4)

²² 2014 Criminal Law Journal, Vol. 60.

²³ Criminal Appeal No.1203 OF 2012 on 20 November, 2015.

²⁴ (2015) 7 SCC 178.

²⁵ AIR 2017 SC 3441

certificate and its absence with the electronic evidence being *res integra*, (as per Anvar's case) the Court focused on the procedural aspects of production of electronic evidence. It held that "Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65 B (4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof."

In *Shafhi Mohammad v. The State of Himachal Pradesh*²⁶, while relaxing the operation of Section 65(4) B in a case where parties did not have in their possession the primary device from which such computer outputs were produced, the court held that such party need not produce 65B Certificate. The court held that the requirement of 65B certificate was not always mandatory. It tried clarifying the legal position on the matter relating to the admissibility of electronic evidences in form of 'computer output' with reference to special circumstances where a party who is not in possession of device from which the document is produced. The court held that such party need not be required to produce 65B certificate. Hence, Supreme Court while considering the requirement of 65B certificate, left it to the ambit of the Court taking the evidence to relax the production of the certificate wherever "interest of justice" so justified.

However, recently in the case of *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*²⁷, the three-bench judge of the Supreme Court while deciding the case by reference by the Division bench on the interpretation of Section 65 B, dealt with the effect of the previous judgments and appreciated the controversy in detail. The Hon'ble Supreme Court overruled the judgment of Shafhi Mohammed²⁸ and observed that "when in cases where either a defective certificate is given or in cases where such certificate has been demanded and is not given by the concerned person, the Judge conducting the trial must summon the person/persons referred to in Section 65B (4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in

²⁶ (2018) 2 SCC 801.

²⁷ 2020, SCC Online SC 571.

²⁸ Supra 26.

evidence before him without the requisite certificate in the circumstances. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the Criminal Procedure Code.” While concluding the judgment in Arjun Panditrao’s case, Hon’ble Justice Ramasubramanian²⁹ rightfully observed “Therefore, it is the need of the hour that there is a relook at Section 65B of the Indian Evidence Act, introduced 20 years ago, by Act 21 of 2000, and which has created a huge judicial turmoil, with the law swinging from one extreme to the other in the past 15 years from Navjot Sandhu to Anvar P.V. to Tomaso Bruno to Sonu to Shafhi Mohammad.” Further, the Court in Arjun Panditrao case reaffirmed the mandatory need of submitting 65B certificate in all cases that relied upon electronic evidence in form of ‘computer outputs’.

IV. Conclusion

In the light of the above discussion of the effect of precedents of the Supreme Court of India on Section 65B of the Evidence Act, the question of retroactive application of precedents or judge made law have to be viewed. Justice Cardozo is the champion of the idea of using prospective adjudication as a tool to redress the hardship resulted by some retroactive application of judge-made law.³⁰ Pareto-superiority is sometimes advanced as the appropriate efficiency criterion for evaluating whether one set of legal rules should be preferred over another.³¹ Paretian analysis traditionally concerns itself with welfare, that is, with the subjective preferences of individuals within a society for various states of affairs.³² It remains our common task, in every field of the law, to foster the well-tempered judicial decision.³³ When there are various conflicting precedents to bring stability legislation has to interfere in settling the position of law in consideration of public policy.

²⁹ V. Ramasubramanian J., had passed separate judgment in the same case.

³⁰ See Cardozo, Benjamin N. (ed.) “The Nature of the Judicial Process”, Yale University Press, USA, 1921.

³¹ Michael J. Graetz, “Legal Transitions: The Case of Retroactivity in Income Tax Revision”, 126 U. Pa. L. Rev. 47 (1977).

³² Sager, Lawrence G. (1980) "Pareto Superiority, Consent, and Justice," Hofstra Law Review: Vol. 8: Iss. 4, Article 3, accessed from <http://scholarlycommons.law.hofstra.edu/hlr/vol8/iss4/3> on 12th July 2021.

³³ Roger J. Traynor, “The Well-Tempered Judicial Decision, 21 Ark. L. Rev. 287 (1967).

It is pertinent to note that other jurisdictions like UK and US have overcome this limitation in law that they also had at one point of time, similar to Indian law which insisted for production of a certificate while seeking admissibility of computer outputs. These jurisdictions have made timely amendments to their laws and today have in place alternative mechanisms for production of electronic evidences. Insisting for one and the only mode of admissibility of such evidence like in the case of India, the insistence for 65B certificate, may affect effective regulation of cyber-crimes. On the other hand it is also necessary to ensure that the admissibility of evidences must be assessed on basis that adds to evaluating validity and certainty of such evidences. Hence apart from 65B certificate there must be additional modes of production of evidence that can aid courts in evaluating admissibility of electronic evidences. It is high time that the Parliament makes necessary amendment to the provisions of the Section 65 A and B to give effect to the various challenging circumstances that have arose today due to precedents passed since last two decades.

JUDICIAL APPOINTMENT IN INDIA: THE WAY AHEAD

Dr. Rohit Moonka* & Dr. Silky Mukherjee**

I. Introduction

To enable the courts to discharge their functions effectively, it is important that the courts enjoy independence particularly with regard to appointment of judges in High Courts and Supreme Court being the constitutional courts. Under the Constitution, the ultimate interpreter of the law is the Supreme Court of India, not the legislature or the executive. Judicial independence is, central to democracy because it is the judiciary which helps the realisation of the Rule of Law and protection of human rights. But the concept of independence is a complex one which subsumes in it concepts like impartiality, accountability, efficiency and respect for other institutions of governance. In this context, appointment of Judges in the Supreme Court is provided under Article 124 (2) of the Constitution of India.¹ But after the second judges case, this provision has been totally reversed by the Supreme Court and it has assumed exclusive authority in the judicial appointment with role of executive been made extremely minimal and supremacy given to the opinion of the collegium consisting of CJI and four other senior most judges of the Supreme Court of India.

II. Position prior to 1993

In this regard the position before 1993 was that the final power to appoint Supreme Court Judges rested with the President who acts on the aid and advice of the Council of ministers and opinion expressed by the CJI wasn't binding which was upheld in *S.P. Gupta v. Union of India*². Opinion of CJI/CJ of H.C concerned was only consultative in nature & no primacy was to be

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¹“The Judges of the Supreme Court are appointed by the President in consultation with such of the Judges of the S.C and the H.C. in the State as he may deem necessary for the purpose”

² AIR 1982 SC 149

given. After S.P.Gupta case, Executives started wielding the overriding power in selection & appointment of judges in Supreme Court and in the High Courts. However, later in *Subhesh Sharma v. Union of India*³, it was held (though by a smaller bench) that the role of the institution of the CJI be recognized as of crucial importance & primacy be given to his opinion. Independent, non-political judiciary is important for a democratic country like India.

III. Position after 1993

It is in this backdrop that the nine judges bench was constituted in the second judge's case *Supreme Court Advocates on Record Association v. UOI*.⁴ It was held in this case that the process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable candidate where executive's role to as mere check. Primacy of the opinion of the CJI formed collectively. In case of conflicting opinion, the opinion of CJI will have primacy.

Thereafter, the President of India who required clarification on the second judges case made a reference to the Supreme Court under Article 143 of the Constitution in *In Re: Presidential Reference*.⁵ In this matter, Supreme Court laid down nine guidelines for the functioning of the collegium for appointments and transfers this has come to be the present form of the collegiums, and has been prevalent ever since. It was held that the expression "consultation with the CJI" in Articles 217(1) and 222(1) of the Constitution required consultation with a plurality of judges in the formation of the opinion of the CJI. The CJI is not entitled to act solely in his individual capacity, without consultation with other Judges of the S.C, in respect of materials and information conveyed by the Government of India for non-appointment of a Judge recommended for appointment.

³ AIR 1991 SC 631

⁴ AIR 1994 SC 268

⁵ AIR 1999 SC 1

IV. The National Judicial Appointments Commission (NJAC) Act, 2014⁶ & Constitutional Amendment

To establish a comprehensive body which consist of members from the judiciary, executive and other eminent personalities in a form of a Commission for such appointment, Parliament passed the much awaited Constitution (99th Amendment) Act, 2014 and the National Judicial Appointments Commission (NJAC) Act, 2014. The Amendment's object was to replace the collegium with a more broad-minded forum, which would provide a genuine chance to participate and influence the selection of higher judiciary not merely to the Supreme Court and the executive, but also to laypersons outside the constitutional framework. To make it a body consisting of six members representing various stakeholders, it was provided that the Chief Justice of India, the two most senior judges of the Supreme Court, the Law Minister, and two 'eminent persons' would be its member. With regard to these two eminent persons, they will be nominated for a three-year term by a committee consisting of the Chief Justice, the Prime Minister, and the Leader of the Opposition in the Lok Sabha, and are not eligible for re-nomination.

V. Fourth Judges Case⁷

Despite serious fallacies of the collegiums system, the NJAC Act which sought to wither away the collegiums system, could not be upheld on the yardstick of "basic structure doctrine" as the insertion of the law minister in the NJAC as a member and the ambiguously in defining "eminent persons" were considered in contravention of the basic structure doctrine as propounded in the case of *His Holiness Kesavananda Bharati Sripadagalavaru v State of Kerala and Another*⁸. This concern of the Supreme Court is reflected in the judgment wherein it has observed that "It is difficult to hold that the wisdom of appointment of judges can be shared with the political-executive. In India, the organic development of civil society, has not as yet sufficiently evolved. The expectation from the judiciary, to safeguard the rights of the citizens of this country, can only be ensured, by keeping it absolutely insulated and independent, from the

⁶ The National Judicial Appointments Commission Act, 2014 (No 40 of 2014), India Code, http://www.indiacode.nic.in/acts2014/40_of_2014.pdf (last accessed on March 12, 2021)

⁷ Supreme Court Advocates-on-Record Association & another V. Union of India WP (Civil) No. 13 of 2015

⁸ 1973 (4) SCC 225

other organs of governance,” Justice J.S. Khehar, the presiding judge on the five-judge Constitution Bench, explained in his individual judgment.

It is well established fact that no system of appointment is perfect. The collegium that was robustly defended by four out of the five judges who declared the NJAC Act illegal has its faults which have been acknowledged by the majority judges as well. The Bench admitted that all is not well even with the collegium system of “judges appointing judges”, and that the time is ripe to improve the 21-year-old system of judicial appointments. It is also a fact that in no country of the world serving judges exclusively select and appoint judges. In the Indian context, it may be conceded that the Judiciary too should not have the exclusive authority to appoint judges. It is a pity that our institutions are suspicious of other institutions but liberal in self-assessments and they lack confidence amongst each other’s. The independence of the judiciary is an important objective of the Constitution, but the basic structure of the Constitution should not be interpreted in a manner which is more suitable to the interests of one institution over other even at the cost of the Constitutional mandate as being done by the Supreme Court in the present case.

Suggestions for appointment need not come from senior judges only; other judges, the Bar and legal academic community as well as retired judges should also be able to come up with names for consideration. Reform should include wider participation. Although the Court in the NJAC decision has ruled against civil society being on the selecting panel, it should encourage its presence in the screening and recommendatory body. The involvement of the Law Minister should not be ruled out either; placing him as a permanent ex-officio invitee to the collegium will enable his views to be made known. Under the current Memorandum of Procedure the government can reject a name sent by the collegium, but if the latter reiterates it the appointment must go through. If this is to be retained, it ought to be accompanied by the requirement that both rejection and reiteration should be accompanied by reasons to be made public; if the two organs of State differ on such issues, people of this country are entitled to know why a controversial name is going through despite objected by one such organ.

The NJAC judgment establishes that reforms in the judiciary do not happen from within. It also shows that any move for executive preponderance would be curtailed relying on the

doctrine of “basic structure” as judicial independence is interpreted as one of the facet of the basic structure of the Constitution by the Supreme Court in Kesavananda Bharati case⁹.

VI. 2nd NJAC Judgement

The bench which heard and decided the forth judges case had invited suggestion for the improvement of the collegiums system which received overwhelming response from the bar, academia and the civil society. The suggestions ran over 11,500 pages, as mentioned by the Supreme Court in its 2nd NJAC judgment of December 16, 2015. It was in this judgment (2nd NJAC) that Supreme Court again asked the Centre to come up with a revised Memorandum of Procedure (MoP), a practice which is also a judicial invention imposed on the executive through the Supreme Court’s judgment in the Second Judges’ case. The MoP was first drafted in the year 1999 which laid down the procedure to be followed under the collegium system for appointing judges to the High Courts and Supreme Court with a very limited role of the executive. It is worth noting that neither the Constitution nor any statute provides for an instrument like the MoP for judicial appointments in India.

The Supreme Court in 2nd NJAC judgment further held that the CJI will take a decision based on the unanimous view of the collegium. Though it was discoursed that factors such as (i) eligibility criteria; (ii) transparency in the appointment process; (iii) secretariat and (iv) complaint redress mechanism are to be considered, there was no wholesale change in the matter. Though the Supreme Court emphasised reform in the 1st NJAC judgment, it resorted to a highly highhanded position in the 2nd NJAC judgment. The plea for eligibility got reduced to the prescription of a minimum age and such other harmless factors. The secretariat that the legal fraternity aspired for as a centre for judicious selection became a storehouse of data on those who were fortunate enough to be close to the power centre. It appears that the collegium is not in favour of any far-reaching shift and it is also not willing to part with its exclusivity in judicial appointment with anybody in any manner on the name of independence of judiciary.

⁹Id

VII. The way forward: A reformed collegium

During the Constituent Assembly debates, Mr. Alladi K. Iyer had warned against vesting untrammelled power in the judiciary, which he said could create a super legislature. This is exactly the role that the Supreme Court performed in the *Second Judges Case*, by literally rewriting the Constitution to create a self-serving body, taking away the powers from both Parliament and the executive. In many ways, the enactment of the 99th Amendment was intended to redress this imbalance. It was to some extent, Parliament's effort at regaining some of its lost space in the constitutional structure with regard to appointment of judges in the constitutional courts.

When the Constitution was adopted on 26 November 1949 by the Constituent Assembly, its members were mindful of the challenges of governance. Speaking after the completion of his work, B R Ambedkar, Chairman of the Constitution Drafting Committee, said, "*I feel that the Constitution is workable; it is flexible and it is strong enough to hold the country together both in peacetime and in wartime. Indeed, if I may say so, if things go wrong under the new Constitution the reason will not be that we had a bad Constitution. What we will have to say is that Man was vile.*"¹⁰ In my opinion, he was referring this in the context of both for the executive as well as judiciary.

The collegium had indicated that no new fresh appointments will be recommended till the new memorandum of procedure, a document to guide appointment of judges, is finalised. On the other hand, the draft MoP as circulated by the Government empowers it with the power to reject a nomination citing the "national interest". It further enables the executive not bound to reconsider a recommendation once rejected. The collegium, finding such clauses "undesirable" in the draft returned the MoP to the government and since the matter is lingering. Due to this ongoing tussle between the Collegium and the executive over MoP has led to a complete deadlock in the appointment procedure and which is causing grave injustice to the litigants

¹⁰ Constituent Assembly Debates (1948); Vol VII, Part II, available at <http://parliamentofindia.nic.in/ls/debates/vol7p1b.htm> (last accessed on 10th March, 2021)

mostly in the High Courts as there are many posts of judges being vacant but appointment could not be made as per requirement.¹¹

To conclude, the present situation is only part of the challenges facing the judiciary. The Supreme Court should move quickly to restore confidence in the collegium system (as it will not allow any other model on the name of judicial independence) as lack of objective criteria for selection of judges and lack of transparency of its in-house methods is also not justified for a long time. One must wait to see what the reformed collegium system will be, and further wait to see if the process and results satisfy the Bar, other stakeholders and of public opinion. The time is indeed challenging, but all challenges present opportunities. Our past disappointments should not prevent hope for the future.

¹¹ Disagreements stall rules on appointment of judges, available at <https://www.hindustantimes.com/india-news/disagreements-stall-rules-on-appointment-of-judges/story-FilVn4bFayBzQU0H7j7B9H.html> (last accessed on February 10, 2021)

CHANGING NATURE OF CENTRE-STATE RELATIONS: A COVID-19 EXPERIENCE

Snigdha Singh* & Charan Tej**

I. Introduction

Since the beginning or commencement of the Constitution of India (with the seeds of debate being planted as one would argue, with the introduction of the Government of India Act, 1935), the jurists, scholars, academics among others have argued regarding the nature or type of the Constitution. The legal scholars like H.M Seervai, Prof. M.P Jain, Prof. D.D. Basu to name a few, strongly advocated the case of federal nature of the India Constitution. Reliance was placed on the common features (written, rigid supreme Constitution providing for sharing of powers by the Centre and the States/units/cantons under the guardianship of an independent judiciary) found across federal Constitutions¹ (United States of America, Canada, Australia, Switzerland etc) since there was no consensus on the legal pre-requisites to classify a constitution as federal or non-federal. Support to such idea was also garnered through various landmark judgments of the Apex Court in India² like *Kesavanand Bharti v. State of Kerala*³, *S.R. Bommai v. Union of India*.⁴

It would be incorrect to portray a picture of uniform acceptance. Such perception was also heavily contested by various political scientists and jurists who classified Indian Constitution as not completely federal⁵ or unitary or federation with strong centralizing tendency.

Beg, C.J. observed in *State of Rajasthan v. Union of India*⁶:

“...Indian Union is federal but the extent of federalism has been watered down by the needs of progress and development of a country which has to be nationally integrated,

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¹Dicey, Law of the Constitution (10th Edn.) 164, as cited in Dr. Durga Das Basu (ed), Comparative Federalism (2nd Rev Edn Wadhwa Nagpur 2008), 143.

² *Jindal Stainless Limited and another v. State of Haryana and others*, (2017) 12 SCC (Ramana J.).

³ *Keshvanand Bharti v. Union of India*, AIR 1973 SC 1461.

⁴ (1994) 3 SCC, 68.

⁵ *Bhim Singh v. Union of India*, (2010) 5 SCC 538, 577, 97.

⁶ *S.R. Bommai vs Union Of India* A.I.R. 1994 1918.

politically and economically coordinated, and socially intellectually and spiritually uplifted. In such a system, the states cannot stand in the way of legitimate and comprehensively planned development of the country in the manner directed by the Central Government. ”

Advocates who thought of the Indian structure as a non-federal type substantiated their claim by placing on record certain unique deviating, non- federal or unitary features of the Indian Constitution like unequal distribution of powers in the seventh schedule between the Centre and the States indicating central bias, no territorial integrity to the states⁷, supremacy of the Central laws through Doctrine of Repugnancy⁸, residuary power with the Centre⁹, single citizenship, single Constitution for both the Centre and the States etc.

States historically have often complained of inadequate financial competency to discharge the constitutional obligations placed on them through the Constitution. This led to setting up of various committees to examine the Centre State relations in India (Sarkaria Commission¹⁰, Puncchi Commission). Most of the recommendations tended to further the co-operation between the Centre and the States while addressing various concerns of numerous states. However, the nature of the Indian Constitution was never contested in these reports. Federal balance was presumed and it was hoped that recommendations enumerated would further the cause of better relations between the Centre and the States in India. Numerous amendments over the years have kept the Constitution relevant to the needs of the specific period in question. However, it is times like these which leads us to revisit the federal balance in the Indian Constitution since the true test of a federal constitution as it has been said “its work in practice”.

The legislative conflicts, inconsistent policy application and dismal state of affairs has yet again brought to light challenges to Centre- State relations in a unique federation like India in these unprecedented times. India’s inconsistent and fragmented response to COVID 19 pandemic has led one to rethink the constitutional and institutional safeguards in place.

⁷ Const. of India, art. 2, 3, 4.

⁸ Const. of India, art. 254.

⁹ Const. of India, art. 248.

¹⁰ Inter-State Council Secretariat, Ministry of Home Affairs, Government of India, The Report by Sarkaria Commission on Centre State Relations.

The paper at hand at first, explores constitutional scheme in relation to division of legislative and executive powers in the seventh schedule read with relevant Constitutional provisions and the relevant legislations brought about pursuant to it (Disaster Management Act, 2005 and Epidemic Diseases Act 1897 and related Regulations and Notifications) which were used to deal with problems created by COVID 19. The second part of the paper deals with the conflicts arising out of the various provisions of the legislations and the consequences thereof leading one to revisit the federal balance in our co-operative federal structure. Lastly, the paper explores feasibility of various suggestions by numerous Committees and experts (shifting of entries from State List to Concurrent List) and concludes with a few of its own (setting up of an empowered Interstate Council which could offer an institutional space permitted Constitutionally for sustained dialogue and discussions between the Centre and the States and for creation of the necessary resilience and credibility to better handle crisis like one created by the COVID 19 pandemic)

II. Constitutional and legislative scheme in relation to COVID-19 pandemic

It all began on the 30th of January 2020, when, the first case of coronavirus appeared in India, in Thrissur district of Kerala. The patient was a student of Wuhan University who returned from China on a special plane designated to bring back Indians stranded in China.¹¹ Incidentally, it was on this same day that WHO announced the outbreak to be a “*Public Health Emergency of International Concern (PHEIC)*”¹² with death toll touching 170 along with about 7000 reported cases in China and over 7500 cases being reported across 20 other countries.¹³ It was a clear imputation of the risk the virus posed to countries beyond China. And here we were, sharing a barbed fence with China.

¹¹P. S. Gopikrishnan Unnithan, Kerala reports first confirmed coronavirus case in India, INDIA TODAY, January 31, 2020, <https://www.indiatoday.in/india/story/kerala-reports-first-confirmed-novel-coronavirus-case-in-india-1641593-2020-01-30> (last visited Jun 6, 2021).

¹²WORLD HEALTH ORGANISATION, COVID 19 Public Health Emergency of International Concern (PHEIC) (2020), [https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-\(pheic\)-global-research-and-innovation-forum](https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-(pheic)-global-research-and-innovation-forum) (last visited Jun 7, 2021).

¹³Covid-19 India timeline: Looking back at pandemic-induced lockdown and how the country is coping with the crisis, THE INDIAN EXPRESS, March 23, 2021, <https://indianexpress.com/article/india/covid-19-india-timeline-looking-back-at-pandemic-induced-lockdown-7241583/> (last visited Jun 7, 2021).

As has been outlined earlier India has a written, supreme, comparatively rigid Constitution which divides the power between the Centre and the States (and further to panchayats and municipalities as the third-tier government). The judiciary though integrated guards and sees to it that one does not encroach upon the powers of another as demarcated by the Constitution. This is ensured through the power of judicial review. This is usually the norm in regular times.

Article 246 read with the Seventh Schedule has bifurcated the powers among the federal units whereby complete power to legislate on the subjects of List I has been vested with the Centre, on the subjects of List II has been vested with the States and that of List III has been vested with both the Centre and the States. Further, Entry 97 of List I vest the Centre with the power to legislate on subjects that do find a place in any of the three lists. Accordingly, Entry 28 and Entry 81 empowers the Centre to legislate on matters incidental to port quarantine, seamen's and marine hospitals and inter-state migration and inter-state quarantine. Also, Entry 6 of List II empowers the States to legislate on matters incidental to public health and sanitation, hospitals and dispensaries. Further, Entry 29 of the List III empowers both the Centre and the States to legislate on matters incidental to prevention of the spread of infections, contagions or pests between states which may affect humans, flora or fauna.

The Centre brought about the Disaster Management Act in 2005 (hereinafter referred to as DM Act) that currently is the main legislative tool to deal with disasters in the country. Accordingly, the disaster has been defined to include any catastrophe, mishap, calamity or grave occurrence in any area, arising from either natural or man-made causes, or by accident. In accordance to the powers granted under Section 6(2)(i) of the DM Act, the NDMA, by order dated March 24, 2020, directed the State governments to take appropriate steps to prevent the transmission of Covid-19 in the country. In furtherance of the above order, exercising powers granted under Section 10(2)(1) of the DM Act, Ministry of Home Affairs (MHA) issued an order with guidelines and requirements for strict implementation. The order was in force for a period of 21 days and, with that, India witnessed its first Covid-19 nationwide lockdown.

Additionally, many States enacted their own Covid-19 regulations, deriving their powers from a colonial law, the Epidemic Diseases Act, 1897 ('ED Act'). Under the ED Act, both the Central and States are empowered to exercise powers to prevent the spread of dangerous

epidemic diseases. Accordingly, the Centre is empowered to take such measures and prescribe regulations at any land port or aerodrome to prevent the spread of such diseases. Similarly, the States are also empowered to take such measures and regulate the public to prevent the outbreak or spread of such diseases. Consequently, the States have banned public gatherings, postponed the examinations, closed educational institutions and instructed commercial establishments to devise work from home methods as far as possible¹⁴.

Much like the DM Act, Section 2A of the ED Act authorizes State governments and the Central government to pass any regulations that they might deem “necessary to prevent the outbreak or spread” of an epidemic disease. Some of the states attempted to legislate which led to Constitutional crisis which was consequently rectified¹⁵. For example, with the legislature not in session, the Governor of Kerala acted swiftly by promulgating the Kerala Epidemic Diseases Ordinance, 2020, (Ordinance 18/2020) on March 26, 2020. However, necessary implication of Section 12(2) of the Kerala Ordinance, 2020 is that it attempts to take away the powers of the Central Government. Section 12(2) of the ordinance invited criticism for going against the central ED Act, which stated that the provisions of the central ED Act would not have any effect on the state jurisdiction. Later, the Governor of Kerala promulgated another ordinance titled The Kerala Epidemic Diseases (Amendment) Ordinance, 2020 (Ordinance 38/2020) on July 4, 2020 omitting Section 12(2) from the previous ordinance.

III. Legislative conflicts, inadequacies and challenges to Centre-State Relations exposed by COVID - 19

Things however get tricky in times like these where policy and implementation in a co-operative federal government largely depends on the political will and co-operation between the different levels. It has been argued that Indian federalism is suggestive of conflicts rather than co-operation in recent period and is popularly being characterized as inconvenient federalism. It is needless to emphasise that the context of opposing political ideologies and pragmatic

¹⁴Rekha Saxena, Federalism and the COVID-19 crisis: Centre-State apposite relations in Pandemic Federalism - India, FORUM OF FEDERATIONS, <http://www.forumfed.org/publications/federalism-and-the-covid-19-crisis-federalism-and-the-covid-19-crisis-centre-state-apposite-relations-in-pandemic-federalism/>.

¹⁵Niharika Salar, COVID-19 & India's Institutional Response: The Centre-State Relationship, NUS LAW, <https://law.nus.edu.sg/impact/covid-19-indias-institutional-response-the-centre-state-relationship/> (last visited Jun 6, 2021).

orientations has always supplied grounds on which the ruling regime at the centre and governments at the states mount their mutual tensions from time to time¹⁶. This had gained significance with the advent of coalition government in 1980s and way further with a single party dominating the Centre since 2019. It is argued that decision making in such arrangement can be quicker and efficient with a single party enjoying the confidence of people at the Centre and is suited to tackle emergencies like the one presented to the us these days¹⁷. Yet, politically and functionally never has the federal balance been put to test with such vigor¹⁸. This paper attempts to explore the challenges in four dimensions as under.

A. The Epidemic Diseases Act, 1987 vis-à-vis the National Disaster Management Act, 2005

As has been mentioned earlier in this paper, the Centre resorted to the Epidemic Diseases Act and the Disaster Management Act, 2005 centralising as much power as legislatively and constitutionally permissible to tackle the first wave of the pandemic. Largely unilateral decisions undertaken by the Centre, despite specific provisions requiring consultations with the states under these statutes, led to the mass reverse migration of migrant workers from one state to another with little to no planning and subsequent poor execution¹⁹. The states due to the national lockdown lost out on considerable revenue and their dependence on the Centre increased. These were the beginning of the larger problem, which was to be witnessed during the second wave²⁰. The Central government was nevertheless hailed as a hero for handling the crisis after the first wave while the states were left to fend for themselves.

B. Vaccination drive

Vaccines are predominantly prophylactic, particularly those that impact public health. Such vaccines are considered preventive measures as such diseases are usually highly fatal or have

¹⁶ Editorials, COVID-19 Crisis and the Centre–State Relations, EPW (24 Apr, 2021) Vol. 56, Issue No. 17.

¹⁷ Shivanshu Goswami Animesh Upadhyay, Centre-state relations and powers in handling the Covid-19 pandemic, THE DAILY GUARDIAN (June 22, 2020, 5:24 AM), <https://thedailyguardian.com/centre-state-relations-and-powers-in-handling-the-covid-19-pandemic/>

¹⁸ Anita Tagore, Covid has raised urgent questions about Centre-state relationship, THE INDIAN EXPRESS (May 3, 2021 11:25 PM) <https://indianexpress.com/article/opinion/covid-has-raised-urgent-questions-about-centre-state-relationship-7300816/>

¹⁹ Ambar Kumar Ghosh, Imperative of Centre-State cooperation on Covid19, Observer Research Foundation (Jun 02 2020), <https://www.orfonline.org/research/imperative-of-centre-state-cooperation-on-covid19-67214/>

²⁰ Anirudh Burman, How COVID-19 is Changing Indian Federalism, CARNEGIE INDIA (July 28, 2020), <https://carnegieindia.org/2020/07/28/how-covid-19-is-changing-indian-federalism-pub-82382>.

irreversible effect or simply that, either there is no effective treatment available or the treatment is exorbitantly expensive. It is for these reasons that vaccines are central to address public health.

Acknowledging the significance, historically, almost all mass vaccination programs (for polio, BCG, perta-vaccine etc) have been made available to the public free of cost. Even today, with regards to vaccination for COVID, several countries (Japan, America, UK, France, Norway etc.) have declared free vaccination for all. Keeping in line with this on October 2020, several ministers of the Government announced free vaccination for all in India²¹.

However, after the first drive of vaccination in March 2020, the Central Government delegated the function of procurement to States on the grounds that “*Public health*” is a state subject. The consequence being a mad rush by the States, competing with each other in securing vaccines for their respective states. The states were faced with three problems in this context: firstly, financial crunch owing to a combination of lack of economic activity and non-realization of their due share of GST and compensation from the Centre.

Secondly, this led to a bidding war between the states, with shooting of the prices. This was furthered by the manufacturers refusing to sell vaccines to the States at the price sold to the Central Government. Shockingly, the Central Government did not come to the rescue of the States in this regard. This showcased the much promoted and gloated “*competitive federalism*”, albeit for the wrong reasons at the worst possible time.

Thirdly, the states were also denied vaccines by the manufacturers (Pfizer, Moderna) as they were not willing to deal with the States and would rather negotiate with the “Indian Government”. Under these circumstances, the States were left with no choice but to fall back on the Centre for vaccine procurement. The Centre, however, did not budge until being rapped by

²¹Coronavirus | All Indians to get free COVID-19 vaccine, says Union Minister, THE HINDU, October 25, 2020, <https://www.thehindu.com/news/national/coronavirus-all-indians-to-get-free-covid-19-vaccine-says-union-minister/article32940902.ece> (last visited Jun 10, 2021).

the Supreme Court for not procuring the vaccines²². Relenting to pressure, the Prime Minister on the 8th of June 2020, announced that vaccines will be provided by for free for everyone²³.

C. The Goods and Services Tax

In a welfare state, taxation is much more than mode of revenue generation for the state. It is a tool of Public Policy which shapes the economy and informs of the objectives that the state intends to achieve, indicates the priorities is the state and most importantly gives direction and blue print for the path of development of the state. The Central Government intends to achieve a mere 2.5% of GDP in terms of Public Health expenditure while the current Global average is 6%. India has one of the world's highest out-of-pocket expenditure at 63% of total health expenditure²⁴. This informs us of the state of social security or the lack of it for the poor and the distressed. In times of healthcare crisis, particularly of the current magnitude, it is an imperative of any *Welfare State* to make healthcare affordable. Reduction of taxation for such goods is proactive steps towards that end, which, the States rightly so intends to.

Under the “*one India, one tax*” regime, the States surrendered this important tool to the Centre. As far as the revenue loss, the Central Government promised to compensate, but, as far as, a tool of policy making, the states considered it as being the larger good, which unfortunately has come to bite them back. This has been exposed by COVID-19, whereby the States were at the mercy of the Centre to reduce the taxation of essential healthcare goods²⁵. The states had to force the Central Government to convene a GST Council (which was not convened for two quarters since October 2020) to persuade for the reduction of taxation among other things, which has not been successful though.

²²PTI, “India is Union of States”: SC schools Modi govt on why Centre must buy vaccines & distribute, THE PRINT (2021), <https://theprint.in/judiciary/india-is-union-of-states-sc-schools-modi-govt-on-why-centre-must-buy-vaccines-distribute/669285/> (last visited Jun 10, 2021).

²³Narendra Modi speech highlights: PM announces free vaccine for all 18+, Oppn says ‘thanks for acceding to our request,’ THE INDIAN EXPRESS (2021), <https://indianexpress.com/article/india/narendra-modi-address-to-nation-live-updates-covid-vaccine-7347936/> (last visited Jun 10, 2021).

²⁴Lalit Maurya & Joyjeet Das, India’s Health Crisis, DOWN TO EARTH , https://www.downtoearth.org.in/dte-infographics/india_s_health_crisis/index.html (last visited Jun 10, 2021).

²⁵Sujit Kumar Bisoyi, Odisha seeks reduction of GST on items required for Covid management, TIMES OF INDIA, May 28, 2021, <https://timesofindia.indiatimes.com/business/india-business/odisha-seeks-reduction-of-gst-on-items-required-for-covid-management/articleshow/83043371.cms> (last visited Jun 10, 2021).

D. PM CARES Fund – Prime Minister’s Citizen Assistance and Relief in Emergency Situations Fund

On March 27, 2020, a Public Charitable Trust was registered establishing the PM CARES fund. The stated objective of this trust is to have a dedicated fund for “*dealing with any kind of emergency or distress situation, like posed by the COVID-19 pandemic, and to provide relief to the affected*”. The two concerns raised with regards to the federalism are: firstly, the composition of the trustees is the Prime Minister (ex-officio chairman), the Defense Minister, the Finance Minister, the Home Minister and other government appointees. It is apparent that the trust is not an autonomous body, rather it is highly political and non-inclusive (representation from other parties). Given the current politically charged centre-state relations and the lack of transparency, the functioning of the trust becomes questionable. Further, there is a lack of any representation from the states in the trust. Also, there is no separate CM CARES fund which would have made it decentralized and federal. Secondly, the height of centralization and politization was apparent when uncapped corporate donations to the said fund would be considered as CSR expenditure, while not extending the same benefit to the Prime Minister’s National Relief Fund or Chief Minister’s Relief Fund²⁶.

IV. Inference and suggestions

Practice or principal application of true co-operative federalism is the key to sustainable governance in India. The governments at the Centre and the states need to rise above their petty politics through political gimmicks and blame game and honour the Constitutional Code in letter and spirit.

Decisions after consultation with the states and the experts in a transparent and non-partisan manner will help resolve any challenge which may be put to test the federal spirit of the Indian

²⁶Priscilla Jebaraj, How different is the PM CARES Fund from the PM’s National Relief Fund?, THE HINDU, May 10, 2020, <https://www.thehindu.com/news/national/coronavirus-how-different-is-the-pm-cares-fund-from-the-pms-national-relief-fund/article31546287.ece> (last visited Jun 9, 2021).

polity. This can be successfully achieved by bringing to life the Interstate Council²⁷ in a permanent fashion.

A separate entry in the Concurrent List could be introduced through formal amendment to effectively manage such natural or manmade emergencies. This will ensure that the Centre does not resort to residuary entry (Entry 97 List I) in such cases in future to experiment with new legislative tools if and when adequate safeguards to protect the interests and constitutional space of the states are ensured in the existing legislative tools or when the current legislative tools become inadequate.

²⁷ See Explained Desk, Explained Ideas: How to improve Centre-state relations on a sustained basis, THE INDIAN EXPRESS (Sept. 18, 2020, 7:51 AM), <https://indianexpress.com/article/explained/explained-ideas-how-to-improve-centre-state-relations-on-a-sustained-basis-6600580/>.

REALIZATION OF THE 'RIGHT TO WATER' IN THE LIGHT OF EVOLVING RURAL DRINKING WATER REFORMS IN INDIA

Astha Khare*

I. Introduction

The right to water has gained great significance in recent years. From time to time, the Supreme Court of India has declared that the right to water is inherent to the right to life, according to Article 21 of the Indian Constitution. It puts the State under an obligation to protect the realization of the fundamental right to safe drinking water. However, in the recent past, India has been witnessing accelerated water-based reforms. These reforms show a transformation in India's water law and policy, from treating water as a common good, of the community, to an economic good, a commodity to be regularized in the market, as a result of the Structural Adjustment Policies of the Government, since 1991. The reforms encourage private participation in water management and delivery, shifting from a welfare-based and free water supply approach to a market-oriented, demand-driven approach. This paper proceeds with the premise that India's Constitution puts an obligation upon the State to impart the requisite quantity and quality of drinking water to its citizens and hold the water resources as a common good in 'public trust'. The recent shift in India's water policy conflict with constitutional goals, such as social justice, poses a threat to the fulfillment of the right to water by the poor and marginalized sections of the society. From the human rights perspective, the State is duty-bound to ensure the right to safe drinking water for the citizens' continued health and well-being.

Water is essential for living, yet many people worldwide do not have access to clean drinking water. Several countries around the world in Asia, Africa and Latin America are experiencing a severe water crisis. The United Nations, in its latest report, estimates that around 2 billion people live in countries facing severe water crisis, and about 4 billion people face acute water scarcity once a month every year.¹ "Some 2.2 billion people around the world do not have Safely Managed

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¹ "United Nations World Water Development Report, 2019: Leaving No One Behind", available at, <https://unesdoc.unesco.org/ark:/48223/pf0000367306>, last visited on 29/8/19.

Drinking Water Services (SMDWS)", criteria used for Sustainable Development Goals (SDG) to examine the drinking water services.²Water poverty has been spreading in many regions, and over 20% of the world's population is without access to adequate supplies of portable water necessary for daily needs.³This water crisis is compelling the governments to privatize the water delivery services and treat water as a commodity both in developed and developing countries. Privatization of water services is considered an effective tool against the water scarcity world is facing today.⁴The proponents of privatization argued that the market-oriented, demand-driven water policy would relieve the governments from the huge burdens of repairing and expanding the water infrastructure to make it accessible to all.⁵The role of international organizations such as the World Bank and IMF cannot be overlooked in this case. These organizations influence the national governments to 'choose' privatization and commoditization of water as an 'effective tool'⁶ to manage the excessive demands for water, particularly in developing countries facing a severe water supply shortage. These developments led water to be transformed from water as 'commons' to the 'commodity'. The shift from 'commons' to 'commodity' has raised several issues concerning the human right to water that has been resisted and challenged by citizens in many countries (e.g., Bolivia's case study)⁷. It was argued that these neo-liberal policy reforms would bring adverse outcomes to those belonging to poor and marginalized sections of the society.

Looking at the Indian scenario, during the past decade, India has witnessed several water sectors reforms, relying upon the notions of neoliberal discourse that stretched its root first in developed nations⁸ and later spread into third world countries, including India. These reforms

² <https://www.worldbank.org/en/topic/water/overview>, lastvisitedon 29/8/19.

³ Bakker Karen, the "Commons" Versus the "Commodity": Alter-globalization, Anti-privatization and the Human Right to Water in the Global South, available at <https://sites.ualberta.ca/~ksentes/commons%20versus%20commodity.pdf>, last visited on 27/12/18.

⁴ Subramaniam Mangala, Neoliberalism and water rights: The case of India, SAGE, Vol. 62(3) 393–411, 2014.

⁵ Paul Tara E, Plugging the Democracy Drain in the Struggle for Universal Access to Safe Drinking Water, Indiana Journal of Global Legal Studies, Vol. 20, No. 1 (2013), pp. 469-503.

⁶ Sampath Anitha, Water Privatization and Implications in India, available at https://www.researchgate.net/publication/238078636_Water_Privatization_and_Implications_in_India, last visited on 07/12/2018.

⁷ See "Bolivia: The water war to resist privatization of water in Cochabamba" available at: https://www.gwp.org/en/learn/KNOWLEDGE_RESOURCES/Case_Studies/Americas--Caribbean/bolivia-the-water-war-to-resist-privatisation-of-water-in-cochabamba-157/, last visited on 27/12/18, also see "Bolivia's Water Wars" at <https://www.wordsinthebucket.com/bolivias-water-wars>, last visited on 27/12/18.

⁸ The international support for commercialization of water had been made for the first time in controversial Dublin Statement on Water and Sustainable Development, 1992, where the emphasis had been given to recognize the economic value of water and managing water as an economic good is an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources. See Dublin Statement on Water

aim to commodify the water to retrieve the total costs of production directly from its users⁹, resulting in treating water as a commodity that can be available at a cost, as against the basic human need to be provided and fulfilled by the State. This shift in the approach was due to the neo-liberal policy guidelines adopted by the Government of India in 2002¹⁰. These policy¹¹ guidelines require the water delivery services to be handed over from purely state-institutions to various state-private or purely private institutions. Also, it gives them the right to plan, manage, and deliver water services at a cost regulated by the market.

This paper examines the content of the right to water and argues that the right to water is intrinsic to the right to life itself and that these pro-market, development-oriented, water sector reforms are highly discriminatory and unequal in terms of access to water by the week and the marginalized sections of the society.

II. Establishing the Human Right to Water under international and national legal instruments

A. Right to water under International legal instruments:

Water has been recognized as a 'human right essential for living' by international and national legal instruments either expressly or impliedly. Before 2010, the international instruments did not explicitly mention the 'right' until 2010, when the U.N. General Assembly passed a resolution that expressly recognized the "right to safe drinking water and sanitation as a human right that is essential for the fulfillment of life and all human rights."¹² Prior to this, no international treaty has expressly provided a right to water that an individual can uphold against the State. In the same year, the U.N. Human Rights Council also issued a resolution similar to the resolution passed by the General Assembly. It stated that "the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human

and Sustainable Development, 1992, available at <http://www.un-documents.net/h2o-dub.htm>, last visited on 27/12/18.

⁹National Water Policy, 2002, available at: <http://www.dowrrorissa.gov.in/actsnpolicies/nwp/2002/nationalwaterpolicy2002.pdf>, last visited on 27/12/18.

¹⁰Id at 2.

¹¹ Id.

¹² UN General Assembly Resolution on Human right to water and sanitation, 2010 available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/292, last visited on 28/12/18.

dignity."¹³It further reaffirms that "the states have the primary responsibility to ensure the full realization of all human rights, and that the delegation of the delivery of safe drinking water and/or sanitation services to a third party does not exempt the state from its human rights obligations." ¹⁴ The Council also requires the states "to develop appropriate tools and mechanisms, which may encompass legislation, comprehensive plans and strategies for the sector, including financial ones, to achieve the full realization of human rights obligations related to, access to, safe drinking water progressively."¹⁵

The Universal Declaration of Human Rights, 1948 has not expressly mentioned the human right to water. Article 25 of the Declaration states that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services." ¹⁶ Article 25 cannot be guaranteed without ensuring access to clean drinking water by the states.

Before 2010, the two primary international treaties on human rights, the International Covenant on Civil and Political Rights, 1966 (ICCPR) ¹⁷ and the International Covenant on Economic, Social, and Cultural Rights, 1966 (ICESCR)¹⁸, implicitly supported a human right to water but did not expressly mention water as human rights. These two covenants implicitly recognized the right to water. Article 6 of the ICCPR states that "it is the duty of the states to take positive measures to protect the right to life derive from the general duty to ensure the rights recognized in the Covenant".¹⁹ It further states that "the duty to protect life also implies that state parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity."²⁰The duty to protect life also includes providing adequate conditions such as 'access to water' to safeguard life.²¹ The 'right' is more explicitly mentioned under Article 11 and 12 of the

¹³ Resolution adopted by the Human Rights Council on Human rights and access to safe drinking water and Sanitation, 2010 available at:<https://www.right-docs.org/doc/a-hrc-res-15-9/>, last visited on 28/12/18.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Universal Declaration of Human Rights, 1948, Article 25.

¹⁷ ICCPR, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, last visited on 20/03/2021

¹⁸ ICESCR, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>, last visited on 20/3/2021.

¹⁹ General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, Human Rights Committee, available at: <https://oursplatform.org/wp-content/uploads/Right-to-Life.pdf>, last visited on 20/3/2021.

²⁰ Ibid.

²¹ Ibid..

ICESCR. It states that "the state parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The Covenant under this Article has used the word 'including', which indicates that the list of rights mentioned is not exhaustive rather than inclusive of other rights that can be interpreted from time to time. The 'right to water can be said clearly falls within this category as it is essential for securing an adequate standard of living."²² Human Right to Water is vital and indispensable for leading a life with dignity. It can be said that the right to water is a prerequisite for realizing all human rights.

B. Recognizing the right to water in India:

India does not expressly mention a human right to water under any constitutional or legal instruments; however, the courts in India have recognized fundamental right to water within the meaning of Right to Life under Article 21 of the Constitution²³. The constitutional guarantee of clean drinking water can be drawn from various judgments of the Supreme Court of India dealing with the right to food²⁴, the right to environment²⁵, right to health²⁶, all of which have been guaranteed by the Supreme Court under article 21 of the Constitution of India. Article 39(b)²⁷ of the Directive Principle of State Policy also recognizes "equal access to the material resources of the community", which directs the state government to ensure through its policy equality and common good in terms of ownership and control over the material resources of the community. Through various decisions, the Courts in India have protected safe drinking water as a human right. With regard to the nature of water as a resource, the Supreme Court in *M.C. Mehta v. Kamal Nath*²⁸ held that "the Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life."²⁹ The doctrine enjoins the Government to protect the resources

²²General Comment No. 15: The Right to Water, available at: <https://www.escr-net.org/resources/general-comment-no-15-right-water>, last visited on 18-3-2021.

²³ Cullet Philippe, Water Sector Reforms and Courts in India, available at: <http://www.ielrc.org/content/a1006.pdf>, last visited on 28/12/18.

²⁴*Kishen Patnaik and Anr v. State of Orissa*, AIR 1989 SC 677.

²⁵ *M.C. Mehta v. Union of India*, AIR 1988 SCR (2) 538

²⁶*Hamid Khan v. State of Madhya Pradesh*, AIR 1997 MP 191.

²⁷ The Constitution of India, 1950.

²⁸ *MC Mehta v. Kamal Nath*, (1997)1 SCC 388.

²⁹*Ibid.*

for the general public's enjoyment rather than permit their use for private ownership or commercial purposes. The fundamental right to water can also be derived from Article 47³⁰ of the Constitution, and the courts in India, on repeated occasions, have established that the fundamental right to water includes a positive duty on the part of the State to provide water to the public.³¹ Apart from the formal recognition of water as a fundamental right, the legislatures have done very little. No legislation has been adopted relating to the framework for drinking water in India.³² Nevertheless, during the past several years, the Union and the State governments in India took several policy initiatives to regulate clean drinking water. Since the mid-1990s, the law and policy framework for drinking water has dramatically evolved³³; as mentioned earlier, a series of these reforms are known as water sector reforms.

III. The National Water Policy, 2002: A paradigm shift in water sector reforms

India's drinking water management and governance have continuously evolved from the pre-colonial era to the colonial period, the post-colonial, centralized state management and, further to more recent neo-liberal policy reforms.³⁴ The pre-colonial era marked by harmonious traditional community-based management of water.³⁵ Colonialism shifted the ownership and control of water from the community to state-managed water institutions,³⁶ along with the notions of a welfare state and its role in ensuring the fundamental right to water among its citizens. In the 1990s, consensus started taking shape against the government institutions' supply-based mode of water management and delivery. Their poor performance in fulfilling the demands of water supply resulted in an urgent need for a shift from supply-driven to demand-oriented approach,

³⁰ See Article 47 of The Constitution of India.

³¹ Ibid.

³² Cullet Philippe, Realization of the Fundamental Right to Water in Rural Areas: Implications of the Evolving Policy Framework for Drinking Water, *Economic and Political Weekly*, Vol. 46, No. 12 (March 19-25, 2011), pp. 56-62.

³³ Ibid.

³⁴ Joshi Deepa, Caste, Gender and the Rhetoric of Reform in India's Drinking Water Sector, *Economic and Political Weekly*, Vol. 46, No. 18 (April 30-May 6, 2011), pp. 56-63.

³⁵ Ibid.

³⁶ Ibid.

influenced significantly by the World Bank in 1998³⁷. The World Bank, in its report, 1998, has called for "[a]n urgent shift from supply-driven to demand-oriented approaches...an explicit engagement of non-government stakeholders in sector activities."³⁸

In 2002, the National Water Policy gave a detailed understanding of how the private sector should manage and supply water among the citizens. It says, "Private sector participation should be encouraged in planning, developing, and managing water resources projects for diverse uses, wherever feasible. Private sector participation may help introduce innovative ideas, generate financial resources, and introduce corporate management and improve service efficiency and accountability to users. Depending upon the specific situations, various combinations of private sector participation, in building, operating, leasing, and transferring of water resources facilities, may be considered"³⁹. Based on neoliberal ideals, the policy invites and encourages private sector participation in planning, developing, and managing water resources opening various human rights issues central to water privatization. First, whether natural resources like water can/should be treated as an economic good or commodity? Second, how far do these water sector reforms ensure universal access to clean drinking water irrespective of the user's capacity to bear the cost? Commoditization of natural resources occurs when private capital takes over the natural resources like water, which were earlier kept outside the scope of the capital market previously managed and regulated in 'common' by the public or community⁴⁰. The water-based reforms that dominated the developed nations were mainly concerned with creating private property rights for resources previously governed as common-pool resources⁴¹. This paper argues that the production and delivery of essential services like drinking water supply should be kept outside the market economy's scope as the market functions outside the scope of democratic controls. In its various judgments, the Supreme Court has recognized the right to water as a fundamental

³⁷ World Bank, "India - WaterResources Management Sector Review", "Rural Water Supplyand Sanitation Report", 1998 available at:

http://www.indiawaterportal.org/sites/indiawaterportal.org/files/India_Water%20resources%20management%20sect%20or%20review_Rural%20water%20supply%20and%20sanitation%20review_%20World%20Bank_19988.pdf, last visited on 28/12/18.

³⁸ Id at 6.

³⁹ See National Water Policy, 2002 available

at:http://www.indiawaterportal.org/sites/indiawaterportal.org/files/National%20Water%20Policy_%28MoWR%29_2002.pdf (last visited on 28/12/18).

⁴⁰ Terhorst Philipp, Olivera Marcela, Dwinell Alexander, Social Movements, Left Governments, and the Limits of Water Sector Reform in Latin America's Left Turn, available at:https://sites.tufts.edu/iafe/files/2016/05/Social-Movements-Left-Govts-the-Limits-of-Water-Reform-_TerhorstOliveraDwinell1.pdf, last visited on 10/12/18.

⁴¹ Id at 6.

right that can be challenged against the State. Therefore, it can be very well said the State is under an obligation to provide water to all sections of society. The current paradigm shift in water policy cannot be said to address the universal access to clean drinking water to all, especially those belonging to the weak and marginalized sections of the society.

IV. Regulatory framework for the rural drinking water supply

The regulatory framework for the drinking water supply has evolved with time from the 1990s until recently. Water being a State subject, many policy initiatives were taken by the State governments. The 73rd Constitutional Amendment⁴² played a significant role in giving autonomy at the local level, the panchayats, concerning water regulation in rural India. However, the Central Government has also done many reforms in the form of Structural Adjustment Policies⁴³ under the World Bank's influence. One such policy initiative can be identified in the form of the Swajaldhara Project⁴⁴ and Swajaldhara Guidelines⁴⁵. The first critical framework that dominated the water sector before the 1990s was Accelerated Rural Water Supply Programme (ARWSP)⁴⁶. ARWSP gave the foundation to the Rajiv Gandhi National Drinking Water Mission, which first came into existence in 1991.⁴⁷

In the 1990s, the first reform in rural drinking water came into place as the World Bank-funded project, namely, the Swajaldhara Project, 1996⁴⁸. It has brought several policy changes in the drinking water supply in rural India and led to the formation and adoption of the Swajaldhara Guidelines, 2002⁴⁹. These guidelines replaced the previous 'supply-driven approach' and

⁴²The Constitution (Seventy-third Amendment) Act, 1992, available at: <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-seventy-third-amendment-act-1992>, last visited on 20/3/2021.

⁴³Structural Adjustment Policies are the set of economic policies, based upon the neoliberal discourse, that a country must follow in order to take loan from the World Bank or IMF.

⁴⁴Swajaldhara Project, available at:

<http://documents1.worldbank.org/curated/en/746401468774893010/pdf/27288.pdf>, last visited on 20/3/2021.

⁴⁵Guidelines on Swajaldhara, 2002, Government of India, Ministry of Rural Development, Department of Drinking Water Supply, International Environmental Law Research Centre, available at <http://www.ielrc.org/content/e0212.pdf>, last visited on 20.3.2021.

⁴⁶Rural Drinking Water Supply Programme, Rajiv Gandhi National Drinking Water Mission, Department of Drinking Water Supply, Ministry of Rural Development, Government of India, 2000, available at <https://www.ircwash.org/sites/default/files/822IN-17005.pdf>, last visited on 20-3-2021.

⁴⁷Id.

⁴⁸Id at 8.

⁴⁹ Guidelines on Swajaldhara, 2002, Government of India, Ministry of Rural Development, Department of Drinking Water Supply, International Environmental Law Research Centre, available at <http://www.ielrc.org/content/e0212.pdf>, last visited on 20.3.2021.

introduced a 'demand-oriented approach' in managing and delivering the drinking water in rural India. These guidelines introduced a new system of management and delivery of drinking water by converting the water from 'common property' to a 'commodity'. Swajaldhara Guidelines, 2002,⁵⁰ was based upon the connotation that the interpretation of water as a 'social right' was misunderstood and that water should be seen as an 'economic good'. The guidelines were built on the foundation that the previous supply-driven approach in water management and delivery did not take into consideration the user's preferences and were ineffective in carrying out the operation and maintenance activities by the Government. This demand-driven approach treats water as a 'socio-economic' good and prefers the 'users' to get the services at a cost. The paper argues that this new policy initiative by the Government of India in the form of Swajaldhara Guidelines in drinking water supply has ignored the primary constitutional mandate that guarantees a fundamental right to water and casts a duty upon the State to provide and fulfil the right to water to all. This constitutional right extends to the poor and marginalized section of society, who cannot bear the cost of water under this new policy framework of the Government.

Another critical reform in rural drinking water came in the form of the National Rural Drinking Water Programme⁵¹ in 2010, updated in 2013⁵². This new reform brought essential changes in the policy framework concerning drinking water in rural areas and took a new turn on the policy framework since the 1970s. The NRDWP, 2010 sees water as a 'public good' that everyone can demand and as a 'basic need'.⁵³ The significant change brought by NRDWP, 2010 was a shift in the premise from bringing down the focus from the individual to the household, which is contrary to the fact that the right to water is an individual entitlement.

However, this recognition of water as 'public good' or 'basic need' falls incompatible with the existing legal framework that promotes private ownership over water resources and invites private players in water sector management and water delivery.

⁵⁰ Ibid.

⁵¹ See National Rural Drinking Water Guideline, 2010 at http://www.indiawaterportal.org/sites/indiawaterportal.org/files/National%20Rural%20Drinking%20Water%20Programme_MoRD_2010.pdf (last visited on 29/12/18).

⁵² National Rural Drinking Water Programme, Rajiv Gandhi Drinking Water Mission, Movement Towards, Ensuring People's Drinking Water Security in Rural India, Ministry of Drinking Water and Sanitation, Government of India, available at: https://jalshakti-ddws.gov.in/sites/default/files/NRDWP_Guidelines_2013.pdf, last visited on 20/3/2021.

⁵³ Id.

v. Conclusion

The human right to water is central to the issue of water management and water delivery services. The right has been recognized in international instruments, and India's Constitution has guaranteed a fundamental right to water. However, the policy reforms in the past decade advocated treating water as a commodity. This new trend in treating water as a commodity or economic good fundamentally shifted the focus from 'existential human water needs' to 'developmental water needs'. The paper concludes that the Government's policy framework, which treats water as an 'economic good' instead of a 'social right', is highly discriminatory and unequal. This shift from 'commons' to 'commodity' does not guarantee a human right to water, especially to society's weaker and marginalized sections. Hence, the current policy framework concerning the rural drinking water that bypasses the interests of the weak and marginalized section of the society will ultimately bring inequitable access to water in the community. Further, the current regulatory framework for drinking water lacks a binding legal framework for ensuring the right to water to all sections of society. The paper concludes that there is a need for a comprehensive legal framework, especially for ensuring the right to drinking water, focusing on society's underprivileged sections.

ONLINE DISPUTE RESOLUTION - AN EMERGING SOLUTION FOR RESOLUTION OF IBC CASES

Swapna Somayaji*

I. Introduction

“The question today is not whether we should adopt technology but how well do we adopt technology.”- Justice Chandrachud.

“Online Dispute Resolution (ODR) has emerged as a knight in shining armour for justice delivery in COVID-19 times. Yet, the challenges on court dockets will only increase as courts have been functioning at a lower capacity”. Dormaan J. Dalal argues for adopting ODR to reduce litigation burden on Indian courts in a post-COVID world.

“Adopting technology in the Indian Legal system during this unprecedented global crisis would safeguard our ancient custom – Justice, at all Cost, Always!”

The outbreak of pandemic has disturbed liquidation process under the Insolvency Bankruptcy Code, 2016 (hereinafter: the IBC). It has been ordered that the period of lockdown is to be excluded from calculating any statutory timelines under the IBC. Moreover, the NCLAT has also ordered interim stay shall continue to operate till next date of hearing which may be notified later¹. In the light of pandemic, the Insolvency Bankruptcy Board of India (IBBI) has introduced a Regulation 47A to the IBC, 2016 which states that ‘subject to the provisions of the Code, the period of lockdown imposed by the Central Government in the wake of COVID-19 outbreak shall not be counted for the purpose of computing the timeline for any task that could not be completed due to lockdown, in relation to any liquidation process.’²

None of the previous downturn had ever weakened the legal system, Coronavirus is the first Black Swan event leaving long lasting and unpredictable impact on the legal landscape in India.

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¹ <https://nclat.nic.in/Useradmin/upload/7281701495e81d18e254d0.pdf>

² No. IBBI/2020-21/GN/REG060 , INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, <<https://ibbi.gov.in/uploads/whatsnew/4697af9d01b6c12c0816f4be28ea6835.pdf> >accessed on 01 April,2021

The IBC 2016 is considered as landmark legislation for insolvency. India has seen an upsurge in the category of the corporate debtors. With more and more companies getting liquidated and in the current times of changing dimensions of the economy, the corporate world plays a crucial role in maintaining a viable economy. Insolvency norms help corporate sector as well as the economy of the country. Hence, the IBC law was a step towards reformation supporting the corporate world to secure the position of top ten in the ease of doing business index last year.³ Insolvency laws help companies which are facing economic burden and distress by helping them to recover investment by the investors.⁴ The IBC law is useful in ensuring the economy to have beneficial businesses and with sustainable corporate sector in the economy both nationally and internationally. The corporate insolvency occurs the best way to resolve is rapid renegotiation and resolution between the creditors, promoters and stakeholders as and when such arrangements are put into place effectively.

II. Objective of the IBC

The IBC was enacted to consolidate and amend the law of insolvency, revival and liquidation of companies, LLP's, partnership and individuals. The Code repealed Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920.⁵ It amended 11 statutes including SICA, 1985, SARFAESI Act, 2002, Recovery of Debt and Bankruptcy Act, 1993 and the Companies Act, 2013. IBC provides a mechanism of reorganisation and insolvency resolution of debtors in a timely manner. In the pre-IBC era, the growth of the insolvency system in India was flawed with presence of multiple statutes.

The Code was enacted with the primary aim to amend and consolidate the then existing framework relating to reorganization and insolvency resolution of corporate persons in a time bound manner. The Code also aims at maximization of value of the assets of such persons to balance the interest of all the stakeholders.⁶

³ Yogima Seth Sharma, India jumps to 63rd position in world banks doing business 2020 report, ECONOMIC TIMES, (OCT,24,2019, 12:53 P.M.) <https://m.economictimes.com/news/economy/indicators/india-jumps-to-63rd-position-in-worldbanks-doing-business-2020-report/articleshow/71731589.cms>.

⁴ Srijan anant & ayushi Sharma ,A Study Of Insolvency And Bankruptcy Code And Its Impact On Macro Environment Of India ,7, IJEDR , (2019).

⁵ Not yet notified

⁶ Refer Preamble of the Insolvency and Bankruptcy Code, 2016

The Code also provides for timely bound completion of procedure a maximum of 330 days⁷ for insolvency resolution and at the same strikes a balance between rights of the creditors to recover their legal dues and at the same time does not affect the survivability of the corporate debtor. The SC in *Swiss Ribbons v. UOI*⁸-

“The primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.”

A. The status of insolvency matters during the pandemic

The Covid has and will create a large pool of distressed assets across the globe. With a plenty of trial-and-error courts have slowly but steadily adopting themselves to virtual hearings and video conferences as a minimum acceptable alternative.

The negative impact of COVID-19 has resulted in slow down of growth of IBC and smaller businesses who owe small amounts by bigger businesses and are facing difficulties in recovering amounts due to them.

The judicial functioning of the appellate tribunal disrupted several times due to staff being tested positive. This situation made Supreme Court to instruct NCLAT to look into the ways to resume online hearing during its functioning remains suspended on the principle that “the doors of justice cannot be closed”. The IBC has been one of the crown jewels of reforms and helped India to set a mark in a ‘ease of doing business’ index, but the suspension of IBC proceedings during pandemic raised concerns for various stakeholders.

Billions of dollars have been stuck in non-performing companies and IBC became a beacon of hope for freeing the money. It afforded opportunities to many companies to put back into profitable operation. The empirical data has shown that IBC as the most effective resolution framework till date.

By way of the notification dated 25th March 2020 the minimum threshold is increased by 100 times with the object of reducing hardships to MSME’s considering the COVID-19 outbreak and the subsequent lockdown. The post COVID world tilts the balance in favour of lenders rather

⁷ Refer Section 12 of the Insolvency and Bankruptcy Code, 2016

⁸ (2019) 4 SCC 17

than the debtors. Hence the question that arises whether increasing threshold limit under section 4 would help MSME's sector which is facing economic and practical difficulties. The notification may not help to protect the interests of genuine creditors to invoke their claim under section 7 and 9 of the Code despite the fact that 'default' might have occurred prior to Covid-19 pandemic. The object of the notification would result in a heavy cost to genuine creditors.

Hence in the given situation it would be advisable for genuine creditors to initiate appropriate proceedings available under CPC provisions, ADR mechanism or MSME Act, 2006.

B. The scenario of Indian legal system during the prevailing pandemic situation

The COVID-19 pandemic has destabilized the entire world economy during this lockdown period. The world has come to a halt, but disputes remain unresolved. The pandemic has triggered supply chain difficulties, employment issues and raised potential liquidity concerns and this in turn has increased multiple disputes. The International supply chain is also disrupted because countries are going through lockdown phase. This has resulted in inability of the companies to fulfil their contractual obligations. The Law firms are forced to invoke force majeure clauses resulting in suspension of contracts. The lawyers are trying to revise dispute resolution clauses.

The post pandemic situation will give rise to many more cases to arbitrate than ever before. Once Court resumes back to a normal functioning mode, it would have many lawsuits in hand for resolution involving contractual claims, commercial delays, insurance claims and employment claims etc. The parties to a dispute would invoke arbitration clauses and try to recover no fault clauses arising out of pandemic.

The Courts in India have adopted virtual hearing of the cases for urgent matters and few courts are either setting aside the matter or postponing the hearings. The Supreme Court of India is now operating in a digital mode. In the new world today where practicing social distancing is mandatory for all of us, digitalization of dispute resolution mechanism is bound to become the new norm. Hence ODR methods may be considered as a need of the hour in the given situation.

III. Meaning of Online Dispute Resolution (ODR) and feasibility of ODR mechanism in India

Kaufmann-Kohler and Schultz define ODR as the use of ADR with the help of various ICT tools including online litigation and other sui generis forms of dispute resolution. Hence it can be stated ODR is a mechanism for resolving disputes through use of electronic communications and other information and communication technology. ODR mechanism is an application of ADR methods in combination with ICT and is recognised under various enactments like Arbitration and Conciliation Act, 1996, Consumer Protection Act, 2019, Legal services Authorities Act, 1987. ODR includes online mediation, Assisted Negotiation etc.,

A co-joint reading and interpretation of the Arbitration & Conciliation Act, 1996, IT Act, 2000 and Indian Evidence Act, 1872 makes ODR mechanism legally, technically viable. ODR has multiple advantages when compared other adjudication mechanisms of overcoming jurisdictional issues, eliminating geographical barriers and enhances productivity of the professionals contributing towards effective resolution of disputes in a timely manner. Since March 2020, the Supreme Court passed an order announcing it would hear matters through Video Conferencing. The systematic change caused by the pandemic has altered the course of access to justice through a progressive approach of adopting technology for resolution of disputes. In a meeting hosted by NITI Aayog, Justice Chandrachud stated that the relevant question today is- ‘how well can we adopt technology to enhance access to justice and strengthen the rule of law?’ He further mentioned use of technology should promote sense of inclusive justice, justice for which the system is meant to deliver service. The pandemic has accelerated adoption of technology in a unprecedented way to resolve disputes in a timely and efficient manner.

“In the light of pandemic, the system and ODR mechanism emerges as a knight in shining armor for proper delivery of justice. In a post covid world the best way to reduce burden of litigation on courts is to adopt ODR mechanism and ensure effective functioning of the Courts. The increased use of internet and e-commerce in India makes it essential to adopt measures in legislation to ensure quick and effective dispensation of qualitative justice in digital India. Due to devastation Covid-19 is causing the justice seekers no more aspire for traditional methods of dispute resolution especially in commercial disputes between private individuals or entities. “

This necessitates aggressively promoting ADR mechanisms more preferably in virtual form and getting adapted to the new normal.

A. Advantages of ODR mechanism to IBC cases:

In cases relating to the IBC, mediation can be used for settlement of disputes through NCLT. Though IBC was never meant to be used as a money recovery proceeding, it has proved to be useful to small and medium enterprises to recover their pending dues and IBC also has ensured recovery of admitted dues.

As per RBI reports recovery rate in IBC cases is 42% as against 10-18% as per previous regimes. The notification dated March 24, 2020 was meant to protect corporate debtors from proceedings initiated against them during Covid-19, but raising threshold limit from 1 lakh to 1 Crore relegated creditors to regular Civil and Criminal Courts.

In normal times the proceedings would take minimum 3-5 years at trial stage and one can predict that during pandemic proceedings for recovery of claims would take still longer time. Hence government should take all the initiatives to fill the void created by the notification dated March 24, 2020.

With the sudden onset of COVID-19 pandemic, the legal fraternity have been encouraged to adopt commercial mediation in India, because of the impact created by the pandemic situation on the functioning of physical courts.

As per the report in business standard which appeared on April 22, 2019 the government initiates to insert a provision of mediation in IBC matters in order to make it cost effective and for timely resolution of cases. If IBC is reviewed the government should introduce a pre-packaged resolution and use of artificial intelligence. Though IBC stipulates 180 days extendable to further 90 days more for resolution of cases, timelines are not strictly adhered.

In Ontario, the Supreme Court has passed an order to make use of video conferencing and teleconferencing from urgent matters to all the matters.

The Supreme Court of Singapore issues guidelines to use Audio and video conferencing for hearing matters using Zoom. The COVID-19 (Temporary Measures) Act, 2020 allows court proceedings to be conducted using remote communication technology (e.g. teleconference/video conference)

Internationally the world witnessed in case of Lehmann Brothers Holdings mediation served as a best strategy for resolution of insolvency disputes in United States.⁹ With the great understanding of importance and potential of use of mediation, report of Bankruptcy Law reforms Committee suggested the process of the negotiated settlement between creditors and debtors without any involvement of the Court.¹⁰ Though IBC Code prescribes a time limit for resolution of disputes, they are hardly complied due to delays at NCLT. To overcome the present delays occurring in resolution of IBC cases the legislation can give consideration to mediation mechanism which has proved successful so far in other jurisdictions.¹¹ To further expedite the process of IBC ODR mechanism could be duly considered.

(a) Recognizing ODR's potential by judicial member

In a stakeholder's meeting titled as "Catalysing Online Dispute Resolution in India"¹² organized by NITI Aayog on 12th June 2020, Justice Indu Malhotra elaborated on advantages of ODR mechanism as an expeditious and cost effective for resolution of disputes especially the commercial disputes relating to MSME and disputes under IBC, 2016. D. Y. Chandrachud J., made an observation about utility of ODR a best mechanism to avail justice and use of technology to promote a sense of inclusive justice. He stated ODR can be used for dispute containment and dispute avoidance services in addition to dispute resolution. Justice Sanjay Kishan Kaul acknowledged potential of ODR for resolution of disputes arising during COVID-19 pandemic as well as personal and commercial disputes.

Justice (Retd.) B.N. Srikrishna in a meeting organised by NITI Aayog titled as 'Unlocking Online Dispute Resolution to Enhance the Ease of Doing Business' made an observation that ODR systems will prevent cluttering of Courts by resolving a large number of disputes.¹³

⁹ Kayjal Dasan and Samuel Seow, 'Seminar Review: Mediation in International Insolvency, International Arbitration Asia (20 September 2015) accessed on 14 October 2020.

¹⁰ Bankruptcy Law Reforms Committee, 'The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design' Insolvency and Bankruptcy Board of India (November 2015), accessed on 14 October 2020.

¹¹ Veena Mani, 'Changes in IBC will allow provision for mediation to cut costs, time' Business Standards (22 April 2019) accessed 14 October 2020.

¹² NITI Aayog, 'Catalyzing Online Dispute Resolution in India' (12 June 2020) accessed 20 October 2020

¹³ NITI Aayog, 'Unlocking Online Dispute Resolution to Enhance the Ease of Doing Business' (25 August 2020) accessed 3 October 2020.

Insolvency activities would become more and more hectic than before the pandemic due to Covid induced financial stress. To overcome the impact of economic disruption of Covid-19 the Govt., should take a series of initiatives to keep struggling businesses afloat.

B. Legislative measures during pandemic to deal with financial disruptions and insolvency cases

In 2020 when the first wave of the COVID-19 pandemic started with the lockdown being announced throughout the world causing a lot of unprecedented economic disruption. During 2020-21 constricted to 7.7%. To deal with this disruption the RBI and Central Government announced a series of measures like forbearance measures to support businesses. The RBI has given an option to provide a six-month loan repayment moratorium and retain asset classification of accounts. This ensures that banks would not take any kind of coercive action for the defaults that have occurred due to the COVID-19,

Even the Government of India announced that insolvency proceedings cannot be initiated under the IBC, 2016 for the defaults that have occurred between March 25th 2020 and March 25th 2021. The Government also announced that for any defaults that occurred prior to March 25th 2020 insolvency proceedings could not be initiated unless default amount was more than 1 crore. The government introduced all these measures to prevent businesses to enter into insolvency proceedings due to temporary distress attributable to COVID-19. Even recourse to insolvency proceedings under the IBC was also suspended to 'flatten the bankruptcy curve' and also to relieve NCLTs already combating with infrastructural and capacity constraints from dealing with large volumes insolvency proceeding applications as in the given situation NCLT was expected to hear only urgent cases.

The relaxation with regard to the strict requirements to complete CIRP within 330 days was passed by an order of the NCLAT [LSI-485-NCLAT-2020(NDEL)] and with regard to taking of various steps in CIRP and liquidation processes within stipulated timelines were eased by regulatory changes.

Earlier this year the government also introduced a special pre-packaged insolvency resolution process to deal specifically with distress of MSMEs. Under this MSME debtors who have committed default of at least INR 10 lakh are eligible for PPIRP to negotiate with base plan for the creditors. Once 75% of its members and 66% of its unrelated financial creditors approve the

proposal to initiate PIRP the pre-existing management continues to stay in possession of the company with the oversight of the Committee of Creditors.

After a yearlong moratorium on taking the financially stressed companies for NCLT resolution under IBC, the normal functioning was restored in the last week of March 2021. The moratorium was lifted in line with the opening of the economy during March 2021. The situation again reversed after the outbreak of second wave of COVID-19. The foray towards strong economic recovery supported by timely economic and policy interventions is now being with a rise in COVID-19 cases across the States.

In the light of changing situation of second wave of COVID-19 placing NCLT resolution process under suspension again till December this year would be a critical interim measure that would require urgent steps till the targeted assistance would be given through comprehensive assessment. The Government and RBI are proactive in extending regulatory and fiscal support to the industry, particularly the MSMEs. The second wave has brought another set of uncertainty where the country is equipped only with medical infrastructure in form of vaccination, hence there is a need to ring fence the economy for sake of protecting jobs and businesses.

The second wave of COVID-19 has resulted in overall economic slowdown of all the businesses which has resulted in demand being made for further twist in the insolvency regime to tide over the crisis. In the first wave of the pandemic measures such as suspension of initiation of CIRP on the basis of fresh defaults under IBC, 2016, measures by RBI to grant moratorium and facilitate restructuring for distressed assets were announced. The economic distress on account of second wave is substantial, restructuring activity including under IBC should not be completely suspended.

The recent special pre-packaged insolvency resolution process introduced by the government specifically to deal with the distress of MSMEs should be accompanied with appropriate modifications allowing out of court admissions resulting in a moratorium for a limited period at least so that NCLTs would not be overburdened with the applications.

(a) Effect of Notification dated 25th March 2020

The notification on 24th March 2020 by Ministry of Corporate Affairs increased threshold value for initiating CIRP against corporate debtors was increased from 1 lakh to 1 crore. During

this period even section 7, 9 and 10 of IBC, 2016 was suspended for a period of 6 months to 1 year.

The reforms in IBC laws certainly provides some relief to the corporate sectors in a challenging time of pandemic but when considering the objective of IBC which mainly aimed to strike balance between the interest of all stakeholders and not just among few. But the reforms made may not serve the purpose with which IBC was enacted.

If IBC proceedings get suspended at this hour, banks will initiate proceedings under SARFAESI Act and other recovery laws and statutes which would deprive debtors from the benefits of the Code and create contradiction.

Hence the government should once again relook into the reforms and give clarifications to mark an end to the conundrum created by recent changes under the IBC. A balanced approach should be adopted and reforms have to come in the form that it will benefit stressed companies without negating the objectives of IBC.

(b) Relaxations to begivenduring Second Wave of COVID -19

Emergency operational measures can be put in place and relaxation could be given in timelines for ongoing insolvency proceedings under the IBC. This would take care of companies not going into forced liquidation and stakeholders do not suffer for being unable to carry out activities on account of lockdowns and COVID-19 and would avoid rushing to NCLT to seek necessary exclusion of time resulting in cost and unpredictability.

In the given circumstances rather than staging off insolvency resolution and postponing the problem to the future, out of court restructuring and one time settlement through the process of mediation should be encouraged which would ultimately serve the interest of all the stakeholders. The RBI can make necessary provisions to facilitate out of court restructuring with potential standards.

Quick and amicable resolution of IBC cases especially cross-border and group insolvency issues would further facilitate foreign investments as international commercial activity is slowly picking up. This would in turn boost Indian economy by attracting foreign investment into distressed assets. This step is essential as it could be predicted even if infection rates stabilise Indian economy can continue to have a slump in economic activity making it necessary to have liquidity support from the Government to prevent redundancy and promote reconstruction in

priority sectors. The lacunae that exist in IBC Code in a form of judicial delays and regulatory uncertainty has dampened the interest of international investors in the Indian distressed market. Time and cost efficiency of insolvency resolution outcome under IBC will go a long way in re-enforcing investor confidence.

Adoption of various resolution options like ADR strategies as regulatory mechanism under IBC will make inflow of foreign investment in stressed loans and distressed assets. The Government should also make efforts in expanding resources to build capacity of NCLTs not only by increasing benches but also by improving virtual hearing and case management tools. These measures would ensure effective resolution of distress in the economy.

V. Current scenario of mediation under statutory provisions

In today's globalised world the Central Government has initiated several legislative measures to promote mediation: For e.g. Under Sec. 4 of ID Act, 1947 Conciliators are under the duty to mediate and promote settlement of industrial dispute. Through amendment to CPC in 2002 Section 89 Order X Rule 1A provided for reference of cases pending in Courts to ADR. Order XXXIIA of CPC recommends mediation for settlement of family disputes.

Section 442 of the Companies Act, 2013 read with the Companies (Mediation and Conciliation) Rules, 2016 provides for referral of disputes to mediation by NCLT and NCLAT.

The MSME Development Act, 2006 mandates conciliation for disputes arising out of payments to MSMEs.

HMA, 1955 and Special Marriages Act, 1954 requires the Court in the first instance to attempt mediation between the parties.

Section 32 (g) of the Real Estate (Regulation and Development) Act, 2016 provides for amicable conciliation of disputes between the promoters and allottees through dispute settlement forum set up by consumer associations.

The 129th law Commission of India Report recommends courts to refer disputes for mediation compulsorily.

The 2018 Amendment to the Commercial Courts Act 2015 (section 12A), made it mandatory for parties to exhaust remedy of pre-institution mediation under the Act before instituting a suit. The Government has framed the Commercial Courts (Pre-Institution Mediation and settlement) Rules 2018 (PIMS Rules). The new Consumer Protection Act, 2019 under Section 37-38

provides for the dispute to be first referred to mediation. As regards International disputes India is a signatory to the United Nations Convention on Mediation which gave mediation settlements the force of law.

A. New way forward

The present pandemic situation leading social distancing orders will remain in force even after the present situation becomes normal. The present situation is likely to transform the Indian Legal system leading to digital era restructuring its landscape. The directions of the judiciary to introduce virtual court system in order to make justice accessible to all is a welcome change for attaining the principle of 'justice must not only be done but seen to be done.' The challenges in the present scenario should be utilized as an opportunity for the Indian Legal system to revamp and strengthen their operating procedures to mitigate the effects of the Covid-19.

The Hon'ble President on 4th April 2021 promulgated an ordinance on IBC (Amendment) Ordinance, 2021 which added Part III-A to the IBC, 2016 providing a framework for pre-packaged insolvency resolution for corporate debtors qualifying as MSME resolution (Prepack). This ordinance is in pursuance of a backdrop of Covid-19 pandemic on MSMEs as pandemic exposed many of small businesses to severe financial distress. On March 24th, 2020 the Government by way of notification raised minimum threshold limit to 1 crore for initiating Corporate Insolvency Resolution processes from earlier INR 1 lakh. This resulted in suspension of new insolvency proceeding defaults occurred after 25th March 2020 irrespective of size of the default. The ordinance was promulgated with an intention of providing alternative insolvency resolution process for MSMEs to ensure value maximizing outcomes for all the stakeholders.

The report of the sub-committee on prepack suggested a prepack framework with a combination of speed, efficiency and flexibility of an informal process with binding effects and structure of a formal process. Hence the prepack framework envisages completion of certain actions prior to formally filing an application for commencement of pre-packaged insolvency resolution process thereby keeping most of the time taking actions outside the rigors of a formal process.

The present situation around the world has affected the economy causing disruption in demand and supply chain. The situation worsens day by day bringing financial institutions on its knees due to increase in NPAs and default by corporations. Various policies are framed by the

government to protect the economy by reducing interest rates or by way of introducing ‘economic stimulus’ to balance economic disruption.

The NCLAT in *Vivek Bansal v. Burda Druck Pvt., Ltd.*,¹⁴ permitted parties to exit CIRP half the way and settle through an agreement. This came as a relief to all those corporate debtors who are in the process of resolution. The NCLAT using its inherent power under Rule 11 of NCLAT Rules 2016 (“Rule-I”) set aside the order of NCLT and permitted the parties to exit the CIRP.

The Supreme Court in *Uttara Foods Pvt Ltd. v. Mona Parachem*¹⁵ directed the competent authority to make changes in the code through which the NCLT/NCLAT may allow such settlement, which would restrict unnecessary appeal filed before the Apex court.

The Insolvency Law Committee discussed this issue; following which section 12 A was inserted in the code, by IBC (Second Amendment) Act, 2018. Section 12A gives the power to the adjudicating authority to allow such settlement when it gets the support of at least 90% voting share of the Committee of Creditors (“COC”).

In *Swiss Ribbons v. Union of India*,¹⁶ the apex court observed that even if CoC hasn’t been constituted, the NCLAT may allow the settlement agreement using its inherent power under Rule 11 of the Rule-I. Hence, this judgment extended the scope of inherent powers under Rule 11 to matters under the I&B Code.

B. Importance of ADR during the current crisis

The second wave of the Covid-19 would further delay resolutions under the IBC and increase haircuts for lenders through realisations for financial creditors through IBC is likely to improve under the Code during the financial year 2022. The effects of Covid 19 pandemic in financial year 2021 battered the prospects for stressed asset resolution. The Covid has increased operational challenges for various parties involved in CIRP which is yielding a limited case resolution plan.

The unprecedented effects of the COVID – 19 crisis on the global economy and small businesses have created extraordinary pressures leading to large scale closures and loss of job. It was estimated that 30 million small business jobs were lost in USA alone (Dua et al, 2020). Parallely, technology continues to shape commercial sectors with an existing reality of social

¹⁴Company Appeal (AT) (Insolvency) No. 552 of 2020). (NCLAT) dated (14.07.2020).

¹⁵ C. A. No. 18520 of 2017 (Arising out of SLP (C) No. 26824 of 2017) | 13-11-2017

¹⁶2019 SCC Online SC 73

distancing including in the operations of Courts financial markets and the way commercial disputes are resolved. Those who are well versed with technologies are likely to have an advantage over others with regard to delivery of services.

It is against this backdrop that an increasing interest in the form of ADR is gaining popularity in the form ODR in the combination of traditional ADR techniques such as negotiation, mediation and arbitration or a combination of different ADR processes with different innovative techniques and online technologies to the process, even with multiple stakeholders without any access to physical facilities.

ADR is a process for resolving a dispute other than adjudication by a judge in a statutory Court. The term ADR has negotiation, conciliation, mediation and arbitration and can be provided by private institutions, courts. Nowadays even government has appreciated the importance of ADR to address financial distress before business becomes insolvent during 'pre-insolvency stage' for rescuing the business.

Since the time IBC is enacted huge cases are still remain pending for resolution. The average time taken for completion of cases is beyond 330 days as set by the Code. This delay has caused financial distress and heavy monetary losses. Hence alternatives like settlement outside the Court is viable in given situation. ADR mechanism is more feasible for the reason that pandemic hits India's economic activities causing a greater shrinkage. In the economic turmoil persisting as on today takeover is not beneficial as businesses are in distress nor current market is favourable for liquidation hence creditors can go for settlement outside the court.

The IBC ordinance 2020, has suspended the initiation of CIRP for any default after 25th March for 6 months. This means that CIRP cannot be initiated, for any default by a corporation within this period. The implication would make it more favorable, even for financial creditors to follow a settlement, which wasn't earlier preferred, owing to the institutional formalities and the nature of lending.

In a recent verdict of *ES Krishnamurthy v. Bharath Hitech Builders*,¹⁷ NCLAT observed that considering the present crisis; a concession can be given to the corporate debtors to settle their claims in matters where a time limit has been given for settling all the claims of creditors.

Under section 230 of Companies Act, 2013 an alternative remedy exists for the parties seeking a settlement. This right can be exercised in today's scenario as suspension of CIRP has

¹⁷Company Appeal (AT) (Insolvency) No. 649 of 2020

taken away the right of the creditors available under the Code. The parties can seek relief by applying to NCLT for settlement.

It was affirmed in the case of *S C Sekaran v. Amit Gupta & Ors.*¹⁸ NCLAT made an observation that liquidation results in corporate death and to prevent that court can interfere at any time with resolution process to alternative methods on an application filed under section 230 provided alternative is in the interest of all the parties.

With enactment of IBC the scope of settlement is given more flexibility as inferred in *Brilliant Alloys Pvt., Ltd., v. Rajgopal*¹⁹ the Apex Court considered the matter pertaining to regulation 30A of CIRP Regulations 2016 which stipulates that application for withdrawal under section 12A shall only be allowed before the invitation for expression of interest. The court held this regulation to be merely directory depending upon facts and circumstances of each case.

VI. Conclusion

The legislations have to be amended to include ODR mechanisms for resolution of insolvency disputes. The Covid-19 has retarded the wheels of the Indian economy of the corporates and in order to respond to the dynamics of the business environment which is changing every second in the wake of the globally spread WHO declared pandemic the central government has responded in a structured manner by providing various sops, relaxations, extensions and amendments to the existing legal framework in the country. Across the globe, it is observed that the corporates are experiencing financial instability due to COVID-19 due to suspension of new proceedings under the IBC.

Hence, in the given situation ODR can be a better platform as it serves to be simple, affordable and appropriate. There would be a deluge of cases post COVID and we need a collaborative mechanism for dispute resolution that do not require parties to approach Courts and for any dispute at International and national level including small and medium value disputes could be resolved by adopting alternate means of dispute resolution. The mechanism of ODR should be used by judiciary to address long standing problems of delay impairing present judicial system. Though ODR is still in its infancy stage it is just a matter of time before ODR is

¹⁸Company Appeal (AT) (Insolvency) No. 495 & 496 of 2018

¹⁹SLP Civil No. 31557 of 2018

positioned as a legitimate dispute resolution mechanism. Mainstreaming ODR will require a favourable ecosystem of law to support its growth in India. The government should take a leap to enrich our legal culture by incentivising out of court resolution of dispute especially through ODR process.

ODR is a promising tool to redress a long-standing problem of justice delivery. The current Covid19 crises people have come forwards to accept technology to ease their daily lives. The present time is a better time to harness ODR's potential, which through adoption of technology has been responsive and adaptive to the needs of its users and thereby promoting legal health by reducing judicial pendency.

CRITICAL REVIEW OF THE INDIAN COUNCIL OF MEDICAL RESEARCH ETHICAL CODE OF CONDUCTS

Kanchan Yadav*

I. Background of the Indian Council Of Medical Research (ICMR) Code

The medical or biomedical sector is one of the primary areas where the operation of a carefully constructed ethical code of conducts is desperately needed, closely followed by the scientific community. In fact, even in the oldest discovered Indian medical documents, *Charaka Samhita* and *Sushruta Samhita*, references to professional code of conducts can be found¹. As the medical community directly deals with the life, health, and wellbeing of people, be it from a professional perspective or a research perspective, it becomes essential to mandate a code of conducts to protect the interests of the participants or patients. On the other hand, while protecting their interests, this code cannot be so restrictive as to hinder research and progress in various areas of the biomedical sector. Without such research on human participants, lifesaving treatments and medicines would never be discovered². Thus, the job of any ethical code in this arena is primarily to bring in and maintain a balance between the current interests of the participants and the prospective interests of the human race.

As biomedical sciences have been advancing in leaps and bounds in the previous few decades, a number of new nuances and problems have come up, which were perhaps never considered before³. To combat these problems, the last century saw a sharp increase in the number of ethical policies and guidelines related to medical and biomedical research, both in the national and international levels. One of the first global level interventions in this sector was the Nuremberg Code of 1947, which was a direct result of the severely unethical and cruel medical experiments that were conducted by German doctors during the pre-World War II era⁴.

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¹Indian Council of Medical Research, National Ethical Guidelines for Biomedical and Health Research Involving Human Participants (2017).

²JS Srivastava, Need for Ethical Oversight of Clinical Trials in India, 99 CURRENT SCIENCE 1505 (2010).

³Indian Council of Medical Research (n 1).

⁴*United States of America v. Karl Brandt et al* (American Military Tribunal).

In the context of India, the Indian Council of Medical Research or ICMR, funded by the Ministry of Health and Family Welfare, Government of India, is the first and foremost body in India when it comes to biomedical research⁵. The history of the organization dates back more than hundred years, in 1911, when the Indian Research Fund Association (IRFA) was set up by the Government of India to aid and promote medical research in the country. After independence, in 1949, it was reformulated as the Indian Council of Medical Research⁶. The central office of the body is situated in New Delhi, however, it has a number of national and regional institutes and research centres that deal with specific diseases plaguing the Indian society.

The first document published by the ICMR related to ethical guidelines dates way back in 1980, in the form of the 'Policy Statement on Ethical Considerations Involved in Research on Human Subjects'. Revisions were made in 2000 as the 'Ethical Guidelines for Biomedical Research on Human Subjects', in 2006 as the 'Ethical Guidelines for Biomedical Research on Human Participants', and finally in 2017, it has been revised and published as the 'National Ethical Guidelines for Biomedical and Health Research Involving Human Participants'. The current version of document acknowledges its roots and influences to the Nuremburg Code itself⁷. Given the changing backdrop of the biomedical sector, such a reformulated guideline has been extremely welcome.

One of the primary reasons why this code is extremely important in the Indian context is related to the social and cultural makeup of the nation. Given that India is a nation of 1.35 billion people, it has a great deal of socio-cultural diversity, which signifies that a large section of the people is somehow or other in a disadvantageous position than the rest. Some people may be victims of discrimination from a caste or religion based perspective, others may be suffering due to their economic background, and even others may be facing difficulties due to illiteracy. For that reason, whatever comprehensive code came into play, it would have to make sure to take into account all of these various inequalities and disadvantages that different people may have.

⁵About ICMR <<https://www.icmr.gov.in/aboutus.html>> accessed 27 December 2020.

⁶Timeline - ICMR <<https://www.icmr.gov.in/timeline.html>> accessed 27 December 2020.

⁷Indian Council of Medical Research (n 1).

The good news here is that the current document provides adequate reference to these different inequalities⁸.

From an ethical point of view, it can certainly be said that while the ICMR ethical guidelines have shown considerable improvements through its various versions in the last four decades, it is still far from perfect. This article will briefly discuss three of its primary problem areas – the evolution of the title itself and the use of problematic language in the same, the various implementation related issues with respect to the ethic committees (EC), and the inadequate protection of interests of the vulnerable population. In these areas, significant gaps still remain, which ensure that the ethical boundaries of medical and biomedical research are often violated.

A. Existing problem areas

While looking at the history of the ethical guidelines, it seems evident that with each revision, the title of policy has been changed. The first document, published in 1980, was under the name ‘Policy Statement on Ethical Considerations Involved in Research on Human Subjects’. It is evident that this is only a policy statement with respect to the ethical considerations, and very little authoritative value could be attached to the same⁹. Also interesting is the use of the term ‘Human Subjects’, which is derogatory to a great extent. This terminology implies the existence of an inherent power imbalance with the scientists or researchers holding the bulk of the power, and the participants acting merely as ‘subjects’, to be utilized as the researchers prefer¹⁰.

The next revision in this policy document came two decades later, in 2000, in the form of the ‘Ethical Guidelines for Biomedical Research on Human Subjects’. It can be seen from an analysis of the title that this document is no longer simply a policy document, it is now an ethical guideline, and various enforcement mechanisms were also provided with respect to the same¹¹. However, sadly, even as recently as in 2000, the document still featured in its title that the guidelines were essentially related to ‘human subjects’. During this phase, even though there had

⁸ibid.

⁹Indian Council of Medical Research, Policy Statement on Ethical Considerations Involved in Research on Human Subjects (1980).

¹⁰David Nderitu and Eunice Kamaara, An Analysis of India’s 2017 National Ethical Guidelines for Biomedical and Health Research Involving Human Participants: The Social and Behavioural Sciences Aspect, 3 Indian Journal of Medical Ethics (2018).

¹¹Indian Council of Medical Research, Ethical Guidelines for Biomedical Research on Human Subjects (2000).

already been a number of global level initiatives in the medical and biomedical communities to change the term ‘human subjects’ and to ‘participants’ or ‘respondents’, this change is not reflected in the ICMR guidelines¹².

It was not as late as 2006, till this drawback was rectified. In 2006, the revised document by the name of ‘Ethical Guidelines for Biomedical Research on Human Participants’ was released, acknowledging the role of the concerned people not as subjects, but as participants¹³. However, one glaring drawback is that the research, according to the title, would be done ‘on’ the human participants – effectively still making them the passive receptors of the research¹⁴. This defect was cured in the recent version of the guidelines, in 2017, when the ‘National Ethical Guidelines for Biomedical and Health Research Involving Human Participants’ was released¹⁵. Though this title still does not do complete justice to the role of the participants in research, it bridges an important gap with respect to their roles – in as much that they are participants in the research, and the research is being done not ‘on’ them, but ‘involving’ them.

On the other hand, the latest document also includes ‘Health Research’ in the title, something that was absent in the previous versions. Essentially, this broadens the scope of the research that is to be done, but at the same time, raises a few ambiguities. Considering that biomedical research is done with a health motive only, it seems redundant to mention both of them in the title, unless the ICMR is aiming to include biomedical research done without a health perspective under its purview as well. However, the long-term consequences of this change in the title remain to be seen.

II. Operation of the Ethics Committees

The Ethics Committees formulate an important part of the 2017 guidelines, and they are seen as important stakeholders in the research process. Their responsibility is to “safeguard the dignity, rights, safety and well-being of all research participants”¹⁶. The responsibility is upon the researching institution to formulate an EC, which will function independently and approve

¹²Petra M Boynton, People Should Participate in, Not Be Subjects of, Research, 317 BRITISH MEDICAL JOURNAL 1521 (1998).

¹³Indian Council of Medical Research, Ethical Guidelines for Biomedical Research on Human Participants (2006).

¹⁴David Nderitu and Eunice Kamaara (n 10).

¹⁵Indian Council of Medical Research (n 1).

¹⁶ibid.

the research proposal as well as monitor the ongoing research process. The code encourages every EC to have members with multi-disciplinary and diverse backgrounds, some of whom are ideally not employees of the institution, and comprising of medical scientists, clinicians, legal experts, social scientists, ethicists, and laypersons alike¹⁷.

However, while detailed regulations regarding the composition, qualification, and operation of the ECs have continued to exist even in the previous versions of the ICMR guidelines, in practice, they have been ineffective in a number of cases. In fact, due to the lax operation of the ECs, India has been a popular destination for international organizations to conduct clinical researches¹⁸. Just a few years ago, in 2009, the ethical irregularities related to the human papilloma virus (HPV) vaccination program made news, where many young school-aged girls were vaccinated without the proper informed consent process¹⁹. Right now, at the crux of the Covid-19 vaccination program, it is a scary prospect that such instances may very well be repeated.

One of the primary problems regarding the ECs is that they essentially run within the institutional hierarchy, in spite of being dubbed as ‘independent’. The “logistical support, such as infrastructure, staff, space, funds, adequate support and protected time”²⁰ for conducting their operations are provided by the institutions themselves, and it certainly poses a conflict of interest²¹. Additionally, due to a lack of properly trained experts and ethicists, the ECs tend to act more as a symbolic authority than a real one. A study conducted by ICMR itself was able to deduce the poor conditions related to recruitment, competency of the members, and operation processes when it came to most ECs in the country²². It was also found that often, after the initial signing off process in the proposal, the ECs do not partake in the periodical review of the research that is mandated in the guidelines²³.

¹⁷ibid.

¹⁸Srivastava (n 2).

¹⁹Caroliijn Terwindt, Health Rights Litigation Pushes for Accountability in Clinical Trials in India, 16 HEALTH AND HUMAN RIGHTS 84 (2014).

²⁰Indian Council of Medical Research (n 1).

²¹Sandhya Srinivasan, Clinical Trial Industry: No Accountability?, 46 ECONOMIC AND POLITICAL WEEKLY 19 (2001).

²²Nandini K. Kumar, Bioethics Activities Under ICMR (Indian Council of Medical Research).

²³Mira Desai, Ethics Committee: Critical Issues and Challenges, 44 INDIAN JOURNAL OF PHARMACOLOGY 663 (2012).

III. Protection of vulnerable population

Another area of problem that exists in the current guidelines is related to the research ethics with respect to vulnerable people. The document defines vulnerable persons as “Those individuals who are relatively or absolutely incapable of protecting their own interests because of personal disability; environmental burdens; social injustice; lack of power, understanding or ability to communicate or are in a situation that prevents them from doing so”²⁴. For these vulnerable people, in order to protect their interests due to their own relative inability to protect the same, special provisions have been provided. As a vulnerable person may not be able to provide their informed consent with respect to the research, consent is usually obtained from a legally acceptable / authorized representative or LAR²⁵. However, a number of problems exist with respect to how the vulnerable people have been defined, and also regarding the consent system via the LAR.

To begin with, the document provides two lists regarding who may be under the scope of vulnerable populations. The first list provides different identifying characteristics of the vulnerable individuals or populations or group, and the second list provides some examples of the vulnerable populations or groups.

List I²⁶

Characteristics of vulnerable individuals/populations/group

Individuals may be considered to be vulnerable, if they are:

- socially, economically or politically disadvantaged and therefore susceptible to being exploited;
- incapable of making a voluntary informed decision for themselves or whose autonomy is compromised temporarily or permanently, for example people who are unconscious, differently abled;
- able to give consent, but whose voluntariness or understanding is compromised due to their situational conditions; or
- unduly influenced either by the expectation of benefits or fear of retaliation in case of refusal to participate which may lead them to give consent.

²⁴Indian Council of Medical Research (n 1).

²⁵*Supra* 24

²⁶*ibid.*

It can be seen here that for a person to be considered as vulnerable, one or more of these characteristics need to be there. While that may be fine in theory, this is difficult to apply, specifically due to the broad and ambiguous wording of these characteristics. For example, the first point simply mentions that it would include the people who are ‘socially, economically or politically disadvantaged’²⁷, but does not define any of the same. In a country as vast and diverse as India, it is extremely difficult to determine what would be considered ‘disadvantaged’ in various social, economic, or political spheres, without there being some minimum thresholds of the same.

List II²⁸

Vulnerable populations or groups

Following are some examples of vulnerable populations or groups:

- economically and socially disadvantaged (unemployed individuals, orphans, abandoned individuals, persons below the poverty line, ethnic minorities, sexual minorities-lesbian/ gay /bisexual and transgender (LGBT), etc.);
- unduly influenced either by the expectation of benefits or fear of retaliation in case of refusal to participate which may lead them to give consent;
- children (up to 18 years);
- women in special situations (pregnant or lactating women, or those who have poor decision-making powers/poor access to healthcare);
- tribals and marginalized communities;
- refugees, migrants, homeless, persons or populations in conflict zones, riot areas or disaster situations;
- afflicted with mental illness and cognitively impaired individuals, differently abled - mentally and physically disabled;
- terminally ill or are in search of new interventions having exhausted all therapies, suffering from stigmatizing or rare diseases; or
- have diminished autonomy due to dependency or being under a hierarchical system (students, employees, subordinates, defence services personnel, healthcare workers, institutionalized individuals, under trials and prisoners).

This second list, while it provides some examples of various people who might be counted as vulnerable populations, does not improve the scenario by much. It does provide some examples of people who might be economically and socially disadvantaged (though political disadvantages

²⁷ibid.

²⁸ibid.

are not mentioned), like unemployed individuals, persons below the poverty line, ethnic and sexual minorities, etc.²⁹. However, on the very face of it, it leaves out a number of other important vulnerable groups such as the illiterate people, older people, *pardanashin* women, etc.³⁰. Even though it is provided that this is not an exhaustive list, in action, the further guidelines provided under section 6 pertain only to these particular populations which have been mentioned—effectively turning a blind eye to the needs of a number of other vulnerable groups.

Another area of problem that exists with respect to the vulnerable population, is regarding the consent that has to be obtained from the LARs. It provides that in order to avoid manipulation or coercion of the participants, “additional precaution should be taken to avoid exploitation/retaliation/reward/credits, etc., as they may either feel intimidated and incapable of disagreeing with their caregivers, or feel a desire to please them”³¹. However, this is an extremely loose guideline, as it does not provide what form this additional precaution would take. This also has a great potential for conflict regarding the guidelines for payment for participation, which says that “participants may be reimbursed for expenses incurred relating to their participation in research, such as travel related expenses. Participants may also be paid for inconvenience incurred, time spent and other incidental expenses in either cash or kind or both as deemed necessary (for example, loss of wages and food supplies)”³². Both of these statements seem to be mutually contradictory. Given that poverty and unemployment are extremely prevalent issues in India, under the current guidelines, there seems to be almost no safeguard in place against the LARs manipulating or coercing the vulnerable persons to participate in research just to get paid for the same. Even though the guidelines provide that “When the LAR is giving consent on behalf of a participant, payment should not become an undue inducement and to be reviewed carefully by the EC”³³, in reality, that is almost impossible to determine, particularly in the context of the continuous shortcomings of the ECs themselves³⁴.

²⁹ibid.

³⁰Preethi Shivayogi, Vulnerable Population and Methods for Their Safeguard, 4 PERSPECTIVES IN CLINICAL RESEARCH 53 (2013).

³¹Indian Council of Medical Research (n 1).

³²ibid.

³³ibid.

³⁴Urmila M Thatte and Padmaja A Marathe, Ethics Committees in India: Past, Present and Future, 8 PERSPECTIVES IN CLINICAL RESEARCH 22 (2017).

IV. Recommendations and conclusion

Overall, it seems that while the 2017 National Ethical Guidelines for Biomedical and Health Research Involving Human Participants is bridging an important gap when it comes to research ethics in the sphere, it has numerous defaults from both regulatory and implementation perspectives. Without a strong ethical guideline in place, India will continue to become the favourite destination of international researchers, but at the cost of the health and safety of its own citizens³⁵. Given that in the next few months and years, there is likely to be a surge of biomedical research with respect to the Covid-19 virus, now is high time to tighten up the existing guidelines.

The first and foremost thing that a new version of the guidelines should take into account is its scope, which is currently only poorly outlined by the title. The selection of an appropriate and modified title for the document is also important, but not as important as clarifying the scope first. Without the same, one is reduced to determining the scope of the document from the title itself, which has a large probability of inaccuracy. This scope should clarify the applicability of the guidelines with respect to the fields of research and the different stakeholders, the legal nature of the guidelines, and areas which are kept outside the purview of the same. This will bring some much-needed clarity regarding the operational extent of the guidelines.

The problem related to the Ethics Committees cannot be solved without both stricter regulations and implementations. Currently, the regulations related to composition of the ECs suffer from multiple defects, such as not providing any mandatory minimum qualification levels for the committee members, and the lack of independence that the ECs have within the institutional structure³⁶. Moreover, the already existing regulations related to the workings of the EC are only loosely implemented, with there being very few multi-disciplinary, expert, and diverse ECs in operation. The ECs also usually do not continue to monitor the progress of a research beyond the proposal stage. For that reason, stricter implementation, perhaps by introducing an element of penalty for non-compliance, should be mandated.

³⁵Srivastava (n 2).

³⁶Indian Council of Medical Research (n 1).

The problem related to the vulnerable population is something that does not have a straightforward solution. While in some cases it might be necessary to conduct research on these populations to ensure that they can reap the research benefits, which should not come at the cost of their ethical boundaries. The first improvement that is needed in this context is a clarification of the term vulnerable individuals or populations, and while an exhaustive list is not possible to be formulated, the current list must be broadened to include a number of other vulnerable groups. Moreover, to safeguard their interests, some additional protection mechanism over the current LAR system should be provided – perhaps in the form of an expert third party witness. The strengthening of the ECs will also play a large role in this context, by providing a stronger review of the whole consent procedure.

It is not the case that only these three areas need improvement in the current ICMR guidelines, however, these three are the most urgent issues in the current context. Once these are resolved, the guidelines will stand at a much stronger footing with respect to the ethical obligations of biomedical researchers, and will be able to protect the interests of the participants in a more efficient manner.

INTERNATIONAL LABOUR ORGANISATION'S STANDARDS ON CONDITIONS OF EMPLOYMENT RELATING TO INFORMAL SECTOR WORKERS: AN ANALYSIS

Dipa Gautalair*

I. Introduction

The expression “unorganised sector” has been used by the Indian National Account Statistics¹ and is regularly identified as informal sector internationally. Unorganised, traditional, unregulated and informal are diverse terms used interchangeably in contrast with organised, modern, regulated, corporate and formal sector. The “Task Force on Definitions and Statistical Issues” which was setup by the National Commission for Enterprises in the Unorganised Sector (NCEUS). NCEUS submitted its Report the year 2007. The report contains a comprehensive Chapter defining the term unorganised sector. The unorganised and informal sector has been treated as the same in the said Report. After considering the complexities and also the definitional issues, it has adopted a wide-ranging definition of the unorganised workers means “All those who are working in the unorganised sector and the workers in the formal sector without any employment security and social security provided by the employers”.² The employment in the informal sector can be identified if any one or more of these characteristics are present which includes, firstly; absence of employment security i.e. there is no safeguard against arbitrary dismissal, secondly; lack of work security i.e. there is no protection illness and

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¹The NAS is a framework that provides an internally consistent description of National macro economy based on the processing of data generated by the entire National statistical system. The estimates of National income and related aggregates and accounts are derived statistics that draw on basic data available from different primary sources. The primary sources consist of data generated as a by-product of public administration system (such as land records, collection of direct and indirect taxes, civil registration of births and deaths, etc.) as well as data collected directly through censuses and sample surveys conducted by official agencies of the Central and State Governments.

²Report of the “*Task Force on Definitions and Statistical Issues*” by the National Commission for Enterprises in the Unorganised Sector (NCEUS) in the year 2007, p.13.

accidents at the place of work and thirdly; absence of social security such as health care, maternity benefits and pension benefits etc.³

On the other hand, there is a recognised human right to free choice of employment and the right to just and favourable conditions of work and the protection against unemployment. In the industrialised employment the right to decent working conditions is the outcome of the right to work and the right to adequate wages.⁴ This right enables a worker as said by H. J. Laski in his book entitled 'An Introduction to Politics', "towards attaining significance for himself beyond then getting of his livelihood."⁵ Hence, reasonable working hours, holidays with pay, rest and leisure, and some other necessary facilities are important elements for living a decent life in a society. Apart from above significance of leisure which reduces fatigue, it aids in maintaining good health and further leading to development of individual's personality.⁶ Further, Prof. Laski emphasised in his book 'Grammar of Politics' that, "The right to reasonable hours of labour is the right to discover the land of the mind. It is the key to the intellectual heritage of the race"⁷. Hence, without this i.e. right to working hours and other decent conditions of work, dignity, the enjoyment of freedom and the overall development of personality would remain a myth to the workers. This necessitates a need to analyse the existing International Labour Organisation's Standards on Conditions of Employment and adaptation of the same into Indian Labour Laws.

II. The concept of conditions of employment

In the matter of Industrial Employment the term 'conditions of employment' is a significant aspect in the contract of employment as it covers the whole aspects of terms and conditions of employment namely the tenure, wages, hours of work, leave, holidays, rest, over time wages and other social security and welfare amenities. The concept of 'contract of employment' is said to be "corner-stone of the edifice" of the labour laws.⁸ There is absence of uniform or consistent statutory definition to the concept of 'contract of employment'. However, the principles of law of contract apply to the formation of the employment contract and such

³*Id.* at 51.

⁴ See Article 21 of United Nations Universal Declaration on Human Rights, 1948.

⁵ H.J. Laski, *An Introduction to Politics* 37 (1939) .

⁶ International Labour Organization, *Repercussions of a reduction in hours of work*, INTERNATIONAL LABOUR REVIEW, 24, 23-45 (1956).

⁷ H. J. Laski, *Grammar of Politics*, III (4th ed.1938) .

⁸ B. A. Hepple, *Employment Law*, 53 (3rd ed. 1979) .

contract is enforceable in the eye of law whether it is oral or written⁹ or it may be even formed by conduct. The written parts may take the form of various pieces of paper such as work rules, correspondence or collective agreements. Apart from these matters the contract contains certain terms which are implied in the employment contract for the purpose of making the contract workable between the parties. In the contract of employment there is a promise to pay wages for the actual performance of work or a promise for the performance of the work. In this kind of contract, the act or return promise forms the consideration. In the employment contract also consideration forms an essential part and as mere promise to render gratuitous services is not enforceable. Nor even a volunteer is entitled for remuneration. The promises in the employment contract may be express or implied. There also exists the exchange of offer and acceptance. The acceptance of the employment offer may be in words of mouth or written or by a conduct¹⁰.

The terms or conditions of employment can be stated into contract of employment at the time of entering into contract which includes elements like scale or rate of remuneration along with the clarification as to the intervals of remuneration such as weekly remuneration or monthly remuneration. Terms and conditions pertaining to working hours also need to be stipulated. Apart from this any other terms of employment have to be set out which may include terms relating to: entitlement to holidays, as well as public holidays and holidays with pay; provisions for sick pay in case of incapability for work owing to sickness or injury; Benefits of Pension and related schemes; Length of notice to determine the contract of employment which is to be served by employee to the employer; and the designation of the job for which the employee is employed.¹¹ The employer is further required to state the disciplinary rules that are applicable to the employee; specify the authority to which the employee can approach if he is aggrieved with any verdict relating to him; and also specify the authority to which the employee can approach for seeking redress of grievance relating to his employment. In this context it is relevant to mention the fundamental characteristics of labour welfare legislations in India which are basically of two kinds, namely the welfare legislations which are exclusively applicable in general to workers engaged in organised or formal section and the other category of welfare legislation sector specific in character applicable to particular categories of unorganised

⁹ Dr. E. M. Rao, O .P .Malhotra's The Law of Industrial Disputes, 205 (7th ed. 2015).

¹⁰ *McCreadie v. Thomson and Macintyre (Patternmakers) Ltd.* (1971) 2 All E.R. 1135; *Lonmet Engineering Ltd. v. Green* (1972) I.T.R. 86 (N.I.R.C.).

¹¹ *Id.* at 101.

workers.¹² The fundamental theme of the said welfare legislation is that they contain certain norms to be complied by the employer as a standard of working conditions. So any formal contract between the employer and workmen in the circumstance would be only if either such terms of contract do not violate such standards or provide the level of above such standards. The purpose of discussing the issue in the content is to explore the situation of Informal Sector avocation where there is no law which deals with certain standards of welfare amenities to the workers. In such cases the private law principles of contract of employment would dominate the scenario where in the employer always enjoys an upper hand which ultimately leads to the exploitation of the illiterate sectors.

There are some general contractual principles pertaining to employment relationship apart from specific conditions of employment which take form of the implied terms of contract in contract of the employment. Cooperation is one of the implied terms in the employment contract as it is an obligation of the employer and employee to facilitate each other to perform their mutual obligations as stipulated in the employment contract. Under the contract of employment, the employer is bound to provide work and failure to provide the same would lead to breach of contract of employment. Simultaneously the employee should not disregard his work.¹³ It is the obligation of an employer to provide for the safe working conditions in the course of employment of his employees by providing safe tools, a safe system of working, a safe place of work, and the employer has to select properly skilled co-workers at the same time the employee is also reciprocally bound to employ a reasonable care and skill during performance of his services.¹⁴ Hence, even care forms the part of implied terms in the contract of employment. Fidelity is considered to be the responsibility of the worker and accordingly he is bound to serve his employer honestly and faithfully. The employee must take reasonable care in handling the property of employer and also must protect confidential information of his employer.¹⁵

In the industrial law it has been perceived that, the employer and employee relationship is partially contractual and partially non-contractual. It is contractual when the agreement creates a duty on the part of employer to pay wages and a corresponding duty on the employee to render

¹² In India there exists sector specific welfare legislation of certain categories of unorganised sector employment of which majority of them are enacted by the Parliament apart from few State enacted welfare legislations.

¹³ *Id.* at 119-121.

¹⁴ *Id.* at 124.

¹⁵ *Id.* at 126.

services. The relationship is partly non-contractual when obligations are prescribed by the legislations such as bonus facility under the Payment of Bonus Act, 1965; duty to pay minimum wages under the Minimum Wages Act, 1948; and obligation of gratuity payment under the Payment of Gratuity Act, 1972, reinstatement of employee in the matter of wrongful dismissal, etc.¹⁶

III. Role of International Labour Organisation in fixing standards on conditions of employment relating to informal sector workers

The need to ensure humane and socially admissible conditions of employment is based on the fundamental principles of moral values and rights and human dignity, which is sequentially adopted as the international Covenants by international bodies i.e. the International Labour Organisation (herein after referred as ILO) and others mainly concerned with human rights and overall development. The rights of different categories of workers are dealt with in the Conventions, Deliberations and Recommendations of the International Labour Organisation, which is the vital multi-lateral organisation addressing the issues pertaining to welfare of workers.

Large number of Conventions and Declarations has been adopted by the International Labour Organisation to achieve fair treatment of workers. As of now the International Labour Organisation has adopted 42 conventions, one Protocol and 36 Recommendations regulating the working conditions of labour. The ILO has divided the conditions of employment into three following categories namely:

- A. Wages;
- B. Conditions of work consisting of (a) hours of work, (b) night work (c) weekly rest (d) paid leave (e) Part-time work;

¹⁶Malhotra, *Supranote* note 9 at 206.

- C. Occupational Safety and Health, consisting of (a) general provisions (b) Protection against specific risks (c) Protection in given branches of activity and (d) Social Services, Housing and Leisure.¹⁷

A. Wages

(a) Protection of wages

ILO has adopted the Protection of Wages Convention, 1949 (No. 95) which defined wages as – “remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten contract of employment by an employer to an employed person for the work done or to be done or for services rendered or to be rendered”.¹⁸

This Convention ensures the regular payment and the direct payment of wages to the workers in legal tender. The Convention prohibits the payment in the form of vouchers, coupons, promissory notes or in any other manner to represent as a legal tender.¹⁹ In addition to that, the right to dispose of the wage has been recognized in the Convention. Deductions from wages are permitted only when national laws or regulations are prescribed in that respect or agreed upon in collective agreements.²⁰

(b) Minimum wage fixing machinery.

The ILO has adopted the Minimum Wage Fixing Convention, 1970 (Convention No. 131), this convention requires the States to constitute and maintain machinery i.e. minimum wage-fixing machinery after consulting the social partners. The Convention and the Recommendation (No. 135) i.e. the Minimum Wage Fixing Recommendation, 1970 endeavours to ensure that the fixing of amount as the minimum wage covers the basic necessities of the employees and their families taking in to consideration various factors like general level of wages in the Country, cost of living and the social security

¹⁷ Dr. N. Maheshwara Swamy, Impact of I.L.O. Standards on Indian Labour Law, 171 (1st ed. 2007).

¹⁸ See Article 1 of The Protection of Wages Convention, 1949 (No. 95).

¹⁹ *Id.* see Article 3.

²⁰ *Id.* see Article 8.

benefits. The social partners are under obligation under the Convention to participate in the establishment as well as enforcement of minimum wage systems.

The Convention on Minimum Wage Fixing Machinery (Agriculture) (Convention No. 99 of 1951) necessitates the Member State to establish or maintain adequate machinery to do the work of fixing minimum rates of wages for the labours employed in agricultural undertakings and other related occupations.²¹ It is permitted under the national laws for the payment of minimum wages partially in the form of allowance and in kind if it is desirable or customary.²² If minimum wages are paid at fewer rates than the rates fixed, the employees are entitled to recover the amount which is unpaid amount by way of penal or any other appropriate proceedings.²³

B. Conditions of work

(a) Hours of work and weekly rest

Hour of work is the duration at which the workers employed are under the direction and control of the employer. ILO has adopted the Hours of Work (Industry) Convention, 1919 (No. 1). The Convention deals with fixing of working hours in various industries for which it has precisely laid down various categories of industries for the purpose of extending the convention. According to the convention the industry comprises of the following –

- ii. Mines, quarries, and other works for the extraction of minerals from the earth;
- iii. Manufacturing industries; including shipbuilding and the electricity industry;
- iv. Industries dedicated to construction work; and
- v. The transport of passengers or goods.²⁴

²¹ See Article 1 of The Convention No. 99 of 1951 on Minimum Wage Fixing Machinery (Agriculture).

²²*Id.* see Article 2.

²³*Id.* see Article 4.

²⁴ See Article 1 of Hours of Work (Industry) Convention, 1919 (No. 1).

Working time in industry has been restricted to eight hours in a day and forty-eight hours in a week²⁵. However these numbers of working hours do not apply in case of accident, in the case of '*force majeure*', in case of urgent work required for the machinery or plant, but only to avoid serious interference with the normal working of the industry.²⁶ The fixed working hours in industry may be also exceeded in such industrial process which requires to be operated continuously by way of shifts. However this is subjected to the condition that the hours of working in no way be in excess of 56 hours on an average in a week.²⁷ Further, the Convention (No. 14) i.e. the Weekly Rest (Industry) Convention, 1921 prescribes for a twenty-four in a week as a consecutive hour of period of rest. This period of rest stipulated in the Convention has to be fixed in such a way that it should match with the days which are already established under the custom or traditions of the Country or District.²⁸ The States may authorize the total or partial evasion of granting the rest days on humanitarian and economic grounds.²⁹ However, under such circumstances the States are required to provide for compensatory periods of rest as far as possible.³⁰

(b) Night work

The Night Work Convention, 1990 (No. 171), applies to persons who perform work during the night, including the interval from midnight to 5 a.m.,³¹ except those employed in agriculture, stock raising, fishing, maritime transport and inland navigation.³² It stipulates the obligation of the State to take measures to protect the health of night workers, assist them to meet their family and social responsibilities, provide opportunities for occupational advancement, and compensate them appropriately.³³

(c) Paid leave

²⁵*Id.* see Article 2.

²⁶*Id.* see Article 3.

²⁷*Id.* see Article 4.

²⁸ See Article 2 of Weekly Rest (Industry) Convention, 1921 (No. 14).

²⁹*Id.* see Article 4.

³⁰*Id.* see Article 5.

³¹ See Article 1 of The Night Work Convention, 1990 (No. 171).

³²*Id.* see Article 2.

³³*Id.* See Article 3.

The ILO has adopted the number of Conventions under this head, namely: (i) Convention No. 52 of 1936 on Holidays with Pay; (ii) Convention No. 140 of 1974 on Paid Educational Leave; (iii) Convention No. 101 of 1952 on Holidays with Pay (Agriculture); and (iv) Convention No. 132 of 1970 on Holidays with Pay (revised). The Convention No. 52 of 1936 on Holidays with Pay is applicable to all persons employed in the undertakings either engaged wholly or mainly in the construction, reconstruction, alteration, maintenance, repair, or demolition of building, railways, airports, tram ways etc.³⁴ The person covered by this Convention is entitled for an annual holiday with pay the total number of days of at least six working days after every one year of service. The annual holidays are not to be increased if the length of service is to be set by national laws and regulations.³⁵ Under the Convention person taking holidays with pay is entitled for usual remuneration for the complete period of holidays.³⁶ Subsequently the convention No. 101 of 1952 on Holidays with Pay (Agriculture) was revised in the year 1970 through Convention No. 132. The Convention requires formulating appropriate provisions in compliance with the established procedure for the regulation of holidays with pay in agriculture sector for achieving more favourable treatment of young workers. The States under the Convention under empowered to divide the annual holiday with pay within the limits prescribed by the competent authority in the matters of holidays with pay. The Convention is extended to all employed persons except the seafarers. Persons coming within the preview of the Convention are entitled for an annual holiday of a specified minimum length. Further, it has been mandated that the holidays guaranteed under this Convention for one year of service cannot be less than three working weeks³⁷ and also entitled for the remuneration normal or average as may be calculated by the competent authority.³⁸

C. Occupational health and safety

(a) Protection against specific risks

³⁴ See Article 1 of The Convention No. 52 of 1936 on Holidays with Pay.

³⁵ *Id.* See Article 2.

³⁶ *Id.* see Article 3.

³⁷ See Article 3 of Convention No. 132 of 1970 on Holidays with Pay (revised).

³⁸ *Id.* See Article 5.

The Preamble to the ILO Constitution states that, “the protection of the worker against sickness, disease and injury arising out of employment” is a elementary element norm of socio-economic justice. This right to safe, decent and healthy working conditions and environmental conditions was reaffirmed in the year 1944 through the Declaration of Philadelphia and as well as in the year 2008 in the Declaration on Social Justice for purpose of Fair Globalization. The ILO has normally adopted a number of Conventions And Declarations Relating To Occupational Safety And Health (OSH), the chief among them is the (Convention No. 155) on Occupational Health and Safety Convention, 1981, the Protocol of 2002,³⁹ and the Convention No. 187 on the Promotional Framework for Occupational Safety and Health Convention, 2006.

Convention No. 155 is applicable to all the workers in all wings of economic activities. It calls the States in consultation with representatives of employers and workers to formulate implement and periodically review, the national policies on occupational health, occupational safety, and the working environment. The object behind this is to prevent accidents arising out of, in the course of work and linked with of work, further to minimize, as far as possible, the causes of accidents and hazards which are inherent to the peculiar work atmosphere. The Convention requires acting on the mandates at the national level as well as at an enterprise level by imposing duties on employers and as well as workers for ensuring a healthy and safe place of work.⁴⁰ Articles 5 and 19 of the said Convention are predominantly pertinent for young labour. Article 5(c) mandates formulating a national policy for the “training and motivating the persons for achieving the adequate safety and health”. Further Article 19 mandates the provision of “suitable training in occupational safety and health” at the undertaking level. Training will aid in coping up with the hazardous work such as mining, construction, and agriculture and hazardous substances like ionizing radiation, asbestos and benzene chemicals.

The 2002 Protocol to Convention No. 155 on Recording and Notification provides for the creation of periodical review with the consultation of representatives of employers

³⁹ Protocol no. 155 of 2002 to the Occupational Safety and Health Convention, 1981.

⁴⁰ See Article 2 of the Convention No. 155 on Occupational Health and Safety Convention, 1981.

and workers. Such reviews are for the purpose of recording and notifying the occupational accidents (as well as commuting accidents), dangerous occurrences and diseases. This helps in keeping the track of various dangerous occurrences and helps in preventing injuries and disease caused by the accidents.⁴¹ For the purpose of identifying the core problems and to take the indispensable remedial measures there is need of accurate and reliable data on occupational diseases and accidents. The Convention No. 187 on the Promotional Framework for Occupational Safety and Health Convention, 2006 emphasizes the significance of implementing a national policy on occupational health and safety, as in Convention No. 155, and further promotes a national preventative culture of safety and health, by formulating and implementing a national system for Occupational Safety and Health (OSH), as well as a national programme, in consultation with the most representative organizations of employers and workers. Convention No. 187 has been instrumental in promoting the monitoring of OSH at the national level and ensuring the coherent and uniform promotion of preventive actions driven by analysis of the national OSH system.⁴²

(b) Protection in given branches of activity

The ILO has also adopted a number of International Instruments regulating the specific wings of industry or employees working with various hazardous substances. The object behind these International Instruments is to safeguard the Rights of Young People in the matters of Occupational Safety and Health. So far conventions adopted by the ILO are: (i) The Maximum Weight Convention, 1967 (Convention No. 127); (ii) The Safety and Health in Mines Convention, 1995 (Convention No. 176); (iii) The Safety and Health in Construction Convention, 1988 (Convention No. 167); and (iv) The Safety and Health in Agriculture Convention, 2001 (Convention No. 184). There are specific stipulations in all these Conventions on training. The Article 33 of The Safety and Health in Mines Convention, 1995 requires the employees to be adequately and suitably –

⁴¹ See Article 3 of The 2002 Protocol to Convention No. 155 on Occupational Health and Safety Convention, 1981.

⁴²*Id.* see Article 4

- i. Kept informed in the matters of safety also must be kept informed in the matters concerning the health hazards at workplace, workers to which are likely to be exposed; and
- ii. Instructed and trained adequately in the safety measures available to prevent and control the hazards at workplace and also to ensure adequate protection against the workplace hazards.

(c) Social security

According to ILO, social security is a universal human right; social Security is essential to afford protection to all persons either young or old, from social risks and other contingencies during their life-time by guaranteeing a healthy, secure and decent standard of living for every person. Two Strategies have been developed by ILO to extend social protection, firstly; by guarantying the social security, so that there can be universal access to the basic and vital health care and financial security at nationally defined minimum level i.e. at horizontal dimension which is in line with the Convention No 202 on Social Protection Floors Recommendation, 2012. Secondly, by striving to achieve the higher levels of protection in a vertical dimension within the available comprehensive social security systems by complying guidelines laid in the Convention No. 102 on The Social Security (Minimum Standards) Convention, 1952. Recommendation No. 202 defines the National Social Protection Floors has been defined as “a nationally defined sets of basic social security guarantees, which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion”. The National Social Protection Floors as defined above should be comprised of at least following four social security guarantees at the national level, namely :-

- (i) Basic and essential health care facility including maternity care;
- (ii) Income security, education, access to nutrition and any other required goods and services for children;
- (iii) Income security for the persons of inactive age who are unable to earn adequate income in case of sickness, disability, maternity and unemployment, and;

(iv) For older persons basic income security.

ILO aims at extending social security to cover unemployed young people. ILO defines the contingency of unemployment as the suspension of earnings of a person due to incapability to obtain appropriate employment who is in fact capable of work and available for work. The ILO has adopted a Convention No. 168 the Employment Promotion and Protection against Unemployment Convention, 1988 in order to extend protection to the workers who have lost their employment and also young persons who do not employment or never had an employment. States under the Convention are required to provide “social benefits” to the unemployed persons as identified under the Convention and also required to seek to extend protection to all the categories of unemployed persons recognised under the Convention. In order to ensure the protection against the unemployment, Convention No. 168 broadens the range of benefits to be provided to the unemployed persons by way of requiring the State to promote additional employment opportunities and employment support for categories of workers recognised in the Convention i.e. disadvantaged persons and young workers.

IV. Impact of International Labour Organisation Standards on Indian labour legislations

The approach of India with regard to International Labour Standards is always been identified as positive. The instruments adopted by the ILO have acted as guidelines and framework for the development of legislative and administrative measures for advancement and safeguarding the interests of labour. The Ratification of a Convention imposes a legally binding obligation on the ratifying country therefore India has been careful in ratifying the Conventions. It is the usual practice that India decides to ratify a Convention only when it is satisfied that domestic laws and practices are in conformity with the relevant ILO Conventions. It is now considered that a better course of action is to proceed with progressive implementation of the standards and leave the formal ratification for consideration at a later stage when it becomes practicable. The implementation of ratified ILO Conventions is ensured by framing legislations and amending the existing laws in line with the provisions of the Conventions. As a result every ratified Convention in India is either backed by a supporting legal or policy framework or is

embedded in the Constitutional guidelines which are adhered to in practice by suitable administrative actions.

As of now ILO has adopted 190 conventions and 206 recommendations. Out of 190 ILO Conventions, India has so far ratified 47 ILO Conventions and 1 protocol which includes four core or fundamental human rights Conventions like Forced Labour Convention (C-29), Equal remuneration Convention (C-100), Abolition of Forced labour Convention (C-105) and Discrimination (Employment & Occupation) Convention (C-111) and three priority/governance conventions such as Labour Inspection Convention (No.81), Employment and Social Policy Convention (No.122) and Tripartite Consultations (International Labour Standards) (No.144). During 104th session of ILC, India supported the adoption of recommendation (R-204) on “Transition from Informal to Formal Economy” by ILO. On conditions of Work ILO has adopted 42 conventions including a Protocol and 36 Recommendations. The following are the list of ILO conventions and protocols ratified by India as far as the interest of informal Labour are concerned. With respect to Conditions of Work and Conditions of Employment India has ratified following Conventions:

- a. Convention No. 1 on Hours of Work (Industry).
- b. Convention No. 14 on Weekly Rest (Industry), 1921.
- c. Convention No. 26 Minimum Wage-Fixing Machinery, 1928.
- d. Convention No. 27 Marking of Weight (Packages Transported by Vessels), 1929.
- e. Convention No. 32 Protection against Accidents (Dockers) (Revised), 1932.

A perusal of above provisions of the Conventions reveals that many of the Indian enactments are designed to contain the provisions of above Conventions. The Factories Act, 1948, The Plantations Labour Act, 1951, the Mines Act, 1952, The Beedi and Cigar Workers (Conditions Of Employment) Act, 1966, Building and Construction Workers (Regulation of Employment And Conditions of Services) Act, 1996 etc., are some such enactments in the direction of the ratification of relevant ILO Convention in this regard.

V. Conclusion

Though India has not ratified some of the core conventions of the ILO, yet it attaches deep significance to ILO's Labour standards. It believes that the process of ratification of ILO Conventions must be gradual and adequate time should be given to the Member States for creating favourable conditions for ratification, taking into account the socio- economic realities of each Member State. However, ILO is lagging behind in recognising of the conditions of employment and welfare of the workers who are employed in open employment and exposed to adversities of the nature such as Brick Kiln workers, Rag Pickers etc. It is these workers who are subjected to exploitation. In view of migrant character, the labour contractor who entrust their service to the principles employer the industry often may not be interested on securing various welfare benefits to these ignorant labour for employment in open employment situation. The State role is very important in ensuring the core welfare benefits to the said categories of workers and it is a challenging issue to be seen in days to come in this era of globalisation. Hence, more pragmatic approach is needed in this direction.

INTELLECTUAL PROPERTY RIGHTS AS BARRIER TO CONTAIN THE PANDEMIC: WORLD AND INDIA PERSPECTIVE

Harshit Jain^{*}

I. Introduction

The COVID-19 pandemic has already infected more than 160 Million victim¹ and has claimed the lives of over 3 million people.² Out of which India suffering from the disastrous second wave of Covid-19 has seen more than 2.4 Crore (24 Million)³ cases and more than 2.62 lakh⁴ victims have lost their lives of this virus. Moreover the pandemic has overburdened national health systems, resulting in more deaths and illnesses, and has triggered a severe economic crisis, putting millions of women, infants, and men's lives in jeopardy due to malnutrition, lack of access to public services, and abuse. The corona virus epidemic posed a political threat to multilateralism and its institutions, and it reintroduced nationalism to the global agenda. The need for greater cooperation and unity, as well as an efficient and sensitive global health protection framework, to combat global pandemics, was highlighted by the urgency of responding to the current pandemic. Uneven supply of pharmaceuticals and critical medical supplies is one of the most important issues that arise in circumstances like the COVID-19 outbreak. This emphasises the significance of reforming the existing global innovation structure in order to increase the manufacture and distribution of drug delivery, vaccines, and other pharmaceutical products and technologies.

India and the world saw the New Year 2021 with great hope and encouragement with the incoming of vaccines to battle the COVID-19 outbreak. Multiple vaccines gained emergency

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¹ Corona virus cases and Death Toll available at <https://www.worldometers.info/coronavirus/coronavirus-death-toll/> last seen on 14 May 2021 at 5:35 PM.

² Ibid.

³ Ministry of Health and Family Welfare, Statistics, available at <https://www.mohfw.gov.in/> last seen on 14 May 2021 at 5:35 PM.

⁴ Ibid.

approval across the world particularly the Pfizer, Moderna and Astra Zeneca Vaccine in the USA and the European Union. 2 vaccines namely, COVIDSHIELD and COVAXIN were also given Emergency Approval by the Drugs Controller General of India (DCGI) on 2nd January, 2021.⁵ Covishield is a Recombinant Chimpanzee Adenovirus vector vaccine encoding the SARS-CoV-2 Spike (S) which is manufactured by Serum Institute of India for India developed with technology transfer from AstraZeneca and Oxford University.⁶ Another Vaccine which received Emergency Approval is COVAXIN, which is a Whole Virion Inactivated Corona Virus Vaccine developed by M/S Bharat Biotech, Hyderabad based Pharmaceutical company in collaboration Indian Council for Medical Research (ICMR) and National Institute of Virology (NIV).⁷

The COVID-19, on the other hand, has uneven consequences, and the gains of scientific advances do not seem to help all at the same time – the pandemic affects countries and societies in a variety of ways, putting a harsh human and economic burden on the poorest and most vulnerable. It is critical to develop a comprehensive strategy to ensure mass vaccination and that people in the poorest regions and the needy have timely, sufficient, and affordable access to all COVID-19-fighting technologies, including the rapid manufacture of billions of doses of high-quality vaccines, financial support for vaccine purchases, and logistics coordination to ensure adequate supply and equity. It is critical to establish political commitments that restrict unilateralism, especially among the wealthiest countries, which have greater capacity to obtain vaccines.

The term *Vaccine Nationalism* has gained vast prominence in past few weeks, which insinuates the procurement of whole lot of the vaccines by the rich countries to themselves and not distributing it to the rest of world which is dreaded with the pandemic. The International Chamber of Commerce has predicted that if developing nations do not receive the required doses of the vaccine, the global economy will suffer losses of up to \$9.2 trillion.⁸

⁵Press Statement by the Drugs Controller General of India (DCGI) on Restricted Emergency approval of COVID-19 virus vaccine, available at <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1685761> last seen on 14 May 2021 at 18:12.

⁶ Ibid.

⁷ Ibid.

⁸Hindustan Times, Vaccine nationalism hurts the whole world, available at <https://www.hindustantimes.com/opinion/vaccine-nationalism-hurts-the-whole-world-101619358008334.html> last seen on 14 May 2021 at 18:43.

The *British Medical Journal* also cited Vaccine Nationalism as one of the major reasons for shortage of Vaccines around the world. According to Article published on 19th March 2021 in *British Medical Journal*, The US ordered 800 million doses of the vaccine from six vaccine manufacturers, with a billion more doses on the way. The United States has a population of 331.42 million people, which means it has much more resources than it needs. The United Kingdom is in the same boat. The Boris Johnson government has set aside five doses for each resident.⁹

Not surprising, the Intellectual Property Rights and Protection which was initially aimed at promotion of research and development has posed a barrier to battle the COVID-19 pandemic. The effect of intellectual property (IP) rights on production capacity and the availability of technology to react to the pandemic is a critical factor to consider at this time. A number of therapeutics will have to obtain a secondary patent because they are repurposed therapeutics or will be registered for new applications, and the key inventions involved with the treatment of COVID-19, whether medicines or technical devices, are already patented. Vaccines are being subjected to the same fate of IP barriers. The Vaccines launched have strict patent protection, and those in the trial phases have the same protection. Their basic elements and background technology is and will be patented as well, which restricts the mass production and yields setback to developing and least developed nations.

To get relieved from the adverse effect of the Intellectual Property Regime in order to effectively and efficiently tackle the wrath of COVID-19 Pandemic, on October 2, the governments of India and South Africa proposed waiver ¹⁰ of certain basic clauses of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as a legal-institutional response to the COVID-19 emergency. The proposal is in line with significant

⁹ The BMJ, British Medical Journal, Covid-19 vaccine shortages: what is the cause and what are the implications?, BMJ 2021;372:n781, Published 19 March 2021 available at <https://www.bmj.com/content/372/bmj.n781> last seen on 14 May 2021 at 19:54.

¹⁰ Waiver From Certain Provisions Of The TRIPS Agreement For The Prevention, Containment And Treatment Of Covid-19, Communication From India And South Africa 2 October 2020 (IP/C/W/669) Available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True> last seen on 13 May 2021 at 20:18.

resolutions¹¹ passed by the World Health Organization (WHO) and the United Nations (UN) in 2020, as well as other measures aimed at ensuring access to control, medication, and immunisation technologies. The resolution by WHO and UN both stressed the importance of rapidly scaling manufacturing and strengthening supply chains to ensure reliable, effective, accessible, transparent, and equitable access to and supply of diagnostics, medicines, and COVID-19 vaccines to those who need them, especially in developing and least developed nations.¹²

II. TRIPS Agreement

The World Trade Organization (WTO) is a global organisation that regulates international trade laws. The World Trade Organization (WTO) currently has 164 members.¹³ Countries that join the WTO commit to follow the 18 relevant agreements that are annexed to the WTO Agreement. Trade-Related Aspects of Intellectual Property Rights or TRIPS Agreement came into effect in 1995 and is one of most highly comprehensive International Intellectual Property (IP) Agreement till the date. The TRIPS Agreement established basic optimal international standards for protecting and implementing virtually all types of IPR, including patents. Prior to TRIPS, there were no minimum conditions for patents in international conferences. With a few exceptions, the TRIPS Agreement now mandates that all WTO members amend their laws to meet minimum IPR security requirements. About 40 countries around the world did not offer pharmaceutical products patent rights when the negotiations started.¹⁴

The TRIPS Agreement had been recipient of various criticisms in the context of interests of the least developed and the developing countries and had been time and again referred as the barrier to the access of nations who do not have modern technology and are abused by the extravagant prices charged by the Multi National Enterprises. The major criticism came in the light of pharmaceutical and therapeutic sector as the TRIPS agreement had the paramount adverse

¹¹ UNGA Resolution 74/274 - International cooperation to ensure global access to medicines, vaccines, and medical equipment to face COVID-19; and UNGA Resolution 74/270 - Global solidarity to fight the coronavirus disease 2019 (COVID-19) .

¹² Ibid.

¹³ WTO, TRIPS, available on https://www.wto.org/english/docs_e/legal_e/27-trips.pdf last seen on 10 May 2021 at 20:38.

¹⁴ Ibid.

impact on the availability and the access to medicines, and other medical equipment and technology.¹⁵

A. Patent protection under TRIPS

Patent security is a type of intellectual property protection that The TRIPS Agreement allows WTO members to provide protection for any innovation, including pharmaceutical products and processes, for a period of 20 years from the filing date of a patent application.¹⁶ Many countries' patent durations were considerably shorter prior to the TRIPS Agreement. Patent terms ranged from 15 to 17 years in both developed and developing countries, while patents in some developing countries were issued for shorter periods of 5 to 7 years.¹⁷ In all fields of technology, the TRIPS Agreement allows countries to have patent rights for both processes and products. Prior to TRIPS, several countries only granted process patents, not product patents. Product patents provide complete protection for the product, while process patents cover the technology as well as the manufacturing process or system. Protection for process patents does not prohibit the manufacture of patented goods using a reverse engineering process, in which a new process or system is used than the one that was invented (and patented).¹⁸ Manufacturers in some countries including India have been able to produce generic copies of licenced drugs thanks to national legislation requiring only process patent protection.¹⁹ These countries have chosen to take advantage of the transition era, which allows countries to postpone patent rights in areas of technology that were not covered prior to the TRIPS Agreement until 2005.²⁰

B. Patents and Pharmaceuticals

Drug regulatory authorities require pharmaceutical companies to send data demonstrating the product's protection, effectiveness, and efficacy as a condition of allowing it to be sold or

¹⁵ WHO, WHO AND TRIPS Agreement, available on https://www.who.int/medicines/areas/policy/wto_trips/en/ last seen on 11 May, 2021 at 02:49.

¹⁶ WTO, Article 33, Agreement On Trade-Related Aspects Of Intellectual Property Rights, available on https://www.wto.org/english/docs_e/legal_e/27-trips.pdf last seen on 15 May 2021 at 12:41.

¹⁷ WTO, Developing countries' transition periods, available on https://www.wto.org/english/tratop_e/trips_e/factsheet_pharm04_e.htm last seen on 13 May 2021 at 22:19.

¹⁸ Ibid.

¹⁹ NITI Aayog, Intellectual Property Rights And The Impact Of Trips Agreement With Reference To Indian Patent Law available on https://niti.gov.in/planningcommission.gov.in/docs/reports/sereport/ser/ser_alla.pdf last seen on 14 May 2021 at 21:11.

²⁰ Ibid.

marketed. WTO Members must secure undisclosed test data sent to drug regulatory authorities for the purpose of gaining marketing approval under the TRIPS Agreement from improper commercial use.²¹ It is argued that while countries have significant latitude in defining "unfair commercial use," they can satisfy their obligations to protect test data by banning "dishonest" data use.

However, data exclusivity is now argued to be a condition of the TRIPS Agreement. The data exclusivity strategy gives the originator exclusive access to their test data and prohibits regulatory authorities from registering generic alternatives based on the test data. Prior to the implementation of the TRIPS Agreement, most countries required generic goods to be approved based on originator test results. The regulatory authorities could use the test data submitted by the originator company to approve subsequent requests for similar products, or they could depend on evidence of prior approval of a similar product in another nation.²² Manufacturers of generics just need to show that their product is chemically similar to the brand-name, initial product, and that it is bioequivalent in certain countries. This method allowed for the rapid introduction of generics to the market while avoiding the costs associated with registration data. If a company has submitted original test data, no competing manufacturer is entitled to use such data for a period of time under the data exclusivity approach.²³

The TRIPS Agreement had posed a barrier in the distribution of pharmaceuticals, associated technologies and even vaccines across the globe. The rich nations have an extravagant and unequal share of the Drugs and Vaccines due to the developed Research and Development technologies which has resulted in the vast unavailability of the vital pharmaceuticals and vaccines to the Developing and the Least Developed Countries. The TRIPS Agreement entail the provision for the waiver of the TRIPS Agreement in the event of public health emergency. Along with the issue of domestic waiver of TRIPS in the form of Compulsory License, the TRIPS Agreement had allowed waiver of the agreement cross border as well.

²¹ WTO, Article 39, Agreement On Trade-Related Aspects Of Intellectual Property Rights, available on https://www.wto.org/english/docs_e/legal_e/27-trips.pdf last seen on 15 May 2021 at 12:41.

²² Germán Velásquez and Pascale Boulet, Globalization and access to drugs: Implications of the WTO/TRIPS Agreement, EDM Series No. 7.

²³ WHO Drug Information Vol 19, No. 3, 2005, Access to Medicines.

C. TRIPS-Waiver and compulsory license

On October 2, the governments of India and South Africa suggested Waiver of some vital provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as a legal-institutional response to the COVID-19 emergency, in order to obtain certain relief from the negative effects of the Intellectual Property Regime and to effectively and efficiently combat the wrath of the COVID-19 disaster.

While the TRIPS agreement establishes a minimum standard for patent rights in order to give a temporary monopoly to patent holders, it also establishes a number of exceptions that member countries can use in specific circumstances. Compulsory licence, as established by Article 31 of the TRIPS, nullifies this monopolistic right by authorizing member nations to grant licences to manufacture licenced goods without the consent of the patent holder.²⁴ Article 31 does not specifically mention the word "compulsory licence," but when read in conjunction with TRIPS Article 2(1) and the Paris Convention Article 5(A)(2), the allowance of compulsory licence is inferred.²⁵ As a result, developing countries have interpreted Article 31 to allow member countries to grant compulsory licences to third parties in order to produce medication to resolve domestic public health issues.²⁶ As per Article 31 of the TRIPS, in the event of a national emergency or other extreme circumstances of extreme urgency, or in cases of public non-commercial usage, a Member nation may waive the requirements mentioned for the grant of right to manufacture the patented product. In the event of a national emergency or other situation requiring immediate attention, the right holder will be informed as soon as reasonably possible. In the case of public non-commercial use, the right holder shall be immediately notified if the government or contractor knows or has demonstrable grounds to know that a legitimate patent is or will be used by or for the government without conducting a patent search.²⁷

Developing countries have made limited use of Article 31, which requires member countries to issue compulsory licences according to certain procedures and conditions. According to studies, developing countries have not used compulsory licencing as a method to resolve public

²⁴ WTO, Article 31, Agreement On Trade-Related Aspects Of Intellectual Property Rights, available on https://www.wto.org/english/docs_e/legal_e/27-trips.pdf last seen on 16 May 2021 at 11:47.

²⁵Anthony P. Valach, Chicago-Kent Journal of Intellectual Property, Ed. 16, 2005.

²⁶*Supra* note 24.

²⁷*ibid.*

health concerns for a variety of reasons, including the fact that successful implementation of compulsory licencing necessitates the fulfilment of certain administrative, financial, and technological preconditions, which are often not met in developing countries.²⁸

III. Doha Declaration

The Declaration on the TRIPS Agreement and Public Health was adopted on November 14, 2001, at the WTO's fourth Ministerial Conference in Doha, Qatar (Doha Declaration). One of the goals of this conference is to clarify the uncertainty surrounding TRIPS' compulsory licence provision.²⁹

The WTO General Council approved the Decision on Implementation of Paragraph 6 of the Doha Declaration on TRIPS Agreement and Public Health on August 30, 2003.³⁰ The Decision permits any member country to export pharmaceuticals produced under compulsory licences as long as the export meets the conditions of paragraph 2 of the Decision. Despite the fact that the Decision requires all member countries to benefit from the waiver, 23 countries indicated in the Decision that they would not import pharmaceuticals as a result of it, and another 11 countries stated that they will only use the waiver clause if an emergency or extremely urgent situation occurred.³¹

IV. TRIPS-Waiver proposal from India and South Africa

As discussed above, India and South Africa have passed a Communication to WTO for the waiver of TRIPS agreement to efficiently and effectively combat the COVID-19 Pandemic assuring the adequate access of pharmaceuticals and particularly vaccines to the Developing and Least Developed Countries. Discussed above about the adverse impact of the patent regime on the production of vaccines for the Developing and LDCs, this led to both the nations to appeal in the WTO for the TRIPS Waiver. Speedy vaccination across the world is the only viable way to

²⁸ WHO, WHO AND TRIPS Agreement, available on https://www.who.int/medicines/areas/policy/wto_trips/en/ last seen on 11 May 2021 at 02:49.

²⁹ WTO, Doha WTO Ministerial 2001: Trips/Min(01)/Dec/2, Declaration on the TRIPS Agreement and Public Health available on https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm last seen on 16 May 2021 at 11:25.

³⁰ WTO, Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, WT/L/540 and Corr.1, 1 September 2003.

³¹ Ibid.

counter the pandemic well. The production of vaccines very limited due to the stringent IPR regime because of TRIPS agreement and the access is restricted to first world nations.

Initially the developed nations of the world including USA, Canada, Japan and countries of European Union, were advert to waiver of TRIPS citing the significance of Intellectual Property for driving innovation and inventions.³² Against it, 57 member nations have backed the proposal initiated by India and South Africa, but the approval requires consent of all the member nations who are signatories of TRIPS Agreement.³³ Failure to approve the COVID-19 waiver for equal access to medicines under the Trade Related Intellectual Property Rights (TRIPS) Agreement, India's ambassador to the World Trade Organization (WTO) addressed to all the member nations, could cost the global economy trillions of dollars at the cost of protecting vaccine makers' \$30-40 billion industry.³⁴ Recently, USA Representative to WTO stated the decision of Biden Government on the waiver of TRIPS Agreement and expressed support to the waiver citing the global health crisis and the need for extraordinary measures to combat the COVID-19 pandemic by ensuring removal of barriers posed by the IPR regime and promoting adequate availability of vaccines across the world and especially to developing and LDCs.³⁵ With this major change in stance of the US government the other opposing nations have stated on reconsideration of their decision on the waiver proposal by Indian and South African Governments.³⁶

V. Compulsory licensing in India

The signatories of the TRIPS Agreement are required to draft new legislations or suitable amendments which are in consonance with the Agreement, therefore, to match the international

³² The Hindu, TRIPS waiver for vaccines key to growth: India's envoy to WTO available on <https://www.thehindu.com/business/trips-waiver-for-vaccines-key-to-growth/article33950900.ece> last seen on 14 May 2021 at 19:53.

³³ WTO, Doha WTO Ministerial 2001: Tripswt/Min(01)/Dec/2, Declaration on the TRIPS Agreement and Public Health available on https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm last seen on 16 May 2021 at 11:25.

³⁴ *Supra* note 32.

³⁵ Office of the United States Trade Representative, Statement from Ambassador Katherine Tai on the Covid-19 Trips Waiver, available on <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver> last seen on 16 May 2021 at 5:35.

³⁶ WTO, 2021 News Items, TRIPS Council to continue to discuss temporary IP waiver, revised proposal expected in May, available on https://www.wto.org/english/news_e/news21_e/trip_30apr21_e.htm last seen on 16 May 2021 at 5:56.

requirements, the Indian legislators amend the Acts related to Intellectual Property in the country with the amendments in TRIPS. One such important statute vital to Indian IPR is the Indian Patent Act, 1970³⁷ which regulates the law of patents in India. TRIPS Agreement came into force in 1995, and the Indian Patents Act, 1970 was eventually been treated with the amendments required to meet the requirement set by TRIPS Agreement. Compulsory licences are permits granted by the Controller General of Patents to a third party to produce, use, or sell a patented product or to use a patented method to make a patented product without the permission of the patent owner.

A. The Indian Patent Act, 1970

The rules about compulsory licencing are expressly set out in Chapter XVI of the Indian Patent Act, 1970 (“Act”).³⁸ Sections 84 and 92 of the Act specify the different requirements that must be met in order for a compulsory licence to be issued, such as the grounds for the issuance of a compulsory licence and the considerations that the Controller must consider when determining whether or not to grant a compulsory licence.³⁹ While in ordinary course a Compulsory License may be applied for and granted after 3 years of original patent granted.⁴⁰ Importantly, under Section 92 of the Act, the Central Government can issue a compulsory licence in respect of any patent in force to any individual interested at any time after the patent is sealed, in cases of national emergency, extreme urgency, or public non-commercial usage. Furthermore, in the event of a public health emergency, such as an outbreak, the process for obtaining a compulsory licence set out in Section 87 of the Act is not required to be followed.⁴¹

B. Judiciary on compulsory licensing

The case of *Bayer Corporation v. Union of India*⁴² (the "Bayer case") is a watershed moment in India's compulsory licencing history. The Bayer case stemmed from a patent issued by Bayer Corporation (“Bayer”), a German company in 2010 for a medical drug known as

³⁷ Indian Patents Act, 1970.

³⁸ Section 84, Indian Patents Act, 1970.

³⁹ *Supra* note 37.

⁴⁰ *Supra* note 38.

⁴¹ Section 92, Indian Patents Act, 1970.

⁴² 2014 SCC OnLineBom 963.

Sorafenib Tosylate, which was marketed as *Nexavar* and used to treat liver cancer and was priced very heavy at around Rs.2.8 lakhs. Natco Pharma (“Natco”) an India company approached Bayer in 2010 for a voluntary licence to manufacture and market the patented drug under its own brand name in India at a lower price of Rs. 9000. However, discussions for a voluntary licence did not succeed, and in 2011, three years after Bayer's patent was granted, Natco filed an application with the Controller for a compulsory licence. After considering the various provisions of the Act, the Controller granted Natco a compulsory licence to manufacture and distribute the patented drug in India. Intellectual Property Appellate Boards (“IPAB”) upheld the Controller's decision. The aggrieved party Bayer filed a writ petition in the High Court of Bombay, challenging IPAB's decision. The IPAB's decision was upheld by the High Court, which found that Bayer had failed to fulfil the fair demand of the public in respect of the generic drug by not selling it at an affordable price. The Hon'ble Court held that the proceedings under Section 84 of the Act were in the public interest because the whole purpose of the compulsory licence is to make patented articles available to society in sufficient quantities and at a fair price. This was the landmark movement in Indian IPR regime which set judicial precedent of granting Compulsory License in the interest of public health and medical emergency.

C. Use of compulsory license in COVID-19 pandemic

Given the fact that COVID-19 has been declared a pandemic by the World Health Organization and the severity of the disease's effect across the country, the current situation may be classified as a "national emergency" or a "case of severe urgency." The same would imply that if an inventor develops and patents an effective vaccine or successful medicine, the government would be well within its rights to grant a compulsory licence in order to efficiently tackle the public health crisis. The granting of a compulsory licence would benefit the public interest because it would result in the mass production and selling of the patented pharmaceuticals and vaccines at low prices, speeding up the availability process.

One of the pharmaceutical firms, Gilead, which has licenced Remdesivir, a wide spectrum anti-viral medication that has shown promise in treating COVID-19, has signed non-exclusive voluntary licencing agreements with five generic pharmaceutical manufacturers in

India to extend Remdesivir's supply.⁴³ The agreements not only give the pharmaceutical manufacturers a non-exclusive right to receive a technology transfer of the Remdesivir manufacturing process, but Gilead on the humanitarian grounds, has also agreed to not charge any royalties before the World Health Organization declares the COVID-19 Public Health Emergency to be over, or until a pharmaceutical product other than Remdesivir or a vaccine is approved. Such a measure by the pharmaceutical patent holders of the anti COVID-19 drugs and Vaccine manufacturers enables the government not to take the drastic step of Compulsory Licencing which interferes with the IPR policies of the nation and even at the global level on one hand and benefits the public at large on the other.

In India, 2 Anti-COVID vaccines are majorly administered as discussed above, and till now more than 18 Crore (180 Million) doses have been administered in India.⁴⁴ India entails the 2nd largest population in the World and vaccination drive in India is one of the major aspects of the COVID-19 combat globally. Therefore, speedy vaccinations in India is immensely important and with the incoming of devastating second wave the people of India have firmly recognised the importance of COVID-19 vaccination and thus, vaccines are now in vast demand in India. To cater such large population, the current production seems inadequate and measures are required to be undertaken to speed up the vaccination production. The Union Health Ministry mentioned that total of around 8 Crore (80 Million) vaccines will be received in the month of May 2021 and the production of vaccines will be ramped up.⁴⁵ According to the PTI Report both Bharat Biotech International Ltd. And Serum Institute of India have submitted the production plans to DCGI and the Union Health Ministry. Bharat Biotech plans to increase COVAXIN production to 3.32 crore doses in July and 7.82 crore doses in August, according to the schedule. In August, the Serum Institute plans to increase production to 10 crore doses.⁴⁶

⁴³Gilead, Voluntary Licensing Agreements for Remdesivir; available at- <https://www.gilead.com/purpose/advancingglobal-health/covid-19/voluntary-licensing-agreements-for-remdesivir> last seen on 16 May 2021 at 15:37.

⁴⁴ Ministry of Health and Family Welfare, Cumulative Coverage Report of COVID-19 Vaccination, available on <https://www.mohfw.gov.in/pdf/CumulativeCovidVaccinationCoverageReport15thMay2021.pdf> last seen on 16 May at 20:13.

⁴⁵ Press Information Bureau, Delhi, Ministry of Health and Family Welfare, Dr. Harsh Vardhan reviews Public Health Response to COVID-19 and Progress of Vaccination with 8 States/UT, published on 12 May, available on <https://pib.gov.in/PressReleasePage.aspx?PRID=1718098> last seen on 17 May at 18:03.

⁴⁶ Hindustan Times, Bharat Biotech, Serum Institute submit Covid vaccine production plans for next 4 months to Centre Reports PTI, published on May 13 2021 available on <https://www.hindustantimes.com/india-news/covid19->

The government has been facing criticism over the shortage of supply vaccines due to the limited production and the experts appealed for the grant of Compulsory License for the quick and efficient upscale production of vaccines by the certified laboratories involved in the production of other vaccines. The Compulsory License in the current situation is possible but the production of anti COVID-19 vaccines requires basic infrastructure and facility, a number of vaccination producing companies are already involved in manufacturing or development trials of one or the other COVID-19 vaccines. Six Indian manufacturers including Dr. Reddy's Laboratory have already tied up with Russia's RDIF for the production of Sputnik V vaccine and Zydus Cadilla's vaccine is in its Phase III trials.⁴⁷ Therefore, Indian Government is keen on certain measures to be undertaken and a lot more can be done which has been subsequently discussed.

VI. India on vaccine production

Following the vast demand for vaccines and the only effective way of combat against the deadly virus, the Indian Government is before the WTO to Waive the IPR regime under TRIPS Agreement for the anti COVID-19 pharmaceuticals and vaccines, in order to increase the production of vaccines and pharmaceuticals across the world.

A. Initiatives undertaken by Government of India

Meanwhile, till the TRIPS Waiver is granted, the Government of India have a robust measure which if rightly implemented can prove to be a revolutionary in battling the pandemic. As stated above, COVAXIN, one of the COVID-19 vaccines administered in India is jointly developed by the Bharat Biotech International Ltd. along with Indian Council of Medical Research (ICMR), which is an organisation established and governed by the Department of Health, Ministry of Health and Family Welfare and National Institute of Virology, which comes under ICMR. Therefore, the Government of India is also the developer of the COVAXIN vaccine and can move forward with technological transfer to the eligible laboratories for the

vaccine-production-to-reach-8-crore-doses-by-may-says-harsh-varadhan-101620870311166.html last seen on 16 May at 21:41.

⁴⁷ The Lancet, VOLUME 397, ISSUE 10285, P1611-1612, MAY 01, 2021, Experts Criticise India's Complacency available on [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)00993-4/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)00993-4/fulltext) last seen on 17 May at 18:54.

manufacture of COVAXIN vaccine. The Government of India took the cognizance of the situation amidst the high demand and shortage of supply and in the month of April decided to bank upon joint patent ownership. As part of its strategy to boost domestic production of the Covid-19 vaccine, the Indian government has tried to engage public sector companies to enter into technology transfer agreements with Indian vaccine manufacturer. Bharat Biotech has entered into a technology transfer agreement with two Central Government PSUs, Indian Immunologicals Ltd. (IIL) and BIBCOLD. In addition, the Haffkine Institute, a State Government Undertaking, has entered into a technology transfer agreement with Bharat Biotech. Grants have been made to these PSUs to acquire the adequate infrastructural facilities required for the efficient and speedy production of COVAXIN. Indian Immunologicals Limited will be able to begin producing COVAXIN in September 2021 as a result of the Central Government's constructive intervention, while Haffkine Institute and BIBCOLD will begin producing COVAXIN in November 2021.⁴⁸ This again is a time taking process and the need for vaccine is immediate, and the experts' advice the government to speed up the vaccination as soon as possible as there's an imminent danger of 3rd wave, which can only be countered well with vast scale vaccination. Very recently, Even 2 private firms from Gujarat named OmniBRx, which is a biotech company and an animal healthcare firm named Hester Biosciences have also been included to manufacture COVAXIN, and Bharat Biotech has signed contract for Technology Transfer with them.⁴⁹ This is the need of the hour to involve both Public and Private sector to ramp up the vaccine production even till the time there's no clear decision on the TRIPS Waiver and to continue the same till the requirement is fulfilled.

In order to ramp up the vaccine availability, the Government of India has further liberalised the procurement policy of the internationally developed vaccines under the newly introduced "Liberalized Pricing and Accelerated National Covid-19 Vaccination Strategy". The Union Government has made specific provisions in its new liberalised strategy that vaccines for COVID-19 that have been developed and manufactured in foreign countries and have been granted emergency use authorization by National Regulators in the United States, European

⁴⁸ Press Information Bureau, Delhi, Ministry of Health and Family Welfare, Liberal Enabling Environment Created by Government of India for Enhanced Vaccine Supply in the country, , published on 13 May 2021, available on <https://pib.gov.in/PressReleasePage.aspx?PRID=1718332> last seen on 17 May at 20:47.

⁴⁹ The Hindu, More firms get the nod to produce COVAXIN, published on 16 May 2021, available on <https://www.thehindubusinessline.com/news/three-more-firms-get-the-nod-to-produce-covaxin/article34567892.ece> last seen on 18 May at 03:18.

Medicine Agency (EU), United Kingdom, Japan, or WHO (Emergency Use Listing), will be granted. It also allows for the execution of a post-approval parallel bridging clinical trial in lieu of a prior local clinical trial, as stated in the Second Schedule of the New Drugs & Clinical Trials Rules 2019.⁵⁰ This would make it easier to import Covid-19 vaccines and ensure that they are more readily available in India.

Under the same policy, other than the Government of India channel, which includes state governments, private hospitals, and industrial establishments, 100 percent doses of manufactured and ready-to-use international vaccine will be available.

VII. The way ahead: Solutions and suggestions

The second wave of COVID-19 has caused huge broil in India, while some states considered the pandemic over and referred to it as endemic, the devastation this wave is causing implausible. This led to one the one solution that the waves are uncertain and vaccinating maximum people is the only way out, and therefore, the Union Government launched vaccination for all the adults, which has caused shortage of supply of vaccines as it is not easy to cater the vast population such as India.

Now, in order to rectify the shortage, the government has been trying to ramp up the production through their means but is being criticised for the low production and limited production units. To speed up the production process, since the Union Government is the joint developer of COVAXIN should invite the proposals from vaccine manufacturers and grant the entities with adequate infrastructure the license to produce the COVAXIN, also certain grants can also be made by the government to speed up the process of procuring necessary infrastructure and therefore speeding up the production. In this way, the price of manufacturing the vaccines would go down achieving economies of scale and large number of vaccines could be produced in limited time span. The licenses for manufacturing COVAXIN shall be termed as temporary in nature by the Government and a time limit, for example, of 2 years should be set, which is an approximate time estimated for the total population of the country. After the lapse of

⁵⁰*Supra* note 48.

this period, the original patent shall be restored in the name of the original developers and provisions of the Indian Patents Act be made applicable.

India needs large number of vaccines to obtain self-sufficiency, plus the nation has a reputation for being the ‘pharmacy of the world’, and hence, COVAXIN, which is an Indian vaccine, can be exported to the world to combat the pandemic in the whole world if such method is adopted and implemented well. COVAXIN is special in its nature as it does not require extreme cold storage unlike Pfizer, Moderna, which enables the developing nations and LDCs with limited cold storage facility to distribute and administer vaccines well with minimum wastage. The Government of India should make the provision for reasonable Royalties to Bharat Biotech International Ltd. for the vaccines meant for commercial export, in this way the leading innovator gets the recognition for its efforts and IP laws are also appreciated.

RAMIFICATIONS OF NON-REFOULEMENT IN THE SOUTH-ASIAN COUNTRIES

Deepansh Tripathi*

I. Introduction

The condition of statelessness is one of the worst experiences that any human can encounter. It is even more unfortunate when the person is mercilessly tortured, becomes a victim of persecution and is forced to settle in a different part of the world leaving his own home, family and nation behind. Moreover, hosting these displaced people is another major issue for the countries. In this paper, the author will address how South Asian countries are home to over 2.5 million refugees. While on one hand, these nations are themselves struggling to provide primary needs to their own citizens, on the other hand, the international community forces them to accept millions of people. These obligations are just adding further to the miseries of the host states¹.

The refugee crisis is addressed as a global problem. Statistics reveal that the global South countries have provided shelter to over 80 percent of the world's refugees². We also need to consider that this region is ill-equipped to deal with the contemporary refugee crises and fails miserably in accommodating the displaced population. Refugees choose to settle in the South Asian region due to liberal migration laws and easy access due to porous borders and principles like non-refoulement³.

* Student, South Asian University, New Delhi.

¹ Moving Targets An Analysis of Global Forced Migration, 33 (September 2017)

<https://belonging.berkeley.edu/sites/default/files/haasinstitute_moving_targets_globalmigrationreport_publish_web.pdf> accessed 22 January 2021

² UNHCR Note on the Principle of Non-Refoulement, UNHCR, (November 1997)

<<https://www.refworld.org/docid/438c6d972.html>> accessed 22 January 2021

³ Nafees Ahmad, 'Options for Protecting Refugees in South Asia' (2019)

<<https://harvardilj.org/2019/09/options-for-protecting-refugees-in-south-asia/#:~:text=South%20Asia%20is%20home%20to,with%20the%20contemporary%20refugee%20crisis>> accessed 22 January 2021

This article attempts to find the answers to some complex questions involved particularly concerning the principle of non-refoulement; *the position of South Asian countries concerning refugees; reasons for migration; non-refoulement as a Customary International Law; whether the principle of non-refoulement binds any country at all.*⁴

II. The catastrophe of displacement

There can be numerous motives for a person to migrate from their country and relocate to another country, but the element of will or consent is present in such a case. However, in refugees' case, they do not choose this position but are forced for this⁵. Whether it is a civil war or external aggression or prolonged conflict situations of any other kind, it result in generations born and bred in refugee conditions⁶.

Any human becomes a refuge only when there is a feeling of being unprotected, fear of persecution for political, religious, ethnic beliefs or membership of a particular social group pushes people to resettle in different parts of the world. Other reasons for the frequent displacement of the population can be natural disasters, which transpire increasingly due to climate change⁷.

Post relocation these people have to encounter numerous problems such as finding a new place to settle, food to eat and clothes to wear, but they also have to incessantly deal with xenophobia just as frequently; this dislodged population becomes the victims of sexual and gender-based violence, especially women and children⁸.

⁴ Aman Kumar, 'India's relationship with the Principle of Non-Refoulement' (2020) <<https://allaboutitl.wordpress.com/2018/05/19/indias-relationship-with-the-principle-of-non-refoulment/>>accessed 22 January 2021

⁵Sikanyiso Masuku and Size Nkala Source, 'Patterns of the refugee cycle in Africa' (2018), Vol. 7, No. 3, Journal of African Union Studies <<https://www.jstor.org/stable/10.2307/26890366>> accessed 22 January 2021

⁶ Refugees, Oxfam Australia <<https://www.oxfam.org.au/what-we-do/emergencies/refugees/#:~:text=People%20become%20refugees%20or%20displaced,as%20a%20result%20of%20war>> accessed 22 January 2021

⁷Comments on the Draft 5th Immigration Control Basic Plan, UNHCR (2015) <https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Final_UNHCR_Comments_ENG.pdf>accessed 22 January 2021

⁸Ibid 6.

III. Fortifying the Refugee rights

The principle of *non-refoulement* serves as the kernel of international refugee protection laws⁹. The origin of the principle of non-refoulement can be traced during the two world wars, and a tacit recognition was granted when it was codified in Article 33 of the Refugee Convention of 1951¹⁰. Principle of non-refoulement is an indispensable international norm, and is related to *Responsibility to Protect (R2P)* commitment by United Nations member states¹¹.

In simplistic terms, this principle means that "*a person cannot be compelled to return to their home state if they continue to have a well-founded fear of persecution in their home state*"¹². It prohibits States from "*transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations in their home state*"¹³.

However, non-refoulement demonstrates an inextricable clash with state sovereignty. It is very well understood that the sovereign state has complete authority over its borders and gets to regulate the movement between the borders. However, the principle of non-refoulement threatens this notion of sovereignty¹⁴.

IV. Abiding by the Non-Refoulement principle: A Customary law principle

First, we need to discern which kind of practice becomes law as part of customary international law. Customary international law results from a general, and consistent practice of states followed by them from a sense of legal obligation¹⁵. Custom in its legal sense means

⁹Sonia Bucan, Nikolas Dolmat, Sarah Hajjaji, Lucy Keller, Ali-Mikael Sanji, 'Non-Refoulement and the Case of the Rohingya' (2020)

<<https://crgreview.com/non-refoulement-and-the-case-of-the-rohingya/>> accessed 22 January 2021

¹⁰Ibid 5.

¹¹Ibid 10.

¹²SanyaSamtani, 'Deporting Rohingya Refugees: Indian Supreme Court Violates Principle of Non-refoulement' (OxHRH Blog, 18 October 2018), <<http://ohrh.law.ox.ac.uk/deporting-rohingya-refugees-indian-supreme-court-violates-principle-of-non-refoulement>>accessed 22 January 2021

¹³ The principle of non-refoulement under international human rights law, OHCHR <<https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>> accessed 22 January 2021

¹⁴Ibid 10.

¹⁵ Abbas, Ademola, *Complete International Law: Text, Cases, and Materials*, (New York: Oxford University Press, 2012) 83

something *more than mere habit or usage*¹⁶; it is a usage felt by those who follow it to be an obligatory one¹⁷. *Article 38(1) of the ICJ Statute* lays down two criteria for proving the existence of custom in international law:-(a) *general practice* and (b) *the acceptance of this practice as law*.

Non-refoulement fulfils both the conditions mentioned above and hence qualifies to be customary international law, and all the member states need to abide by this principle¹⁸.

One major problem arises here because, except Afghanistan, none of the South Asian Countries is a party to the Refugee Convention of 1951, which is the primary document in which the principle of non-refoulement is embedded. It will be legally challenging for the international communities to compel the South Asian countries to abide by the principle¹⁹.

Non-compliance of this principle demonstrates that the governance of non-refoulement as an international norm is not very effective, despite claims that the principle of non-refoulement has acquired *jus cogens' status*²⁰. However, to counter the above notion²¹ it can be argued that the principle of non-refoulement falls under various other international conventions as well to which these South Asian countries are signatories. Hence, they are obligated to the principle of non-refoulement in those other international conventions²².

V. Significance and application of Non-Refoulement in the South-Asian countries

The nations always face a dilemma between "*morality versus reality*" while dealing with refugees' problem²³. On the one side of the pedestal, there is the moral obligation of protecting refugees, asylum seekers or the stateless person. Furthermore, on the other side, there is a rational perspective to protect national interests, security and sovereignty, which always receives precedence over morality.

¹⁶*Colombia v. Peru* (1950) ICJ REP 266

¹⁷ *Federal Republic of Germany v. Denmark, Federal Republic of Germany v. The Netherlands* (1969) ICJ REP 3

¹⁸*Ibid* 16.

¹⁹*Ibid* 5.

²⁰*Ibid* 10.

²¹*Ibid* 5.

²²Abdul Gaffer, 'Approaching The Rohingya Crisis' (2018), *World Affairs: The Journal of International Issues*, Vol. 22, No. 1, <<https://www.jstor.org/stable/10.2307/48520051>> accessed 22 January 2021

²³*Ibid* 23.

Similar is the situation while obeying the principle of non-refoulement. Countries are obligated to any international law extend to the international convention or treaty signed and ratified by those nations²⁴. When it comes to international refugee laws, the South Asian countries have a very dubious stand. India, Pakistan, Bangladesh, Sri Lanka and Nepal are not parties to the 1951 Refugee Convention²⁵. Therefore prima facie they are not bound by the restrictions and rules of this convention. It can be further implied that these nations do not have to adhere to the principle of non-refoulement as well, which is given in Article 33 of the 1951 Refugee Convention²⁶.

But as already explained above, Non-refoulement is customary international law and nations must obey this principle. In order to counter the whole narrative of customary international law obligation, the states put forward this argument of *prioritisation of state/national security* and to substantiate the same, states highlight the Article 33(2) of the 1951 Refugee Convention which justifies that, any threat national security²⁷ is an exemption in order to escape the obligation of non-refoulement.

Another moral claim these countries usually put forward is that- the refugee inflows deprive the citizens of their fundamental citizenship rights, strain national resources, and create equal employment opportunities. However, these moral arguments do not have a legal backup. At last, this is to summaries that the countries are not exempted from this principle's obligation. The principle of non-refoulement binds states as it is a part of customary international law.

The principle of non-refoulement is rooted in other international conventions as well. For example, India is not a party to 1951 convention but a signatory to the *2016 New York Declaration for Refugee and Migrants*²⁸, thereby giving tacit recognition to the principle of non-refoulement as Paragraph 24 of the New York Declaration mentions this principle. Other international conventions which indirectly encapsulates the principle of Non-refoulement are- Article 3 of the Convention²⁹ against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; Article 6 & 7 of International Covenant on Civil and Political Rights,

²⁴Ibid 13.

²⁵Ibid 13.

²⁶Ibid 10.

²⁷Ibid 5.

²⁸Ibid 6.

²⁹Article 3- No state party shall expel, return ("refouler") or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture

1966; Article 16 of International Convention for the Protection of All Persons from Enforced Disappearance, 2006; Article 22 of Convention³⁰ on Rights of Child, 1989³¹.

All the South Asian countries are indirectly accountable with the principle, as these countries are party to some or all the conventions mentioned above ³² and also a signatory to the International Covenant on Civil and Political Rights, 1966, whose Article 7 imposes obligations on the state parties to not subject anyone "to torture or cruel, inhumane or degrading treatment or punishment" and the UN human rights committee interpreted this article to include the principle of non-refoulement in it³³.

VI. Raising security concerns as an exception to Non-Refoulement

Countries such as India and Bangladesh have often claimed that the refugees pose a *national threat or security concern to their state*, and have started this as an essential consideration in repatriating the *Rohingyas*³⁴.

In order to address the claim in a better fashion, we need to revisit that national security is a valid exception to non-refoulement under Article 33(2) of the 1951 Refugee Convention. Even during the Refugee Convention's drafting, states were reluctant to include any exception to the principle of non-refoulement.

However, national security is mentioned as one of the exemptions, keeping in mind that any country's sovereignty is supreme. Nevertheless, the point needs to be seen here is that the national security exception has not attained the status of a principle of customary international law, which is the source of obligation of non-refoulement for all the member states, because most of the international treaties enshrining the principle of non-refoulement do not create a national security exemption. Therefore, those states that have raised security concerns as a

³⁰Article 22- *State parties shall take appropriate measures to ensure that a child who is seeking refugee status ... receives appropriate protection and humanitarian assistance*

³¹Ibid 5.

³²Srihari Gopal, 'Rohingyan Repatriation and the Principle of Non-Refoulement' (OxHRH Blog, 18 August 2018) <<http://ohrh.law.ox.ac.uk/rohingyan-repatriation-and-the-principle-of-non-refoulment>> accessed on 22 January 2021

³³Ibid 5.

³⁴ Abhishek Bhatia, Ayesha Mahmud, Arlan Fuller, Rebecca Shin, Azad Rahman, Tanvir Shatil, Mahmud Sultana, K. A. M Morshed, Jennifer Leaning and Satchit Balsari, 'The Rohingya in Cox's Bazar: When the Stateless Seek Refuge' (2018), Health and Human Rights, Vol. 20, No. 2, <<https://pubmed.ncbi.nlm.nih.gov/30568406/>>, accessed 22 January 2021

ground for repatriating refugees to the country of origin do not apply to the customary international law that imposes non-refoulement obligations³⁵.

One of the alternative solutions to this situation can be, since the law provides that the Host country (taking India as example) cannot send the refugees (considering Rohingya refugees) to the country of origin (Myanmar) because there is a threat of persecution, but can send these migrants to other refugees camps (as there are 6,55,000 people in Bangladesh camps). If the host country's government deport these migrants to a third country where there is no threat of persecution, that will not be a violation of the principle of non-refoulement. And the host nation can reduce the burden of its own state.

VII. Applying the precautionary principle is the solution

The right to protection of one's sovereign border flows from the right as a sovereign state. The sovereign states have the liberty to decide, who shall and shall not enter inside the geographical boundaries. From the equality principle perspective, the state has to treat everyone equally, but that principle applies within its territorial boundaries and among its citizens. However, when a person is entering into another's country, prerogative in terms of sovereignty reigns supreme. Hence, it is crucial to apply the precautionary principle well in advance because once there will be a massive influx of migrants, it will be difficult to differentiate between an illegal migrant, a legal one and who can be a threat to the country.

The existing international law on migration does not dictate upon states how to control migration flows, nor does it impose on how to formulate migration rules and regulations. The law prescribes that states ought to develop migration laws that protect and manage both documented and undocumented migrants' fundamental human rights enshrined in the international law provided by various instruments³⁶. At the same time, it is indispensable to notice that refugee or migrations laws should also not compromise the hosting state's security and public order situation.

³⁵D Chigudu, 'International migration: The state-sovereignty-migration nexus' (2015), Department of Public Administration & Management, University of South Africa, The Journal for Transdisciplinary Research in Southern Africa

³⁶Ibid 6.

VIII. Challenges and obstacles in the refugee crises

The predicaments are infinite, and there is no definitive list of concerns the host countries need to handle³⁷. One of the significant issues is *identifying* an illegal immigrant, legal migrant, or a threat to the country. It will be highly discriminatory to assume that everyone is a threat, judging everyone through one perspective is not acceptable, but accommodating everyone without proper security check is also not the safest route³⁸. But the core issue with the influx of refugees is that hundreds of thousands of people come together, some have their identification documents but many of them don't have any proof of identity. And it is next to impossible to run everyone through security check first and then allowing them to enter the borders.

Another major problem for South Asian states is that they have *limited resources* both in monetary and non-monetary terms. Furthermore, providing assistance, shelter, food and other necessities is a major challenge for these countries. Countries also need to prevent a situation like mobilisation of these refugees in the *country's inner part; civil conflicts due to the high influx of immigrants and changing demographics*. Even after all the challenges, the host nation needs to ensure that refugees are not deprived of any human right.

IX. The way forward

Before providing any solution, we need first to identify the major stakeholders in this problem, the refugee issue is a shared problem, and management framework must incorporate diverse actors at multiple levels³⁹. Most important actors in the refugee crisis are- the *country of origin of the conflict, the people affected by the crisis* and the *states hosting the refugees*. Another major actor is *UNHCR*, a specialised agency mandated to lead and coordinate international action to protect refugees and resolve refugee crises worldwide.

It also coordinates with intergovernmental organisations, international organisations and other non-governmental organisations to provide humanitarian assistance including food and non-food aid. Regional organisations like *ASEAN and SAARC* also plays a significant role in resolving refugees' issues⁴⁰ by determining the status of refugees, facilitating negotiations for

³⁷Ibid 33.

³⁸Ibid 35.

³⁹Ibid 23.

⁴⁰Ibid 6.

repatriation or can share the burden of refugees among all the nations of the regional organisation. Collaboration and cooperation is the key to deal with the issue effectively⁴¹.

Displacement of populations is not one country's problem; if collective efforts are not taken soon, all the member nations will have to face the repercussion in one way or the other. The identification of actors leads to the development of networks and functional modalities for collaboration. Authority and responsibility should be based on expertise and skill among the broad range of actors. Collaboration, cooperation, and networking should be developed to resolve identified problematic areas and provide humanitarian assistance and service to refugee communities.

Also, 'long term solutions' and 'short-term management' must be two integral parts while dealing with the refugee issue. All active actors must address the root causes of the problem and take appropriate measures to address them⁴². It is the responsibility of the host nation's authority to stipulate the difference between asylum seekers and economic migrants. Only then will the host country comply with UNHCR's recommendation of treating refugees as economic migrants where states need to fill a gap in the local labour force.

It is also crucial to conduct awareness campaigns to address the immediate fear and hostility among the host nation's local communities against refugees. Because there can be a scenario when this hostility might turn into retaliation and further lead to these refugees' oppression in the host state.

X. Conclusion

The problem does not lie in the fact that the refugees are coming, but since they are stretching into other states' sovereign territory, that creates a real humanitarian crisis and perhaps even a demographic crisis in the host nation itself. The world has already witnessed the major refugee crisis of Syria, Afghanistan, South Sudan, Myanmar, and Somalia; there might be even worse situations in the future. It is essential for the South Asian countries to collectively realise this concern's gravity and start formulating laws and policy to apply the principle of prevention in the refugee crisis context.

⁴¹Ibid 23.

⁴²Ibid 23.

The author also dealt in depth with the Principle of Non-refoulement; the bindingness of the principle as customary international law; the response of South Asian countries to this international obligation. As the principle of non-refoulement has become widely accepted as customary international law, South Asian countries cannot escape their responsibility of offering refuge to asylum seekers altogether. But the author tries to provide an alternative route to reduce the burden to an extent.

Through this paper, the author urges the world community to support the South Asian countries to deal with the influx of millions of migrants and opt for a collaborative and cooperative approach. In addition, do not shift the whole burden on a few states; it is not one country's problem, but this is the collective responsibility of all the member's states. Finally, the paper calls for support from other developed nations, the international community and regional bodies to deal with this issue.

RIGHT TO EDUCATION VIS A VIS STATE RESPONSIBILITY

DURING COVID -19 PANDEMIC: A PERSPECTIVE AND WAY FORWARD

Dr.Sangeeta Taak*

I. Introduction

Right to education is not a privilege but a right guaranteed by the State to every individual without any discrimination, wherein, the State has an inherent duty to provide education through minimum standards, wherein, the State can be made accountable for the violations and deprivation of the right to education. The Constitution (Eighty-sixth Amendment) Act, 2002 inserted Article 21-A in the Constitution of India to provide free and compulsory education of all children in the age group of six to fourteen years as a Fundamental Right in such a manner as the State may, by law, determine. Right to Education is a Fundamental Right in Article 21A of the Constitution of India.¹ The UNESCO has highlighted that the education is divided into three levels, i.e. primary, secondary and higher. Primary education that is free, compulsory and universal; Secondary education, including technical and vocational, that is generally available, accessible to all and progressively free; and Higher education, accessible to all on the basis of individual capacity and progressively free.²

This paper is an attempt to mention the Right to Education is a Fundamental right even during COVID -19 Pandemic. In this paper I shall be explaining the responsibility of the State during the Pandemic, the problems, challenges and the possible solutions and also the responsibility of an individual as citizens.

II. Right to Education and Human Rights

As we know the Right to Education is one of the important human right as it is an inevitable

*Department of School Education & Literacy, Ministry of Human Resource Development, Government of India, *Right to Education*, [February, 2019]
(available at <https://mhrd.gov.in/rte>).

¹ UNESCO, *What you need to know about the Right to Education*, [October, 2018] (available at <https://en.unesco.org/news/what-you-need-know-about-right-education>)

part of Universal Declaration of Human Right (UDHR). The Universal Declaration of Human Rights 1968 states that the right to education is a human right and available to all human beings. The right to education is a human right and indispensable for the exercise of other human rights. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit³. Since then, the right to education has been widely recognized and developed by a number of international normative instruments elaborated by the United Nations, including the International Covenant on Economic, Social and Cultural Rights (1966, CESCR), the Convention on the Rights of the Child (1989, CRC), and the UNESCO Convention against Discrimination in Education (1960, CADE). The right to education has also been recognized in ILO Conventions and international humanitarian law, as well as in regional treaties. It is worthwhile to mention that India is a State party to the ICESCR, the CERD Convention, the CEDAW Convention and the Convention on the Rights of the Child. It means, India is bound to fulfill the obligations of all these international treaties during Covid - 19 also. However, India and any other nation was not prepared for such situation. However, it is still coping up with the obligations of the international instruments vis-à-vis its state obligations under International Human Rights Law.

III. State Obligations under International Human Rights Law

As the States are the duty-bearers under International Human Rights Law and hold the principal responsibility for making provisions for the right to education in most circumstances. Through ratification of international human rights treaties, Governments undertake to put into place domestic measures and legislations compatible with their treaty obligations and duties.⁴ In order to fulfill these obligations the States must take positive measures that enable and assist individuals and communities to enjoy the right to education⁵. The obligations related to each of the “essential features” of the right to

³ United Nations' Universal Declaration of Human Rights (UDHR), Art 26 .

⁴ UNESCO, Right to Education - State obligations and responsibilities (available at <https://en.unesco.org/themes/right-to-education/state-obligations>)

⁵ Once a state has ratified a treaty that guarantees the right to education, it has obligations to respect, protect, and fulfil this right. The obligation to respect requires States to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States to take measures that prevent third parties from interfering with the enjoyment of the right to education.

education are categorised under four areas: availability, accessibility, acceptability, adaptability.⁶ India has tried to adopt these international instruments by enshrining these provisions in the Indian Constitution. India is perhaps the first or only country which has included the Right to Education as a Fundamental Right. It is a matter of pride that Fundamental rights as well as the Directive Principles of the State Policy includes the provisions for the Right to Education.

IV. Obligations of State under the Constitution of India

The Indian constitution has provisions to ensure that the state provides education to all its citizens.⁷ The Fundamental Rights and Directive Principles of State Policy (DPSP) & Fundamental Duties under the Constitution of India provide the framework for rights to education.⁸ The Constitution (Eighty-sixth Amendment) Act, 2002 inserted Article 21-A in the Constitution of India to provide free and compulsory education of all children in the age group of six to fourteen years as a Fundamental Right in such a manner as the State may, by law, determine. The Right of Children to Free and Compulsory Education (RTE) Act, 2009, which represents the consequential legislation envisaged under Article 21-A, means that every child has a right to full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards⁹. Despite these provisions the present situation of COvid-19 has brought various challenges before the state to fulfill its obligations. These are discussed as under:

V. Impact of COVID 19 on Right to Education in India

With the spread of the corona virus, the education system is facing a new crisis, as more than 160 countries mandate some form of school closures impacting at least 1.5 billion children and youth. Extended school closures may cause not only loss of learning in the short term, but also further loss of human capital and diminished economic opportunities over the long term. These nationwide closures

⁶*Ibid.*

⁷Khabirul Alam, *Human Rights and Right to Education in India*, IJRAR- International Journal of Research and Analytical Reviews, [Volume 5 I Issue 2 I April – June 2018 at Pg 2183].

⁸*Ibid.*

⁹By the Constitution (Eighty-Sixth Amendment) Act, 2002, (w.e.f 1.4.2010) adding a new clause (k) under Article 51A (fundamental duties), making parent or guardian responsible for providing opportunity for education to their children between six and fourteen years. RTE has been a part of the directive principles of the State Policy under Article 45 of the Constitution, which is part of Chapter 4 of the Constitution.

are impacting over 60% of the world's student population.¹⁰ While school closures seem to present a logical solution for enforcing social distancing within communities, prolonged closures tend to have a disproportionately negative impact on the most vulnerable students.¹¹ Education has been hit hard by the COVID-19 pandemic with 1.53 billion learners out of school and 184 country-wide school closures, impacting 87.6% of the world's total enrolled learners. Drop-out rates across the globe are likely to rise as a result of this massive disruption to educational access.¹² Since, the outbreak of Covid-19, schools and universities closures will not only have a short-term impact on the continuity of learning for more than 285 million young learners in India but also engender far-reaching economic and societal consequences.¹³

VI. Challenges during Covid-19

First and foremost, challenge is that the online education is conducted in two ways. The first is through the use of recorded classes, which, when opened out to public, are referred to as Massive Open Online Course (MOOCs).

The second challenge is while taking live online classes, Universities require high-speed internet and education delivery platforms or learning management systems, besides stable IT infrastructure and faculty members who are comfortable teaching online. Students also need high-speed internet and computers/mobiles to attend these sessions or watch pre-recorded classes.¹⁴

During the Covid-19 the operation of various fundamental rights was restricted by the State. However, education is imparted by the schools and colleges and universities during the lockdown period. The teachers were delivering lectures either through pre-recorded lectures or online through video conferencing using different technological tools, which, required electronic equipments i.e.

¹⁰ UNESCO, *Education: From disruption to recovery* (May, 2020, available at <https://en.unesco.org/covid19/educationresponse>).

¹¹ World Bank, *World Bank Education and COVID-19* (April, 2020, available at <https://www.worldbank.org/en/data/interactive/2020/03/24/world-bank-education-and-covid-19>).

¹² Education Cannot Wait, *COVID-19 AND EDUCATION IN EMERGENCIES* (April, 2020, available at <https://www.educationcannotwait.org/covid-19/>).

¹³ Richa Choudhary, *COVID-19 Pandemic: Impact and strategies for education sector in India* (April 16, 2020, available at <https://government.economictimes.indiatimes.com/news/education/covid-19-pandemic-impact-and-strategies-for-education-sector-in-india/75173099>).

¹⁴ Sarah Farooqui, *Education in the time of Covid-19: How institutions and students are coping* (May, 2020) (available at https://www.business-standard.com/article/education/education-in-the-time-of-covid-19-how-institutions-and-students-are-coping-120043001575_1.html).

mobile, laptop, iPads etc., and internet. In India, where clean water and food is a luxury for some, access to education through online medium is a distant dream¹⁵. In India majority of the students and their parents cannot afford the requisite accessories for their children.

Most of the teachers and their organizations have embraced this challenge, although in many developing countries teachers lack the skills and equipment to provide distance education effectively.

The third challenge was the state to understand the duties and challenges and to face the challenges in order to comply with their commitment under various international legal instruments along with the provisions of the Constitution.

In most of the schools and colleges/universities the sessions remained online till December, 2021¹⁶. While technology is enabling, it can also be limiting, especially in India, where basic access is a challenge. Not every student had a computer or fast-streaming internet at home. This led to the issue with attendance and participation in online sessions. Many parents didn't have a spare computer or a laptop at home, as they themselves were busy working from home. This forced the students to struggle with attending the classes over smart phones.

As many students were at the loss of their studies, the experiment of virtual class has upset us all when on June 2, 2020, 14 years old Dalit girl child, Devika, committed suicide due to the lack of facilities in her house to attend the online classes¹⁷. Devika was a bright student and could not even bear the pain of losing a single class of her most important Class IX standard. Her parents did not have a smartphone or television in her home. She was disappointed about the inadequate facilities to take the online classes in the house.

One more girl in Mansa Punjab, committed suicide for the same reason. The victim, who was

¹⁵COVID-19: Indian Internet infra not prepared for shift to online teaching-learning, says QS report, The Economic Times April 21, 2020, available at <https://economictimes.indiatimes.com/tech/internet/covid-19-indian-internet-infra-not-prepared-for-shift-to-online-teaching-learning-says-qs-report/articleshow/75269679.cms?from=mdr>

¹⁶ Telangana: Online classes a distant dream for rural students, The Times of India, July 4, 2020 available at <https://timesofindia.indiatimes.com/city/hyderabad/online-classes-a-distant-dream-for-rural-students/articleshow/76777799.cms>.

¹⁷Kerala Dalit student kills herself, parents say upset over not being able to attend online classes, The Indian Express, July 15, 2020 Available at: <https://indianexpress.com/article/education/kerala-dalit-student-kills-herself-parents-say-upset-over-not-being-able-to-attend-online-classes-6439682/>.

the daughter of a farm labourer, had been asking for a smartphone to attend classes. Her parents because of their poor financial conditions, could not buy her one¹⁸.

In Gujarat also, a 12 years old girl committed suicide because of the stress of online classes and homework on June 24, 2020. As per the report of Ahmedabad Mirror, the main reason was that she was unable to cope with the homework and could not bear the emotional stress of not being able to meet her classmates. So she took the extreme step¹⁹.

On June 23, 2020 In Assam also a 15 years old student committed the suicide after failing to attend the online classes due to the non- availability of smart phone. The boy belonged to economically weak family, living in a small house and failed to get a smartphone for online classes²⁰.

These incidents also prove that the State has failed to protect the Fundamental rights of the children to education. The schools, colleges, universities cannot provide internet for the students. They work as the supporters and they are doing their duties that is to impart the education. But it is the duty of the state to fill the gaps. On the other hand, these online teachings are also a challenge before the teachers.

VII. Challenges for Teachers

The teachers in private schools are also complaining about online bullying by students during video calls, their government counterparts claim the biggest challenge is reaching students who belong to the economically weaker section. Privacy- and propriety-related issues constitute a major concern among tutors. Some parents, teachers allege that, during online classes, family members of students “peep in”²¹. Teachers in government schools have a different set of problem, that is, reaching students who do not have basic prerequisites like smartphones, laptops, and the internet. The online teaching process has left the teachers overworking and also open to abusive behaviour

¹⁸No Smartphone For Online Classes, Punjab Girl Allegedly Commits Suicide, June 8, 2020, available at: <https://www.ndtv.com/india-news/coronavirus-india-punjab-mansa-no-smartphone-for-online-classes-girl-allegedly-commits-suicide-2242789#:~:text=Upset%20about%20not%20having%20a,in%20the%20state%27s%20Mansa%20district.>

¹⁹12-year-old Gujarat girl kills self over stress of online classes, homework, India Today, June 24, 2020, available at: <https://www.indiatoday.in/india/story/gujarat-teen-kills-self-over-stress-of-online-classes-1692105-2020-06-24>.

²⁰<https://nenow.in/north-east-news/assam/assam-with-no-smartphone-15-year-old-student-commits-suicide-after-failing-to-attend-online-classes.html>.

²¹Kritika Sharma, Peeping parents, sleeping students, bullying — online classes are a nightmare for teachers (July, 2020, available at <https://theprint.in/india/education/peeping-parents-sleeping-students-bullying-online-classes-are-a-nightmare-for-teachers/458522/>).

from students.²²

The state has definitely failed in the duty in this case to take positive measures to ensure that education is provided poor indigenous people. Is the state ready to deal with the challenges of the right to education for children? Is the state ready to deal with the challenge of children facing mental stress and the loss of their academic and extra-curricular activities? The schools owe a responsibility to get in touch with the students for their mental stability.

VIII. Challenges of Teaching Pedagogy

When the whole situation in had changed, then why not the pattern of education during pandemic? The children are under tremendous pressure because of continuous online classes. The curriculum is not dealing with it. There is a need to change the curriculum for these kinds of situations when the schools cannot be conducted normally. School should not emphasize on the bookish knowledge. Children's emotional needs attention as they are missing the schools, teachers and friends. If education is causing mental stress, then we need to revisit the education policy.

It is a necessity to change with the situation. The education policy should not be rigid but it should be flexible to cope with any situation. Still the education policy remains the same or similar as it was earlier.....isn't it a failure of the education policy? The education pedagogy should make the students prepared for the challenges and adaptability. However, the education policy itself is not flexible. During Pandemic, syllabus, examination, viva voce, attendance, etc remained the same. During pandemic, the teaching methods shifted from offline to online where teacher has no personal contact. Moreover, the student even if is willing to attend the lecture could not attend due to practical problems. Still no vision had been made to make education policy/pedagogy suitable to all students. When we demand tuition fees from all student it is our duty to ensure that each student must be in a position to get education.

The students are left to arrange their resources for gadgets, internet on their own. Teaching Methodology should have been complied with alternative methods to the deal with the teaching. For

²² Puja Awasthi, Online classes turning out to be nightmare for teachers amid COVID-19 lockdown (May, 2020, available at <https://www.theweek.in/news/india/2020/05/23/online-classes-turning-out-to-be-nightmare-for-teachers-amid-covid-19-lockdown.html>)

example, the students who could not attend the classes, projects could be given, assignments could be given. Some relaxation could have been given to those students who were not able to afford or attend the online classes. There is a need to be flexible during COVID-19. Another alternative approach could have been made for the students to attend MOOC course during COVID-19 Pandemic. The credit of MOOC Course/ Swayam Portal/ NPTEL Course as per their convenience and the certificate may be considered at par with the curriculum subject to promote to next class.

IX. Conclusion

The developing country like India there is a need to change the education policy, teaching pedagogy to suit the needs of normal days and during pandemic or any other uncertain situations. Specially the shift is necessary to deal with the pandemic like situations, i.e, from books to craft. Reported suicides and various unreported incidents, the “Right to Education” during Covid-19 pandemic had proved that the State had failed in its duty to fulfill the obligations accepted under the Universal Declaration of Human Rights and the Constitution of India.

BHAGWADAS KEDIA CASE vis-à-vis E-CONTRACT: AN ANALYSIS

Dr. Anant D. Chinchure*

I. Introduction

Oxford dictionary defines contract as, a written or spoken agreement, especially one concerning employment, sales, or tenancy that is intended to be enforceable by law. It is the view of William Markby that Contract belongs to that class of acts which give rise to legal rights and duties upon occasions when the parties themselves have agreed so to declare

¹ In his book entitled *Elements of Law*, Markby quoted Savigny's definition of contract. Savigny defines contract as,

A contract is the concurrence of several persons in a declaration of intention whereby their legal relations are determined.

From the above definition of Savigny, it can be observed that the contract includes not only those agreements which are a promise to do or to forbear from, some future act, but also which are carried out simultaneously with the intention of parties being declared.

Section 2 (h) of Indian Contract Act, 1872 gives broader definition. It defines, 'an agreement enforceable by law is a contract'. Markby criticises definition saying that it restricts the word contract to those agreements which the party making the promise is compelled by law to perform. Further, he states the definition of contract is very vague because there is no guidance with regard to what agreements or what classes of agreements are enforceable by law. Markby is of view that Savigny's definition is very comfortable to adopt, he also provides reason for the same.²

- That the agreement in order to become a contract must be one in which the parties contemplate the creation of a legal relation between themselves.
- That it clearly describes the true relation of the parties and how it arises.

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¹ Sir William Markby, *Elements of Law*, 6th Ed., Oxford at the Clarendon Press, London, 1905, p.298 .

²*Ibid.* Ref. pp.301-303.

II. Bhagwandas Kedia Case

Prior to judgment of *Bhagwandas Kedia*³ the Contract Act of 1872 was applicable to traditional mode of contracts, which means, contracts entered face to face between the competent parties. In order to understand *Kedia Case*, it is necessary to discuss *Entores Ltd. v. Miles Far East Corporation*.⁴ This is the case on which *Kedia Case* decision is based. The facts of the *Entores* case were that, an offer was made from London by telex to a party in Holland and it was duly accepted through the telex, the only question being as to whether the contract was made in Holland or in England. The Court of Appeal held that telex is a method of instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offerer; and the contract is made at the place where the acceptance is received. Denning LJ observed as follows:

“Let me first consider a case where two people make a contract by word of mouth in the presence of one another. Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that movement. If he wishes to make a contract, he must wait till the aircraft is gone and then shout back his acceptance so that I can hear what he says.... Now take a case where two people make a contract by telephone. Suppose for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes ‘dead’ so that I do not hear his words of acceptance. There is no contract at that movement.”

The principle of the *Entores* Case has been endorsed in *Kedia Case*. The rule above stated is called ‘acceptance rule’.

III. Facts of the Case

Plaintiffs brought an action against the defendants for a decree for Rs. 31,150/- on the plea that the defendants had failed to supply cotton seed cake which they had agreed to supply under an oral contract dated July 22, 1959 negotiated between the parties by conversation on long distance telephone.

³*Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas & Co.* AIR 1966 SC 543.

⁴ (1955) 2 All ER 493.

The plaintiffs submitted that the cause of action for the suit arose at Ahmadabad, because the defendants had offered to sell cotton seed cake which offer was accepted by the plaintiffs at Ahmadabad. Also because the defendants were under the contract bound to supply the goods at Ahmadabad and the defendants were to receive payment for the goods through a Bank at Ahmadabad. The defendants contended that the plaintiffs had by a message communicated by telephone offered to purchase cotton seed cake and they (the defendants) had accepted the offer at Khamgaon, that under the contract delivery of the goods contracted for was to be made at Khamgaon, price was also to be paid at Khamgaon and that no part of the cause of action for the suit had arisen within the territorial jurisdiction of the City Civil Court Ahmadabad.

On the issue of jurisdiction, the Trial Court found that the plaintiffs had made an offer from Ahmadabad by long distance telephone to the defendants to purchase the goods and that the defendants had accepted the offer at Khamgaon, that the goods were under the contract to be delivered at Khamgaon and that payment was also to be made at Khamgaon. The contract was in the view of the Court to be performed at Khamgaon, and because of the offer made from Ahmadabad to purchase goods the Court at Ahmadabad could not be invested with jurisdiction to entertain the suit. But the Court held that when a contract is made by conversation on telephone, the place where acceptance of offer is intimated to the offer or, is the place where the contract is made, and therefore the Civil Court at Ahmadabad had jurisdiction to try the suit. A revision application filed by the defendants (*Kedia*) against the order, directing the suit to proceed on the merits, was rejected *in limine* by the High Court. Aggrieved by the order of the High Court, defendants preferred appeal to Supreme Court with special leave.

IV. Defence of Defendants

The defendants (*Kedia*) contended that in the case of contract on telephone, the place where the offer is accepted is the place where the contract is made, and that Court alone has jurisdiction within the territorial jurisdiction of which the offer is accepted and the acceptance is spoken into the telephone instrument.

V. Reasoning and Judgment

Matter was decided by a three Judges Bench consisting of Justice J.C. Shah, Justice K.N. Wanchoo and Justice Mohd. Hidayatullah. There was a split verdict with 2:1. Shah (afterwards CJ) and WanchooJJ., gave majority view whereas Hidayatullah M, J (afterwards CJ) gave dissenting opinion. Shah J. gave judgment on behalf of himself and Wanchoo J. The Judges constituting majority opinion preferred to follow the English rule laid down in the *Entores* Case and saw no reason for extending the post office rule to telephonic communication. Shah, J. observed:

Making of an offer at a place which has been accepted elsewhere does not form part of the cause of action in a suit for damages, for breach of contract. Ordinarily it is the acceptance of offer and intimation of that acceptance which result in a contract. The intimation must be by same external manifestation which the law regards as sufficient.

On the general rule that a contract is concluded when an offer is accepted and acceptance is intimated to the offerer, is engrafted an exception based on grounds of convenience which has the merit not of logic or principle in support, but of long acceptance by judicial decision. The exception may be summarized as follows: When by agreement, course of contract or usage of trade, acceptance by post or telegram is authorised, the bargain is struck and the contract is complete when the acceptance is put into a course of transmission the offeree by posting a letter or dispatching a telegram.

The rule that applies to acceptance by post or telegram does not however apply to contracts made by telephone. The rule which applies to contracts by telephone is the ordinary rule which regards a contract as complete only when acceptance is intimated to the purchaser. In the case of a telephonic conversation in a sense the parties are in the presence of each other, each party is able to hear the voice of the other. 'There is an instantaneous communication of speech intimating offer and acceptance, rejection and counter-offer. Intervention of an electrical impulse which results in the instantaneous communication of messages from a distance does not alter the nature of the conversation so as to make it analogous to that of an offer and acceptance through post or by Telegram.

It is true that the Posts and Telegraphs Department has general control over communication by telephone and especially over long distance Telephones, but that is

not a ground for assuming that the analogy of a contract made by post will govern this mode of making contracts. In the case of correspondence by post or telegraphic communication, a third agency intervenes and without the effective intervention of that third agency, letters or messages cannot be transmitted. In the case of a conversation by telephone, once connection is established there is in the normal course no further intervention of another agency. Parties holding conversation on the telephone are unable to see each other; they are also physically separated in space, but they are in the hearing of each other by the aid of a mechanical contrivance which makes the voice of one heard by the other instantaneously and communication does not depend on external agency.

....that the draftsman of the Indian Contract Act could not have envisaged use of telephone because it had not been invented and, therefore, the words of the provision should be confined to communication by post.

On the other hand in his dissenting opinion Hidayatullah J., observed:

In the *Entores* Case Lord Denning no doubt held that acceptance given by telephone was governed by the principles applicable to oral acceptance where the parties were in the presence of each other and that the analogy of letters sent by post could not be applied. But the Court of Appeal was not called upon to construe a written law which brings in the inflexibility of its own language. It was not required to construe the words found in Section 4 of the Indian Contract Act, namely, “The communication of an acceptance is complete as against the proposer when it is put in a course of transmission to him, so as to be out of the power of the acceptor.”

The law under consideration was framed at a time when telephone, wireless, Telstar and Early Bird were not contemplated. If time has marched and inventions have made it easy to communicate instantaneously over long distance and the language of our law does not fit the new conditions it can be modified to reject the old principles. But it is not possible to go against the language by accepting an interpretation given without considering the language of our Act.

The language of Section 4 of the Indian Contract Act covers a case of communication over the telephone. Our Act does not provide separately for post, telegraph, telephone, or wireless. Some of these were unknown in 1872 and no attempt has been made to modify the law. It may be presumed that the language has been considered adequate to, cover cases of these new inventions. It is possible today not only to speak on the telephone but to record the spoken words on a tape and it is easy to prove that a particular conversation took place. Telephones now have television added to them. The rule about lost letters of acceptance was made out of expediency because it was easier in commercial circles to prove the dispatch of letters but very difficult to disprove a statement that the letter was not received. If the rule suggested on behalf of the plaintiffs is accepted it would put a very powerful defence in the hands of the proposer if his denial that he heard the speech could take away the implications of our law that acceptance is complete as soon as it is put in course of transmission to the proposer.

Where the acceptance on telephone is not heard on account of mechanical defects there may be difficulty in determining whether at all a contract results. But where the speech is fully heard and understood there is it binding contract, and in such a case the only question is to the place where the contract can be said to have taken place.

In the present case both sides admitted that the acceptance was clearly heard it Ahmadabad. The acceptor was in a position to say that the communication of the acceptance in so far as he was concerned was complete when he (the acceptor) put his acceptance in transmission to him (the proposer) as to be out of his (the acceptor'....) power of recall in terms of s. 4 of the Contract Act. It was obvious that the word of acceptance was spoken at Khamgaon and the moment the acceptor spoke his acceptance he put it in course of transmission to the proposer beyond his recall. He could not revoke acceptance thereafter. It may be that the gap of time was so short that one can say that the speech was heard instantaneously, but if we are to put new inventions into the frame of our statutory law we are bound to say that the acceptor by speaking into the telephone put his acceptance in the resource of transmission to the proposer.

It is worth to mention that at the time of enactment of Contract Act of 1872 there were no telephones, telex or computers. Therefore, the draftsmen never imagined about scientific inventions. So, the Contract Act of 1872 did not envision about communication using different technologies. Further, the Supreme Court of India, through Hidayatullah J., stated that law can be modified to suit present day's requirements. At this point it can be stressed that, circumstances have changed and new inventions are coming up. Under this situation, it appears that, the majority opinion in *Kedia* is standstill and would virtually be overtaken by the fast changing technological innovations and circumstances. Further, these changes have made the dissenting opinion, expressed by Justice Hidayatullah, more relevant today than the majority opinion. In addition to this, India is signatory party to the Model Law on Electronic Commerce, 1996. On that basis India has enacted Information Technology Act, 2000. Signing of such a convention and enacting law makes the binding majority opinion in *Kedia's* case redundant.

Having discussed about e-commerce and an important case, while moving ahead, now e-contracts are discussed here.

VI. E-Contract

After looking at bird's view of e-commerce, now it is time for understanding what is the meaning of e-contract? There is no hard and fast definition of e-contract. The traditional definition of 'contract' cannot be applied to 'e-contract', because realm of e-contract is much bigger than the realm of traditional mode of contract. To put it simply, e-contract is any agreement which is entered on internet by competent parties, with lawful consideration, free consent, without any mala fide intention and to create legal relationship.

E-contract can be defined in following words:⁵

E-contract is a kind of contract formed by negotiation of two or more individuals through the use electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer program, or the interaction of at least two electronic agents that are programmed to recognise the existence of a contract.

⁵ US Legal Definitions, available at <http://definitions.uslegal.com/e/e-contract/> last visited on 28 November, 2012.

As it is already stated that there is no exhaustive definition as to e-contract and most of times only generic definitions are available. E-contracts are also referred as ‘cyber-contract’ or ‘digital contract’ or ‘online contracts’.

Etymologically one can give as many as definitions for e-contract, but there is no border line for it meaning. In broader sense, it can be summed up as contracts made using computers, either via e-mail or the Internet, or that involve computer related products, such as databases and software.⁶

The International Chamber of Commerce refers to ‘electronic contracting’ as ‘the automated process of entering into contracts via the parties’ computers, whether networked or through electronic messaging.’⁷ This definition is an amalgamation of two separate explanations, one contained in the UN Convention on the Use of Electronic Communications in International Contracts and the other taken from the US Uniform Electronic Transaction Act and Uniform Computer Information Transactions Act providing for ‘automated transactions’. ‘Electronic Communication’ means ‘any communication that parties make by means of data message’, whereas ‘automated transaction’ means ‘any transaction conducted or performed, in whole or in part, by electronic means or electronic records’.

VII. Kinds of E-Contract

There are two ways through which commercial contracts can be entered electronically. A common and popular method is through the exchange of electronic mail ‘e-mail’. The other method of contracting is using the World Wide Web or ‘website’. Further the website based is divided into following kinds:

- Click Wrap
- Shrink Wrap and
- Browse Wrap

⁶ Available at, http://highered.mcgraw-hill.com/sites/0073524948/student_view0/glossary.html last visited on 28 November, 2012.

⁷ General Usage for International Digitally Ensued Commerce (GUIDEC) Version II, International Chamber of Commerce, available at, <http://www.iccwbo.org/> last visited on 28 November, 2012.

E-mail Contract

A contract can be entered into and concluded following the exchange of a number of e-mails between the parties. Here the e-mails serve the same purpose as normal letters, do had a contract been negotiated through letters written by both parties. The fact that a contract has been negotiated electronically will not raise any specific legal or contractual consideration *sui generis* to the type although there may be evidential considerations raised dependant on the existing legislation and if there are any formal requirements for a written signed contract.

Contract through web sites

Normally, a vendor would provide a display of products on his website and indicates cost of such product. A customer can scroll through the website previewing the items or products on offer, click on the item for further information and if interested in the purchase, can place an order by filling in an order form and clicking 'Submit' or 'I Agree' or 'I Accept' or something similar button. Shrink wrap,⁸click wrap and browse wrap are common types of agreements used in electronic commerce.

Click wrap

A click wrap agreement is mostly found as part of the installation process of software packages. It is also called a 'click through' agreement or click wrap license. The name 'click wrap' comes from the use of 'shrink wrap contracts' in boxed software purchases. In a Click Wrap Agreement, the party after going through the terms and conditions provided in the website or programme has to typically indicate his assent by clicking "I Agree/I Accept" icon or decline the same by clicking the icon "I disagree". These types of contracts are extensively used on internet for granting permission to access the site or downloading the software or selling some product. Click-wrap agreements can be of the following types:

- i. **Type and Click** where the user must type 'I accept' or other specified words in an on-screen box and then click a 'Submit' or similar button. This displays acceptance of the terms of the

⁸The clinging transparent plastic film that is used to shrink-wrap the Compact Disks.

contract. A user cannot proceed to download or view the target information without following these steps.

- ii. **Icon Clicking** where the user must click on an 'OK' or 'I agree' button on a dialog box or pop-up window. A user indicates rejection by clicking "Cancel" or closing the window.

Software Developers generally rely on the use of contracts in the form of click wrap license agreements as a means to protect software from unauthorized use, modification and copying. By granting a license to the purchaser to use the software rather than selling the program outright, the Software Developer is able to retain and have control over his product. Most of click wrap license agreements are non-exclusive licenses which mean that the licensor reserves the right to license the same software to other licensees.⁹

Click wrap agreements usually include provisions such as a 'Notice of Agreement Clause' stating that the using of the software/ product constitutes agreement to the license's terms, a 'Title Retention Clause' which, in effect, states the user does not own the copy of the program he/she has contracted for, but takes possession subject to a perpetual license, an 'Exclusive Use Clause', a clause preventing the user from creating unauthorized copies of the software/ product for use or otherwise, an 'Anti-refuse Clause' prohibiting the user from lending, renting, or transferring the software to others, in case of softwares, a clause prohibiting usage in more than one computer specified for that parties, an 'Anti-reverse Engineering Clause', prohibiting the user from reassembling the product from the already available version, a provision protecting the copyright over the software/ product design, a usual limitation or disclaimer of warranties and liabilities, a clause limiting the liability of the vendor, a purchaser's right to decline the terms of the agreement by returning the software program or the product, as the case may be, and miscellaneous provisions such as a governing law clause, jurisdiction clause, force majeure clause etc....¹⁰

Thus, click wrap agreements are adhesion contracts which do not involve the concept of mutual assents and bargains as provided in the contract theory. Actually they are "take it or leave it" agreements in which the user is not made aware of the terms until late in the transaction (just before the

⁹Kunal Singh, *Click Wrap Agreements in Indian Contract Law*, available at <http://lex-warrier.in/2012/03/click-wrap-agreements-in-indian-contract-law/> last visited on 05-11-2012.

¹⁰*Ibid.*

use of the product) which is different from traditional written contract.¹¹

In click wrap agreements, the meeting amongst the parties is virtual i.e. they do not meet physically. The contract could be for the sale of any kind of product, physical or otherwise. Following are some of the issues that may arise out of click wrap contracting, which will be dealt at later juncture:

- Identity of Parties
- Jurisdiction and
- Legal Recognition of Transaction

The validity and enforceability of click wrap agreements will be dealt in later chapter.

Shrink Wrap

Shrink wrap contracts are license agreements or other terms and conditions which can only be read and accepted by the consumer after opening the product. The term describes the shrink wrap plastic wrapping used to coat software boxes, though these contracts are not limited to the software industry.

A shrink wrap contract is the prior license agreement enforced upon the buyer when he buys software. Before he or she tears the pack to use it, he or she is made aware by tearing the cover or the wrap that they are bound by the license agreement of the manufacture.

This is done to protect the interests of the manufacturer where the consumer cannot reproduce the package, copy it or sell it or donate it to others affecting the sale of the software. The license, which is shrunk and wrapped in the product, same becomes enforceable and taken as consent before the buyer tears the package. The usual clauses that are part of the shrink-wrap license are that of:

- prohibiting unauthorised creation of copies
- prohibiting rentals of the software
- prohibition of reverse engineering, de-compilation or modification

¹¹ Mark A. Lemley *et al.*, *Software and Internet Law*, Aspean Law and Business, California, 3rd Ed., 2006, p.363 available at <http://www.law.berkeley.edu/5368.htm> last visited on 24-11-2012.

- prohibition of usage in more than one computer specified for that purpose
- disclaimer of warranties in respect of the product sold
- limitations of liability

The logic and business sense is that to protect the manufacturer of the package, as it is easy to copy, manipulates and duplicate under other brand name.

The legal status of shrink wrap is somewhat unclear. In the 1980s, the US courts tried to solve the problem of status. The first legal ruling to address the enforceability of a shrink wrap license grew out of a pair of decisions (a trial court decision and an appeal to the Fifth Circuit) from Louisiana. In case of *Vault Corp. v. Quaid Software Ltd.*¹², the district court stated without explication that the shrinkwrap license at issue in that case was “a contract of adhesion which could only be enforceable” if the provisions of a Louisiana statute - which explicitly made such license agreements enforceable - were a valid statute that was not preempted by federal law. It was held that the shrink wrap is unenforceable.

Further in *Arizona Retail Sys. v. Software Link*¹³ and *Step-Saver Data Sys. v. Wyse Technology*¹⁴ the courts did not discuss much about the shrink wrap agreements. It was in *ProCD, Inc. v. Zeidenberg*¹⁵ courts gave bit of relief to the software companies by enforcing shrink wrap agreement. Further it was held that shrink wrap agreements were enforceable.¹⁶

ProCD was followed by *Klocek v. Gateway, Inc.*¹⁷, which found the contracts at hand unenforceable, but did not comment on shrink wrap contracts as a whole.

Browse Wrap

In a browse-wrap agreement, the terms and conditions of use for a website or other downloadable product are posted on the website, typically as a hyperlink at the bottom of the screen.

¹² 655 F. Supp. 750, 761 (E.D. La. 1987), aff’d, 847 F.2d 255 (5th Cir. 1988) available at http://itlaw.wikia.com/wiki/Vault_v._Quaid last visited on 29-11-2012.

¹³ 831 F. Supp. 759 (D. Ariz. 1993) available at http://itlaw.wikia.com/wiki/Arizona_Retail_Systems_v._Software_Link last visited on 29-11-2012.

¹⁴ 939 F.2d 91 (1991) available at http://itlaw.wikia.com/wiki/Step-Saver_Data_Systems_v._Wyse last visited on 29-11-2012.

¹⁵ 908 F. Supp. 640 (W.D. Wis. 1996) available at http://itlaw.wikia.com/wiki/ProCD_v._Zeidenberg last visited on 29-11-2012.

¹⁶ David L. Hayes, Esq., *The Enforceability of Shrink wrap License Agreements On-Line and Off-Line*, (1997) available at <http://euro.ecom.cmu.edu/program/law/08-732/Transactions/ShrinkwrapFenwick.pdf> last visited on 29-11-2012.

¹⁷ 104 F.Supp.2d 1332 (D. Kan. 2000) available at <http://www.law.unlv.edu/faculty/rowley/Klocek.pdf> last visited on 29-11-2012.

Unlike a click wrap agreement, where the user must manifest assent to the terms and conditions by clicking on an “I agree” box, a browse-wrap agreement does not require this type of express manifestation of assent. Rather, a web-site user purportedly gives his or her assent by simply using the product — such as by entering the website or downloading software. Browse-wrap agreements, like click wrap agreements, derive their name by analogy to ‘shrink wrap’ used in the licensing of tangible forms of software sold in packages.

As in case shrink wrap agreements there is uncertainty of enforceability, same way the uncertainty continues with browse wrap agreements. But browse-wrap agreements present different issues because it is less clear that the person using the website has accepted the terms of the agreement. The courts have held that the validity of a browse wrap agreement primarily depended on whether a website user has had actual or constructive notice of the terms and conditions prior to using the website or other product.

In *Hubbert v. Dell Corp.*,¹⁸ on appeal, an Illinois state appellate court reversed the trial court’s refusal to compel arbitration. The appeals court took note of how prominently Dell had warned the user that Dell’s terms and conditions would apply:

...The blue hyperlink entitled “Terms and Conditions of Sale” appeared on numerous Web pages the plaintiffs completed in the ordering process [...and] should be treated the same as a multipage written paper contract. The blue hyperlink simply takes a person to another page of the contract, similar to turning the page of a written paper contract. Although there is no conspicuousness requirement, the hyperlink’s contrasting blue type makes it conspicuous. Common sense dictates that because the plaintiffs were purchasing computers online, they were not novices when using computers. A person using a computer quickly learns that more information is available by clicking on a blue hyperlink.

Additionally, on three of the defendant’s Web pages that the plaintiffs completed to make their purchases, the following statement appeared: “All sales are subject to Dell’s

¹⁸ 359 Ill. App.3d (Ill. Ct. App. 2005) available at http://itlaw.wikia.com/wiki/Hubbert_v._Dell last visited on 29-11-2012.

Term[s] and Conditions of Sale.” This statement would place a reasonable person on notice that there were terms and conditions attached to the purchase and that it would be wise to find out what the terms and conditions were before making a purchase.

The statement that the sales were subject to the defendant’s “Terms and Conditions of Sale,” combined with making the “Terms and Conditions of Sale” accessible online by blue hyperlinks, was sufficient notice to the plaintiffs that purchasing the computers online would make the “Terms and Conditions of Sale” binding on them.

Because the “Terms and Conditions of Sale” were a part of the online contract and because the plaintiffs did not argue that their claims were not within the scope of the arbitration agreement, they were bound by the “Terms and Conditions of Sale,” including the arbitration clause.

Whereas in *Specht v. Netscape*,¹⁹ the influential Second Circuit court of appeals affirmed denial of a motion (or application) to compel arbitration; the court agreed that:

... a reasonably prudent Internet user in circumstances such as these would not have known or learned of the existence of the license terms before responding to defendants’ invitation to download the free software, ...defendants therefore did not provide reasonable notice of the license terms.

In *Hoffman v. Supplements Togo Mgmt. LLC*,²⁰ and *In re Zappos.com Inc., Customer Data Security Breach Litigation*,²¹ the court held that “without direct evidence that Plaintiffs click [sic] on the Terms of Use, we cannot conclude that Plaintiffs ever viewed, let alone manifested assent to, the Terms of Use.

VIII. Online shopping agreements

¹⁹ 306 F.3d 17 (2d Cir. 2002) available at http://itlaw.wikia.com/wiki/Specht_v._Netscape last visited on 29-11-2012.

²⁰ 18 A.3d 210 (2011).

²¹ No. 3:12-cv-00325-RCJ-VPC MDL No. 2357, 2012 WL 4466660 (D. Nev. Sept. 27, 2012).

This is another kind of e-contract, in this people can purchase goods, home appliances and many more things online. Very recently in India some websites are selling some products and services online. This type of sale is gaining more popularity. Therefore, this kind of agreement assumes importance.

Generally a typical B2C e-commerce cycle involves the following five major activities:²²

- **Information Sharing:** The general practice in information sharing is that the Company uses the following application/methodology to share information with its prospective customer. This information could be in the form of the Company's website, online catalogs, email alerts, online advertising, bulletin boards, message Board systems, news groups and discussion groups.
- **Order:** Once a customer is familiarized with his needs the customer may use the electronic forms which are available on the Company's website and order for the necessary goods.
- **Payment Channels:** The website gives the customer various options for payment for the goods or services selected, all of which are listed with the website. The most popular modes of payment are credit and debit cards, cheques and cash on delivery or charge cards.

The web company to ensure security and confidentiality with respect to each of these electronic transactions incorporates various security measures. These measures in the form of digital signature, authentication, public key cryptography, certificate authorities, SSI, secure HTTP digital signatures and public and private key transactions.

- **Performance of Order:** The function of performance of the order, depending on the nature of the transaction and the directions of the customer might be either simple or complex. The mode of fulfillment will also depend on how the e-business handles its own fulfillment operations or outsources this function to third parties.
- **Support and Services:** In any e-business service plays a very vital role by virtue of the fact there is a lack of physical presence and other innovative methods are required to maintain current customers. The general ways of applications of technology for providing such service and support are having; periodic follow up by e-mails, email confirmation/alerts, Online surveys, Help Desk and Guarantee of secure transaction.

IX. Conclusion

²²*Supra* Ref. 3, pp.1246-1247.

The law of contract is the bedrock on which the whole superstructure of the economy is built on. Business, trade and commerce can flourish only when the law of the land is definite and clear in the minds of all concerned parties. Indeed, certainty of law is a vital factor in bringing down the risks and costs of business. This element of certainty should exist across all forms of contract, whether they be negotiated in the conventional form of postal communication or the modern way of electronic communication. Therefore, there is reason for Judges, jurists and practitioners engaging in the study of law to iron out the inconsistencies and make the law of e-contract easy to understand and simple to apply.

While, in its fundamentals e-contract is no different from a conventionally formed contract, i.e., through postal communication, there are some aspects which stretch the capacity and imagination of the contract law. Firstly, there is the question of relevance of the “postal rule” to contracts made through electronic communication. Secondly, there is the question of jurisdiction, given that the infrastructure and working of the internet is highly dynamic, and thus fixing any one place as jurisdiction of the contract is highly contentious and problematic. Thirdly, there are issues relating to evidence of the contract, such as to how identity of the parties to the contract could be ascertained, and their assent to the contract determined.

The Supreme Court in the *Bhagwandas Kedia* had established the acceptance rule in the case of contracts negotiated over instantaneous communication like telephone. Some commentators and some judgments seem to suggest that by analogy, the acceptance rule would prevail in contracts negotiated over electronic means also. However, it is important to note that there have been two major developments which have struck at this position: firstly, the passage of the Information Technology Act, 2000, which was substantially inspired by international legal trends, and secondly, the judgment of the Allahabad High Court in *PR Transport v. Union of India*.²³

Section 13(1) of the Information Technology Act, 2000 provides that except as agreed to between the parties to the contract, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator. This is a major blow against the acceptance rule enunciated by the majority of judges in the *Bhagwandas Kedia* case, and re-establishes the postal rule, as advocated by Hidayatullah J., in his dissenting opinion. Thus, it can be said that the *Kedia* case has

²³AIR 2006 All 23.

taken a back seat with respect its application regarding e-contracts.

The Allahabad High Court in the *PR Transport v. Union of India* recognised email communication as analogous to postal communication, and applied the postal rule as to communication between parties by email. This is a very significant development since it goes against conventional wisdom that email communication was in the same class as telephone communication, i.e. instantaneous communication.

Although, e-contracts are gaining acceptance and there should be a policy to promote e-contracts by pre-emptively resolving the ambiguous and vague aspects of e-contracts. Further the following practices may help for promotion and acceptance of e-contracts with the general public as well as the business community:

- i. The Indian Contract Act requires that for an enforceable contract, the parties to the contract must be above 18 years of age. However, the basic problem in the electronic sphere is that there is no proof way of knowing the correct age of the customer. Thus, in a recent case filed in the Delhi High Court, the bench asked orally as to how minor persons are registering with online sites such as Facebook and Orkut, when they do not fulfil the requirement of being above the age of 18 years. The government must frame a policy whereby online service providers should try to ascertain the age of the customer before such customers are registered on their sites. Failure to ensure this can lead to information, privacy and money of minor customers being used and abused.
- ii. Presently, electronic communication is still regulated by the Indian Telegraph Act. This Act was framed at a time when there was no idea of the internet or the modern communications systems we have today. Therefore, to suit today's exigencies, the ancient law is being stretched beyond imagination. There is an urgent requirement to codify the laws relating to electronic communication as well as e-contract and bring them into harmony with each other. We should also take inspiration from the various international treaties and standards regarding contracts and electronic communication so that there is no hurdle to international commerce and business with India. Particularly, the model laws framed by UNCITRAL are very helpful in this regard.
- iii. Since the electronic commerce and communications field is a very dynamic and fast-changing area, many of the definitions and concepts provided for in the laws become very soon outdated.

Therefore, to obviate the possibility of injustice, the courts should give high value to the evidence of experts in the computer field, who will be having knowledge of the latest trends.

- iv. Ideally, the parties to the contract should have freedom of contract, that is, the terms of the contract should be mutually agreed and acceptable to the parties. Such acceptance can come only from open bargaining and negotiation. Unfortunately, in e-contracts, the seller is in a highly advantageous situation, and he employs it to impose unfair terms on the buyer. There is a need to regulate the imposition of such unfair terms so that the interests of the consumers are not harmed.
- v. The question of jurisdiction is very important as regards to e-contracts. The Supreme Court of India in the Bhagwandas Kedia case endorsed the ruling in the Entores case, that there will be instantaneous communication when transactions are conducted over telephone. However, later developments like the introduction of the Information Technology Act, 2000 have seriously impacted the instantaneous communication rule since the Information Technology Act, 2000 provides that email communication is deemed to be complete when the email goes out of the computer of the sender. Therefore, there is a serious need to revise and update the laws regarding jurisdiction under e-contracts.

EMERGING SOCIAL NETWORK IMPACT ON HUMAN TRAFFICKING DURING THE COVID -19 PANDEMIC LOCKDOWN: FROM INDIAN PERSPECTIVE

Ms. Inderakala T B *

Ms. Divya K S **

I. Introduction

The rapid change in the emerging technology has changed India's approach towards social media. Classroom to business, public sector to private sector, organisations are in use of social network for communication and business. Social network is exponentially increased in all sectors of society from elders to children for the potential usage. The usage of social network has increased over the years globally and especially the social network sites have become an integral part of day to day lives of most of the people working and non-working, school kids and students. Social media network is becoming an addiction for youth during the Covid-19 pandemic crises where schools and college was shut and others are working from home.

From 2019 to 2020, the use of social media has significantly increased. The internet now serves over 4.5 billion people, while social media users have surpassed 3.8 billion. Nearly 60% of the world's population is currently online, and current trends estimate that by the middle of this year, more than half of the world's population will be using social media.

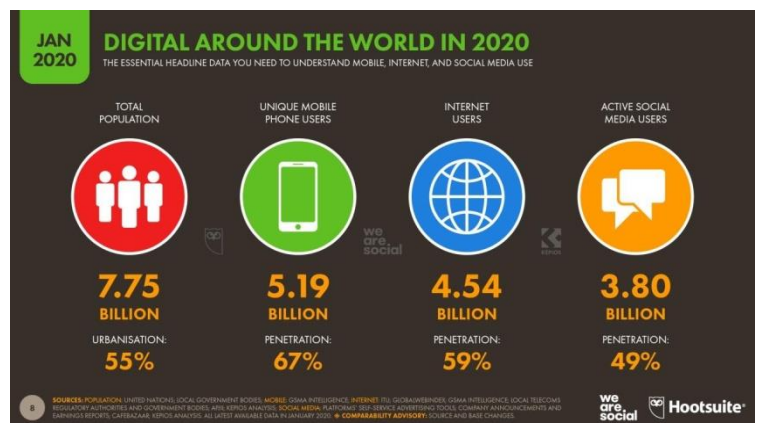


Fig. 1

Online learning has become a new pedagogy for teachers and students. It's good to be a part of social media network and easy to connect with people for away. The corona virus has created extra humans liable to exploitation via way of means of traffickers and discovered the world's

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unpreparedness to shield them. Unfortunately the more time on social media network can easily lead to many threats such as cyber bullying, anxiety, exposure and mainly human trafficking. Traffickers use social media in opposition to sufferers once they isolate them from their assist structures with the aid of using limiting or closely tracking social media use. Traffickers additionally use social media to impersonate sufferers, unfold destructive rumors, distribute intimate images, or stalk a victim's account.

II. Social media network users in India

Social networks have become a crucial part of many lives. Without the media it becomes difficult for all of us to keep working in any form. From children to the elderly, social media has become an indispensable part of everyone's life around the world.

- The number of people accessing the internet has increased by 7% (298 million additional users) since January 2019, bringing the total to 4.54 billion.
- In January 2020, there were 3.80 billion social media users worldwide, up more than 9% (321 million new users) from the same month the previous year.
- Mobile phones are currently used by more than 5.19 billion people worldwide, up 124 million (2.4 percent) in the last year.¹

Social media have come to be a fundamental a part of normal lifestyles for human beings all around the world. More than 4.5 billion human beings now use the internet, at the same time as social media customers have handed the 3.8 billion mark. Nearly 60 percentage of the world's population is already online, and the modern-day tendencies advise that extra than half of the world's general population will use social media through the center of this year. With digitalization of the trafficking industry, barriers in research efforts have become more severe. Easy communication, photo-modifying tools, disposable "burner" phones, code words, slang, and reused content material make it tough for regulation enforcement officials to attach the dots.

According to statistics, the total number of social media users is predicted to exceed 4.4 billion by 2025, accounting for over half of the world's population. Given that Asia is home to roughly 60% of the world's population, it's no wonder that it has the highest proportion of social media users. Eastern Asia accounted for 30% of all global users, followed by Southeast and Southern Asia

¹Social Media & User-Generated Content, Feb 8, 2022
<https://www.statista.com/markets/424/topic/540/social-media-user-generated-content/>.

countries. In 2020, there were 3.6 billion social network users globally, and this number is expected to rise to nearly 4.4 billion by 2025, a 22.5 percent growth in five years.

III. Leading social networks in india

India is becoming digitalized in all spheres. There is a wide range of social media, whether it is used in proper channel is the question faced by all .The growing digitalization is growing due to low data prices which enabled significant number of people using the social media across India. Social media has changed life of every individual including young fraternity to become techno freak.

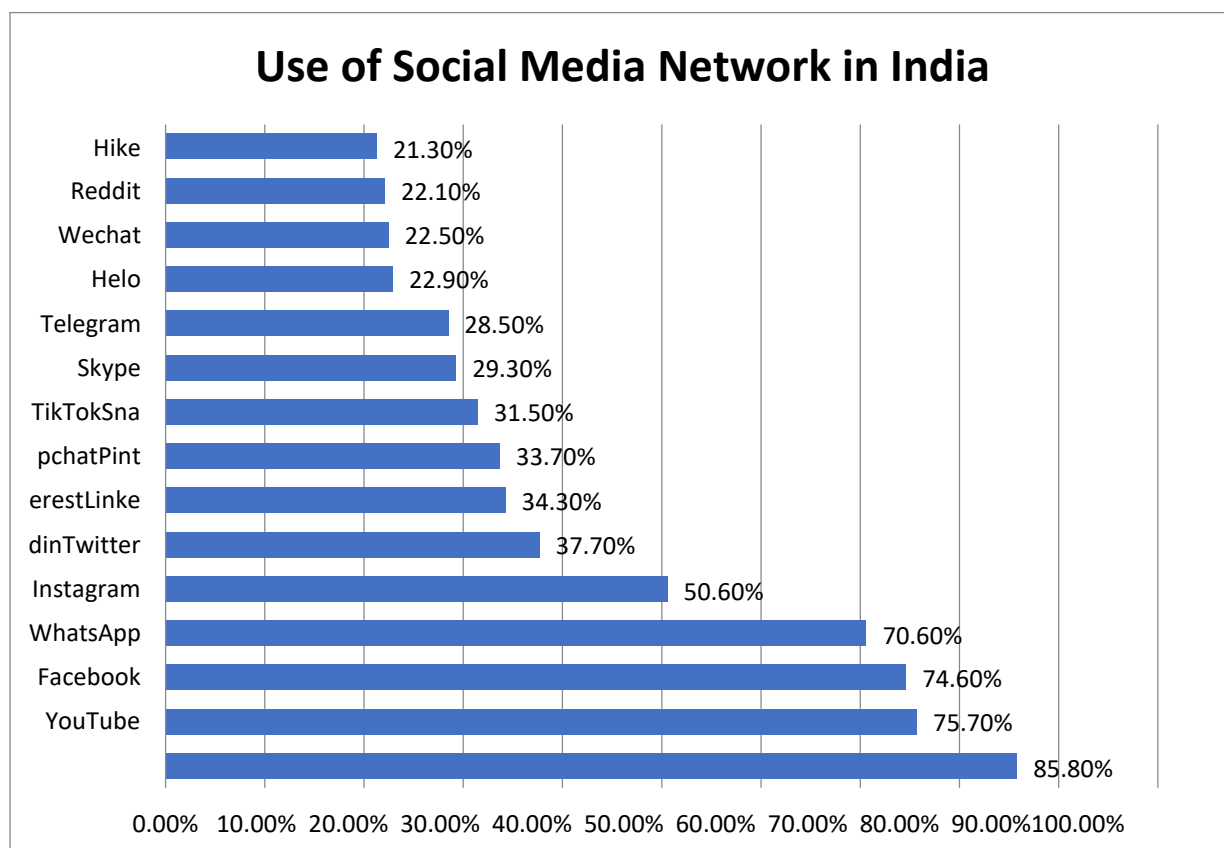


Fig-2

The introduction of the government's Digital India initiative has increase the growing pattern of the network usage approximately 624 million users. There is a huge supporter of YouTube and Face book and both have accounted for the largest penetration, at nearly 86 percent and 76 percent respectively. Apart from YouTube and Face book other sites also have active users for their day to day communication or work. Unfortunately sites have indulged in controversy of misusing of the

sites knowingly or unknowingly during the pandemic situation as all of us involved to work through online sources. Youngsters are more prone to YouTube and Facebook which indirectly lead them to unknown features and which become a misery in their life.

IV. India as a Large Internet Consumer Base

According to the Online and Mobile Association of India, which counts monthly active internet users rather than overall internet users in India. In previous IAMAI reports, the total number of Internet users in India was tracked. 385 million of the 451 million users are over the age of 12 years , while 66 million are between the ages of 5 years and 11years, indicating that schoolchildren make up a large portion of India's internet demographic. These users do not have their own devices and rely on their parents' or other family members' devices to meet their internet needs.

People rely on social media more than any other form of communication, which can reduce the threat of traffickers misusing social media to target victims and expand their trafficking operations, as well as to control victims by restricting their social media access, impersonating the victim, spreading lies and rumors online, distributing intimate images, or stalking a victim's account activity even after they have left the trafficker. Because of the traffickers' conduct, victims have been depressed and attempted suicide².

V. Social media network promotes human trafficking

Social media is a platform for creating awareness on communication and other supportive online works and online class for students and other public. The same social media network is the world's largest platform for human trafficking. Online platforms are frequently used by traffickers to groom and control their victims. Between 2015 and 2018, the National Human Trafficking Hotline reported nearly 1,000 cases of possible sex trafficking victims who were recruited via internet platforms, the most common of which are Facebook, Instagram, Snapchat, online dating sites, and chat rooms. According to the study, 58 percent of victims encountered their traffickers in person at some point, but 42 percent of those who met their traffickers online never met them in person and were nonetheless trafficked. Grooming and manipulation, as well as pressure and threats that equal

² Nandita Mathur (2019, March 11)

<https://www.livemint.com/industry/telecom/internet-users-exceed-500-million-rural-india-driving-growth-report-1552300847307.html>.

"extortion," are used to exert authority over the victims in these circumstances³.

This trend was first noticed by the National Center for Missing and Exploited Children in 2013. Extortion cases have increased dramatically in recent years, according to the centre. There have been countless reports of women being abused by human traffickers who threaten to post nude images of them online if they do not comply with their demands. In the commercial sex world, the internet has opened up a huge new market and given human traffickers a whole new commodity to sell: remote, interactive sexual acts streamed directly to individual buyers. Human traffickers also utilise social media to post deceptive or false job postings. Some human traffickers lure victims in with phony job promises for models, nannies, or dancers. Fake company profiles, phony event pages on Facebook, and posts are sometimes used to aid these deceptions. Internet technology has broadened the geographical scope of traffickers' operations. The internet helps traffickers to operate across borders and in multiple locations at the same time, while physically exploiting the victims in a single location. By making use of internet technologies, traffickers are able to overcome geographical distances using the 'cyberspace' to connect themselves, victims and the final consumers of exploitative services.

VI. Online Human Trafficking During Pandemic Lockdown

During the Covid-19 pandemic, traffickers adapted to the "new normal," using social media and other internet platforms to exploit survivors, particularly women, children, and migrants who are vulnerable and 'at danger.' Since the beginning of the epidemic, over 37% of stakeholder survey respondents (frontline practitioners) noted that survivor recruiting has shifted online. "Traffickers have promoted fraudulent jobs on social media in recognition of the increased amount of time that individuals, especially youngsters, spend on the internet," says the UN Office of Drugs and Crime study⁴.

Traffickers are increasingly targeting children, using social media and other internet channels to reach out to new people and benefitting from the increased demand for child sexual exploitation content. "Traffickers have moved sexual exploitation of adults and children to private houses and apartments in response to the shutdown of pubs, clubs, and massage parlours due to lockdowns and

³Mellissa Withers, Ph.D., M.H.S (2021, November 10) "How cutting edge tools can mitigate global trafficking, exploitation, and abuse"

<https://www.psychologytoday.com/intl/blog/modern-day-slavery/202111/using-the-power-technology-fight-online-human-trafficking>.

⁴"Impact Of The Covid-19 Pandemic On Trafficking In Persons"- Human Trafficking and Migrant Smuggling Section https://www.unodc.org/documents/Advocacy-Section/HTMSS_Thematic_Brief_on_COVID-19.pdf.

curfews." Cyber-crime refers to human trafficking that occurs through the internet. These crimes are linked in cyberspace, and they use the internet to carry them out.

In recent months, the Committee on the Elimination of Discrimination against Women (CEDAW) has warned of an increase in "trafficking in cyberspace" around the world. In response to a spike in online traps designed to recruit potential victims during the health crisis, the committee has called on social media platforms to leverage big data and artificial intelligence to assist abolish trafficking in women and girls. "The global epidemic has highlighted the critical importance of addressing the use of digital technologies in and against human trafficking," says the report. Demand has been channeled online "via social media, the dark web, and messaging platforms," according to the Committee on the Elimination of Discrimination against Women, which allow easy access to potential victims while concealing the perpetrators' identities.

According to a Pew Research study, 95% of kids aged 13 to 17 have access to a Smartphone, and nearly half of them are active online. As a result, criminals are increasingly turning to the internet to target vulnerable demographics, such as the young, in order to extend their operations.



Fig. 3

"Traffickers frequently send friend invitations to large groups of people in the hopes that some would accept. Online gaming sites and dating apps, in addition to social media, are the most prevalent areas where traffickers target their victims because they require contacts with complete strangers." Cybersex traffickers are likely to utilise the pandemic to target more children across

Southeast Asia for online sexual abuse, according to the United Nations Children's Fund (UNICEF).

A new study launched by United Nations Office on Drugs and Crime (UNODC) illustrates the devastating effect of COVID-19 sufferers and survivors of human trafficking and highlights the elevated concentrated on and exploitation of kids. Meanwhile, traffickers took benefit of the worldwide crisis, capitalizing on peoples` lack of earnings and the elevated quantity of time each adults and kids had been spending online.<sup>5</sup> “Traffickers prey on vulnerabilities and frequently entice their sufferers with faux guarantees of employment,” explains Ilias Chatzis, Chief of UNODC`s Human Trafficking and Migrant Smuggling Section, which advanced the brand new study.⁶

The pandemic has brought about job losses in lots of sectors and this creates possibilities for crook networks to take gain of determined people. It is been observed that kids are being more and more centered through traffickers who're the usage of social media and different on-line systems to recruit new sufferers and taking advantage of the accelerated call for sexual exploitation substances. Due to lockdowns and barriers on anti-trafficking services, sufferers had even much less hazard of escaping from their traffickers.

Identifying victims of human trafficking is challenging even in normal conditions. Nonetheless, experts believe that the current pandemic is exacerbating the problem. The fact that trafficked victims are frequently abused in illegal, informal, or unregulated sectors such as the sex business, domestic settings, and drug cultivation is not helping matters, nor is organised crime's ability to hide its activities in plain sight. Other reasons include victims' unwillingness to come forward and report their plight, as well as law enforcement's limited capacity to detect this crime.

VII. Conclusion

The fact is that during the pandemic lockdown people are forced to use social media network for their work and online classes for students. Due to lack of vigilance by parents have put children to get easy access with strangers on social media sites and get involved in human trafficking. Now it's time for all of us to understand and to be more vigilant to keep check on children using social media. Children can be protected from human trafficking on a large scale around the world by using age-appropriate filters, monitoring/accountability software, prohibiting access to chat rooms,

⁵Ms. Ghada Waly (8 July 2020) COVID-19 and Crime: The Impact of the Pandemic on Human Trafficking https://www.unodc.org/unodc/en/frontpage/2021/July/covid-19-and-crime_-the-impact-of-the-pandemic-on-human-trafficking.html.

⁶*Ibid* p 6.

regularly monitoring use, setting time limits, using safe search engines, using parental controls, and other ideas. Parents who are well-educated can fight back effectively against potential online recruitment and exploitation of their children. It is impossible for parents and laws to do all on their own. Youth require the assistance and collaboration of knowledgeable youth who see the dangers and want to practice staying safe online. This is the foundation on which successful obstacles to trafficker attempts can be built. However, usage of social media in an accurate form will certainly reduce the risk factor which is unknown to children and parents as they get carried away with social hub for their daily requirement and entertainment.

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