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ARTICLES

CURBING UNFAIR-DISMISSAL OF WORKERS IN NIGERIA : WHAT LESSONS FROM OTHER COUNTRIES?
ANDREW EJOVWO ABUZA *09*

THE UNITED NATIONS: IN LONG TRAVERSE OF 75 ODD YEARS
DHARMENDRA KUMAR MISHRA
ANSHU MISHRA *40*

USING THE BUSINESS VEHICLE IN THE LEGAL PROFESSION : AN ORIENTATION TOWARDS MONEY
RAJNEESH KUMAR PATEL *59*

INCLUSION OF MEDIATION AS CLINICAL COURSE IN LEGAL EDUCATION IN INDIA: SIGNIFICANCE AND ITS TEACHING PEDAGOGY
SAROJ BOHRA (SHARMA) *79*

SURROGACY LAWS IN INDIA - A JOURNEY FROM CONTRACTUAL ARRANGEMENT TO THE LEGISLATIVE FRAMEWORK: AN ANALYSIS
RUCHITA CHAKRABORTY *94*

PROTECTION OF PERSONAL DIGITAL DATA UNDER INDIAN LEGAL FRAMEWORK: A MYTH OR REALITY
AJAY KUMAR SINGH *109*

PROTECTION OF RIGHT TO HEALTH OF CHILDREN IN INDIA : A LEGAL STUDY
ADESH KUMAR *123*

ABOLITION OF TRIPLE TALAQ IN INDIA: A CRITICAL REVIEW
HARUNRASHID A. KADRI *140*

SPORT FEDERATIONS' ROLE AND COMPETITION
LAW - ISSUES IN INDIA
SURENDER MEHRA *159*

NOTES AND COMMENTS

HUMAN RIGHTS EDUCATION IN INDIA : ISSUES AND
CHALLENGES
PRADEEP KUMAR *174*

BOOK-REVIEWS

CONSTITUTIONAL LAW
(2nd edn. 2021) by Mamta Rao, Eastern Book Company,
Lucknow, Pp LXXX + 979; Price
Rs. 875/-Paperback Format: Paperback
MD. ZAFAR MAHFOOZ NOMANI *183*

P S A PILLAI'S CRIMINAL LAW
(14th Edn, (Reprint), 2021), revised by K I Vibhute, Lexis
Nexis, Gurgaon, Haryana, Pp. cxii+1133, Price Rs. 995.00-
(Paperback), ISBN: 978-93-8854-839-7
GOPAL KRISHNA SHARMA *189*

CURBING UNFAIR-DISMISSAL OF WORKERS IN NIGERIA: WHAT LESSONS FROM OTHER COUNTRIES?

ANDREW EJOVWO ABUZA*

ABSTRACT : The 1999 Nigerian Constitution bestows on the National Industrial Court of Nigeria (NICN) exclusive jurisdiction to hear and determine labour disputes relating to or connected with unfair labour practices, including unfair dismissal. There is, however, no general statutory right, in explicit terms, accorded to workers under the Nigerian Labour Law, not to be unfairly dismissed and to claim compensation, re-instatement and re-employment for unfair dismissal. This paper reviews the practice of unfair dismissal of workers in Nigeria. The research methodology adopted is mainly doctrinal analysis of applicable primary and secondary sources. The paper finds that the unfair dismissal of workers in Nigeria is contrary to the United Nations (UN) International Labour Organisation (ILO) Termination of Employment Convention 158 of 1982 as well as international human rights' norms or treaties. The paper suggests that Nigeria should enact a Labour Rights Act that would accord to workers, in explicit terms, the rights not to be unfairly dismissed and to claim compensation, re-instatement and re-employment for unfair dismissal in line with the practice in other countries, including the United Kingdom (UK) and Kenya.

KEY WORDS : Unfair-dismissal, Unfair labour practice, 1999 Nigerian Constitution, Constitution(Third Alteration) Act 2010, Employer, Worker, Summary-dismissal, Re-instatement, Re-employment, Nigeria.

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I. INTRODUCTION

The general rule under the Nigerian Labour Law, governed significantly by the common-law,[1] is that an employer in a mere master and servant relationship can terminate the contract of employment with an employee of any grade or level for good or bad reason or for no reason at all and contrary to the terms and conditions of the employee's contract of employment or the right to fair hearing, guaranteed under the common-law and the Nigerian Constitution.[2] All the employee is entitled to is damages for wrongful dismissal. The damages is the amount he would have earned over the period of a proper notice to terminate the contract of employment or the amount payable in lieu of a proper notice to terminate the contract of employment[3].

The motive of the employer in terminating the contract of employment with the employee by giving a notice of termination is not relevant.[4]Motive is a reason for doing something.[5] Put differently, motive is the hidden or real reason which made a party to terminate the contract of employment. Often times, the employer decides to terminate his employee's appointment by giving notice of termination because of some hidden reasons, such as the active involvement of the employee in trade union activities. Where such is the real reason why the employee's appointment was terminated, it can be said to be a case of unfair dismissal for which the court should intervene to invalidate such a termination of employment.[6] It is an open secret that many Nigerian workers have been victims of unfair dismissal, due to their participation in

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1. Note that common-law means Judges' made law based on the traditions and customs of the English people. By virtue of being colonised by Britain, Nigeria received English Law made-up of: (i) the statute of general application in force in England on 1 January 1900; (ii) the doctrines of equity; and (iii) the common-law of England. See s 32(1) of the Interpretation Act Cap 192 Laws of the Federation of Nigeria (LFN) 1990 (now Cap 123 LFN 2004).

2 See, for example, *Samson BabatundeOlarewaju v Afribank Nigeria Public Limited Company* [2001] 13 NWLR (Pt. 731) 691, 695 – 97, Supreme Court (SC), Nigeria.

3 See *Abalogu v Shell Petroleum Development Company of Nigeria Ltd* [2001]FWLR (Pt. 66) 662,SC, Nigeria.

4 See *Calabar Cement Company Ltd v Daniel* [1997] 14 NWLR (Pt. 188) 750, 758, Court of Appeal (CA), Nigeria and *Ben Chukwuma v Shell Petroleum Development Company of Nigeria Ltd* [1993] 4 NWLR (Pt. 289) 512, SC, Nigeria.

5 P Phillips et al (ed), AS Hornsby's Oxford Advanced Learner's Dictionary: International Students Edition (Oxford: 8th edn, Oxford University Press 2010) 963.

6 AE Abuza, *General Principles of Nigerian Labour Law: Law of Contract of Employment (*vol. 1)(Eku: Justice and Peace Printers and Publishers 2018) 91-92.

union activities. A good case on the matter is that of *COB Eche v State Education Commission and Another,*[7] where the plaintiff was dismissed from the Anambra State Public Service on the ground that he took part in a strike by teachers in the State.

It is disappointing that the Nigerian Labour Law does not provide, in explicit terms, for general statutory rights of an employee not to be unfairly dismissed and to claim compensation, re-instatement and re-employment for unfair dismissal as well as the circumstances where a dismissal may be considered to be unfair. This is unlike the practice in other countries like the UK, Canada, Ghana, South Africa and Kenya. The National Assembly of Nigeria (NAN) is to blame for this, as none of its enactments provides for general statutory rights of an employee not to be unfairly dismissed and to claim compensation, re-instatement and re-employment for unfair dismissal as well as circumstances where a dismissal may be considered unfair. This lacuna in its laws, including the Constitution of the Federal Republic of Nigeria 1999 (1999 Nigerian Constitution),[8] as amended would not augur well for the system of administration of justice in the industrial sub-sector of Nigeria's political economy, as it is prone to abuse as has been the case, for example, since the coming into force of the 1999 Nigerian Constitution. The case of *Godwin Okosi Omoudu v Aize Obayan and Another*[9] is a typical example. In the case, the second defendant-university terminated the claimant's appointment in breach of the contract of employment between the parties, as he was not paid one month's salary in lieu of notice before or contemporaneously with the termination as enunciated under the said contract of employment and for an unfounded reason.

Needless to mention the planned five-days warning strike action embarked upon by the Nigeria Labour Congress (NLC)as well as Trade Union Congress (TUC) and their affiliates in Kaduna State between 16 and 19 May 2021 to reverse the termination of the employment of over 7, 000 civil servants in Kaduna State on the ground of redundancy without following the due process, having not given notice to the workers and their unions as well as pay severance package as encapsulated under section 20 of the Labour Act[10]

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7 [1983]1 FNR 386, 391, High Court (HC), Nigeria.

8 Cap C 23 LFN 2004.

9 (Unreported) Suit No. NICN/AB/03/2012, Judgment of Adejumo J of the NICN, Lagos delivered on 8 October 2014.

10 Cap L 1 LFN 2004.

2004. This is a clear case of unfair-dismissal of workers by their employer, that is the Kaduna State government.[11] The strike action paralysed or crippled economic activities of the State for the days it lasted.[12] The strike action was suspended on 19 May 2021 to pave way for a reconciliatory meeting on 20 May 2021 at the instance of the Federal Government of Nigeria. At the end of the meeting, a memorandum of understanding was signed by both the Kaduna State government and the NLC. Despite this agreement, the Kaduna State government continued with laying-off workers in the State, as announced before the commencement of the strike.[13] This prompted the NLC to write to President Muhammadu Buhari, threatening to resume the suspended strike in Kaduna.[14] Meanwhile, Governor Nasir El-Rufai of Kaduna State, however, says there is no going back on 'right sizing' of the State's work force.[15] According to His Excellency, over 90% of the State's Federal Allocation is currently being spent on civil servants.[16]

The unfair-dismissal of workers by their employers has adverse effect on the victims of unfair dismissal and the political economy of Nigeria. To be specific, it has led to strike actions by trade unions whose members had been unfairly dismissed by the employers of the same as well as Federations of trade unions to which the trade unions whose members had been unfairly dismissed by the employers of the same belonged. A typical example is the case of unfair dismissal of workers by the Kaduna State government. As disclosed already, the strike action by the NLC and TUC as well as their affiliates in Kaduna State paralysed or crippled economic activities of the State for the days it lasted. A lot of people are actually upset by this ugly situation. Worse still, the president, governors and other officials of the government whose action of unfair dismissal led to the workers' strike are not being dealt with or removed from office by the Nigerian Government.

A relevant question to ask at this juncture is: is the unfair dismissal of workers in Nigeria lawful? Another relevant question is: are there lessons

11 'NLC may escalate Kaduna Strike to National Industrial Action' <https://m.guardian.ng>appointments> accessed 26 July 2021.

12 'NLC writes Buhari, threatens to resume suspended strike in Kaduna' <https://www.preminmtimes.ng> accessed 25 July 2021.

13 *Ibid.*

14 <https://www.premiumtimesng.com> accessed 25 July 2021.

15 *Ibid.*

16 *Ibid.*

from other countries? A further relevant question is: should there not be statutory rights, in explicit terms, accorded to Nigerian workers not to be unfairly dismissed and to claim the reliefs of compensation, re-instatement and re-employment for unfair dismissal in line with the practice in other countries like the UK and Kenya? These questions form the basis or foundation of this paper. This paper reviews the practice of unfair dismissal of workers in Nigeria. It analyses applicable laws. It takes the position that the unfair dismissal of workers in Nigeria is unlawful, unconstitutional and contrary to the UNILO Termination of Employment Convention 158 of 1982 as well as international human rights' norms or treaties and, therefore, Nigeria ought to accord its workers general statutory rights not to be unfairly dismissed and to seek the remedies of compensation or damages, re-instatement and re-employment for unfair dismissal. It highlights the lessons or take-away from other countries and offer suggestions, which, if implemented, could curb the problem of unfair dismissal of workers in Nigeria.

II. CONCEPTUAL FRAMEWORK

The word 'employee' is a key-word in this paper. Under section 48(1) of the Trade Disputes Act 2004[17] a worker in Nigeria means:

> any employee, that is any member of the public service of the Federation or of a State or any individual other than a member of any such public service who has entered into or works under a contract with an employer, whether the contract is for manual labour, clerical work or is otherwise expressed or implied, oral or in writing and whether it is a contract personally to execute any work or labour or a contract of apprenticeship.

The definition above can be criticised on the ground that it includes as a worker any person under a contract of apprenticeship and a contract personally to execute any work or labour, that is an independent contractor. These persons cannot be said to be under a contract of service to make them workers[18].

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17 Cap T8 LFN 2004.

18 See AEAbuza, 'Lifting of the Ban on Contracting-out ofthe Check-off System in Nigeria: An Analysis of the issues involved' (2013) 42(1) *The Banaras Law Journal* 61.

Be that as it may, a worker, irrespective of his grade, qualifies as an employee within the meaning of a worker in the definition above.

On the other hand, an 'employer', another key-word in this paper, means:

> any person who has entered into a contract of employment to employ any other person as a worker either for himself or for the service of any other person and includes the agent, manager or factor of that first mentioned person and the personal representative of a deceased employer[19].

The employer of a worker would include a corporate organisation or unincorporated organisation, an individual, the local Government Council, the State Local Government Service Commission and the Civil Service Commissions of both the Federal and State governments.

Another key-word in this paper is the expression 'summary-dismissal'. It is the most popular mode of determining a contract of employment. In actuality, 'summary-dismissal' is the common-law right of the employer to terminate the contract of employment of an employee without notice or payment of salary in lieu of notice on account of gross misconduct on the part of the employee which strikes at the root of the contract of employment[20]. 'Unfair-dismissal' is another key-word in this paper. It is, also, known as unfair-termination or unjust-dismissal. It is part of unfair labour practice. It can be defined as the termination of a contract of employment without a good cause or valid reason or fair procedure or both.[21] Another key-word in this paper is 're-instatement'. It is, also, known as specific performance. The meaning of 're-instatement' is fairly well-known. It means to go back to a person's job or employment. Re-instatement is a remedy that is only awarded in Nigeria in favour of an employee whose contract of employment is with statutory flavour or protected by statute[22]. Lastly, 're-employment' is another key-word in this paper. The meaning of re-employment or re-engagement, as it is sometimes called, is, also, fairly well-known. It means that the worker

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19 See s 91 of the Labour Act 2004.

20 O Ogunniyi, *NigerianLabour and Employment Law in Perspective* (Lagos: Folio Publishers 1991) 174.

21 <https://deale.co.za/unfair-dismissal-southafrica> accessed 7 July 2021.

22 See, for example, *Olaniyan v University of Lagos* [1985] 2 NWLR (Pt. 9) 363, SC, Nigeria.

gets his job or employment back, but starts as a new worker.

III. BRIEF HISTORY OF THE PRACTICE OF UNFAIR DISMISSAL IN NIGERIA

In this segment, the discussion shows that the practice of unfair dismissal in Nigeria dates back to the period when Nigeria was under the colonial rule of Britain. Nigeria came into being on 1 January 1914, following the amalgamation of the Colony of Lagos and Protectorate of Southern Nigeria as well as the Protectorate of Northern Nigeria by Lord Fredrick Lugard; he was appointed the first Governor-General of Nigeria by the British colonial master of Nigeria.[23]

One cannot say with exactitude how and when the practice of unfair dismissal started in Nigeria. Be that as it may, it is crystal clear that the practice of unfair dismissal started with the introduction of wage employment during the colonial period of Nigeria. It is an open secret that unfair dismissal and other unfair labour practices led to the formation of workers' trade unions for the protection of the labour rights and other interests of Nigerian workers. These workers' trade unions, include the Nigerian Civil Service Union, formerly known as Southern Nigeria Civil Service Union formed in 1912,[24] the Railway Workers Union[25] and the Nigeria Union of Teachers (NUT) formed in 1931.[26] These unions were formed to protect the Labour rights and other interests of their members working in the colonial public service.

Needless to say that it was on 1 October 1960 that Nigeria gained independence from Britain. In 1963, the nation became a Republic.It so happens that over the period between when Nigeria came into being and today many Nigerian workers have suffered from the practice of unfair dismissal. A typical example is that of *Eche*. Unfortunately, some ordinary courts in Nigeria have refused to accord the Nigerian worker the right to sue for unfair dismissal and claim reliefs such as compensation or damages, re-

23 See AE Abuza, 'A Reflection on the Regulation of Strikes in Nigeria' (2016) 4 (1) *Commonwealth Law Bulletin* 6 &21, quoted in AE Abuza, 'A Reflection on the Issues Involved in the Exercise of the Power of the Attorney-General to enter a *nolle prosequi* under the 1999 Constitution of Nigeria' (2020) 1 *Africa Journal of Comparative Constitutional Law* 85.

24 See Ogunniyi (n 20).

25 See O Lakemfa, 'One Hundred Years of Trade Unionism in Nigeria', *Vanguard* (Lagos, 14 August 2012) 32.

26 Ogunniyi (n 20) 3 and *Vanguard,Ibid.*

instatement and re-employment for unfair dismissal. A typical example of a case on the matter is *Samson Babatunde Olarewaju v Afribank Public Limited Company,*[27] where the Supreme Court of Nigeria held that an employer in a mere master and servant contract of employment can terminate the contract at any time and for any reason or no reason at all. The position of the apex Court in Nigeria is hinged on the common-law.

The 1999 Nigerian Constitution, as amended, predicated on the Presidential system of government came into effect on 29 May 1999, signaling the commencement of Nigeria's Fourth Republic. In 2010, the 1999 Nigerian Constitution was amended by the Constitution (Third Alteration) Act 2010.[28] Its section 254A (1) establishes the NICN. The Court is bestowed with exclusive jurisdiction over all labour and employment-related disputes. Section 254C(1)(f) of the 1999 Nigerian Constitution, as amended by the Constitution (Third Alteration) Act 2010 gives the Court exclusive jurisdiction to hear and determine labour disputes, relating to or connected with unfair labour practice or international best practices in labour, employment and industrial relation matters. It is true that unfair-dismissal is not mentioned in the provisions above. Nevertheless, it is an open secret that unfair-dismissal is part of unfair labour practice.

Notwithstanding the provisions above, the practice of unfair dismissal has continued unabated in Nigeria. This is not surprising in view of the fact that there are no general statutory provisions guaranteeing the rights not to be unfairly dismissed and to the reliefs of compensation, re-instatement and re-employment for unfair-dismissal in Nigeria, whether or not an employee is under a mere master and servant relationship as well as stating the circumstances where a dismissal can be considered unfair.

A cardinal point to make at this juncture is that the practice of unfair dismissal is not unique to Nigeria. It is in accordance with the practice in other countries, including the USA, the UK, Canada, Ghana, South Africa, and Kenya- a country practicing the common-law and the Presidential system of government. For instance, in the Kenyan case of *Lilian Mbogo Omollo v Cabinent Secretary, Ministry of Public Service and Gender,*[29]the Employment

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27 [2001] 13 NWLR (Pt.731) 691, 695-699, SC, Nigeria

28 Act No 1 of 2010.

29 See 'Kenya: How Court awarded one shilling as compensation for unfair dismissal' <https://www. mondaq.com. how-co…> accessed 15 July 2012.

and Labour Relations Court awarded in favour of the claimant a former Principal Secretary, Public Service and Youth, the sum of one shilling as compensation for unfair-dismissal after it held that her termination of employment by the defendant was contrary to section 232 of the Kenyan Constitution 2010 and the provisions of section 45(10) of the Kenyan Employment Act 2007, since she was not neither subjected to due process nor given reasons for her removal from office.

IV. ANALYSIS OF CASE-LAW ON THE PRACTICE OF UNFAIR-DISMISSAL OF WORKERS UNDER THE NIGERIAN LABOUR LAW

The courts in Nigeria have discussed the practice of unfair-dismissal of workers in many cases. A discourse on a few selected cases would suffice in this segment. One important case is *Babatunde Ajayi v Texaco* Nigeria Limited.[30] In the case, the appellant/plaintiff was employed on 7 March 1978, as Operations Manager by the first respondent/defendant-company a post which is permanent and pensionable. The second respondent/defendant was the Managing Director of the first respondent/defendant-company. While the third respondent /defendant was the General Manager of the first respondent/defendant-company. By a letter dated 1 February 1979, the second respondent/defendant directed the appellant/plaintiff to proceed on leave on the ground that his future relationship with the first respondent/defendant-company was under review. By another letter dated 23 March 1979, the second respondent/defendant invited the appellant/plaintiff to see him between 2 and 4pm on that day. When the appellant/plaintiff went to see the second respondent/defendant, he was asked in the presence of the third respondent/ defendant to tender his resignation of appointment, as Operations Manager to the first respondent/defendant-company. He was given up to 26 March 1979 to hand-over his letter of resignation, otherwise he would be dismissed from employment. The appellant/plaintiff refused to resign as requested by the second respondent/defendant. On his failure to resign as requested, the second and third respondents/defendants, pursuant to Exhibit D1- Employee's Handbook of the first respondent/defendant-company, terminated the employment of the appellant/plaintiff for working against the first respondent/ defendant-company. Instead of giving the appellant/plaintiff one month's notice of termination or paying the same one month's salary in lieu of one month's

30 [1987] 3 NWLR (Pt. 62) 577, 593, SC, Nigeria.

notice of termination, the second and third respondents/defendants paid the same three months' salary in lieu of notice of termination and gave the same all his entitlements.

The appellant/plaintiff instituted a suit in the High Court of Lagos State, Lagos claiming against the respondents/defendants-(1) a declaration that:(a) the appellant/plaintiff was the Operations Manager of the first respondent/defendant-company under a contract of employment; (b) any breach of the said contract of employment between the appellant/plaintiff and the first respondent/defendant-company is illegal, invalid, ultra vires, null and void and of no effect; (2) any injunction restraining the first respondent/defendant-company by itself, its servants and / or agents or otherwise from committing a breach of the said contract of employment existing between the appellant/plaintiff and the first respondent/defendant-company or in any way interfering with the appellant/plaintiff in the performance of his duties as Operations Manager. In the alternative, the appellant/plaintiff claimed against the first respondent/defendant-company the sum of 634, 833 naira (₦) as special and general damages for anticipatory breach of contract. The appellant/plaintiff argued that in terminating his contract of employment, the second and third respondents/defendants were not acting in the interest of the first respondent/defendant-company but solely for their own selfish, irrelevant and improper motive. The trial High Court, Olanrewaju Bada J, in its judgment delivered on 2 November 1979 stated that 'in the circumstances, I cannot make the declaration sought. In so far as a declaration cannot be made, an order for injunction, in the circumstances cannot be made'. His Lordship, however, held that 'the threatened termination of the appellant/plaintiff's appointment was unlawful'. The trial High Court granted the alternative claim because the Court found the termination of appellant/plaintiff's contract of employment malicious.

Being aggrieved by the judgment of the trial High Court, the respondents/defendants appealed to the Court of Appeal. Justice Mahmud Mohammed JCA, delivering the leading Judgment of the Court of Appeal on 18 March 1985 with which the other two Justices of the Court concurred, allowed the appeal of the respondents/defendants and set aside the decision of the trial High Court in the matter. His Lordship held that the termination of the appellant/plaintiff's contract of employment with the first respondent/defendant-company was lawful, having been done under the terms and conditions in Exhibit D1.

Being dis-satisfied with the judgment of the Court of Appeal, the appellant/plaintiff appealed to the Supreme Court of Nigeria. Justice Andrews Otutu Obaseki JSC, delivering the leading judgment of the Supreme Court of Nigeria on 12 September 1987 with which the other four justices of the Court concurred, dismissed the appeal of the appellant/plaintiff and affirmed the decision of the Court of Appeal. His Lordship stated thus:

> 'Where in a contract of employment there exist a right to terminate the contract given to either party, the validity of the exercise of their right cannot be vitiated by the existence of malice or improper motive. It is not the law that motive vitiates the validity of the exercise of a right to terminate validly an employment of the employee. There must be other considerations. The exercise is totally independent of the motive that prompted the exercise.'[31]

The author is of the view that the Supreme Court of Nigeria's decision in the *Ajayi* case is wrong and thus unacceptable. It can be argued that the termination of a contract of employment, whether in a mere or purely master and servant relationship or not, for some hidden reasons or in circumstances where the termination of employment contains all the ingredients of unfairness is unjust or unfair and the court ought to intervene and invalidate such a termination of employment. Contrary to the stance of the apex Court in the *Ajayi* case, it is argued that the motive behind the termination of a contract of employment should be a relevant factor in considering the wrongness of the same. This is so, because a termination that is ill-motivated or as a result of improper motive or bad or invalid reason, such as a worker's participation in a strike is unfair or unjust. It should be re-called that in the *Eche* case, Araka, CJ of the Anambra State High Court of Justice invalidated the dismissal of the plaintiff by the Anambra State Public Service Commission on ground of participation in a teacher's strike. The Court seemed to have taken this stance because it considered the dismissal to be ill-motivated or based on a bad or invalid reason.

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31 See, also, *Calabar Cement Company Limited v Daniel* [1991] 4 NWLR (Pt. 188) 750, CA, Nigeriaand *Fakuade v Obafemi Awolowo University Teaching Hospital Complex Management Board* [1993] 4 NWLR (Pt.291) 45, 58, SC, Nigeria for similar decision reached by SC in the *Ajayi* case.

Another important case in point is *Samson Babatunde Olarewaju v Afribank Public Limited Company.*[32] In the case, the appellant/plaintiff was a Deputy-Manager of the respondent/defendant-company. He was suspended from duty on some allegations of fraud and embezzlement of money as well as sundry allegations. He subsequently appeared before the Senior Staff Disciplinary Committee of the respondent/defendant-company which tried him of the allegations above. At the end, the Committee submitted its report to the respondent/defendant-company. By a letter, the appellant/plaintiff was summarily dismissed from office. No reason for the summary dismissal was given by the letter of dismissal. The appellant/plaintiff instituted a suit in the High Court of Bornu State, Maiduguri challenging his summary dismissal from employment by the respondent/defendant-company. The trial High Court held that the summary dismissal was wrongful on the ground that the appellant/plaintiff was not first arraigned before a court of law to have his guilt on the crimes alleged against the same established. It declared the summary dismissal a nullity and ordered the appellant/plaintiff's re-instatement.

Being aggrieved by the judgment of the trial High Court, the respondent/defendant-company appealed to the Court of Appeal which set-aside the judgment and order of the trial High Court. Being dis-satisfied with the judgment of the Court of Appeal, the appellant/plaintiff appealed to the Supreme Court of Nigeria. Honourable Justice Aloysious Iyorger Katsina-Alu JSC, delivering the leading judgment of the apex Court to which the other four Justices of the Court concurred, dismissed the appeal of the appellant/plaintiff. His Lordship stated that the appellant/plaintiff had a mere master and servant contract of employment with the respondent/defendant-company. Justice Katsina-Alu declared that:

> In a master and servant class of employment, the master is under no obligation to give reasons for terminating the appointment of his servant. The master can terminate the contract with the servant at any time and for any reason or no reason. In the instant case, no reason was given for the dismissal of the appellant.

His Lordship held that:

> in a pure case of master and servant, a servant's appointment can lawfully be terminated without first telling him what is

32 [2001]13 NWLR (Pt.731) 691,695-99, SC, Nigeria

> alleged against him and hearing his defence or explanation. Similarly, a servant in this class of employment can lawfully be dismissed without observing the principles of natural justice.

It was further held by Justice Katsina-Alu that it was not necessary under section 33 of the 1979 Nigerian Constitution (now section 36 of the 1999 Nigerian Constitution) that before an employer can summarily dismiss his employee under the common law, the employee must be tried before a court of law where the gross misconduct borders on criminality.[33] In His Lordship's view, where the Disciplinary Committee of the employer had found the employee guilty of gross misconduct bordering on criminality, the employer can either cause him to be prosecuted in the court of law or summarily dismiss him from employment.

Lastly, Justice Katsina-Alu held as follows:

> 'Where a master terminates the contract with the servant in a manner not warranted by the contract, he must pay damages for breach of contract. The remedy is damages. The Court cannot compel an unwilling employer to re-instate a servant he has dismissed. The exception is in case where the employment is specially protected by statute. In such case, the employee who is unlawfully dismissed may be re-instated to his position'.

It is crystal clear from the foregoing decisions of the Supreme Court of Nigeria and the other ordinary courts in Nigeria that they are not prepared to accord an employee under a mere master and servant relationship the right to sue for unfair dismissal or to claim re-instatement or re-employment for unfair dismissal. The position adopted by the Nigerian Supreme Court and the other ordinary courts is hinged on the position under the common-law.

The author is of the view that the Supreme Court of Nigeria's decision in the *Olarewaju* case is wrong and unacceptable for the following reasons. First, the apex Court in the *Olarewaju* case had suggested that the master is under no obligation to give reasons for the summary-dismissal of the servant. This position is not correct, as in a contract of employment, whether a mere

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33 This view was upheld by the Court of Appeal in *BS Onwusukwu v The Civil Service Commission and Another* [2020] 10 NWLR (Pt.1731)201-202, CA, Nigeria.

master and servant contract of employment or contract of employment protected by statute, reasons for the summary-dismissal of the servant must be advanced.[34]It should be noted that summary-dismissal is predicated on misconduct of the employee. An employer cannot summarily dismiss the servant from employment for doing no wrong. Of course, summary dismissal goes with it a stigma and deprives the dismissed servant of benefits while the termination of a contract of employment does not carry a stigma and deprive the employee whose contract of employment is terminated of benefits. Often times, a servant who is summarily dismissed from service cannot secure employment in the public service for the remaining part of his life on earth. The courts, therefore, maintain that reasons for the summary dismissal of the servant must be advanced by the master which said reasons must be justified by the master, otherwise the summary dismissal would not be permitted to stand.[35] In addition to this, the courts of law insist that where an employer pleads that an employee was dismissed from employment on account of a specific misconduct, the dismissal cannot be justified in the absence of adequate opportunity being given to him to explain, justify or else defend the misconduct that is alleged.[36]

Second, the decision of the apex Court in the *Olarewaju* case is not in accord with its earlier decision in *Ewaremi v African Continental Bank Limited,*[37] where the Supreme Court of Nigeria upheld the decision of the trial High Court which ordered the re-instatement of a company employee in a pure master and servant contract of employment on account that the purported dismissal of the appellant/plaintiff from the employment of the respondent/defendant-company was null and void. Nigeria should borrow a leaf from other countries. For instance, in the Indian case of *Provisional Transport Services v State Industrial Court*,[38]the Supreme Court of India (per Nagpur Das Gupta J) stated that:

34 See, for example, *Abomeli v Nigerian Railway Corporation* [1995] 1 NWLR (Pt. 372) 451-456, CA, Nigeria, quoted in AE Abuza, 'An examination of the power of removal of Secretaries of Private Companies in Nigeria' (2017) 4 (2) *Journal of Comparative Law in Africa* 50.

35 See *Johan Nunnick v Costain Blansevort Dredging Ltd* [1960] LLR 90, High Court, Nigeria and *Ogunsanmi v CF Furniture (WA) Company Ltd* [1961] 1 ALL NLR 862, 864, HC, Nigeria, quoted in *Ibid.,* 51

36 See James *Avre v Nigeria Postal Service* [2014] 46 NLLR (Pt. 147) 1, 10,CA, Nigeria, quoted in *Ibid.*

37 [1978] 4 SC 99, SC, Nigeria

38 AIR 1963 SC 114, 117,

> In dealing with industrial disputes… the Supreme Court has by a series of decisions laid down the law that, even though under contract, pure and simple, an employee may be liable to dismissal, without anything more, industrial adjudication would set aside the order of dismissal and direct re-instatement of the workmen where dismissal was made without fair enquiry.[39]

Third, the decision of the apex Court in the *Olarewaju* case is contrary to section 36(4) of the 1999 Nigerian Constitution, as amended. It provides as follows:

> Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal.

The apex Court had in previous cases interpreted the provisions above to mean that where a Nigerian citizen is alleged to have committed an offence he must be taken to the ordinary court for trial in order to establish his guilt and that no administrative body can try the same for the offence alleged against him.[40]

Arguably, the action of the apex Court in giving an employer or his disciplinary body the option or right to try a servant who is a Nigerian on allegation of committing an offence or a crime is tantamount to a usurpation of the court's function for the benefit of a master or his disciplinary body and depriving a Nigerian servant the protection accorded by section 36(4) of the 1999 Constitution, as amended.[41] It is argued that nobody in Nigeria must be permitted to usurp the jurisdiction and authority of the court of law in the country under any pretext whatsoever.[42]

Fourth, the Supreme Court can be vilified for taking the stance in the *Olarewaju* case that a master in a mere master and servant contract of employment can terminate the contract of employment for any reason or no

39 Quoted in Abuza (n 34) 56

40 See, for example, the Supreme Court of Nigeria's decisions in *Garba v University of Maiduguri* [1986] 1 NWLR (Pt. 18) 550, SC, Nigeria and *Gregg Olusanya Sofekun v Akinyemi and Three Others* [1980] All NLR 153, 165, SC, Nigeria.

41 See Abuza (n 39).

42 *Ibid.,* 55.

reason at all. It is contended that a termination of a contract of employment without a valid reason is invalid or wrongful, being contrary to the UN ILO Termination of Employment Convention 158 of 1982. To be specific, article 4 of the Convention provides that:

> The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Articles 5 and 6 of the Convention above list matters which cannot constitute valid reasons for termination of employment. These matters are: union membership or participation in union activities outside working hours or with the consent of the employer within working hours; seeking office as, or acting, as having acted in the capacity of, a workers' representative, the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; absence from work during maternity leave; and temporary absence from work because of illness or injury.

It is argued that the UN ILO Convention 158 of 1982 has no force of law in Nigeria and, therefore, cannot be applied by the NICN in labour dispute resolution, having not been ratified by Nigeria. As disclosed already, the NICN is the Court that has exclusive original jurisdiction over all labour and employment-related matters. It is rather worrisome that Nigeria a member of, and former member of the Governing body of, the ILO, has not ratified this Convention. Nigeria should sign and ratify the UN ILO Convention 158 forthwith. As a member of the UN and ILO, it is obligated to apply the UN ILO Convention 158. Needless to stress that the nation must show respect for international law and its treaty obligations, as enjoined by section 19(d) of the 1999 Nigeria Constitution, as amended.

Lastly, the Supreme Court of Nigeria can, also, be vilified for taking the position in the *Olarewaju* case that in a mere master and servant contract of employment, the servant's employment can lawfully be terminated without first telling the same what is alleged against the same and hearing his defence or explanation as well as the servant in a mere master and servant relationship

can lawfully be dismissed from employment without observing the rules of natural justice. The stance of the apex Court is certainly contrary to what might be called procedural fairness or the rules of natural justice, that is, *audi alteram partem*- meaning hear the other side of a case and *nemo judex incausasua*- meaning a person cannot be a judge in his own cause. Procedural fairness or these rules of natural justice are guaranteed under the UN ILO Convention 158 of 1982, the common law a part of the received English law in Nigeria and section 36(1) of the 1999 Nigerian Constitution, as amended which guarantees the right to a fair hearing to all Nigerians. In this way, such dismissal from employment without adherence to procedural fairness or the rules of natural justice is void and a nullity for being inconsistent with, or a contravention of, procedural fairness or the rules of natural justice or the provisions of the 1999 Nigerian Constitution, as already indicated. To be specific, article 7 of the 1982 UN ILO Convention 158 embraces the principle of a fair hearing before dismissal or termination of employment by the employer. It states as follows:

> The employment of a worker shall not be terminated before he is provided with an opportunity to defend himself against the allegation made, unless the employer cannot reasonably be expected to provide opportunity.

A noteworthy case decided under the common law is *R v Chancellor, University of Cambridge*.[43] In the case, the University of Cambridge withdrew all the degrees it awarded in favour of its former student one Dr. Bentley without first hearing his explanation or defence. The Court of king's Bench declared the action of the University unlawful. It issued an order of mandamus to the University of Cambridge requiring the restoration of Bentley's Degrees of Bachelor of Arts and Bachelor and Doctor of Divinity of which he had been deprived by the University without a fair hearing. Fortesque, J of the Court of King's Bench stated that even the Almighty God adhered to the rules of natural justice, as he did not punish Adam without first hearing him. The Almighty God was said to have asked Adam: 'Adam, Adam, have you eaten from the tree from which I commanded you not to eat?' This was in spite of

43 [1723] 93 English Reports (ER) 698, Court of King's Bench, the UK. See, also, the decision of the Nigerian Courts in *Adedeji v Police Service Commission* [1967] 1 All NLR 67, SC, Nigeria; *Eperokun v University of Lagos* [1986] 4 NWLR (Pt. 34) 162; SC, Nigeria and *Bamgboye v University of Ilorin* [1999] 10 NWLR (Pt. 662) 296, 299, SC, Nigeria, quoted in Abuza (n 34).

the fact that the Almighty God had seen Adam when he was eating the forbidden fruit. It should be noted that Adam had replied that it was the woman that God gave him, that is Eve who gave him the forbidden fruit to eat, contrary to the directive of the Almighty God. The Almighty God, not being satisfied with the explanations given by Adam, decided to punish the same by driving him and Eve from the Biblical Garden of Eden.[44] It is a general principle settled by cases that the breach of statute or natural justice is a nullity.[45] Good enough, the Supreme Court of Nigeria in *Olatunbosun v NISER Council*[46] a case in point, held that procedural fairness was acclaimed as a principle of divine justice with its origin in the Biblical Garden of Eden.

An important point to bear in mind is that the approach of the 1999 Nigerian Constitution, as amended, as could be discerned from its section 36(1) is in accord with international instruments. For instance, the Charter of the United Nations 1945 guarantees the right to a fair hearing. Also, the Universal Declaration of Human Rights (UDHR) 1948 guarantees the right to a fair hearing and other fundamental rights in its articles 3 to 20. Agreed, the UDHR is a soft-law agreement and not a treaty itself and in this way not legally-binding on member-States of the UN, including Nigeria. Regardless, it has become customary international law that has been adopted globally in protecting human rights.[47]

Additionally, the African Union (AU) African Charter on Human and Peoples' Rights (ACHPR) 1981 guarantees to every person, including a worker the fundamental right to be heard in its article 7. The African Charter has not only been signed and ratified by Nigeria but has equally been made a part of national law, as enjoined by the provisions of the same as well as section 12(1) of the 1999 Nigerian Constitution.[48] In *Sanni Abacha v Gani*

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44 See the Book of Genesis, Chapter 3, verses 11-19 of the *New World Translation of the Holy Scriptures* (New York: Watchtower Bible and Tract Society of New York, Inc., 2013) 46-47.

45 See, for example, *AdeyemiAdeniyi v Governing Council of Yaba College of Technology* [1993] 6 NWLR (Pt.300) 426, 461, SC, Nigeria and *Governor of Oyo State and Others v Oba Folayan (Akesin of Ora)* [1995] 8 NWLR (Pt. 413) 292, SC, Nigeria, quoted in Abuza (n 34) 51

46 [1988] 3 NWLR (Pt.80) 25, SC, Nigeria, quoted in Abuza (n 45) 52

47 See KM Danladi, 'An Examination of Problems and Challenges of Protection and Promotion of Human Rights under European Convention and African Charter' (2014) 6(1) *Port Harcourt Law Journal* 83

48 See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9 LFN 2004.

Fawehinmi,[49] the apex Court in Nigeria held that since the African Charter has been incorporated into Nigerian Law, it enjoyed a status greater than a mere international instrument and the same was part of the Nigerian body of laws.

Furthermore, the UN International Covenant on Civil and Political Rights (ICCPR) 1966 guarantees to every person, including a worker the fundamental right to a fair hearing in its article 14(1). It has been postulated that the ICCPR now has the effect of a domesticated enactment, as required under the provisions of section 12(1) of the 1999 Nigerian Constitution, as amended and, therefore, has the force of law in Nigeria, since the ICCPR guarantees labour rights to workers in its article 22(1) and has been ratified by the nation.[50]

Again, the Arab Charter on Human Rights (ACHR) 2004 guarantees to every person, including a worker the right to legal remedy in its article 9 and the European Convention on Human Rights (ECHR) 1953 guarantees to every person, including a worker the fundamental right to a fair and public hearing in its article 6. While the American Convention on Human Rights (AMCHR) 1969 guarantees to every person, including a worker the fundamental right to a fair hearing in its article 8. It should be noted, however, that Nigeria is not obligated to apply the provisions of the ACHR, ECHR and AMCHR above, as the country is not a member-State of the Council of the League of Arab States, Council of Europe and Organisation of American States, as well as State-Party to the ACHR, ECHR and AMCHR.

It is sensible to contend that as a member of the UN and AU, as well as a State-Party to the ACHPR and ICCPR, Nigeria is obligated to apply the provisions of the Charter of the UN, ICCPR and ACHPR. The country, in this connection, must demonstrate respect for international law as well as its treaty obligations, as enjoined by section 19(d) of the 1999 Nigerian Constitution, as amended.

Regarding the right to a fair hearing guaranteed to citizens of Nigeria under section 36(1) of the 1999 Nigerian Constitution, as amended the Nigerian Court of Appeal (per Helen Moronkeji Ogunwumiju JCA) held in *Nosa Akintola*

49 [2000] 6 NWLR (Pt.660) 228, 251, SC, Nigeria

50 See AE Abuza, 'Derogation from Fundamental Rights in Nigeria: A Contemporary Discourse' (2017) 7(1) East African Journal of Science and Technology 121-22, quoted in Abuza (n 46) 53

Okungbowa and Six Others v Governor of Edo State and Eight Others,[51] that fair hearing is a constitutional and a fundamental right enshrined in the Nigerian Constitution which cannot be waived or unjustly denied to a Nigerian, including a worker, and that a contravention of the same in any proceedings nullified the whole proceedings. Also, the Supreme Court of Nigeria (per Amiru Sanusi JSC) held in *James Avre v NigeriaPostal Service*[52] that the right to a fair hearing is such a significant, radical and protective right, that the courts of law make every effort to protect the same. It even implies, according to the apex Court, that a statutory form of protection will be less effective, if it does not embrace the right to be heard. It went further to state that when an employee is accused by his employer of committing any act of misconduct, he must be accorded the opportunity to explain and give his reason, if any, for committing such misconduct.

With respect to fundamental rights generally, the Nigerian Court of Appeal (per Abdu Aboki JCA) held in *Mallam Abdullah Hassan and Four Others v Economic and Financial Crimes Commission (EFCC) and Three Others*,[53] that:

(a) fundamental rights are rights without which neither liberty nor justice would exist;

(b) fundamental rights stood above the ordinary law of the land and in fact constituted a primary condition to civilised existence; and

(c) it was the duty of the court, including the Supreme Court of Nigeria to protect these fundamental rights.

The words of the Nigerian Court of Appeal (per Obande Festus Ogbuinya JCA) in *Nigeria Security and Civil Defence Corps and Six Others v Frank Oko*[54] are more far-reaching. According to the Court:

(a) fundamental rights are rights attaching to man as a man because of his humanity;

(b) fundamental rights fell within the perimeter of species of rights and stood on top of the pyramid of laws and other positive rights;

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51 [2015] 10 NWLR (Pt. 1467) 257, 268-69, CA, Nigeria

52 [2020] 8 NWLR (Pt. 1727) 421-422, SC, Nigeria

53 [2014] 1 NWLR (Pt. 1389) 607, 610, CA, Nigeria, quoted in Abuza (n 34)

54 [2020] 10 NWLR (Pt. 1732) 314-315, CA, Nigeria

(c) fundamental rights constituted a primary condition for a civilised existence;

(d) due to fundamental rights' kingly position in the firmament of human rights, section 46 of the 1999 Nigerian Constitution, as amended allocated to every Nigerian whose fundamental right was or had been harmed, even *quiatimet*, to approach the Federal High Court or State High Court to prosecute his complaint and obtain redress.

A noteworthy point to make is that due cognisance must be accorded to the import of the provisions of Chapter Four of the 1999 Nigerian Constitution, as amended in which section 36(1) of the 1999 Nigerian Constitution, as amended is a part. In actuality, they are sacroscant. Should any provision require amendment, the 1999 Nigerian Constitution, as amended provides for a tedious and challenging procedure in section 9(3). The country, in this light, must apply, and show respect for, the Constitution. It is important to bear in mind that in Nigeria the provisions of the Constitution are supreme and binding on all persons as well as authorities throughout the Federal Republic of Nigeria, including the Supreme Court of Nigeria.[55]

In the final analysis, it is argued that the decision of the Supreme Court in the *Olarewaju* case on the matter is null and void. This contention is predicated on the insightful provision in section 1(3) of the 1999 Nigerian Constitution, as amended which is to the effect that if any other law, including the decision of the Supreme Court of Nigeria is inconsistent with the provisions of the Nigerian Constitution, such other law shall be void to the extent of its inconsistency. The argument is fortified by the decision of the apex Court in *Attorney General of Abia State v Attorney-General of the Federation.*[56] Perhaps, the Justices of the Supreme Court of Nigeria would have come to a different conclusion if they had applied their minds to the points above.

Good enough, the NICN seems to have departed from the old traditional or common-law position on unfair dismissal, owing to its expanded jurisdiction under the 1999 Nigerian Constitution, as amended by the Constitution (Third Alteration) Act 2010.

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55 See the 1999 Nigerian Constitution, s 1(1)

56 [2002] 6 NWLR (Pt. 763) 264, SC, Nigeria, quoted in AE Abuza, 'A Review of the Jurisdiction of the High Courts and National Industrial Court to hear and determine Labour Disputes Litigation in Nigeria' (2016) 3 (2) Journal of Comparative Law in Africa 157-58

It should be placed on record that before the Constitution (Third Alteration) Act 2010, the NICN actually had an expanded jurisdiction under the National Industrial Court Act (NICA) 2006.[57] But by virtue of the amendment introduced to the 1999 Nigerian Constitution by the Constitution (Third Alteration) Act 2010, the NICN's jurisdiction is further expanded so much so that it is by far wider than its jurisdiction under the NICA 2006. To be precise, the NICN now has exclusive jurisdiction in civil causes and matters:

(1) relating to or connected with any labour, employment, trade union, industrial relations and matters arising from work place, the conditions of service, including health, safety, welfare of labour, employee, worker and matters incidental thereto or connected therewith;[58]

(2) relating to or connected with unfair labour practice or international best practices in Labour, employment and industrial relation matters;[59] and

(3) connected with or related to child labour, child abuse, human trafficking or any matter connected therewith or related thereto.[60]

According to section 254 C (6) of the 1999 Nigerian Constitution, as amended by the Constitution (Third Alteration) Act 2010 an appeal shall lie from the decision of the NICN from criminal causes and matters as stated in section 254C(5) above to the Court of Appeal as of right. Arguably, the decision of the Court of Appeal in any such criminal causes and matters shall be appealable to the Supreme Court of Nigeria.

A significant point to note is that based on the interpretation given to the provisions of section 243(2) and (3) of the 1999 Nigerian Constitution, as amended by the Constitution (Third Alteration) Act 2010 by the Supreme Court of Nigeria in *Skye Bank Public Limited Company v Victor Iwu,*[61] all

57 See s 7(1)(a) (i) and (ii

58 See the 1999Nigerian Constitution, as amended by the Constitution (Third Alteration) Act 2010, s 254C (1)(a).

59 *Ibid.,* s 254 C(1)(f)

60 *Ibid.,* s 254 C(1)(i). See also *Nigeria Union of Teachers, Niger State Chapter v Conference of Secondary School Tutors, Niger State Chapter and 15 Others* [2012] 10 NWLR (Pt. 1307) 87, 111-114, CA, Nigeria. Note that the NICN, also, has criminal jurisdiction, as it can exercise jurisdiction and powers in criminal cases and matters arising from any cause or matter of which jurisdiction is conferred on the National Industrial Court by s 254C of the Constitution above or any other Act of the National Assembly or by any other law. See s 254 C(5) of the Constitution above.

61 [2017] LPELR 42595, SC, Nigeria.

decisions of the NICN in the exercise of its civil jurisdiction are appealable to the Court of Appeal which said Court shall be the final court on labour disputes not touching on criminal causes or matters of which jurisdiction is bestowed on the NICN by virtue of section 254 C or any other Act of the National Assembly or any other law.[62]

It is instructive to observe that the NICN considers unfair-dismissal to be an unfair labour practice.[63] In line with global best practices, the Court now insist that valid reasons must be given by an employer in termination of the contract of employment of an employee, whether or not it is a mere master and servant contract of employment.[64] To cut matters short, the NICN is now prepared to invalidate any determination of a contract of employment triggered by motive or reasons outside the recognised reasons for the termination of a contract of employment in article 4 of the UN ILO Convention 158 of 1982 or not in line with procedural fairness or the rules of natural justice or the right to a fair hearing in tune with the UN ILO Convention 158 of 1982 and other global or international best practices in labour, employment as well as industrial relation matters.[65]Also, it is now prepared to grant appropriate remedies such as monetary compensation, re-instatement and re-employment, whether or not the contract of employment involved is a pure master and servant relationship. To be specific, the NICN adopted the principle of unfair dismissal in reaching its decision in *Godwin Okosi Omoudu v Aize Obayan and Another*.[66] In the case, the first defendant was a Professor

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62 Note that this decision is in line with the practice in other countries, including Kenya and Uganda where the Court of Appeal is the final appellate Court on labour disputes. See, for example, s 17(1) of the Employment and Labour Relations Act 2011 of Kenya and the Ugandan case of *DFCU Bank Ltd v Donnakamali,*Civil Application No. 29 of 2019 arising from Supreme Court Civil Appeal No. 1 of 2019<https://www.bownaslaw.com> accessed 25 July 2021.

63 See *Petroleum and Natural Gas Senior Staff Association of Nigeria (PENGASSAN) v Schlumberger Ana drill Limited* [2008] 11 NLLR (Pt. 29) 164, NICN, Nigeria.

64 See CJ Chibuzor, 'The Concept of Unfair Labour Practice and its applicability in Nigeria' <https://www.patrelipartners.com/the concept-of-unfair-labour-practice-and-its-applicability-in-Nigeria/> accessed 11 July 2021.

65 Note that pursuant to s 254 C (3) of the 1999 Constitution, as amended by the Constitution (Third Alteration)Act 2010 and the NICN(Civil Procedure) Rules, 2017 a judge of the NICN may refer a claim filed in the Court to the Alternative Dispute Resolution Centre within the Court premises for conciliation and mediation. But where conciliation and mediation fails, the judge shall adjudicate over the labourdispute. See NICN (Civil Procedure) Rules 2017, Order 24, Rules 1, 7 & 8.

66 See (n 9).

and Vice-chancellor of the Covenant University, the second defendant. The NICN (per Adejumo J) held that the termination of the claimant's appointment by the second defendant-university on 18 August 1981 was in breach of the contract of employment between the parties,as disclosed before and was therefore wrongful. The Court further held that the termination of the claimant's appointment was also based on an unfounded reason.

His Lordship stated that it can never be just where an employer without just and established cause impugned the integrity of an employee and based on this impugnation goes ahead to peremptorily terminate his contract employment. Justice Adejumo went further to state that the law has moved from the narrow confines of the common-law in master and servant relationship to a more pro-active approach which secures the rights of both parties to a contract of employment. In this way, according to the learned Justice, the attention has shifted to protection of employees in cases of unfair labour practices in tune with what obtains in the comity of nations.

Justice Adejumo concluded that section 254C(1) (f) of the 1999 Nigerian Constitution, as amended by the Constitution (Third Alteration) Act 2010 created an entirely new concept and right of unfair labour practice which is both foreign to the common-law concept of master and servant relationship and the industrial relations jurisprudence hitherto- meaning before now existing in Nigeria. According to his Lordship, it was natural and expected that if this new right was infringed there must be a remedy; otherwise the whole purpose of creating the right would be defeated. Justice Adejumo stated further that if no specify remedy was created by the Nigerian Constitution, the NICN was bound to look at the practice in other countries where the concept had been borrowed. The Court, in the view of His Lordship, was bound to give the provisions of section 254C (1) (f) above a broad interpretation and construe the same as both accommodative of granting a right and imposing a remedy for its breach.

Justice Adejumo granted the following reliefs in favour of the claimant:

(i) the termination of claimant's appointment is declared wrongful;

(ii) the claimant is awarded one-month salary in lieu of notice of termination of his contract of employment;

(iii) the claimant is awarded five-months salaries as general damages;

(iv) the claimant is awarded the costs of ₦100, 000; and

(v) the judgment sum shall attract 10% interest rate per annum, from the date of this judgment until the judgment debt is fully liquidated.

The decision of the NICN above is commendable, being in line with the practice in other countries, including South Africa, Kenya, the UK, Canada and Ghana. Regardless, the Court can be criticised. To start with, section 254C (1)(f) above cannot be construed to granting an employee a right not to be unfairly dismissed or right not to be subjected to unfair labour practice. The provision above does not stipulate such a right in explicit terms unlike sections 94(1) and 185 of the UK Employment Rights Act (ERA) 1996 and the South African Labour Rights Act (LRA) 1995, respectively which explicitly provide for a right of an employee not to be unfairly dismissed or to be subjected to unfair labour practices in the case of South Africa. Secondly, the provision above or any other Nigerian statutory provision does not provide for the circumstances that would amount to unfair dismissal or any remedy for unfair dismissal or unfair labour practice unlike in other countries, including South Africa where an employee who has been unfairly dismissed may be awarded compensation, re-instatement and re-employment.[67] Justice Adejumo alludes to this fact hence; he stated that 'if no specify remedy was created by the Nigerian Constitution, the NICN was bound to look at the practice in other countries where the concept had been borrowed'. Lastly, His Lordship cannot substitute his own words for the words used in the Nigerian Constitution in order to give them a meaning which suits the Court. This would be contrary to the doctrine of separation of powers which has been accepted as part of Nigeria's system of government. Under the doctrine, it is the 'business' of the legislature to make law, while it is the 'business' of the court and executive to interpret the law and implement the law, respectively. It is argued that where a gap or ambiguity in the Constitution ensures, such a law must be referred to the legislature for the amendment of the same. The court cannot be allowed to make law, as Justice Adejumo tried to do in the *Omoudu* case.

In summary, considering the discussion of cases and legislation above, it is not out of context to repeat that there is not in existence in Nigeria yet– general statutory provisions which guarantee the employee in Nigeria the right not to be unfairly dismissed, provide for circumstances that would

67 <https://www.labourguide.co.za/discipline-dismissal/712-unfair-dismissals> accessed 10 July 2021.

amount to unfair dismissal and the remedies of monetary compensation, re-instatement and re-employment for unfair dismissal of a worker, whether or not in a mere master and servant relationship. This is unlike the practice in other countries, including the UK, Canada, South Africa, Kenya and Ghana.[68]

V. PRACTICES ON UNFAIR DISMISSAL IN OTHER COUNTRIES

What is of concern under the sub-heading above is the issue of the practices of unfair dismissal in other countries. The relevant countries with regards to the practice of unfair-dismissal are discussed below:

i. United Kingdom

In the UK a country practicing the common law, the Parliament has intervened to give protection to workers who have been unfairly dismissed from their employment. It accords employees the unfair dismissal remedy. This can be discerned from the provisions of the UK ERA 1996. Section 94(1) of the ERA 1996 guarantees the employee the right not to be unfairly dismissed.[69] It should be noted that the concept of unfair dismissal in the UK goes beyond the contractual position, as it provides employees with a measure of protection. Of course, the concept of unfair dismissal in the UK meets the requirement of the ILO recommendations which were accepted by the UK in 1964 as well as being in line with similar developments in other countries.[70] In the UK, an employee can sue the employer in the Employment Tribunal that he has been dismissed unfairly if the reason for the dismissal is not fair

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68 Note that some unsatisfactory provisions remain in the Nigerian Constitution such as section 254(B) which excludes non-legal practitioners from membership of the NICN and section 294(1) which gives the NICN and other constitutionally-created courts not later than 90 days after the conclusion of evidence and final addresses to deliver their decisions in writing. These provisions are clogs in the wheel of progress of the NICN. The Constitution above should be amended to provide that in addition to the requirement of being a legal practitioner for a least ten years, a holder of the office of judge of the NICN must be a professional civil servant or expert industrialist. See AE Abuza, 'The National Industrial Court and the Third Alteration Act 2010: An Evalution'(2012) 12(3) *The Constitution*: *A Journal of Constitutional Development* 67, 80, quoted in Abuza (n 56) 168.Also, the Constitution above should be amended to give the NICN and other courts created by the Constitution a period not later than 60 days within which judgments must be delivered, after the conclusion of evidence and final addresses. See Abuza above, 165 & 167.

69 See, also, M Suff, *Essentialsof Employment Law* (London: Cavendish Publishing Ltd., 1998) 106.

70 *Ibid*.

or if there was no fair procedure adopted for the dismissal of the employee. It should be noted that under section 94(1) of the ERA 1996, the employer must specify the reason that resulted in the employee's dismissal.

Some things are automatically unfair reasons in the UK,[71] if they are the main reasons for dismissing an employee. These include:

(a) being pregnant or on maternity leave;

(b) wanting to take family leave, for example parental paternity or adoption leave;

(c) being a trade union member or representative;

(d) asking for a legal right, for example to be paid the National Minimum Wage;

(e) doing jury service;

(f) being involved in whistle blowing; and

(g) taking action, or proposing to take action, over a health and safety issue.[72]

It is noteworthy that there is in existence in the UK, Employment Appeal Tribunal which hears appeals from the Employment tribunal only on questions of law. A significant point to bear in mind is that in an unfair-dismissal case, the employee can be awarded interim relief, compensation, re-instatement or re-engagement, if a tribunal finds in favour of the employee.[73] Needless to stress that the UK imposes limitations on the exercise of the right to sue for unfair dismissal. To be precise, only employees who have worked for an employer for a period of at least two years have a right to bring a claim for unfair-dismissal.[74] There are exceptions for those who are dismissed automatically and those who are dismissed principally for a reason related to political opinion or affiliation.[75] Furthermore, the right to complain to a tribunal about unfair-dismissal is not available to self-employed people, independent-contractors, members of the Armed forces or Police forces, unless the

71 Note that the ERA 1996 and other Acts in the UK do not use the term 'automatically unfair' but it has entered general usage. See S Deakin and G S Morris, *Labour Law* (Oxford: 5th edn, Hart Publishing Ltd., 2009) 429-430.

72 See <https://www.acas.org.uk/dismissals> accessed 7 July 2021. See, also, ss 95, 99, 100, 104 A, 104 C, 105(1), (3) & (7A) of the ERA 1996. For details, see *Ibid*.

73 <https://www.acas.thomsonreuters.com>accessed 7 July 2021. See, also, CJ Carr and PJ Kay, *Employment Law* (London: Longman Group UK Ltd., 1990) 158.

74 See Carr and Kay, *Ibid*., 139.

75 <https://www.gov.ukdismiss-staff> accessed 25 July 2021.

dismissal relates to health and safety or whistle blowing.[76]

In this segment, the author highlights or gives the summary of

76. *Ibid*. Note that the Parliament in South Africa, Canada, Ghana, and Kenya-all countries practicing the common-law have, also, intervened to give protection to workers whose contracts of employment have been unfairly terminated by their employers. This can be discerned from the South African Labour Rights Act 1995, Canadian Labour Code Act 1985, Ghana's Labour Act No. 551 of 2003 and the Kenyan Employment Act Cap 226 Laws of Kenya 2007. Sections 185, 240(1), 63(1) and 35(4)(a) of the South African Labour Rights Act 1995, Canadian Labour Code Act 1985, Ghana's Labour Act 2003 and Kenyan Employment Act 2007, respectively guarantee the right of a worker not to be unfairly dismissed by the worker's employer. Also, sections 187(1), 63(2), (3) & (4) and 46(a)-(i) of the South African Labour Rights Act 1995, Ghana's Labour Act 2003 and Kenyan Employment Act 2007, respectively mention circumstances under which a dismissal or termination can be considered unfair to, include pregnancy of a female worker, participation of the worker in trade union activities and where there was no fair or valid reason for the termination of the worker's employment and no fair procedure was adopted by the employer in terminating the worker's employment. In Canada, the purpose of unjust dismissal claims as it is called in the nation under the Labour Code Act 1985 is to provide union-like protection to every federally-regulated employee in Canada. Union-like protection is geared at protecting employees who are dismissed from employment on account of trade union membership or participation in trade union activities, including strike and picketing. Again, in South Africa, Canada, Ghana and Kenya, the Commission for Conciliation, Mediation and Arbitration (CCMA) 'the Labour Program of Employment and Social Development Canada (ESDC)' and the Canadian Industrial Relations Board (CIRB), the National Labour Commission and Labour Officer and Industrial Court (now Employment and Labour Relations Court), respectively are bestowed with the power to order payment of compensation, re-instatement and re-employment for the unfair-dismissal of a worker. See <https://www.labourguide.co.za/discipline-dismissal/712-unfair-dismissals> accessed 10 July 2021, 'No 15-Adjudication of unjust dismissal complaints'<http://www.crib.ccri.ca>site>eng> accessed 19 July 2021, Ghana's Labour Act 2003, s 64 and the Kenyan Employment Act 2007, s 49. Lastly, in the four countries above there are, also, limitations placed on workers who can sue for unfair-dismissal. For instance, under the Kenyan Law only employees who have been continuously employed by their employers for a period of not less than 13 months immediately before the date of termination could sue for unfair dismissal. Seethe Kenyan Employment Act 2007, s 45(3). See, also, the South African Labour Rights Act 1995, s 2, the Canadian Labour Code Act 1985, s 240(1) and Ghana's Labour Act 2003, s 66.

observations/findings during the study as can be seen in the preceding sections. It is glaring from the foregoing review of the practice of unfair dismissal of workers in Nigeria that some ordinary courts in Nigeria have not accorded Nigerian workers the right to sue for unfair dismissal. These courts have hinged their decisions on the position of employees in a mere master and servant relationship under the common-law. It is observable that the unfair dismissal of workers in Nigeria is unlawful, unconstitutional and contrary to international human rights' norms or treaties as well as the UN ILO Conventions. A very typical example is the UN ILO Convention 158.

Also, it is observable that section 254C (1)(f) of the 1999 Nigerian Constitution, as amended by the Constitution (Third Alteration) Act 2010 gives the NICN exclusive jurisdiction to hear and determine claims on unfair labour practice, including unfair-dismissal. Regrettably, neither the Constitution above nor any other enactment in Nigeria provides for general statutory rights of an employee not to be unfairly dismissed by the employer and reliefs such as re-instatement, re-employment and compensation for unfair dismissal as well as circumstances where a termination of employment of an employee would be considered an unfair dismissal. In this way, the problem of unfair dismissal of workers in Nigeria has continued unabated. A typical example is the *Omoudu* case.

Again, it is observable that the Parliament in the UK, South Africa, Canada, Ghana and Kenya has intervened to give recognition to the right of workers to sue for unfair dismissal and claim reliefs such as compensation, interim relief, re-instatement and re-employment for unfair dismissal, as disclosed before. These developments are certainly commendable. They are consistent with international human rights' norms or treaties such as ICCPR, UN Charter, ACHPR, ACHR, ECHR, AMCHR as well as the UN ILO Convention 158.

The problem of unfair dismissal of workers in Nigeria must be given the highest consideration it deserves by the civilian administration of President Muhammadu Buhari so that it may not be accused of paying lip service to the issue of vesting in the NICN exclusive jurisdiction over labour disputes relating to unfair labour practices, including unfair dismissal. A continuation of the problem of unfair dismissal of workers in Nigeria poses a grave danger to the industrial sub-sector of Nigeria's political economy. It is already generating industrial disharmony with capacity to stall economic growth and development. The author wishes to recall the five-days warning strike action embarked

upon by the NLC and TUC as well as their affiliates in Kaduna State between 16 and 19 May 2021 to reverse the unfair dismissal or termination of employment of over 7,000 civil servants in Kaduna State on the ground of redundancy. Incessant strike by workers has capacity to impact adversely on Nigeria's economy. This would certainly discourage both domestic and foreign investors to invest their resources in the Nigerian economy. In this way, President Muhammadu Buhari may not be able to realise fully the 'Change Agenda' of his administration for the over-all socio-economic development of the nation.

The problem of unfair dismissal of workers in Nigeria should be effectively addressed or tackled in Nigeria. In order to overcome the problem, the author strongly recommends that:

(i) A new law to be known as the 'Labour Rights Act' should be enacted by the Nigerian Parliament to provide for a right not to be unfairly dismissed and right to seek reliefs of re-instatement, re-employment and compensation for unfair dismissal as well as circumstances where a termination of employment would be considered an unfair dismissal. It is in accord with the practice of other countries, including the UK, South Africa, Canada, Ghana and Kenya, as disclosed before. A law on unfair dismissal such as the proposed 'Labour Rights Act' would take care of the problem above and give some protection to workers who may otherwise be rounded out of employment on account of their union activities and other invalid reasons for the termination of employment.[77]

(ii) The Nigerian Government should organise public lectures as well as other public enlightenment programmes to sensitise or interface with Nigerians on the import and or purport of the labour rights guaranteed under Nigerian laws and international instruments.

VI. CONCLUSION

This paper has reviewed the practice of unfair-dismissal of workers in

77. Ogunniyi (n 20) 326

Nigeria. It identified shortcomings in the various applicable laws and stated clearly that the practice of unfair-dismissal of workers in Nigeria is unlawful, unconstitutional and contrary to international human rights' norms or treaties as well as the UN ILO Convention 158. This paper, also, highlighted lessons or takes away from other countries and proffered suggestions and recommendations, which, if implemented, could effectively address or end the problem of unfair dismissal of workers in Nigeria.

THE UNITED NATIONS: IN LONG TRAVERSE OF 75 ODD YEARS

DHARMENDRA KUMAR MISHRA*

ANSHU MISHRA**

sarve bhavantu sukhinaḥ, sarve santu nirāmayāḥ |
sarve bhadrāṇi paśyantu, mā kaścid duḥkhabhāgbhavet ||[1]

ABSTRACT : *"Sarve Bhavantu Sukhinaḥ"* is the most beautiful ancient verse illustrating a holistic thought of the well-being of all. This eastern philosophy is enormously quoted in the various Indian texts[2] for the universal well-being. Seven decades ago, it might have been one of the prominent subject-matters of a speculation to change the landscape of a fragile multilateral scene that was brought forth by establishing the United Nations to respond for the whole world, recovering from the devastation of two world wars, in general and the Second World War, in particular. However, it was an era of world-wars and liberation from colonies. As a common endeavour to protect humanity, the new idea of the United Nations came in the backdrop of the failure of the League of

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1. May all be happy; May all be free from infirmities; May all see good; May none partake suffering. सर्वे भवन्तु सुखिनः सर्वे सन्तु निरामयाः। सर्वे भद्राणि पश्यन्तु मा कश्चिद्दुःखभाग्भवेत्।। *Brihadaranyaka Upanishad,* (1.4.14)
2. सर्वेषां मङ्गलं भूयात् सर्वे सन्तु निरामयाः। सर्वे भद्राणि पश्यन्तु मा कश्चिद्दुःखभाग्भवेत्।।
   Garuḍa Purāṇa (35.51);
   सर्वे कुशलिनः सन्तु सर्वे सन्तु निरामयाः। सर्वे भद्राणि पश्यन्तु मा कश्चिद्दुःखभाग्भवेत्।।
   āśīrvacanam of Itihāsa Samuccaya ;
   सर्वे भवन्तु सुखिनः सर्वे सन्तु निरामयाः। सर्वे भद्राणि पश्यन्तु मा कश्चित्कष्टमाप्नुयात्।।
   Uvaţa's Mantrabhāśya of Vājasaneya Saṁhitā.

Nations. The major objective behind establishing the United Nations was to build faith in the basic human rights, human dignity and worthy of human beings; and promoting democratic values for global peace and cooperation, thereby saving the succeeding generations from the scourge of wars. In the last 75 years, the United Nations has catalyzed decolonization, promoted the value of equality, liberty and fundamental freedoms, protected human rights and shaped standards and norms for the promotion of global peace and development. It has shaped itself as a bridge for extending cooperation and mitigating the conflicts among the nation-states. In this paper, the authors maintain whether the United Nations has been emerging beyond its original conception as designed to facilitate cooperation among the nation-states? or whether its practices are still concerning with global commons and human rights? Or, Is there significant downside to the growing connection between human rights and United Nation in terms of facing the new challenges of terrorism; geo-politics and neo-colonisation?

KEY WORDS : League of Nations, United Nations, Human Rights, Decolonization, International Covenant.

I. INTRODUCTION

The world, moreover, is a political system and the interaction among its actors being preeminently is political[3]. The political system, in terms of the authoritative allocation of values, is the legitimate order-maintaining or transforming system in the society.[4]Any persistent pattern of human relationships involves to a significant extent, power, rule, or authority[5]. These are more apposite when applied to the State than used to the global system. Therefore, the political system is simply presumed to exist for a group of actors. Thus, the United Nations (hereinafter the UN) is also a political system of the world-states comprising with those actors who may be presumed to

3. Some of the more widely quoted definitions of political system would seem to preclude the application of the term to the world or indeed to virtually any set of interstate relations.
4. Gabriel A. Almond, *Introduction: A Functional Approach to Comparative Politics"* in Gabriel A. Almond and James S. Coleman, eds., *The Politics of the Developing Areas* (Princeton : Princeton University Press, 1960), p7
5. Robert A. Dahl, *Modern Political Analysis,* (Princeton: Princeton University Press, 1960), p6

interact in the sessions of the UN within somewhat elastic structures of the international system and act as an instrument for building a world order based on the principles of humanity and peace under the International Law.

The idea to keep peace world-wide through an international organization in the activities of the nation-states, found its first practical expression in the year 1919 after the First World War with the establishment of the League of Nations. However, before the League of Nations (hereinafter LoN), there were considerable experiences with the international organizations, institutions and procedures in more limited scope to promote other common purposes in organized international cooperation rather to prevent the wars in the wider context. From League of Nations to United Nations is a result of constraint struggle of many centuries[6]. The nineteenth–century public international unions-

6. Craig Murphy, *International organization and industrial change: global governance since 1850* (Cambridge: Polity, 1994);In the 13th century, St. Augustine's writings and theories were taken up by the immensely influential philosopher Thomas Aquino who combined his ideas with concepts drawn from cannon law, theology, secular law, chivalry, and the habits of relations among princes (Johnson 1987, pp. 67-68; p. 58). From the theories of St. Thomas Aquin by the 15th century Christian just war theory had crystallized into one doctrine with two components within *Jus ad bellum* (referring to permissible reasons to go to war), and *jus in bello* (regarding the permissible actions during war). Furthermore, the force used should not do more harm than good, i.e. it should be proportional. War should be a last resort; it should come after all peaceful means have been exhausted and if there is a reasonable hope for success. If all these requirements are satisfied and war is initiated, there are two general principles of *jus in bello*. First, the use of force should avoid inflicting unnecessary destruction. Second, the noncombatants should be protected from the ravages of war as much as possible (Miller 1987, pp. 267-258). In the 14th century, Dante Alighieri himself was the prophet of peace and international cooperation. He argued that peace is a vital condition for fully realizing humanity's distinct intellectual potential. Peace cannot be maintained if humanity is divided. So, he suggested everyone to accept the Emperor as the temporal sovereign instead of the Pope, as envisioned by Augustine and Thomas Aquino. In the 15th century, a very interesting international system was suggested by George Podebrad of Bohemia. The fear of Turkish invasion inspired George Podebrad to propose a project that would improve international cooperation and unite the West against the threat from the East. Therefore, the purpose of the international system was not peace but protection. Nevertheless, the structure proposed by George Podebrad has a strong resemblance to some organs of the United Nations. He suggested establishing an international Parliament with both assembly and tribunal. In the 16th century, Desiderius Erasmus revived the role of the Church as an arbitrator in settling disputes, completely abandoned the Christian just war theory and replaced it with the pacifist theory. In his "Querela Pacis", Erasmus condemned all wars, just or non-just, by stating that "one can hardly imagine an unfavorable peace which would not be preferable to the most favorable war". In

the International Telegraph Union (ITU) and Universal Postal Union (UPU) to adapt to technological innovations and market forces pushing for economic modernisation of various sorts are some examples. So, League was not totally new. It had its roots in the 19th century "Triple alliance and Triple entente". By that time, the horrors of the conflict made forward the idea of a global institution that could avoid any other possibility of war in the nations engaged. The League of Nations has represented a groundbreaking initiative in the field of international cooperation, but, faced serious contradictions from the time of its inception, which culminated with its disastrous failure to prevent the Second World War. However, League has been considered an innovative mechanism for promoting peace in international politics for the notion of inter-governmental and to engage in collective decision-making processes through which states cooperate with one another while defending the significant parts of their national sovereignty. Nevertheless, LoN, the first global effort to build universal peace and collective security, collapsed in

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the 17th century, a French monk named Emeric Cruce proposed a federation of states that also included not only European rulers but the Emperor of the Turks, the Jews, the Kings of Persia and China, the Grand Duke of Muscovy (Russia) and monarchs from India and Africa. According to Cruce, peace would also benefit the extension of commerce and free trade. Cruce's plan was founded upon the principle of equality and tolerance among nations, and its purpose was to preserve peace and security. The principles and purposes laid out in Cruce's plan constitute an early precursor of the Covenant of the League of Nations and of the Charter of the United Nations (Balch 1909, pp. 85-85). In the 16th and the 17th century Europe evolved the states based on secular rather than religious ideologies. After the Protestant Reformation, a new movement was initiated by the Spanish theologians Francisco de Vitoria and Francisco Suarez who attempted to ground the just war doctrine in natural law instead of divine law. Perhaps the most prominent philosopher belonging to this movement and the "father of international law" was Hugo Grotius. The law of nature consisted of norms and universals that derived from our innate sociability and our desire for self-preservation. The law of nations, on the other hand, was derived from customary practices and relationships of actual states. These two sets of norms provided the theoretical grounding for much of the contextual evolution of international law in the 19th and 20th centuries (Falk et al 1985, p. 7). Later, the 18th century Locke opposed the rather extensive rights of conquest put forth by Grotius and argued that even in a just war the victors should never kill or enslave anyone but the actual combatants. All three authors were read widely in the period leading up to the creation of the League of Nations, and during the founding of the United Nations (Roosevelt 1990, p. 260).

the1930s amidst the great power's rivalry and the impending Second World War[7].

At the onset of the Second World War, League of Nations came to end, but the search for permanent peace did not end. When the World War II was about to an end, a representative of 50 countries gathered in San Francisco from 25 April - 20 June, 1945 at the United Nations conference. These representatives finally signed on a Charter which created a new international organization as the United Nations. Though, the League of Nations has been unsuccessful due to some negative developments in the world conjuncture, but it has been the pioneer of the idea of United Nations in establishing idealistic principles, such as to ensure international peace and security of nations on the earth, maximize the living standard of society, promote human rights against all kinds of injustice, protect territorial integrity, ensure the sovereignty of the state, state rights against other states and ensure the peace and prosperity[8]. The LoN is considered as an innovative mechanism for promoting

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7. On April 18, 1946, the League Assembly adjourned after taking the necessary steps to terminate the existence of the League of Nations and transfer its properties and assets to the United Nations. On August 1, this transfer took place at a simple ceremony in Geneva. Thus, an important and, at one time, a promising experiment in international cooperation came formally to an end; 'The League of Nations was never intended to be, nor is it, a revolutionary organization. On the contrary, it accepts the world of states as it finds it and merely seeks to provide a more means for carrying on some of the business which these states transact between one another. It is not even revolutionary in the more limited sense of revolutionizing the methods for carrying on inter- state business. It does not supersede the older methods. It merely supplements them'-Alfred Zimmern, *The League of Nations and the Rule of Law*, London, 1936, p. 4; the League failed to fulfil its tasks. It did not stop and did not react to the invasion of Manchuria by Japan, neither to that of Ethiopia by Mussolini's Italy, nor, finally, to the Nazi territorial expansion in Central Europe. Above all, it did not prevent the outbreak of World War II. There are various reasons for its failure. Its membership was not universal, since even the United States, which had promoted it through Wilson, did not participate in it.
8. The purposes are as follows:
    1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
    2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

peace in the international system. It brought about for the first time the notions of "inter-governmentalism" through which states cooperate without surrendering significant parts of their national sovereignty. Having these obligations for the establishment of peace, the multilateral approach, the principle of self-determination of peoples, and the defense of human rights on April 18, 1946, the League of Nations had transferred all its assets to the United Nations through an agreement. Thus, to save the succeeding generations from the scourge of war, the United Nations came into existence in 1945.[9]

II. THE UNITED NATIONS : AN OVERVIEW

The United Nations is unique organisation among the contemporary

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends, full access to the Charter is available at <*http://www.un.org/en/documents/charter/index.shtml*>

9. In 1945, delegates from 50 countries met in San Francisco at the United Nations Conference on International Security and drew up the United Nations Charter and on the 26th June 1945, all the representatives of these countries signed the charter. Poland endorsed the charter later, though not represented at the conference to become one of the founding members. Sufficed therefore to state that on the 24th October 1945, the charter was ratified by France, Soviet Union, China, the United Kingdom and United States and the UN officially came into existence; Lord Robert Cecil said about the League of Nations that it is dead; long live the United Nations; it is striking how many of the supposedly discredited ideas associated with the defunct League reappeared- M. Patrick Cottrell, 'Lost in transition? The League of Nations and the United Nations', in Ian Shapiro and Joseph Lampert, eds. *Charter of the United Nations* (New Haven, CT: Yale University Press, 2014), Pp 91–106; Leland Goodrich remarked that 'Quite clearly there was a hesitancy in many quarters to call attention to the continuity of the old League and the new United Nations for fear of arousing latent hostilities or creating doubts which might seriously jeopardize the birth and early success of the new organization.'- Leland M. Goodrich, '*From League of Nations to United Nations'*, *International Organization* 1:1, 1947, p. 3;During the Second World War, more than 70 million people died; millions of people became permanently disabled and many cities were devastated. Furthermore, the United States of America (U.S.) dropped atomic bombs on Japan towards the end of the war, thus killing 220,000 Japanese, Berdal Aral, *the United Nations and International Inequality Analysis*, (2013) SETA, Foundation for Political, Economic and Social Research.

international organisations. It is one of the leading and globally active organizations. It represents one of the best-crafted machinery for the promotion and maintenance of international peace and stability in the New World order since 1945, its membership and mandate have ever since continued to expand the agenda of democratization, promotion of human rights, and good governance. Since its inception, it showed a big support to the decolonization processes and worked as a platform for developing countries to participate in global politics. This is the only organisation established for general global political purposes and with almost universal membership of 193 member countries. It is one of the most important arenas in which world politics is played out. Thus, it provides a unique forum for multilateral discussion of the full spectrum of international issues covered by its Charter. It also plays a significant role in the process of standard-setting and the codification of international law. However, due to the great tension, greater than in other organisations, between sovereign equality and effective power relations, inherent to the Westphalia system, it was founded with the commitment that the nations should cooperate to resolve all conflicts peacefully and change the lives of the people.

Now, more than 75 years later, much has been changed since its inception. The Organization's membership has nearly quadrupled, while decolonization, population growth and globalization each has been contributed to the redrawing the modern landscape, nevertheless new challenges are emerging with the advances in technology, affecting us in all ways to which one could have imagined even a decade ago; crisis relating to finance, food, health and energy have shown no respect for national borders; threats of climate change and other ecological concerns have highlighted that sustainable development depends equally on three components: social development, economic growth and environmental protection.[10] As Delbruck has rightly observed:

> "Looked upon from a distance, the present-day international system, national policies, and the policies of international organizations appear to be determined by factors deeply rooted in and informed by the historical and cultural experiences and the political socialization of the nation-state era. This era

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10. Foreword, Ban Ki-moon, Secretary -General of United Nations, *Basic Facts about the United Nations,* UNDPI, New York, (2011)

> is distinguished by its fixation on sovereignty, national interest, and self-preservation; and its focus on the "individual State" has been only marginally mitigated by the less than a century old process of internationalization[11]."

Consequently, many of the countries have questioned the relevance and significance of the UN and apprehended whether the UN has come on a crossroads in twenty-first century? Whither the United Nations is? Is there a need for re-charting the future of the United Nations? The present paper attempts to look into the successes and failures of UN in protecting human rights? In the present world order, various international organisations are playing a significant role in contemporary international politics internationally and at the regional level[12]. They perform economic, social, political and specialised functions in the interest of their membership and under the set-out objectives enshrined in their constituent instruments. Fortunately, over the last 75 years, the UN as the world's outstanding universal international organisation, a vestige of 20th century international politics, has catered for the need to carry out a comprehensive reform in the field of human rights protection and gained its legitimacy and credibility as one of the most important international organisations with the primary responsibility of maintaining international peace and security and also of protecting human rights and the United Nations is still working to maintain and uphold the same. However, voices have been raised severely from time to time from different forum for the reform of the UN.

III. THE UNITED NATIONS AND THE CHALLENGES OF HUMAN RIGHTS

Human Rights are the foundation of human existence and coexistence. These rights are universal, indivisible and inter dependent and lie at the heart

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11. Jost Delbruck, "The Role of the United Nations in Dealing with Global Problems," *the Indiana Journal of Global Legal Studies*, (1997) Vol 4 : Iss 2 , Article 3, p.279
12. In addition to the UN itself, there are various affiliated agencies such as the International Labour Organization (ILO), the World Health Organization (WHO), and the United Nations Educational, Scientific and Cultural Organization (UNESCO) and a number of regional organizations such as the Council of Europe, the Organization of American States, and the African Union that have considerable significance for taking human rights initiatives, more focused on judicial adjudication to make considerable headway towards the ideal of international human rights protection.

of everything[13]. Contemporary international society is increasingly concerned with human rights. The UN is an institution which is the repository of many ambitions and obligations both. It is the first and foremost international organization, a factor that largely determines the types of efforts that can deploy for the development and promotion of human rights. But, institutionalization, moreover, creates particular challenges for human rights, and therefore, the history of human rights even at the UN is more than the sum total of the organs and their execution that are associated with human rights augmentation.[14] Virtually, all UN bodies and specialised agencies are undertaking efforts for the promotion or protection of human rights into their programmes and activities.

i. Concept and Nature of Human Rights

The understanding of human rights takes more effort than simply referring it. Sometimes it creates confusion to the common man. It is an inclusive term that includes a variety of concepts and covers many areas of the human conditions. Human rights assume formidable dimensions in the post-World War II years. It was catlysed by the desire of the people and nations to redefine, reassert and restore the intrinsic worth and dignity of mankind after the bitter ravages and savagery of that war. So, a single definition could not possibly cover the entire gamut of what human rights involve. Thus, the concept of human rights can, generally, be defined as those rights which are inherent in the nature of mankind and without which one cannot live as human being. Therefore, idea of the inalienable rights of the human beings was often articulated by poets, philosophers and in antiquity of civilisation[15]. In the present era, it has gained momentum and has become increasingly a matter of political priorities throughout the world.[16] The basic norm applying to the concept of human rights is the respect for human dignity and it is

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13. See, Foreword, *Human Rights: A Compilation of International Instrument*, vol. I (First Part), Universal Instrument: UN, 2002
14. Frederic Megret & Philip Alston, *The United Nations and Human Rights: A Critical Appraisal*, 2nd edn (Oxford University Press), 2020, P4
15. अहा! वही उदार है, परोपकार जो करे, वही मनुष्य है कि जो मनुष्य के लिए मरे। मनुष्यता, मैथिली शरण गुप्त; निअमत जो खा रहा है सो है वो भी आदमी, टुकड़े चबा रहा है सो है, वो भी आदमी, आदमीनामा, नज़ीर अकबराबादी; अष्टादश पुराणेषु व्यासस्य वचनद्वयम्। परोपकारः पुण्याय पापाय परपीडनम्।।
16. Carlos Santiago Nino, *The Ethics of Human Rights,* (Oxford)1991, Pp 9-10

available to all irrespective of colour, race, sex, religion or other considerations. These rights are *sine qua non* for the pursuit of happiness, progress and even for all-round development of human beings. The idea of this right has its long history and may be traced from ancient civilizations.[17] Thus, Human rights may be defined as those inherent rights to which mankind is inhabiting in any part of the world should be deemed entitled merely by virtue of having been born as human being.[18]

Human rights and fundamental freedoms allow us to fully develop and use our human qualities- intelligence, talents and conscience. It is based on increasing demand for a life of mankind in which the inherent dignity and worth of each human being receives respect and protection. People from different backgrounds readily endorse the concept of human rights, which refer to its importance and significance. Moving from a general definition of human rights to more specific explanations, it requires having a fresh look at various human rights documents. The importance of these documents is that individuals, groups and governments from all over the world have invested considerable time and thought in drafting the documents. Voices from different corners of the world aired within these instruments, which generally take the form of a written declaration or covenant sponsored by the United Nations. The issue of human rights has moved to the forefront of UN activities, when the founding fathers and the practitioners of international law of the early 20th century characterized proximity of human right and international law and laid emphasis upon the law of nations to accept human rights over and above the legal order of sovereign states. The international concern of United Nations for promotion and protection of human rights is evident from various conventions, covenants and conferences.[19]

Several social, environmental, economic, cultural, and political phenomena relating to the universality of human rights doctrine—universality in terms of the possibility of demanding these rights rather than their philosophical pretensions or unilateral application. The ideal tool for articulating

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17. The Code of the Babylonian King Hammurabi; the theory by the Stoic philosophers; the natural law theories of Cicero and other Stoic thinkers
18. Nagendra Singh, *Enforcement of Human Rights in Peace and War and the Future of Humanity*, Eastern Law House Pvt Ltd , Calcutta, 1986, P1
19. The Congress of Vienna (1814-15), the International Slavery convention(1926), the Covenant of the League of Nations (1919)

collective action are seen among the various efforts of the UN are illustrious. In the second half of the twentieth century, such actions of the repressive sovereign nations had been critised and described violation of human rights by the philosopher and practitioners of international law. The idea of human rights has gradually been adopted by the politicians also as category of political thought and got appraisal around the world. It would be praiseworthy to note the observation of P N Bhagwati, J:

> "to the large majority of people who are living in almost sub-human existence in condition of abject poverty and for whom life is one long, unbroken story of want and destitution, notions of individual freedom and liberation, though representing some of the most cherished values of a free society, would sound as empty words bandied about in the drawing rooms of the rich and well-to-do, and the only solution for making these rights meaningful to them was to re-make the material conditions and usher in a new social order where socio-economic justice will inform all institutions of public life so that the preconditions of fundamental liberties for all may be secured.[20]"

ii) History

The UN identifies the early signs of the conception of Human Rights from the year 539 BC in the Cyrus Cylinder[21] whose provisions inspired the UN. However, the various texts[22] of ancient India have enumerated in detail the

20. *Minerva Mills Ltd. v Union of India*, AIR 1980 SC 1789
21. Armies of Cyrus the Great (539 B.C.), the first king of ancient Persia, conquered the city of Babylon, but, it was his next actions that marked a major advance for Man. He freed the slaves, declared that all people had the right to choose their religion, and established racial equality. These and other decrees were recorded on a baked-clay cylinder in the Akkadian language with a cuneiform script known as the Cyrus Cylinder. This ancient record has now been recognized as the world's first charter of human rights; however, numerous theoretical debates surrounding the origins, scope and significance of human rights in political science, moral philosophy, and jurisprudence. Roughly speaking, invoking the term "human rights" (which is often referred to as "human rights discourse" or "human rights talk") is based on moral reasoning (ethical discourse), socially sanctioned norms (legal/political discourse) or social mobilization (advocacy discourse).
22. In ancient India, the trace of the concept of human rights can be paved back from the Vedas period of the fifteen century B.C. There are wide range of stories, pronouncements found which showed the way to the concept of human rights. In

concepts of Human Rights. The Human rights constitute a set of norms governing the treatment of individuals and groups by states and non-state actors based on ethical principles regarding what society considers fundamental to a decent life. These norms are incorporated into national and international legal systems, which specify mechanisms and procedures to hold the duty-bearers accountable and provide redress for alleged victims of human rights violations.[23] The concept of human rights is an ethical, legal and advocacy discourse. It is a matter of tensions between human rights and state sovereignty.

Human rights are the bedrock principles that underpin all societies where there is a rule of law and democracy. Since the end of World War II, the core importance of human rights has been universally acknowledged. The challenges to the universality of human rights have been recognized by the international community, the means available to translate the high aspirations of human rights into practice are very tough. Human rights are inherent rights available to them by virtue of human beings for their existence, sustenance and all-round progress in their life; they embody key values- equality, dignity, fairness and respect and important means of protection in any society for those who may face abuse, neglect and isolation. Human rights strengthen and enable the common people to speak up about the poor treatment of the public authority. These rights are not granted by any state, they are universal rights regardless of nationality, sexual orientation, age, national or ethnic origin, colour, religion, language, disability or any other status. Since, they are accepted by all States and peoples; they apply equally and indiscriminately to every person and are the same for everyone everywhere.[24]

Vedas, human right is signified with the concept of equality. The "Rig Veda, the oldest document of the world, declared all human beings are equal and emphasized to respect the dignity of human rights. The "Atharva Veda" advocated the same thing. Ancient India has always stressed on the principle that one person's right is another person's duty; further it is described in *Atharva Veda* that all have equal rights in articles of food and water. The yoke of the chariot of life is placed equally on the shoulders of all. All should live together with harmony supporting one another like the spokes of a wheel of the chariot connecting its rim and the hub (*Atharva Veda*-SamjnanaiSukta)………..T.S.N, Sastry, India and Human Rights: Reflections op.cit, (ed.) (M. Rama Jois, in judicial colloquium in Bangalore, 24-25 fed, 1998), New Delhi, pp.45, 47.

23. Stephen P Mark, *Human Rights: A Brief Introduction*, Harvard University Press, (2016) P 1
24. Martin Chunong & Zeid Ra'ad Al Hussein, *Human Rights Handbook for Parliamentarians,* (2016) P19

Thus, human rights are political claims and citizens of the state make these claims against the governments and government institutions established by the State. On the basis of these claims, citizens appeal to a higher level of authority within the established legal and governance structure; or they organise to bring down their government and replace it with a better one; or succeed from a union or federation to create a new autonomous political community, or invite the government of another state to intervene to protect them from their own government. The conception of human right led to the creation of the Universal Declaration of Human Rights 1948 and made possible subsequent flourishing of the idea of international human rights. The Declaration's list of human rights is broadly speaking, the list that is still in the use today. And the international human rights treaties that followed in its wake refined the formulations of these rights and gave them the status of international law[25]. Both the Universal Declaration and Human Rights Treaties have given the idea of human rights for a determinate meaning that has gained widespread international acceptance.

IV. THE UNITED NATIONS AND NORM- SETTING PHASE FOR HUMAN RIGHTS

The process of standard setting at the international level suggests complexity, negotiation and consensus building. It also calls into play competing national interests, cultures and ideologies. It was a matter of the asymmetry of power, the ability to participate effectively in the process and the capacity to own both the process and product that come into play in global order. The business of standard setting would henceforth be a struggle over ideology, philosophy, culture, and sovereignty.

However, the concept of human right has four aspects[26]. *First* is the national aspect since human rights take their origin within the national arena, look for survival to the national forum, whether the executive, legislative or the judiciary rely on the national machinery for enforcement; *second* is the international aspect whether regional or global and universal which is equally profound. Human rights cannot be compartmentalised to be restricted to

25. James W Nickel, *Making Sense of Human Rights*, 2nd ed. (Introduction) Blackwell Publishing (2007) P1
26. Ibid p15

national boundaries;[27] *third* aspect relates to the human rights in *peace time*; and *fourth* aspect in time of *armed conflict*. The activities of the United Nations in the area of human rights can be seen in several phases. Basically, its efforts may be catagorised in three key phases. The first phase starts just after its establishment from 1947 where the work began with standard settings i.e. law-making; in the second phase, it consisted with the public discussions in regard to the alleged violations of human rights; and in the third phase, its efforts were devoted in creating the mechanisms to implement the accepted norms more effectively.[28] In the first two decades, the UN has been limited in the studies of human rights activities as a subject of political debates and in achieving progress in the process of decolonization. These phases are-

a) Standard- Setting for Human Rights (First Phase -1947 to 1954)

b) Promotion of Human Rights (Second Phase- 1955 to 1966)

c) Protection for Human Rights (Third Phase – post to 1967)

a) Standard- Setting for Human Rights (First Phase -1947 to 1954)

It was a period for drawing up the substantial provisions for declarations, and covenants. Human rights have been promoted since 1946 by the United Nations as part of its mandate. The rise of the modern nation-state in certain part of the west and the monopoly of some states over violence and the instruments of coercion gave birth to a culture of individual rights to contain the abusive and invasive steps of the States. The first regime of human rights was originated by the reason of liberal theory and philosophy. John Locke reduced in his *Two Treatises of Government* the relationship between the state and the individual.[29] Since, the human rights standard setting has been continuously developing, new concepts have begun to be adopted by the international community and become part of human rights obligations of the States. The adoption of Universal Declaration of Human Rights (hereinafter

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27. Id, the human race is one and the same throughout the world, and their rights must necessarily spill over the national limits of the sovereign State to the international arena. Therefore, human rights also look to international organizations both the inter-governmental as well as non-governmental type and the cry are also raised for international machinery for enforcement.
28. Christopher C. Joyner, (ed.), *The United Nations and International Law,* 134 (Cambridge University Press, Cambridge, 1997)
29. See John Locke , *Two Treatises of Government*(1988)

UDHR) by the United Nations in 1948 was the beginning point towards achieving its objective. It is seen as the authoritative interpretation of the term 'human rights' by the United Nations.

With the end of the World War II, and the creation of the United Nations, the international community vowed to never allow atrocities in future. World leaders decided to complement the UN Charter with a road map to guarantee the rights of every individual everywhere. The document they considered at the first session of the General Assembly in 1946 was the UDHR. "The Assembly reviewed this draft Declaration on Fundamental Human Rights and Freedoms and transmitted it to the Economic and Social Council for reference to the Commission on Human Rights for consideration . . . in its preparation of an international bill of rights[30]. The Commission, at its first session early in 1947, authorized its members to formulate what it termed a preliminary draft International Bill of Human Rights".[31]

Thus, during its first year of operation, the UN Economic and Social Council which had assumed primary responsibility in this field adopted a resolution stating to promote human rights.[32] The UDHR purports to offer a shared basis for comprehending both the idea of human rights itself and the array of human right that the ideas imply. The declaration presents what the Preamble calls a "common understanding" of human rights and represents what the Proclamation Clause calls "a common standard of achievement for all people of all the Nations." Both are vital steps in the field of Human Rights jurisprudence of the modern age. The UDHR came initially to carry moral authority referred to itself as a "common standard of achievement for all people of all the nations. The UDHR was thought to be a document that would precede the more detailed elaboration of the human rights obligations of states in a binding treaty. Initially, there was hope that such an instrument would immediately follow the UDHR. However, Cold War conflicts and tensions between the United States and the West, on the one hand, and the Soviet Union and the socialist bloc, on the other, brought the noble expectation to a screeching halt. During these years, the Commission on Human Rights discussed various other proposals relating to implementing provisions for

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30. Resolution 43 (I)
31. United Nations: Peace, Dignity and Equality on Healthy Planet-History of the Declaration
32. Res. 9 (II), 7, ECOSOC Off Rec, 2nd Sess, at 400-402 (1946)

the creation of international machinery.[33] But, over the years, discussions have centered around two issues: first, the nature of the membership of the Committee; secondly whether the Committee should be permanent or *ad hoc*.[34]Although, the draft recommendation, 1953 could not be adopted. The Committee on Human Rights primarily was indulged in setting the norms to provide a friendly settlement through its good offices in the cases of disputes the reason that from the very beginning, the States had made it clear that the UDHR is non- binding instrument, and that the role of the UN was confined to merely promoting human rights with the States, as one among many other activities.

b) Promotion of Human Rights (Second Phase- 1955 to 1966)

The adoption of UDHR formed basis for two main covenants which were adopted by the General Assembly. In order to protect the civil and political rights, the human right was conceptualized in new ways. The philosophy of Human rights was attracted by the tumultuous socio-political dislocation and the industrial revolution. The post-World War II decolonization campaigns and consequent clamour for an equitable distribution of the goods for social existence, human rights jurisprudence has, undergone tremendous evolution leading to the emergence of what are referred to as civil and political rights; and social, economic, and cultural rights.

During this period, the General Assembly of the United Nations was primarily concerned with drafting and redrafting the substantive provisions of the draft covenants for the protection of civil and political rights and economic, social and cultural rights. However, in 1963, the measures of implementation were discussed thoroughly. It led to the adoption of the Committee report amidst opposition of some of the States. The two major achievements of this period are : the drafting of the Racial Discrimination Convention in 1965, which contains the most advanced measures of implementation; and the adoption of the Covenant on Civil and Political Rights and the Optional Protocol thereto; and the Covenant on Economic, Social and Cultural Rights in 1966[35]. The civil and political rights represent the first

33. *See Report of the Drafting Committee,* U.N. Doc. E/CN. 4/21 (1947):*Report of the Working Group on Implementation,* 6 U.N. ECOSOC, Supp.1, at 33, U.N. Doc. E/ 600 (1947)
34. Ibid
35. Ibid

generation human rights. These rights, as its concept are known as part of international bill of human rights because, in very purpose, either they proclaim the rights or guarantee them. In this period, a liberal discourse was focused on the rights of citizens against the state with the objective that the state as an imperious entity may not transgress them by power and authority. The International Covenant on Civil and Political Rights 1966 grants individual rights against the state and it has been considered the first covenant for creating treaty body to oversee its implementation and was proved as remarkable achievement.

Thus, at the international level, the protection of the first generation human rights had received more attention after the emergence of the United Nations. The Economic, social and cultural rights represent the second generation of Human Rights and received the same appreciation by the States. In the ICESCR, states are required to fulfil its obligations to the maximum of its available resources, with a view achieving progressively the full realization of the rights.

c) Protection for Human Rights (Third Phase – post to 1967)

Since 1966, when the first two important human rights covenants were adopted by the General Assembly of the United Nations, standards related with the most of the human rights concerns have been set in place. The process of standard setting was then—and is still today—contentious, lengthy, and laborious. The human rights standard settings are still an uphill task. In the post 1966 era, since 1970s, a set of new human rights has appeared which seek to respond to the most urgent challenges facing the international community. The UN Commission on Human Rights recognized the right to development. The other rights are right to peace, right to healthy environment, the right to participation in cultural heritage or the right to humanitarian aid. A comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from. This is the emergence of third generation of human rights.

Thus, the International Bill of Human Rights consisting of the Universal Declaration of Human Rights, and two legally-binding treaties, namely, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, along with the other

human rights treaties of the United Nations and of regional organizations, constitute the primary sources and reference points for what properly belongs in the category of human rights. The International Bill of Human Rights enumerates five group rights; twenty-four civil and political rights; and fourteen economic, social and cultural rights. It also sets out seven principles that explain how these rights should be applied and interpreted.

V. CONCLUSION

The aforesaid long popular description of the UN's activities identified since last seventy five years of long journey for initiating, promoting and protecting human rights. The United Nations has devoted primarily the activity to convey the impression of a planned effort to move human rights regime gradually from paper to reality. In fact, the three phases of major efforts have been cumulative rather than one replacing the preceding one. As a result, recent decades have seen an acceleration of the pace of change and a mingling of these phases. With the adoption of major international human rights treaties, several others are under consideration. However, standard setting is a moribund activity, even promotion and protection activities relating to human rights are continuing extensively.[36]

The human rights regime has had its ups and downs in its long journey. Major international conferences such as the Tehran (1968) and Vienna (1993) World Conferences on Human Rights proved to be major turning points that enabled various human rights forces to regroup and push the UN efforts in different directions. These also helped in promoting shared understandings

36. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of the Child; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families International Convention for the Protection of All Persons from Enforced Disappearance ; Convention on the Rights of Persons with Disabilities; Optional Protocol to the Covenant on Economic, Social and Cultural Rights; Optional Protocol to the International Covenant on Civil and Political Rights; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty; Optional Protocol to the Convention on the Elimination of Discrimination against Women; Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

about the proper place of human rights at the UN. There is no doubt that the UN's human rights activities have further expanded in the last two decades, and that human rights have become at least rhetorically more central to what the organization does. There has been a systematic increase in the number of UN bodies devoted primarily to deal with human rights matters, as well as a major increase in the time devoted by some of the existing organs to be the human rights part of their mandates. Indeed, some organs which traditionally had very little to do with human rights, such as the Security Council or the International Court of Justice, have now become more active in that field. Another important phenomenon is the inclusion of human rights discussions in bodies with no formal human rights mandate but in which they increasingly form part of a broader conversation about the shape of various domestic and international policies. Specific human rights debates within the UN also continue to be significantly influenced by global political conditions. The tendency of states to divide along geopolitical lines and regional groups has often proved a lasting obstacle to human rights initiatives. Divisions reflect deep disagreements about the proper weight that should be given to certain rights over others, as illustrated by the tension between individual and collective rights; civil and political and economic and social right; and human rights and national security. In order to overcome these sources of disagreement, coalitions that combine different political interests have sometimes emerged. Thus, relatively united front has not often been replicated at the UN.

Therefore, this can be sumed-up that the United Nations has very strictly been indulging itself in facilitating cooperation among nation states and its practices are still very much in concern with the global peace and public welfare. Considering these facts, this can be safely enumerated that the United Nations has not undergone any downfall whatsoever it. However, at present it is suffering a lot under presure from some of the various corners. The presumption that UN has come on the crossroad and loosing its relevance and significance is completely an approach of negativity that like the international functionaries of the United Nations.

USING THE BUSINESS VEHICLE IN THE LEGAL PROFESSION: AN ORIENTATION TOWARDS MONEY

RAJNEESH KUMAR PATEL*

ABSTRACT : During the past three decades in India, the concept of globalization, privatization, and liberalization become an integral part of almost all the aspects of our life, and in that swing; it has tinted not only the business sector but also the service sectors, where the legal profession also not remain an exception. Essentially, liberalizing the arena of the legal profession has invited foreign law firms to provide their services in India which stimulated a number of the practices of the business world in the service sectors. Most surely the application of the concept of limited liability partnership is an example of the same, which is a shared characteristic of the company and traditional partnership firm. This hybrid form of business entity merges the manifold features, especially the merits of a company and partnership system, as it made available to the limited liability firm's partners both; the benefits of limited liability, tax efficiency and also allows them the elasticity of organizing their internal management. Accordingly, this commercial vehicle floated to address the emptiness that existed between partnership law and company law and provided an easy platform for the service as well as the business world, but it is also true that a limited liability firm is a tool of business, its application in the legal profession, had always been debatable considering the nature, purpose, and spirit of the legal profession.

KEY WORDS : Legal Profession, Advocacy, Mode of Business, Liberalization, Limited Liability Firm.

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I. INTRODUCTION

From the dawn of civilization either through the law or societal orders, some norms have been kept separate from mixing with other belongings in our society. Though it is very difficult to answer why this separation was necessary, one thing is clear that, mixing the different and contradictory elements into the same vessel always challenges the purity of any prescribed standards. The separation between business and service is a clear example in this regard. Nevertheless, the introduction of liberalization policy has changed this former rationale and established a parting between business and service. Consequently, the legal profession which was totally and purely a social service and free from the element of the profit motive now is moving toward profit-making institutions under the banner of liberalization, privatization, and globalization.

Consequent to this revolutionized change; several ethical and legal issues concerning the legal profession arise in the field of law, such as what is the rationality of mixing the business theories into the service norms, and the requirement of limited liability partnership in the field of the legal profession, etc. The question has also arisen against forming the group by the lawyers for practice, as the Advocates Act, 1961 provides the right to practice only to an individual, not to the group. There is also a very pertinent question if the legal profession is a service, then on what ground the limited liability partnership system; which is the system of business, will apply to this field. It is also debatable that up to what extent it may apply in the pitch of the legal profession and what will be the benefits of this application if it will be made pertinent in the legal profession? The last but not final question is, whether its beneficial credence is more than its terrible effects on the legal profession?

Against this background, the present study is proposed to discuss the pros and cons of the application of the limited liability partnership system in the legal profession. The study will move around the chief issue that how the above-mentioned conflicting interests will be harmonized? To thrash out the concept of limited liability partnership and to provide a clear picture in this regard, the paper will also present the comparative know-how on various business modes prevailing in India, followed by the main characteristics of limited liability firms. In the light of provisions contained under the Advocates Act, 1961 and the Bar Council of India Rules, 1975, the chapter will correspondingly discuss the barriers in the way to its application in the legal profession. Finally, the study will try to find out some way forward in that regard.

II. MODES OF BUSINESS IN INDIA

Sole proprietorship, partnership, and company are the very familiar business modes, which have their special benefits accompanied by their necessary shortcomings, hence particularly due to compulsory differentiation between them and a continuous attempt towards profit motive, a need has been always felt to reveal the innovative business strategies which are more beneficial and safer, especially regarding personal liability and command over the internal affairs of the business. Concerning this, the term "Partnership" is not new in the business world, and somewhat it is the second oldest business model in the world, yet limited liability partnership is a new phenomenon and as indicated above that it is a hybrid-type business entity that possesses the combined characteristics of a limited liability company and a traditional partnership constituted under the Partnership Act, 1932, or as a mutually agreed entity.

To understand the concept of limited liability partnership, much clearer, it will not be out of the mark to have a little focus on various business modes. More commonly at least seven forms of business models are working in Indian society. A brief picture of the same is as under:

i. Sole Proprietorship

The sole proprietorship is the oldest and most popular business model not only in India but in the entire world. The chief reason behind its popularity is that this business model requires the least formalities, as opening and conducting of any business through this mode, the proprietor will not be subjected to weighty legal procedures.[1] Hence, any legal business through this mode can be started even without registration.[2] Under this system of business, a single person runs the entire business, due to which is called sole proprietorship. The main benefit of this system of business is that the proprietor can run the business depending upon his own will and without the interference of any person. Not only this he can collect the profit of the business by managing all its affairs and internal management of the business, shall always be in his own hands. As under this system of business, there is only one person and his business is not recognized as a separate legal entity,

1. In most of the case this business model has the personal dealing and unregulated by the law.
2. Registration will be required if the proprietor will run the business into any shops.

there will be no limitation on the liability and the sole proprietor shall be held entirely liable, if proved, for every dues and liability which occurs against the business entity.

ii. Partnership

The partnership is the second mode of business, which nearly resembles the sole proprietorship, except for the number of its member. Under this system of business two or more people may enter into the contract to share the profits and losses of the business.[3] As per the agreement, the entire business may be run by all the partners or by one partner on behalf of the others. It is important to note here that like the sole proprietorship even the partnership may exist without registration and also without any type of documentation, however, it will be better if the partnership deed in writing specifies all relevant details to avoid any disputes among partners. For the regulation of business through partnership, there is specific legislation in India, namely, the Partnership Act, 1932. It is to be noted that, in the partnership mode again there is unlimited liability however, the partners can manage the affairs of business on their will by their unanimous opinion and consent.

iii. PrivateTrusts

This is the third mode of business; nevertheless, in comparison with the above two, it is the least popular business mode due to the personal nature of its transactions. In India, the creation and transaction through trusts are regulated through the Indian Trusts Act, 1882. As far as the nature of this mode is concerned it is similar to the sole proprietorship and partnership regarding the management of affairs of the business, but it is generally used in private dealings, therefore, it has never developed as a popular and established business model.

iv. Co-operative Societies

In our society business is also conducted through cooperative societies. These societies are a voluntary association of persons for mutual benefit and their aims are accomplished through self-help and collective effort, hence

3. See, section 4 of the Indian Partnership Act, 1932.

they are different from the above business models. Societies are mainly governed by the Cooperative Societies Act, 1912.[4] A minimum of 10 people is required to form a cooperative society. It must be registered with the Registrar of Cooperative Societies under the Act. The capital of a cooperative society is raised from its members by way of share capital. It can also obtain additional resources by way of loans from the State and Central Cooperative Banks. Although a cooperative society has much in common with a partnership there are differences between the two types of organization. In a partnership, mutual benefit is restricted to partners only, but in a cooperative society, it extends also to the public.[5] Besides, a partnership requires the existence of some business activity whereas a cooperative may be formed whenever individuals have common needs that are difficult to fulfill single-handed. Further, registration is optional in the case of the partnership, but it is compulsory for a cooperative society. Cooperative societies are governed by State legislation and multi-state cooperative having activities in more than one state are governed by the Multi-State Cooperative Act 2002.

v. Hindu Undivided Family Business

It is the fifth mode of business, however not governed directly by any special legislation but under Hindu law and it is regulated by the law of succession amongst Hindus. Under this business venture, the male members[6] of a joint Hindu family run the business with inherited property. Besides the other mode of business, one thing is important in this mode is that membership in the joint Hindu family business is also inborn and is not dependent on any agreement between parties. Concerning the membership of this business system, every member may participate in the business and there is no restriction on the maximum number of coparceners. Every male member of the family will get his membership at his birth and there is no restriction on the majority age.

The entire management of this business vehicle is vested in Karta who is the head of the family or the eldest member of the family. Like the first two

4. In Uttar Pradesh it is governed under U.P. Cooperative Societies Act, 1956.
5. In a consumer cooperative store or a cooperative credit society, the benefits are available to the members as well as the general public.
6. The share of ancestral property is inherited by a member from his father, grandfather and great grandfather.

business modes, even in this system of business, there is unlimited liability, but it will apply only to the Karta and not to the other family member, as they will be liable only for their share of the business which they have received as coparcener of the joint family property.

vi. Company

This is the sixth mode of business, which was invented to eliminate the challenges and difficulties of the above-discussed modes of business as well as the problem of joint ownership. Under the Companies Act, 2013, a company is a body corporate, compulsorily formed and registered under the Act of 2013 or any existing legislation on the company.[7] While discussing the effect of such registration, section 9 of the Act provides that, "from the date of incorporation mentioned in the certificate of incorporation, such subscribers to the memorandum and all other persons, as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company under this Act and having perpetual succession and a common seal, if any, with power to acquire, hold and dispose of property both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the same name."Contrary to the partnership, this mode of business provides the security of limited liability, however, internal management power is not available to the members of any company, as it is the subject matter of the Act itself.

It depicts from the above-discussed business modes that regarding their specific nature they are of mainly two types. The sole proprietorship and partnership which is the mostly unregulated business vehicle is caring the unlimited liability but providing a facility to manage the internal management of the proprietors and partners of the firms. However, the business model of the company is regulated through the Companies Act, 2013. Though, this mode provides the security of limited liability but in turn snatches the internal management powers of the members which are available to the sole proprietors and partners of the firms.

Therefore, to consolidate the beneficial nature of two different models the mode of limited liability partnership was invented by the businessmen

7. See, Section 2 (20) of the Companies Act, 2013.

who will provide the extra security with the power of internal management.

III. CONCEPT OF LIMITED LIABILITY PARTNERSHIP

In comparison with all the above business modes, the limited liability partnership is a new form of business in India. It is an unusual business entity that provides the benefits of limited liability accompanied by the flexibility of organizing internal structure as a partnership based on a mutually arrived agreement. Consequently, it amalgamates the advantages of the company and partnership into a single form of organization. Hence, a limited liability partnership is still a partnership with slight modifications regarding its incorporated structure and the nature of liability, which is like a company. This new model of the firm provides a platform to small and medium enterprises as well as professional firms to conduct their business efficiently, smoothly, and under a shield of confined liability.

Like a company, any limited liability partnership firm is also a body corporate, with a distinct legal entity; separate from its partners.[8] It has perpetual succession and a common seal.[9] From the date of registration,it can hold all tangible moveable or immoveable and intangible property in its name.[10]Being a legal person the limited liability partnership firm will be liable to the full extent of its assets, with the liability of the partners being limited to their agreed contribution in the limited liability partnership which may be of tangible or intangible nature or both tangible and intangible. No partner would be liable on account of the independent or unauthorized actions of other partners or their misconduct.[11] However, the liabilities of the firms and partners who are found to have acted with intent to defraud creditors or for any fraudulent purpose shall be unlimited for all or any of the debts or other liabilities of the Limited Liability Partnership. Any change in its partners, will not affect the existence, rights, or liabilities of the limited liability partnership. The mutual rights and duties of partners of a Limited Liability Partnership *inter-se* and those of the limited liability partnership and its partners shall be governed by an agreement between partners or between the limited liability

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8. See, section 3 (1) of the Limited Liability Act, 2008.
9. Id, section, 3(2)
10. Ibid
11. For effect of registration of limited liability firms, see section 14 of the Limited Liability Act, 2008.

partnership and the partners subject to the provisions of the Limited Liability Partnership Act, 2008.

The entity of this mode is registered, guided, and regulated under the Act of 2008, therefore, the Indian Partnership Act, 1932 applicable to the traditional partnership shall not apply to limited liability partnership.[12] This firm may be constituted by the individual or by the body corporate. The minimum number of partners is two and there is no restriction as to the maximum number of partners is concern.[13] It shall have at least two individuals as Designated Partners, of whom at least one shall be resident in India, who has stayed in India for not less than 182 days in the immediately preceding one year. The duties and obligations of designated partners shall be as provided in the law.[14]It will be necessary to note that if any 'body corporate' is the partner in any limited labiality firm then it may appoint an individual to act as a designated partner and the incorporation document may specify who will be the designated partners.[15]

Like a company, the rules regarding finance will apply to it. Therefore, it shall be under an obligation to maintain annual accounts reflecting a true and fair view of its financial and structural state. A statement of accounts and solvency shall be filed by every limited liability partnership with the Registrar of the companies[16]every year.[17]The accounts of limited liability partnership shall also be audited, subject to any class of limited liability partnership being exempted from this requirement by the Central Government, and the government has powers to investigate the affairs of a limited liability partnership.[18]The compromise or arrangement including merger and amalgamation of limited liability partnership shall be following the provisions of the Limited Liability Partnership Act, 2008.The winding-up of the limited liability partnership may be either voluntary or by the Tribunal to be established under the Companies Act,2013.[19] In this regard, the Registrar may exercise *suo-moto* power if the partnership is not carrying on any business for two

12. Section 4 of the Limited Liability Act, 2008
13. Ibid, section 6
14. Ibid, section 7
15. See, proviso to the section 7 of the Limited Liability Act, 2008
16. The Limited Liability Partnership Act,2008 does not have its own Registrar.
17. Section 34 of the Limited Liability Partnership Act,2008
18. Ibid, section 43
19. Ibid,section 64 and 75

years or more, or on application by the firm made with the consent of all partners if the limited liability partnership is not carrying on the business for one year or more.

Thus, it is clear from the above discussion that this new system of the business vehicle carries both the beneficial elements of the company as well as the traditional partnership, therefore, the primary and outer shell of a limited liability partnership is like a limited company but in stipulations of conduct of internal affairs it would be like a traditional partnership, however, there are several issues on which the traditional firm and the limited liability firms are different. Some of the points are summarized as under:

> The traditional partnership can be constituted by two partners and the maximum number of partners is fifty[20], but in the case of a limited liability firm, there is no maximum limit.[21] In traditional partnership minors can be admitted for the benefit of the partnership, however, in this regard, there is no specific provision under the Limited Liability Act, 2008. Again, in the case of a traditional partnership, there is unlimited personal liability of each partner for any dues of the partnership firm, and not only this but their personal property may also be held liable for the same. In the case of limited liability partnership, there is no personal liability of the partners, except in case of fraud,[22] but under the Act of 2008 firms have the same status and are separate from their partners. As they are not a body corporate traditional firms cannot hold any property in their name, but limited liability firms can hold and acquire all their movable and immovable properties in their name. Further, to constitute a traditional partnership written agreement is not essential as registration is not mandatory under the Partnership Act, 1932, but in a limited liability partnership firm incorporation documents shall be required. If the partners are willing to register their firm under the Act of 1932, then the registration documents are required to be filed with the Registrar of Firms of the

20. Section 464 of the Companies Act, 2013
21. Section 6 of the Limited Liability Act, 2008
22. Ibid, section 27

respective State, but in the case of limited liability firms as the Act does not provide any registering officer so that they would file the documents before Registrar of Companies under Companies Act, 2013. Concerning the traditional firms, every partner is anagent of the firm and also of other partners, but under the Act of 2008 though they are the agent of firms but not to the other partner, and therefore, he can bind the firm by his acts but no other partners. In this case only designated partners are liable for statutory compliances as are required under the Limited Liability Partnership Act, 2008. As the traditional partnership firms are purely domestic arrangements, therefore, filing of accounts, statement of solvency, and annual returns are not required, which shall be compulsorily required under the Act of 2008. In both partnership firms, each partner of a traditional partnership firm can take part in the business of the firm, but in limited liability firms, the agreement may provide contrary.

IV. LIMITED LIABILITY PARTNERSHIP AND THE LEGAL PROFESSION

Though there is no direct connection between the limited liability partnership and the profession of law because most commonly limited liability partnership is a mode of business, but as it was indicated in the beginning that the Act of 2008 does not restrict the benefit of limited liability partnership structure only to businessmen and will be available for use by any small and medium enterprise including the professional firms, like accounting and legal firms that fulfill the requirements of this proposed Act. An issue in this regard has been always the matter of disputes as the legal profession is a unique type of profession whose ambit and objects are not to collect money but to provide services to the general public should and can do it through limited liability a firm which is a mode of business.

To discuss this particular question and also some contemporary issues in this regard it will relevant to have a little focus on the rules regarding practice in India.

i. Condition Precedent to Practice in India

Regarding the issue that what is the condition precedent to practice in India, section 29 of the Advocates Act, 1961, verbalizes that, "subject to the

provisions of this Act and any rules made thereunder, there shall as from the appointed day, be only one class of persons entitled to practice the profession of law, namely, advocates."

As of 16th August 1961,was the appointment day of the said Act, on which the Act got its enforcement in India, after the said date, only an advocate can practice the profession of law in this country.[23] It will be needless to say that the language of section 29 is unambiguous and lucid; therefore, no one can practice the profession, without being an advocate under the provisions of this Act. While drafting the Advocates Act, 1961, the legislature intended that, one should practice the profession only after his registration before the State Bar Council, hence the same intention is again repeated and cited under section 33 of the Act, which also provides that, except as otherwise provided in this Act or any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practice in any court or before any authority or person unless he is enrolled as an advocate under this Act.

Consequently, under both sections, it is apparent that only an advocate can practice in India. It will also be relevant to note here that as per section 2(1) of the Act, "advocate" means an advocate entered into any roll under the provisions of this Act. Therefore, to be an advocate and get a right to practice under section 30 of the Act, one must be enrolled before any State Bar Councils under the Act.

The condition of enrollment is written under section 24 of the Advocates, Act, 1961. As per the provision to get enrollment under the Act, he must fulfill the following conditions:

(1) He is a citizen of India.[24] However subject to the other provisions contained in this Act a national of any other country may be admitted as an advocate on a State roll, if a citizen of India, duly qualified, is permitted to practice law in that other country.

(2) He has completed the age of twenty-one years.

(3) He has obtained a degree of law, recognized by the Bar Council of India, and

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23. See, section 55 of the Advocate Act, 1961, which specially save the rights of some practitioners who were practising without having these conditions before the commencement of this Act.

24. The citizenship is dealt with Indian Constitution as well as Indian Citizenship Act, 1955. Relevant provisions of the Indian Constitution are given under Articles 5 to 8 of the Indian Constitution.

(4) He fulfills such other conditions as may be specified in the rules made by the State Bar Council for this purpose, and he has paid in respect of the enrolment, stamp duty, if any chargeable under the Indian Stamp Act, and prescribed enrolment fee.

It is important to note that, apart from section 29 read with sections 24 and 30 of the Act, which provides the condition of practice and enrolment there is another condition of practice that is given under Part VI, Chapter III of the Bar Council of India Rules, 1975.[25] This rule is known as, the Bar Council of India Rules (Conditions for Right to Practice) Rules, 2010, which added one more condition of practice by providing that no advocate enrolled under section 24 of the Advocates Act, 1961 shall be entitled to practice under Chapter IV of the Advocates Act, 1961 unless such advocate successfully passes the All India Bar Examination conducted by the Bar Council of India.[26] It is clarified that the Bar Examination shall be mandatory for all law students graduating from the academic year 2009-2010 onwards and enrolled as advocates under Section 24 of the Advocates Act, 1961.

Hence, it should be noted carefully that, sections 29 and 30 are requiring registration to practice before various courts and authorities within the territory of India, and 24 talks about the conditions of enrollment under the Act. Therefore, passing the Bar examination is not the condition precedent of enrolment and one can get his enrolment without passing the exam and can

25. As amended by the Bar Council of India through its resolution by its meeting held on 10thApril 2010 and which was published in the Gazette of India on June 12, 2010.

26. The All-India Bar Examination shall be conducted by the Bar Council of India. It shall be held at least twice each year in such month and such places that the Bar Council of India may determine from time to time. It shall test advocates in such substantive and procedural law areas as the Bar Council of India may determine from time to time. Such substantive/procedural law areas and syllabi shall be published by the Bar Council of India at least three months prior to the scheduled date of examination. The percentage of marks required to pass the Bar Examination shall be determined by the Bar Council of India. An unsuccessful advocate may appear again for the Bar Examination, without any limit on the number of appearances. The Bar Council of India, through a committee of experts, shall determine the syllabi, recommended readings, appointment of paper setters, moderators, evaluators, model answers, examination hall rules and other related matters. The Bar Council of India shall determine the manner and format of application for the examination. Upon successfully passing the Bar Examination, the advocate shall be entitled to a Certificate of Practice. The Certificate of Practice shall be issued by the Bar Council of India to the address of the successful advocate within 30 days of the date of declaration of results. The Certificate of Practice shall be issued by the Bar Council of India under the signature of the Chairman, Bar Council of India.

practice for two years on the ad-hoc basis, but after the expiry of the said two years he would legally require passing that Bar examination as it is the condition precedent of practice in India. It also depicts from the above provisions that in India right to practice is given only to the individual advocate and not to the group, in any form like partnership firms, associations, or companies. However, if all the members of that group are advocates as defined under section 2(1) of the Act, then they can profess the profession authoritatively under section 29 read with sections 30 and 33 of the Act.

ii. The requirement to pay full attention to the Profession

Concerning the use of limited liability partnership firms in the legal profession, the second argument is related to certain rules contained under the Bar Council of India Rules, 1975. The very first rule provides that, an advocate shall not personally engage in any business; but he may be a sleeping partner in a firm doing business provided that in the opinion of the appropriate State Bar Council, the nature of the business is not inconsistent with the dignity of the profession.[27]

It goes without saying that the legal profession is considered a very serious occupation that requires full-time attention towards the profession. Due to this reason any person doing any job or other service on permanent nature or regular basis then he or they will not be able to choose or continue with the legal profession. In the case of *Hans Raj Chhulani* V. *Bar Council of India*[28], a medical practitioner who has also obtained the degree of law and applied for enrolment before the State Bar Council. The council rejected the application for the reason that he was a practicing doctor. He contended that it was a violation of rights guaranteed under Articles 14, 19 as well as 21 of the Indian Constitution.

Rejecting all the contentions Supreme Court held that the above constitutional provisions were not violated by the council. The rule made by the Bar Council restricting the entry of persons already carried on other professions is not admitted and therefore not violative to Article 14, 19(1) (g), and Article 21 of the constitution. Consequently, considering the seriousness of the legal profession, if any person is engaged in any other profession or service on regular basis then he could not be an advocate under the Act.

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27. See, Chapter II Part VII, Rule 47, Bar Council of India Rules, 1975.
28. 1996 S.C.C. (3) 342

However, it is also important to note that an advocate may be engaged in any service which is ad-hoc or at least not regular.[29] He may be the member or chairman of the Board of Directors of a company with or without any ordinarily sitting fee, provided none of his duties should be executive in nature. However, he shall not be a managing director or a secretary of any company[30] or a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practice, and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears and shall there upon cease to practice as an advocate so long as he continues in such employment.[31] Nothing in this rule shall apply to a Law Officer of the Central Government of a State or of any Public Corporation or body constituted by statute who is entitled to be enrolled under the rules of his State Bar Council made under Section 28 (2) (d) read with Section 24 (1) (e) of the Act despite his being a full-time salaried employee. For the purpose of these rules law officer means a person who is so designated by the terms of his appointment and who, by the said terms, is required to act and/or plead in Courts on behalf of his employer.[32]

Thus, the object which is prohibited under the rules is active involvement in any service or business which may disturb his devotion to this serious profession.[33] Further, An advocate may review parliamentary bills for remuneration, edit legal textbooks at a salary, do press-vetting for newspapers, coach pupils for legal examinations, set exam question papers; and subject to the rules against advertising and full-time employment, engage in broadcasting, journalism, lecturing and teaching subjects, both legal and non-legal.[34] Similarly, nothing in these rules shall prevent an advocate from accepting after obtaining the consent of the State Bar Council, part-time employment provided that in the opinion of the State Bar Council, the nature of the employment does not conflict with his professional work and is not inconsistent with the dignity of the profession. This rule shall be subject to such directives if any as may be issued by the Bar Council India from time to time.[35] Further, the rules contained

29. Thomas P.C. V. Bar Council of Kerala, W. P. (C) No. 20635/36 of 2005
30. Chapter II Part VII, Rule 48, Bar Council of India Rules, 1975
31. Ibid
32. Ibid
33. Ibid,Rule 50
34. Ibid, Rule 51
35. Ibid, Rule 52

under Rule 37, Part III, Chapter III provides that an advocate shall not permit his professional service or his name to be used in the advertisement or to make possible the unauthorized practice of law by any agency. This is to maintain the dignity of the profession again.

Thus, it is clear from the above-mentioned rules that the Indian bar considered the legal profession as a much more serious occupation which creates a full devotion amongst the professionals to keep the environment clean and pure. The spirit of the profession demands that if any person has enrolled himself as an advocate, then being a representative of his client, he should concentrate his skill and experience only on the legal profession in the interest of his client. This state of the profession also indicates the high estimation of the legal profession. Likewise, the above rule provided under the Bar Council of India Rules, 1975 as well as the provisions of the Advocates Act, 1961 indirectly contravene the use of limited liability firms in the legal profession.

V. BENEFITS OF LIMITED LIABILITY FIRMS

It will be pertinent to note that acceptance of globalization policy and liberalization of the legal profession and allowing the business tactics under the arena of the legal profession is not a single issue rather it is the mother of several issues, whether legal or ethical. While discussing the issue related to the application of limited liability firms in the legal profession, no one can out-rightly reject the valuable and advantageous belongings of this system of the business. Some of the benefits of using limited liability partnership by the advocates are as under:

i. Client Oriented Service

The practice of law through a limited liability firm is a combination of numerous skills and many well-trained legal professionals. They all devote their service to a common goal and for the benefit of the firm. Therefore, it is a client-centered practice, which frequently makes sense to consider more than one professional view point when trying to resolve a particular problem.

ii. Delivery of integrated team approach

As discussed above the practice of law using this business system is

run by several members of the same group, based on their collective wisdom. Therefore, the services provided by the group are the delivery of an integrated team approach. This system involves a number of the brain to meet out a problem so it can efficiently cater to the needs of the clients rather than an individual approach.

iii. Secured Future of Advocates

Advocacy is an independent profession, therefore, earning under the profession always depends upon the status, experience, knowledge, personal quality of the professional along with the area, jurisdiction, nature of the practice, and of course the geographical status of the place and court in which he professes his profession. Due to this nature,the future of an advocate may come under misgiving even without his own weakness. The application of a limited liability firm in the legal profession is also competent to remit this challenge as it provides a secured feature to them because of the payment of regular salary by the firms to the partner advocates.

iv. Effective Implementation of Professional Rules

It is well-established fact that Indian society is never faced the problem of lack of legislative provision on most of the points but lack of an effective mechanism to implement that legislation to the last member of the society. It has been experienced in almost all the fields that enforcing agencies are not doing well due to numerous reasons along with the lengthy and impractical procedures given under different legislations. Apart from these, unfortunately, delayed justice is also a key problem[36] of the Indian legal system.[37] Against these limitations, the practice through a limited liability firm will be much better because its management is much easier as they have their own rules of professional conduct.

v. Increasing Employment Rate

India is the second most populated country in the world; therefore,

36. There were 44.75 lakh cases pending in the various High Courts and at the District and Subordinate Court levels, the number of pending cases stand at a 3.14 crore over the country; the Wire Government law; 27thNovember 2019

37. As per the official record of the Supreme Court there are 60469 pending cases which were on 1 march, 2020

from the very beginning, the problem of unemployment has been a common and difficult issue of the country. Indian law firms that will work through this system will employ graduates from different parts of the country. Therefore, up to a certain extent, it may argue that employment opportunities will be created using limited liability firms in the legal profession. Legal Process Outsourcing will also benefit hugely and consequently offer better salaries to law graduates.

vi. Lowering the cost of Litigation

Expensive justice is also a problematic feature of the Indian justice delivery system. It is believed that the use of a limited liability firm will also decrease the cost of litigation in India. It has been argued in this regard that the availability of trained lawyers would reduce costs of litigation as they will try to sum up the case quickly. So, even with similar absolute fees, the overall cost the corporations incur will come down.

vii. Quality Service

As mentioned above that, practice through a limited liability firm is a delivery of an integrated team approach, so that in areas like International Trade, International Arbitration, Information Technology and Cyber Crime any law firm can provide better quality services by using their internal cooperation system and this system of practice will increase the overall quality of legal profession in India.

Thus, it is clear from the above discussion that legal practice through limited liability firms is a virtuous system of practice presently. The main features of this system are time and money-saving system which is the shared necessity of the present-day society.

VI. THE DISADVANTAGE OF LIMITED LIABILITY FIRMS

After discussing the benefits of the limited liability firms in the field of the legal profession to develop a better and favoritism-free understanding it will be necessary to discuss the second face of the same coin. In reality, the use of the business vehicle in the legal profession upto some extent undoubtedly may be beneficial but it is to be noted that penetration of business tactics into the legal profession will not be totally free from blemishes. Therefore, its shortcoming may be discussed in the following heads:

i. Threat towards the Seriousness of the Profession

As indicated above and decided by the Honorable Supreme Court that the legal profession is a very serious occupation that requires full-time attention towards the profession. Therefore, the practice of law through limited liability firms will be a group service in which, members of the group shall be bound to devote their time towards the activities of the group. Hence this compulsion is a serious threat to the seriousness of the profession which may disturb the spirit of the legal profession.

ii. Threat toward the Core Values of the Legal Profession

It is well established that the legal profession has its surroundings free; from any pecuniary purpose and it has been always guided and controlled by the certain core values of the profession.[38] Actually, practice through business vehicles will be not only a question of profit and losses but rather it is deeply attached to the ethical values of the legal profession. How one can oppose this contention that, if practice will be performed through a mode of business rather than a profession,by what means advocacy will be considered a noble profession or pro-bono-service.

Thus, there is a clash between, business and profession.Further,several ethical issues always put their fingers and indicate towards the working style and management of firms in the field of the legal profession. Followers of this system believed that advertising should be allowed in the field of the legal profession, so that the public may be aware of the services of the firms available along with the cost of those services. On the other hand, advertisement is considered always against the spirit of the profession. The same is with slight relaxations[39]are still prohibited under rule 36 of the Bar Council of India Rules, 1975.[40]

Similarly, Advocates are prohibited to take any case in which he is personally interested[41] but in this system, the restriction can't work because members will work in the interest of the group, not in the interest of a

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38. See, the Bar Council of India Rules, 1975
39. See, Amendment of 2008 in Rule number 36
40. An advocate shall not solicit work or advertise, either directly or indirectly, whether by circulars, advertisements, touts, personal communications, and interviews not warranted by personal relations, furnishing or inspiring newspaper comments or producing his photographs to be published in connection with cases in which he has been engaged or concerned. His signboard or nameplate should be of a reasonable

particular client.One step forward, Indian legal practitioners are also prohibited under Rule, 20 of chapter II, Part II of the Bar Council of India Rules for offering or accepting the contingent fees from their clients, and under this system of practice, there will be a strong possibility of demanding the contingent fees from the clients.[42]

Therefore, duty towards clients may be impaired because the practitioners of each discipline are not bound to have the same degree of care and devotion as a member of the legal profession owes to their clients.

iii. Threat Toward Personal Relations

Whenever advocates accept the brief of their clients, they immediately come under two types of duties, i.e., contractual duties[43] and duties relating to the trust.[44] These duties have been described under rules 11-33 of the Bar Council of India Rules, 1975. As these duties are compulsory in nature so in case of any infringement of these duties'both bar councils are empowered under Advocates Act, 1961 to take action against the errant advocates.

Similarly, they are also prohibited to take the cases of personal interest, as it is provided under rule 8 that, an advocate shall not appear in or before any court or tribunal or any other authority for or against an organization or an institution, society, or corporation if he is a member of the Executive Committee of such organization or institution or society or corporation.

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size. The signboard or nameplate or stationery should not indicate that he is or has been President or Member of a Bar Council or of any Association or that he has been associated with any person or organization or with any particular cause or matter or that he specializes in any particular type of worker or that he has been a Judge or an Advocate General

41. After 2008 under a proviso has been incorporated in rule 36 in Section IV, Chapter II, Part VI of the Bar Council of India Rules, which provides that this rule will not stand in the way of advocates furnishing website information as name, address, telephone, email address and area of interest prescribed in the Schedule under intimation to and as approved by the Bar Council of India. Any additional other input in the particulars than approved by the Bar Council of India will be deemed to be violation of Rule 36 and such advocates are liable to be proceeded with misconduct under Section 35 of the Advocates Act, 1961."
42. An advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof
43. See, Section 73 and 75 of the Indian Contract Act, 1872
44. An advocate shall not, directly or indirectly, commit a breach of the obligations imposed by Section 126 of the Indian Evidence Act

VII. CONCLUSION

The study under the paper emphasizes that the area of the profession should be kept free from any business motive elements and it will be not proper to use any commercial vehicle to run any profession and provide the professional service by the same. Undoubtedly, the limited liability partnership is a very effective and beneficial commercial vehicle for small and medium enterprises which is providing its user and entrepreneurs double benefit as it gives free hands to them in the case of internal management of their business affairs just like a traditional partnership, whether regulated under Partnership Act,1932 or not, and it also gives the security of limited liability like a company constituted under the Companies Act, 2013 or any previous legislation on the company in India. The same system of business is very useful to the contemporary world as it is an era of labialization, privatization, and globalization, wherein the entire globe is considered as one unit or a village and it is a consensus that one should not keep close its boundaries for others, particularly regarding the business and service purpose.

It reveals that advocates are prohibited to participate in any commercial purpose; however, they can form an association of their own. The reason for this restriction is two-fold, firstly the active involvement of the advocate in any commercial activity will hamper the interest of their clients and will also affect the interest of justice, and secondly, attraction towards profit motive will convert the entire profession into a bread butter supply industry and will destroy the overall image of administration of justice. Therefore, considering both urgings related to benefits and repercussions of the use of limited liability firms in the arena of the legal profession it is submitted that the very purpose of the legal profession is to provide service to society and not to collect money, the advocates may be allowed to form their associations or group but they should not keep free from the liability, particularly if is directly attached with violation of any duties provided under Advocates Act, 1961 or Bar Council of India Rules, 1975.

To sum up it is requested that the right to form an association should be for professional purposes and should be devoted to the public-oriented service for strengthening the overall image and reputation of the administration of justice.

INCLUSION OF MEDIATION AS CLINICAL COURSE IN LEGAL EDUCATION IN INDIA: SIGNIFICANCE AND ITS TEACHING PEDAGOGY

*SAROJ BOHRA (SHARMA)**

ABSTRACT : Earlier, learning to think like a lawyer was enough to succeed in law school and beyond. Now the focus is on teaching law students to act like layers. Clinical legal education refers learning by doing the types of things as lawyer's do. In words of Dr. N. R. Mahav Menon,[1] it is 'directed towards developing the perceptions, attitudes, skills and sense if responsibilities which the layers are expected to assume when they complete their professional education'. Mediation is one of the ways to resolve the disputes. The specialty of mediation is that it is not in law compulsory as it only helps the parties as a facilitator. With the increasing number of cases in courts which is time consuming process in recent past there is considerably increasing importance of Mediation in disputes between parties. Hence, it's pertinent to teach the mediation skills to law students during their law graduation. Last year i.e. in year 2020, Bar council of India understanding the significance of teaching of mediation issued circular to law schools to include it in law undergraduate programme curriculum. The present article covers the significance of clinical education and mediation in legal education, mediation course goals and teaching pedagogy and its challenges.

KEY WORDS : Clinical Legal education, Mediation, Teaching, Bar Council of India

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1. N.R. Mahava Menon, *A Handbook on Clinical Legal Education* (Reprint 2009), p.1, Eastern Book Company, Lucknow

I. INTRODUCTION

Clinical education is as much a new methodology as it is vehicle for teaching new subject-matter in law. It is a pedagogical tool aimed at making legal education socially relevant and oriented towards social justice. It is part of the process of changing the orientation of legal education which offers opportunity to the student to learn more substantive subject-matter content than the lecture or case -method of instruction can provide. Under this model, law students are to be trained to be productive members of a community of lawyers that had refined the skills needed to develop and implement creative strategies for addressing the pressing demand for social justice in the country. It serves to bridge the divide between universities and communities. The clinical method helps law schools to venture on subjects like law reform, social policy and professional responsibility. Perhaps, the clinical method offers better scope to teach substantive areas which non-clinical method attempts effectively. Thus, substantive areas such as relationship between substantive and procedural rules and the early development of a case through facts of social relationships can be learnt better through practice in a clinical setting than by lectures or discussions[2].

The Mac Crate Report[3], Carnegie Report[4], and Best Practices for Legal Education[5] together emphasize the need for clinical legal education in law schools to prepare students better. The skills and values in the legal education listed by Mac Crate report had been considered by the Law Commission of India in its 184th report on the "Legal Education & Professional Training and Proposals for Amendments to the Advocates Act, 1961 and the University Grants Commission Act, 1956". They include skills such as problem solving, legal analysis, legal research and values such as competent representation, striving to promote justice, fairness and morality. The Law Commission has

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2. For fuller discussion on teaching methods and objects, refer N.R. Madhava Menon, "The Canadian Law Teaching Clinic", *Indian Bar Review* (Editorial), Vol. XI (3)1984
3. Section of Legal Educ. & Admissions to the Bar, American Bar Association, Legal Education and Professional Development- An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992) [Referred as MacCrate Report]
4. William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law 95 (2007) [Referred as Carnegie Report]
5. Roy Stuckey et al., Best Practices for Legal Education: A Vision and a Road Map 151 (2007)

called for developing skills and values of particular relevance to India.[6] The Commission was also of the view that training of 'Alternative Dispute Resolution' system should be given to law students, lawyers and judges, in view of the recent amendments to the Code of Civil Procedure, 1908 (Sec.89) and observations of the Hon'ble Supreme Court in Salem Advocates Bar Association v. Union of India[7] for following the mandatory procedure[8]. After UNCITRAL Model law passed by General Assembly in the year 1985 most of the countries started formalizing age old system of Mediation and Conciliation keeping in mind contemporary practices and need of the society. In India, the concept and philosophy of clinical legal education was initiated by Late Prof. Madhav Menon proved to be an effective model to involve law students in various legal activities and giving them an exposure to various issues confronting the society and applicability of legal principles in such cases.

Arbitration, as a dispute resolution procedure was recognized as early as in 1879 and found its place in the Codes of Civil Procedure Code1879, 1882 and later in 1908 too. When the Arbitration Act was enacted in the year 1940, the provision for arbitration made in Section 89 of the Code of Civil Procedure, 1908 was repealed. The Indian Legislature made a headway by enacting, The Legal Services Authorities Act, 1987 by constituting the National Legal Services Authority as a Central Authority with the Chief Justice of India as its patron in chief.

The concept of mediation got legislative recognition for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are "charged with the duty of mediating in and promoting the settlement of industrial disputes". A complete machinery for conciliation proceedings is provided under the Act. The conciliators appointed under the Act and the services provided by them are part and parcel of the same administrative machinery provided under the Act.[9]

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6. N. Vasanthi, *Strengthening Clinical Legal Education in India*, Volume: 42 issue: 4, page(s): 443-449 (2012); Also available at: https://journals.sagepub.com/doi/metrics/10.1177/0049085712468132
7. 2002 (8) SCALE 146
8. Available at: https://lawcommissionofindia.nic.in/reports/184threport-parti.pdf
9. https://lawcommissionofindia.nic.in/adr_conf niranjan%20court%20annx%20med 13.pdfAccessed 4 Feb. 2021

II. CONFLICT SITUATION, RESOLUTION AND MEDIATION

Conflict is social behavior involving' a process of powers, meeting and balancing'. Latent conflict, the initiation of a conflict, the balancing of power and the disruption of equilibrium constitute a cycle of conflicts. With the awareness of 'the incompatibility of potential future positions', a process of powers meeting and balancing emerges. The United Nations Institute for Training and Research (UNITAR) programme of correspondence instructions in peacekeeping operations, perhaps give the most widely accepted definition of conflict. It refers to conflict as 'pursuit of incompatible goals by individuals or groups'. In other words, conflict situations arise when individuals or groups pursue positions, interests, needs, or values that may lead to actions that come up against the interests, needs and values of others when they also want to satisfy their goal.[10]

Conflict resolution is a set of techniques for resolving conflicts with the assistance of a third party. Alternative Dispute Resolution is a concept that encompasses a variety of mechanisms by which conflicts are resolved. In other words, ADR offers alternatives to litigation which has often times been associated with delays, exorbitant fees, and discontentment. Dispute resolution can be attempted through persuasion, consensus building, voting, negotiation, litigation etc. thus mediation is only one of many forms of dispute resolution. In fact, no particular form will cater to the needs of all types of conflict. Viewed from the point of view of participants, there are simple conflicts in which parties act for themselves, group conflicts involving unorganized groups and organizational conflicts where representatives act for parties not directly involved.

Mediation simply refers to the process of resolving conflict in which a third party neutral called as mediator, assist the disputants to resolve their own conflict. Mediator focuses not on rights but on interests like the needs, desires, or concerns that underlie each side's positions[11]. Mediator is only a facilitator and not an adjudicator. The exercise is participatory in character. The process is voluntary and the mediator does not participate in the outcome of the mediation process or agreement. The disputing parties themselves

10. https://www.gdrc.org/u-gov/conflict amoh.html#:~:text=Mediation%20simply%20refers%20to%20the,the%20mediation%20process%20(agreement).Accessed 6 Feb. 2021.

11. https://www.pon.harvard.edu/daily/conflict-resolution/mediation-and-conflict-resolution/Accessed 6 Feb. 2021.

have control over the agreements to be reached. Parties involve themselves in the mutual give and take which is essence of negotiation. William Zartman and Maureen R. Berman[12] recognize three requisites for negotiation those are perception, will and equality. An urge to change the present situation on finding it unacceptable and the will to bring about the change is the starting point. A readiness to concede a role for the other party to participate in the resolution is essential to preserve the participatory character of mediation.

Negotiation involves exchange of information before bargaining commences. Information improves access to justice. Bargaining is a process of exchange of demands or offers for counter demands or counter offers. The needs of both are in focus. The ethics of challenge which informs the adversarial proceedings in court litigation is totally eschewed in mediation. Often creative bargaining in mediation enlarges the pool and enables the parties to achieve satisfaction.

There are indeed so many advantages in using mediation as conflict resolution mechanism like the process is non-adversarial, less-expensive, assures confidentiality, impartiality and neutrality, it's non-legalistic, avoids delays and very flexible. Besides, the process provides the disputants the opportunity to find solutions to their own conflicts. The process therefore ensures acceptance of the outcome by both parties, thereby enhancing sustainable peace.

III. SIGNIFICANCE OF MEDIATION COURSE IN LEGAL EDUCATION

Dissatisfaction with the judicial process and with lawyers has sparked an enormous interest in alternative methods of dispute resolution. Among these alternatives[13], arbitration and negotiation take taken root most easily in law school curricula. Arbitration is simplified form of adjudication. Negotiation is considered a task for lawyers, and even problem solving approaches to negotiation require the lawyer to make contentions ion behalf of an individual client. However, mediation is different wherein a person is in a neutral position without authority to impose solution, helps parties to reach their own

12. William Zartman and Maureen R. Berman, *The Practical Negotiator'*, New Haven & London Yale University Press, U.S.A.
13. Frank E.A.Sander, Varieties of Dispute Processing, 70 F.R.D. 79(1976). Alternatives to court disposition include arbitration, administrative process, fact finding, ombudsman processes, mediation and negotiation.

agreement concerning a dispute or a transaction. This puts the law and the lawyers in the less dominant position than they customarily play. Some mediation does involve lawyers in roughly traditional capacities as advisors to or representatives of individual clients[14]. The worthwhile nature of encouraging students of law to understand about all types of dispute resolution, not just litigation, is reflective of the times we live in and has more relevance now than ever before.

In ancient India, mediation system has been prevalent in one form or the other. It has continued in our villages and has also been preserved in its customary form in our tribal areas. So far as formal litigation system is concerned, mediation, along with other methods of Alternative Disputes Resolution, has been statutorily recognized by the Civil Procedure Code (Amendment) Act, 1999 which introduced section 89 thereto. The benefits of such processes as mediation can further be fortified from the fact that imminent legal personalities, such as Mahatma Gandhi, Abraham Lincoln and Nani Palkhiwala, have taken pleasure and pride in continually settling cases out of court, in uniting the parties driven asunder by conflict and discouraging litigation. The words of Guatam Budhha, -"Better than a thousand hollow words is one word that gives peace", which even is reflected in the famous Sanskrit quote- "*santosham paramam sukham*". Mediation is one of the modes for attainment of 'Peace'.

The Mediation and Conciliation Project Committee, Supreme Court of India[15] in its preface by Justice Swatanter Kumar mentioned that the committee decided forty hours mediation training and ten actual mediations as the essential qualification required for a mediator to be able to be entrusted the task of mediating disputes. This manual emphasizes the need that law schools must train the students at the graduation level to meet the requirement of future. The basic legal education in regard to modes of dispute settlement must have to be provided to the students so that they can make aware of the people nearby them. The students must have to be proper trained and to make them clear in regard to important keys of such ways.

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14. Leonard L. Riskin, Mediation in the Law Schools, *Journal of Legal Education,* Vol. 34, No. 2 (June 1984), pp. 259-267. *Available at* : https://www.jstor.org/stable/42892684Accessed 4 Feb. 2021
15. Available at: https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf

In August 2020, the Bar Council of India has made 'Mediation (along with Conciliation)[16], a mandatory course which has to be offered to all law students in both three years and five-year law courses across the country. The course is supposed to be 9-14 weeks long, spanning 45 hours. This is the novel idea of Chief Justice of India Justice Sharad Arvind Bobde and it is the need of the hour. The justice is also keen that the art of mediation must be taught to law students as it will go a long way in reducing the backlog and flood of cases. With litigants, students and Lawyers being more aware and keen about Mediation, this will be looked upon more as an option instead of filing suits/cases straight away. Though Alternative Dispute Resolution (ADR) was one of the subjects earlier in a Law Degree Course, but keeping in view the special significance of Mediation & Conciliation and Arbitration, even during pre-trial stage of disputes, the Bar Council of India has introduced this subject as a compulsory subject. For the promotion of the mediation, the active participation of lawyers, judges, law students and volunteers are necessary.

In times of pandemic and Covid-19, when physical hearings in courts are suspended and norms of social distancing are required to be maintained, mediation as a tool for conflict resolution has come to the fore. Litigants have been drawn towards mediation and have begun to realize it's immense benefits. Mediation and Conciliation has been seen to lead to resolutions without undergoing arduous trials and moreover resolutions and solutions are arrived at, at a relatively lesser time. With the introduction of Section 89 in C.P.C. alternative dispute resolution was sought to be invoked and used more, and courts have often started referring many matters under this provision. It's true benefits and reap its true fruits which will pave the way for a great reform in the Indian legal system, which will lead to reduction of burden on courts and quick and efficacious resolution being agreed upon by parties in disputes having varied points of conflict. It shall lead to blending judicial and non-judicial dispute resolution mechanism and bring mediation to the centre of the Indian Judicial System. The long-drawn process of litigation, the costs incurred by both parties for the same have made Mediation an important aspect of the judicial system to ensure swifter and speedier justice. The

16. BCI Circular available at: http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCI-2133-2020-dt.-24.08.20-CIRCULAR-MEDIATION-DEFENCE-STUDIES-INL-LLB-DEGREE-COURSES.pdf

purpose of Mediation is to provide amicable, peaceful and mutual settlement between parties without intervention of the court. In countries all round the world, especially the developed few; most of the cases are settled out of court. The case or the dispute between parties can and should go to trial only when there is a failure to reach a resolution. Bar Council of India also stresses on the course must focus on online dispute resolution also. The recent Draft NITI Ayog Report on Online Dispute Resolution[17] also heavily emphasizes the need for training.

IV. MEDIATION COURSE : THE OBJECTIVES

Primarily the education goal must be to heighten awareness of professional awareness of the professional role of non-adversarial layering and make the student understand the enormous potential for cooperative problem solving[18]. The second goal must be to give students practical skills they need to perform this new layering role along such as active listening, interviewing, counseling which complement those learned in a traditional lawyering process course.

The third goals must be to offer a framework that integrates the theory and practice of mediation with professionally responsibility issues and with some of the substantive law issues.

Lastly attempt must be made to model the interactive dynamics of the mediation process. Certainly, a student-teacher relationship may affect how students conduct themselves later as lawyer mediators.[19]

V. MEDIATION TEACHING PEDAGOGY IN LAW SCHOOLS

The method of instruction termed 'clinical' differs from traditional way of casebook method for imparting legal education. While the casebook method utilizes collections of vicariously or in directly experienced two-dimensional material as its core of learning material, the clinical method on other hand, collects directly experienced legal processes involving a third party (the client)

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17. *Refer* https://niti.gov.in/sites/default/files/2020-10/Draft-ODR-Report-NITI-Aayog-Committee.pdf
18. Gary Bellow & Bea Moulton, The Lawyering Process: Ethics and Professional Responsibility, Mineola, N.Y., 1981, pp. 170-252
19. Steven H. Leleiko, Clinical Law and Legislative Advocacy, Journal on Legal Education, 1985

as its core of material studied by the law student[20]. The format opted to teach the course must be such that must enable to focus on both on mediation process as well on the substantive law and professional responsibility issues confronting lawyer mediators. Hence the course may be taught through or the combination of lectures, deliberations, simulations, videoing and critique, pictures, and skill-building exercises. The few are discussed below:

i. Skills Training

Students must be entailed to attend an intensive skills training when they undertake the course on mediation. It includes:

a) Communication skills in Mediation

Communication is the core of the mediation. It's not talking and listening but a process of information transmission[21]

Communication skills in mediation includes:

* **Active listening :** Listening is a communication skill that a mediator needs. The gestures, facial expressions, inflection of voice, the posture, movements and a host of other seemingly minor movements betray, arrogance, contempt, sympathy which are not spelt out be the words spoken. In active listening the listener pays attention to the speaker's words, body language and the context of the communication. Students must be taught the commonly used techniques of active listening by the mediator which are Summarizing, Reflecting and Re-framing.
* **Listening with empathy:** In the mediation process, students must understand that empathy means ability of mediator to comprehend and appreciate *the* feelings and needs of the parties and to convey them the same to parties without agreement or disagreement with them. Students

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20. David R. Barnhizer, "THE CLINICAL METHOD OF LEGAL INSTRUCTION: ITS THEORY AND IMPLEMENTATION." *Journal of Legal Education*, vol. 30, no. 1/2, 1979, pp. 67–148. *JSTOR*, www.jstor.org/stable/42892497, Accessed on 6 Feb. 2021
21. https://main.sci.gov.in/pdf/mediation/Mediation%20Training%20Manual%20for%20Capsule%20Course.pdf.lat Accessed on 7 Feb. 2021

must be made to understand the difference between empathy and sympathy. In empathy the focus of attention is on the speaker whereas in sympathy it's on the listener.

* **Probing the appropriate questions:** The students should know that in mediation the question asked by the mediator is to gather information, or to clarify facts, position and interests or to alter the perception of parties. Questions as the tool must be used with discretion and sensitivity. Questions must not indicate bias, partiality, judgment or criticism. Appropriate questions demonstrate that the mediator is listening and encouraging parties to talk. In mediation course student must be trained to ask different types of questions like open questions, closed question and hypothetical questions. The right questions help the parties and the mediator to understand the issues clearly.

b) Practicing Negotiation and Bargaining

Mediation is an extension of the negotiation process, it is important that students understand and practice negotiation skills. Negotiation virtually always involves assessment, persuasion and exchange. Assessment involves evaluating what other says and how they say it to examine questions of meaning, trustworthiness and evaluation. Persuasion involves efforts to convince others to share or agree with perspectives. Exchange encompasses the process of reaching an agreement through exchanging information, typically pursuing solutions in problem solving strategy or using positions in adversarial strategy[22].

Often, Negotiation and bargaining are used as synonymously but in mediation these are two distinct terms. Negotiation involves bargaining and bargaining is part of negotiation process. It is technique to handle conflicts. It starts when the parties are ready to discuss settlement terms. Negotiation may involve one or more types of bargaining like distributive bargaining; interest based bargaining or integrative bargaining.

c) Counseling

Mediation is a means of resolving disputes between two or more parties

22. This model is elaborated in Robert M. Bastress& Joseph D. Harbaugh: Interviewing, Counseling and Negotiating: Skills for Effective Representation, Little, Brown & Company, 1990.

who possess a genuine desire to achieve a mutually satisfying outcome. The counselor in the process acts as the 'mediator' by assisting the disputing parties to focus on a mutual problem, discusses possible solutions and agreed upon a solution. Unlike psychology and psychotherapy which are connected with personality of the client, legal counseling helps the client to decide how his legal problem has to be resolved. It helps the client to decide about the relief the client intends. In order to counsel a client effectively, a mediator (who could be lawyer in court annexed mediation) should be familiar with at least the skills, concepts and processes involved in establishing a proper counseling relationship with a client, gathering information relevant to the decision to be made by the client, analyzing the decision and counseling the client about the decision and implanting the same. Also to explain the client about alternative solutions of the problems, the possible legal and non-legal consequences of pursuing such alternatives.

d) Maintaining Neutrality

Mediator is known as third party 'neutral'. The mediation process should be inspired about the fair dealing. Lack of trust or confidence in fair dealing may jeopardize mediation process. Neutrality requires that the mediator should not give even semblance of bias on his part based on his values, culture and experience. Thus students must be taught to be sensitive to the preferences of parties and must be practiced to act positively and apprise the parties about the legal position and if they do so they cannot be accused of bias or partiality, though his/ her doing so helps the case of one party.

ii. Designing role- play Simulations

The simulation serves as laboratory in which student can experiment with responses to a situation. Law teachers may use role-play for demonstration to the students or for direct student's involvement in professional role like playing the role of client or mediators. In designing role-play simulations, the teacher performs several tasks like identifying learning objectives for students may include, substantive law, practical skills, ethical issues, reflections and self-analysis; choosing a context and specific interactions; setting parameters such as time to be allowed and information sources to which student may refer; preparing key questions or observations for use in debriefing to underscore the teaching objectives of the exercise and after use of the simulation, considering to what extent the teaching goals

of the exercise were met, and how the exercise could be improved to meet them better. Role play can be used as primary tool by law teachers dealing with mediation course because role plays can enliven and create a sense of involvement in the course. The role play raises critical questions about confidentiality, legal advice, and power imbalances in mediation.

iii. field work and observation

Integration of clinical and non- clinical curriculum planning helps to ensure that students have the appropriate substantive and procedural background to address the problems. In classes such as mediation or negotiation, students will need background material on the theory of these activities, as well as the law applicable to them. When student work in particular or specialized institutional setting s/he gets to learn the detailed local practices. Proper supervisions transform an *ad-hoc* learning experience into a learning experience integrated into the rest of the law school curriculum. With careful guidance from faculty, students are able to function in a professional role while retaining the benefit of their status and orientations as students. But it's important that teacher must provide guidance without undermining the students' sense of independence, professionalism and personal commitment created by their mediation clinical work. It must be required for students to observe a minimum of two-three mediation sessions in a field setting of their choice and to submit a written report of their observation.

VI. TEACHING MEDIATION: ACADEMIC CHALLENGES

i. Teaching Mediation in an Academic Background

Mediation is now used to process disputes in diverse and in some instances highly specialized areas, teaching mediation as a general law course is increasingly challenging. Not all professional responsibility issues crosscut all types of neither mediated disputes nor are the same mediation skills used in or even suitable for mediation in all settings. To give students a broad-based understanding of mediation, readings, and simulations have to be structured not only to reflect appropriate content area and professional responsibility issues but also a range of suitable mediation skills and techniques[23].

23. Jacqueline Nolan-Haley, Teaching Mediation As a Lawyering Role Developments, 39 *J. Legal Educ*. 571 (1989) Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/286

ii. Ascertaining a role for Lawyers in the Mediation process

Since mediation is just beginning to advance as a profession, its expediency to the practicing lawyer may not be readily apparent. Connecting mediation to the lawyering process is not an easy task. Equivalents can be drawn with the efforts of clinical law scholars who have struggled with the problem of defining lawyering roles. Sifting the relevant from irrelevant is another skill that a law student can learn during mediation. A whole range of language has to be learnt. In fact, the cultural gap between the lawyer and the client often makes it difficult for one to understand the other, though they may face each other across the table. If students need to learn that the lawyer need to know how to bring this barrier down during mediation, it may stand him in good stead in his chambers. Usually, the newly enrolled layers finds the clients values, vocabulary, sequence, and expectations rather puzzling. A familiarity with the layman's way of looking at a problem can be developed in the informal processes of mediation. Riskin[24] believes that lawyers have a duty to promote fairness and maximize interests by encouraging the parties to adopt a cooperative, problem-solving mode instead of a competitive, adversarial one. The young lawyer should learn how to promote an uninhibited flow of facts from the client. It is a lawyers' skill.

Many a law student may not count empathy as one of the lawyer-skills. But then, emotion is the basis for motivation and action is triggered by motivation. It's necessary to sensitize the students that empathy enables the lawyer to understand the emotions of the party. The informality and the participatory character of mediation afford endless opportunities for understanding the emotions of parties and that such an exposure would hone the lawyer's skill in appreciating skill in appreciating the emotions behind the issue in conflict. Such an insight may help the law students later as practicing lawyer even in an adversarial proceeding, particularly in matrimonial causes, criminal trials and the like.

The students must be made to understand that a concern for the emotional overtones in a case does not make the lawyers handling of the case less professional. This capacity to identify oneself with the party's mental turmoil is lawyer skill, and is part of his court-craft in trial situations. A variety of skills go to make up a lawyer's repertoire.

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24. Leonard L. Riskin, Toward New Standards for the Neutral Lawyer in Mediation, 26 *Ariz. L. Rev.,*1984 at 329, 354-59

The client obviously prefers an experienced lawyer to a new raw entrant to the legal profession. Why? The traditional way of legal profession has been to allow the new entrant to learn for himself by trial and error, may be, under supervision his seniors, if and when available. This can be more profitably done even before entering the profession. But the Advocates Act does not permit law students to practice in courts. So the opportunities for learning lessons from live cases in court are denied to them before enrollment, however, clinical teaching of mediation and internship with mediation centers can prove to great lawyering for students before enrolling for advocacy.

iii. Defying the Adversarial Mindset

Teaching mediation in law school provides an opportunity to move students beyond the adversarial practice mode to realize the potential for collaboration and cooperative problem solving. Typically, a student may come to the course already deep in the competitive mindset of the winner-loser thinking so entrenched in the traditional law school curriculum. For many students, the course might mark the first time that they have been required to think critically about the adversary system, many aspects of which may have attracted them to law school in the first place. Persuasion, problem solving, and peacemaking now take precedence over hierarchal power roles. Initial resistance must give way to slow acceptance as gradually students get involved in simulations and exercises that focus on collaborative problem-solving approaches to conflict.

iv. Addressing the ethical issues in Mediation

Justice in mediation is examined through the lens of ethical considerations for mediators. The most important ethical issues surrounding the mediations in which lawyers participate relate to, *firstly,* the appropriate level of candor for the dialogue that occurs during the mediations and *secondly,* the appropriate division of authority between lawyer and client before and during the mediations. These are the very same issues that surround negotiation ethics, though the addition of the mediator changes the context within which they arise.[25] Hence it very much pertinent that a law students must be made

25. Robert P. Burns, Some Ethical Issues Surrounding Mediation, 70 *Fordham L. Rev.* 691 (2001)

aware of such and the other set of ethical issues that surround negotiation have to do with the fostering of client autonomy. In lawyer-to-lawyer negotiation, the attorneys face a shifting set of proposals in an indeterminate relationship to each other. Withdrawal from the negotiation to consult with the client every time a slight modification is tentatively proposed may be impractical and, from a purely strategic point of view, may reveal aspects of the client's position that ought to be withheld. Further client control of the goals of representation in negotiation is more a problem in the lawyer's moral psychology. The client is thus highly dependent upon the lawyer's honesty primarily with himself about what he is saying to his client and what he is doing in the negotiation. Making a young student to understand that a mediator faces various types of ethical dilemmas mediators face like, keeping within the limits of competency; preserving impartiality; maintaining confidentiality; ensuring informed consent; preserving self-determination or maintaining non-directedness; avoiding party exposure to harm as a result mediation; separating mediation from counseling and legal advice; preventing party abuse of the mediation process; handling conflicts of interest is sometimes challenging.

VII. CONCLUSION

Mediation is one such alternate dispute resolution method which is becoming more popular amongst the legal fraternity as it resolves disputes outside courtrooms and avoids the unnecessary procedural delays inherent in the Indian justice system. Hence, it is imperative that law students also understand the intricacies of mediation. The teachers must teach in systematic framework for understanding the concept of mediation, explaining the role of mediator, role of the parties and role of lawyers in mediation. Law schools must provide an insight into the mediation, which is a systematic process that addresses disputes that arise between two or more parties in a legal relationship, with a flavour of practical perspective wherever needed.

SURROGACY LAWS IN INDIA - A JOURNEY FROM CONTRACTUAL ARRANGEMENT TO THE LEGISLATIVE FRAMEWORK: AN ANALYSIS

RUCHITA CHAKRABORTY*

ABSTRACT : The law of contract is primarily used to regulate various forms of commercial transactions. While the Indian Contract Act 1872 is a comprehensive legislation that is very convenient to govern the business world, there are certain aspects that although cannot be said to be business transactions, yet governed under the law. One such aspect is a Surrogacy contract. Although such agreements can be said to be advanced contracts, there are major challenges that the law faces while enforcing such arrangements. There are numerous complications and uncertainties relating to a surrogacy arrangement - owing to its nature and the subject matter that it covers. As such, tackling such situations may not be entirely possible through the law of contract alone. The legislature has drafted Bills in this regard, but before the Bills are passed, its legal framework is restricted to the contract law. This article aims to analyse these challenges and focus on the critical situations that have emerged in the operation of these arrangements. This study also examines the judicial intervention in such conditions and the need for a specific legal framework in mitigating these critical socio-cultural matters.

KEY WORDS : Surrogacy Contracts; Indian Contract Act, 1872, Surrogacy Laws, Contractual limitations of Surrogacy

I. INTRODUCTION

Surrogacy is a technique of medically assisted reproduction method where

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the intending parent deliberates with a different woman, who acts as the gestational mother, agreeing to carry the baby to term. The reason behind opting for surrogacy is the failure of wife to conceive and carry the baby to maturity till its birth. The arrangement may differ depending on the situation. For example, the egg and the sperm could be of the commissioning parents or taken on donation. In the earlier stages of surrogacy, the surrogate would also act as the egg donor. However, in recent times, this practice has majorly ceased to exist and in case the commissioning mother is unable to donate her eggs, they are procured from egg donors. Hence, in most cases, the surrogate mother is not the biological mother of the child she carries in her womb.

It is essential to note here that while a lot of discussion pertaining to surrogacy revolves around the medical systems of Artificial Reproductive Techniques, it is essentially a social arrangement which involves extensive legal intervention. The surrogacy arrangement involves a number of social, cultural, ethical and legal complexities and women rights concerns. While the social complexities mainly revolve around the individuals involved in the process, there are dynamic legal implications that it encompasses. However, this article will primarily analyse the contractual aspects of such commercial contracts along with the legal challenges that surface in this regard. Further, the article also explores the legal framework and the legal protection of the parties in such arrangements and existing gaps if any.

II. LEGAL FRAMEWORK OF A SURROGACY ARRANGEMENT

There are few laws that pertain to a surrogacy arrangement. The main law is the Surrogacy Bill which is yet to be passed by the Rajya Sabha. In the absence of any specific law regulating this arrangement, it has been governed under the Indian Contract Act, 1872 over the past few decades. The Surrogacy (Regulation) Bill was first introduced in the Lok Sabha in 2016 which eventually lapsed and was re-introduced as the Surrogacy (Regulation) Bill, 2019. It was passed by the Lok Sabha on 5th Aug, 2019.

Surrogacy has been defined in the Black's Law Dictionary, as the process of carrying and delivering a child for another person. The New Encyclopedia Britannica defines 'surrogate motherhood' as the practice in which a woman bears a child for a couple unable to produce children in the usual way. The Warnock Report, which influenced the United Kingdom's Surrogacy Arrangements Act 1985, defines surrogacy as a practice in which a woman

carries a pregnancy for intended or commissioning parents, and then she is to surrender the baby under her contractual obligations after child birth.[1]

The Surrogacy (Regulation) Bill, 2019 defines surrogacy as - "surrogacy" means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth; And a surrogate mother as - means a woman bearing a child (who is genetically related to the intending couple) through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub-clause (b) of clause (iii) of section 4.

Based on the recent practices, surrogacy can be of two types viz., i) traditional; and ii) gestational. Traditional or complete surrogacy is the arrangement where the egg of the surrogate mother is used to conceive the child. Hence, here, the surrogate mother is also the biological mother of the child. However, with the advancement of medical science, pregnancies today are achieved via artificial insemination, using the sperm of the commissioning husband. In gestational surrogacy, the embryo created is *in vitro* and is then planted in the uterus of a woman who acts as the surrogate mother. In this case, the surrogate only carries the baby in her womb till childbirth and she is not the biological mother. The biological parents of the child may be the intending couple, or an egg and/or sperm donor. Another distinction created in the forms of surrogacy is commercial and altruistic surrogacy. In Commercial surrogacy, the intending parents pay monetary compensation to the surrogate who is not related to them for her services, while in altruistic surrogacy, the reason behind being a surrogate is mutual love and affection without any compensation being involved.

A Surrogacy Contract in India is considered legitimate since there is no law that expressly prohibits such agreements. The enforceability of any such agreement is within the domain of the Code of Civil Procedure, 1908.[2]

Further, the National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology (ART) Clinics, evolved in 2005 by the Indian Council of Medical Research (ICMR) contemplate that

1. Department of Health & Social Security 'Report of the Committee of Inquiry into Human Fertilisation and Embryology', Para 8. 1 (2008)
2. 228th Report, Law Commission of India, Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations Of Parties to a Surrogacy, Aug 2009

the courts are to enforce commercial surrogacy contracts in India. In this regard it is also essential to mention the Assisted Reproductive Technology (Regulation) Bill, 2020 which was re-introduced in the Parliament recently after the lapse of the earlier one. This law proposes to lay out the regulation for the Assisted Reproductive Technology (ART) clinics that conduct the surrogacy arrangement medically.

However, since the ICMR guidelines are not laws, and both the Surrogacy and ART Bills are still pending, the legal framework for surrogacy continues to depend on the contract law. One important consideration in this respect is the provision under Section 23 of the Indian Contract Act, 1872[3] which forbids the enforcement of a contract opposed to public policy. However, in the absence of any legislation prohibiting it or any judicial pronouncement to this effect, and in view of the growing rate of commercial surrogacy in India, it can be said that these contracts are enforceable and legal.

Regarding the position of a surrogate in India, the ICMR Guidelines provide that a surrogate mother is not considered to be the legal mother. The birth certificate is made in the name of the intending parents. This is in line with the US position under the Gestational Surrogacy Act 2004. These guidelines also require that a child born through surrogacy must be adopted by intending parents unless it is proved through genetic fingerprinting that the child is theirs.[4]

III. SURROGACY CONTRACT : THE MAJOR LEGAL CHALLENGES

The enforcement of a surrogacy arrangement is done through a contract, but the critical dynamics of such an agreement calls for enhanced contractual terms and conditions. In contrast to most other laws, a contract is a document that gives rise to rights in personam. A contractual agreement is like a binding commandment voluntarily accepted by the parties. Thus, the contract law,

3. 23. What consideration and objects are lawful, and what not. -The consideration or object of an agreement is lawful, unless- It is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.
4. ICMR Guidelines for ART Clinics in India, Para 3.10.1

being organic in nature, need to imbibe the changing dimensions of the arrangement it is creating. In this case, the said contract is not just a mere business transaction, but the matter exhibits social, cultural and multiple legal complications. As such surrogacy contracts are extremely critical and the nuances need to be examined thoroughly in the context of existing laws.

In *Jan Balaz v Anand Municipality*[5], January 2008, twins were born through surrogacy in Anand, Gujarat of a German couple. The biological father was the German man, Jan Balaz and the egg used was that of an anonymous Indian donor. Anand Nagar Palika issued birth certificate with the name of the surrogate as the mother. The problem aroused when they applied for passport to travel abroad, which got cancelled since the surrogate could not be said to be the mother of the babies. Jan Balaz then moved the Gujarat High court for issuing the passports so that they could take the babies out of the country. Here, the legal complexities involved citizenship and legitimacy of the children. In the absence of a legal framework, the Regional Passport Officer at Ahmedabad stated that surrogate mother cannot be treated as mother of the babies, and children born out of surrogacy, though in India, cannot be treated as Indian citizens within the meaning of Section 3 of the Citizenship Act, 1955. The court observed that even-though the surrogacy agreement provides that the wife of the German father is the mother of the babies, but since they were carried by an Indian lady in the womb, she is to be the natural mother of the children, and therefore held that, the surrogate children will also be treated as Indian nationals and entitled to Indian passports. However, in an appeal to the Supreme Court, the court had preliminarily issued directions to CARA (Central Adoption Resource Authority), an autonomous agency under the ministry of Women and Child Development, Government of India, to process the adoption procedure. The case is still pending before the Supreme Court. While the Indian courts have agreed to issue "travel documents" for the Jan Balaz children, the issuance of passports or Indian citizenship is a matter to be yet decided. Moreover in this case, although the travel documents would enable the departure of the babies from India, they are insufficient to get a Visa to enter Germany. This appeal has been clubbed by the Supreme Court with another PIL *Jaya shree Wad v Union of India*, which questions the legitimacy of surrogacy in India.[6]

5. AIR 2010 Guj 21
6. W.P. (C) 95/2015

Eventually, the legislature drafted the Surrogacy Bill which was to take into account all these considerations. A very pertinent issue here again is that, if a baby is allowed to leave India without paternity, this procedure may be abused in the future by child traffickers.

In this regard, it is important to note that as per the Indian visa regulations effective from Nov. 15, 2012, foreigners who visit India for the purpose of surrogacy, are required to apply for medical visa and not tourist visa. It also specifies for certain mandatory conditions which include that the commissioning parents must submit a letter from Embassy or the Foreign Minister of the concerned country stating that they recognise surrogacy and the child to be born through the Indian surrogate will be permitted entry to the country as the biological child of the commissioning parents who undertake to take care of the surrogate child.

Again in 2012, there aroused another situation where seven-week old surrogate child Emperor Kaioyus Van Buren Green was refused to be issued passport. The child was born through a surrogate, using the sperms of Eric Dalton (commissioning father). Dalton had not come to India as he suffered from aerophobia, so his wife J. Pearl Linda carried the samples. The egg was used from a donor. In this situation, either the husband was required to come to India for DNA test or get his blood sample for establishing the same, since the ICMR states that one of the parents must prove medically that the surrogate child is her/his biological child, which can be done only through a DNA test. Linda here, was not the biological mother. Moreover, it was also said that in the absence of proper proof, it could also be possible that the child was bought from some unknown poor parents and a certificate was secured from the fertility centre saying he is a surrogate child. Another option for Linda was to legally adopt the child, which is again difficult given the adoption laws in India.[7]

Therefore, it is evident that the issue upholds multi-fold challenges which need to be examined with due care and diligence. Despite the growing prominence of the industry in India, the market is fraught with legal and ethical uncertainties. There are several factors that interplay together to compound the potential for exploitation and systemic abuses thereby escalating global inequalities. Various studies have also revealed that due to the gap in

7. G.S. Radhakrishna," Mom dumps surrogate baby, gets him back", *The Telegraph,*(Jan 29, 2012)

the regulatory framework and other socio-economic constraints of Indian surrogates, they have minimal legal recourse in case of any disputes. Therefore, the Indian surrogacy market significantly bears greater risk than surrogates in more regulated countries.[8]

IV. CONTRACTUAL ISSUES IN A SURROGACY AGREEMENT

Since the legal enforcement of this critical arrangement is primarily based upon a contract, analysing the contractual perspective becomes important. Some of such issues have been discussed in the following paragraphs

i. Surrogacy as Labour

A very important debate revolving around this matter is the consideration that whether the act of surrogacy can be considered as a contract of labour. Typically in a surrogacy contract, the subject matter hired, is the womb of a woman. As such, a major question arises on the ethical and moral aspects of such a contract. However, the focus of this article being specifically on contractual aspects, the argument that could be put forth is whether this hiring amounts to labour and whether the surrogate is a worker or labourer. One aspect of pregnancy and childbirth, rather, the most important aspect is probably motherhood, involving post natal childcare and child nurturing. In a surrogacy arrangement this aspect is missing, as the surrogate is required to relinquish all the rights on the child as soon as it is born. As such, what is the status of these women who bear the children and give birth to them? Under the contract of surrogacy, can they be considered as labours? If so, can they be brought under the purview of the labour legislations which will protect their rights and remunerations, or are these acts purely commercial transactions which are only to dealt with based on the contractual terms and conditions.

As an essential of a valid contract, public policy comes into play here. If surrogacy arrangements are mere contracts, as it is commonly perceived till now in India, in the absence of any particular legislation, there arises a further debate which questions the very validity or morality of such a contract.

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8. Catherine London, "Advancing a Surrogate -Focused Model of Gestational Surrogacy Contracts", 18, *Cardozo Journal Of Law & Gender*, 391-422 (2012)

Questions have been posed as to the commoditization of motherhood[9], the allegation of baby selling and selling of body[10] . On the other hand, if it is considered as a work, there is no legal protection given to the labourer and she bears no right of protection expect the terms mentioned in the contract. Therefore, a surrogacy contract brings forth the conflict between the roles of a woman as a mother and a worker. It is essentially a position where one's identity as a mother is regulated and terminated by a contract. Unfortunately, the contractual arrangement, neither endows the surrogate with the status of motherhood, nor positions her on the footing of a labour. Therefore, although surrogacy as a service is legal, the labour is not considered, yet, it is an emotional labour that makes unique demands, forges complex interpersonal relationships, and blends financial and altruistic considerations.[11]

In the arrangement of a commercial surrogacy involves an intertwining of a woman's reproductive capacities with productive roles, there are some fundamental similarities with the labour structure. For example, like factory workers, surrogates are asked to produce the end product with their labour and skill for the owner, here the commissioning couple. Further, similar to a worker in the factory setup, the surrogates are supposed to treat their employers' property as if it were their own, and act in the best possible manner to protect the interest of the product, which is the baby here.[12]And the consideration of the surrogate is monetary, which being unregulated, depends on the terms and conditions of the contract.

Regarding services of a surrogate as well, a number of intriguing questions can arise. Medically, even though the search is limited in finding a woman with a healthy womb, the socio-ethical criteria demand a surrogate who is a willing worker and, simultaneously, a virtuous mother. In addition, a surrogate is expected not only to be a disciplined contract worker who will give the baby away immediately, but is simultaneously to act as a nurturing mother during the gestation. She is to be a selfless mother who will not treat

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9. Elizabeth S. Scott, "Surrogacy and the Politics of Co modification", 72(3), *Law and Contemporary Problems*, 72(3) 109-146, (Summer 2009)
10. Sara Ann Ketchum, "Selling Babies and Selling Bodies", 4(3), *Hypatia*,116-127,(Autumn 1989)
11. Paula Garner and Katie O'Bryne (ed.), *Surrogacy, Law and Human Rights,*145-148, (Ashgate Publishig Company, 2015)
12. Amrita Pande, "Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker", 35(4), *Journal of Women in Culture and Society,* 969-992 (2010)

surrogacy like a business. The question then is, whether this role of the surrogate involving motherhood and emotions, can be covered under a contract based on monetary valuation. Moreover, this may also vary from one contract to another, depending on the parties. This surfaces another essential contractual issue of surrogacy - the payment of consideration.

ii. Consideration in a Surrogacy Contract

In Indian commercial surrogacy, the surrogate is generally paid in terms of monetary benefit. Even the ICMR Guidelines[13] provides for financial compensation for the surrogates. The surrogate mother would be entitled to monetary compensation from the couple for agreeing to act as a surrogate. Again, the Guidelines also iterates that "Payments to surrogate mothers should cover all genuine expenses associated with the pregnancy. Documentary evidence of the financial arrangement for surrogacy must be available. The ART centre should not be involved in this monetary aspect."[14]

However, as far as the value of this compensation is concerned, the guidelines have left it open subject to the negotiations between the parties to the contract. This aspect have been tried to be resolved through the Surrogacy (Regulation) Bill, 2019 which prohibits commercial surrogacy completely. However, since the Bill is still pending, under contract law, the compensation is open on negotiation between the parties (*consensus ad idem*) as it only creates a *right in personam*. Thus, there is a disparity noticed across surrogacy contracts in the amount of consideration paid. There is neither any minimum amount specified for such act, nor there is any standard form contract that is prescribed for this purpose. For example, in Anand, a place in Gujarat which is increasingly being recognised as the surrogacy capital in India, studies have revealed that there is no uniform rate that is offered to different women for the services they provide. Typically, in case of foreign or NRI couples, the rates are higher than in case of Indian couples.[15] In some cases, the consideration is also paid in kind, e.g., one of the respondents revealed that a couple from New Jersey agreed to build a house for the surrogate mother.[16]

13. ICMR Guidelines for ART Clinics in India, Para 3.5.4
14. ICMR Guidelines for ART Clinics in India, Para 3.10.3
15. Centre for Social Research Report, "Surrogate Motherhood- Ethical or Commercial", (2014)
16. Amrita Pande, "Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker", 35(4), *Journal of Women in Culture and Society,* 969-992 (2010)

iii. Impediments in enforcing Surrogacy Agreements

The quintessential perspective of a surrogacy arrangement, have been noticed to fall short in the enforcement of the contract. Since, the arrangement of surrogacy has a great socio-cultural effect which is indeed complex to deal with, mere contractual terms may not always be sufficient to deal with the dynamic emotional and social ties it involves. Moreover, the feasibility of constraining or controlling human emotions through commercial contracts might often be exigent. The following paragraphs discuss certain such issues that have been noted in the judicial interpretations that the courts dealt with in the past decades.

a. The Surrogate developing ties with the baby

The One of the major issues that makes a surrogacy agreement more complex and critical is the cases where the surrogate mother develops a tie and sentiments towards the child. Although the contractual terms very specifically entail that the surrogate will relinquish the child and the rights thereof once the child is born, there arises a critical issue where the surrogate mother refuses of part with the child. Here, since the existence of the contract tilts the positions in favour of the commissioning parents, whether primacy is to be focused on the contract or the natural ties that arises are more important. This also introduces the society to a classical debate of law versus morality and justice. The legal jurisprudence emphasises the role of law in mitigating the conflicts arising in the society. Law is essentially the means and ends of justice, but this is a typical situation, where law in itself stands in contradiction with the social norms and the basic human instincts of motherhood and child care.

This question first arose in *In Re Baby M,* where the New Jersey Supreme Court ruled that surrogacy contracts are not enforceable.[17] Judge Wilentz, observed that :

> "These contracts are against public policy and payment of money to a 'surrogate' mother is illegal, perhaps criminal, and potentially degrading to women. But, the custody of the child was awarded to the commissioning parents considering the best interest of the child."

Owing to this, in commercial surrogacy norms provided by the ICMR

17. 537 A 2d. 1227 N.J. 1988

Guidelines, very explicitly provide that an oocyte or embryo donor cannot act as a surrogate mother for the couple to whom the egg is being donated. The donor must remain anonymous.[18] Currently, this aspect is further dealt in the pending Surrogacy Bill which only allows altruistic surrogacy. However, the question continues that whether a contractual clause prohibiting the surrogate to get attached to the baby can command the very basic human instincts of motherly love and affection.

b. Decision regarding abortion

Another conflict arising out of the contractual terms might be regarding the decision of abortion of the foetus. There could be a situation where after the surrogate conceives the child, she might not want to continue with the pregnancy, or in case she is pregnant with twins or triplets, and the commissioning parents only wants one baby, they may prefer to go for abortion of the remaining foetuses, which the surrogate may not agree to. However, since it is a contractual obligation, and most surrogacy agreement contemplates that the surrogate generally will not to abort the foetus unless, in the opinion of the medical specialist, the foetus is physiologically abnormal or an abortion is needed to preserve the physical health of the mother, a debate arises as to whether a woman can be compelled to bear a child or abort a child she is carrying. Again, on the other hand, since the surrogate is providing a paid service, a legitimate question arises whether the decision of the commissioning couple is to be final.

To address this issue, most surrogacy contracts add clauses relating to the termination of pregnancy and selective reduction. However, most often, the contracts establish the rights of the intended parents in making the decision in these aspects. In some contracts, further specific clauses are added to avoid conflicts in such situations, especially in case of selective reduction of foetuses, i.e., gender selection; the maximum number of embryos to be transferred; the circumstances which can trigger a reduction, like triplets may be reduced to twins or twins to singleton, based on medical reasons.[19] Yet unenforceable situations may arise adding complexity to the situation. Since it involves very high level emotions and involvement in respect of both

18. ICMR Guidelines for ART Clinics in India, Para 3.5.14, and Sec 27 of The Assisted Reproductive Technology (Regulation) Bill, 2020.
19. ICMR Guidelines for ART Clinics in India, Para 3.4.3 – reduction due to medical reasons

the parties to the contract, it will be wrong to interpret the obligations of the parties to such contracts on similar lines of any other commercial agreement. It is perhaps for this reason that it is extremely difficult to frame objective laws pertaining to these intrinsic issues.

In this context, the case of Beasley in 2001 is relevant where, Beasley, an English woman, entered into a surrogacy contact with a Californian couple. She was impregnated using Mr Wheeler's sperm and eggs from a donor. Under the contract, Beasley was to abort additional foetuses if more than one egg was fertilised. During her 8th week of pregnancy, it was discovered that she was carrying twins. It was claimed that the couple insisted in aborting one of the foetuses during the 13th and 14th week, to which Beasley refused as her pregnancy was too far gone and the procedure could risk the life of the other twin. On communicating her decision to the commissioning parents, they refused accept the babies and no longer provided any support to her. Here, the conflict was further fuelled since the laws operating in the two countries- UK and California regarding this issue is different. Under California law, the legal rights of the intended parents supersede those of the surrogate mother whereas, in Britain, the surrogate has sole legal rights. In this case, it was later reported that the commissioning couple had found another set of prospective parents to take the twins after they are born.[20]

c. Divorce of commissioning parents before child birth

Another complexity in fulfilling the contractual obligations arise in situations where the commissioning parents get divorced after entering into surrogacy contract and the surrogate is already impregnated in the process. This situation gives rise to a number of complex consequences.

The case *In Re Marriage of Buzzanca*[21] is relevant to discuss here. Here, Jaycee, the surrogate child was born who was genetically unrelated to either of the commissioning parents, Luanne and John. After the pregnancy was initiated, Luanne and John got divorced. John disclaimed any responsibility, financial or otherwise as the child was not his biological offspring. The woman who gave birth made no claim to the child. The trial

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20. "New parents found for surrogate mother's twins", *The Telegraph*, Aug 14, 2001. *available at* <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1337422/New-parents-found-for-surrogate-mothers-twins.html>(last visited on Aug 10, 2021)
21. 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280 (Ct. App. 1998)

court determined that Jaycee had no lawful parents. However, the California Court of appeal reversed the orders and found the Buzzancas to be the legal parents, stating that a genetic tie is not determinative and that rather the intention of the parties is to be considered. Accordingly, Luanne was given the custody of the child, and her ex-husband was ordered to pay for child support.

A similar challenge before the Indian courts arose in *Baby Manji Yamada v Union of India,*[22] a baby girl Manji Yamada was born through surrogacy in Anand, Gujarat. The agreement commissioning parents were from Japan. The husband was the genetic father of the child, but the egg used was that of a donor. After commencing the contract, the couple got divorced. When the child was born, the genetic father wanted to take custody of the child, but he had to return to Japan due to expiration of his visa. The Municipality at Anand issued a birth certificate stating the genetic father's name. The child remained alone in Arya Hospital, after the surrogate mother abandoned her. The grandmother of the baby, Emiko Yamada reached India and wanted to take custody of the child. For this, she filed a writ petition in the Supreme Court under Article 32 of the Constitution. She was given travel documents so that she can leave India with her grandmother.

d. Intending Parents Refusing To Take The Baby

This is another critical scenario, where after the child is born through a surrogate, the intending parents, who are also the biological parent(s), refuse to accept the child. Although the contract law does propagate for a civil suit in case of breach, this is an arduous situation which centres on the baby and its care. The surrogate mother's duty ends as soon as the child is born. She has no right or liability to care for the child, on the other hand, the Hospital or the ART (Artificial Reproductive Technology) facility can also not be reasonably asked to care for the new born. In this case, the deadlock that is created, especially concerning the interest of the child is very grueling.

In 2014, an Australian couple opted for surrogacy in India and twins were born. They already had a child, and after the twins were born, they decided to take the girl child only and left the boy child back in India. A lot of discussions took place with the Australian Authorities who tried to convince the parents. But baby Dev, still continues to be in India.[23]

22. JT 2008 (11) SC 150

23. "Aussie couple abandoned surrogate baby in India" The Times of India, Oct 10, 2014

Another case that happened in Thailand in 2014 itself also manifests the ugly face of commercial surrogacy. Baby Gammy was born through surrogacy commissioned by an Australian couple, but the child was born with down syndrome. The couple left him in Thailand and only took his healthy twin sister back with them.[24]

Both these cases are glaring examples of complex situations that can arise through a surrogacy arrangement. Undoubtedly the contract law is not sufficient to deal with these complications and a comprehensive law to regulate such contingencies must be framed.

V. CONTRACTUAL LIMITATION OF SURROGACY ARRANGEMENT

The journey of surrogacy laws in India from being enforced through a commercial contract to stepping towards a legal regime has been very crucial. The contract law, which is a civil law, undoubtedly is not equipped to deal with these umpteen numbers of unforeseen contingencies and challenges. There have been so many incidences that have proved that regulating this issue through a mere commercial contract is not feasible. The 228th Law Commission Report on Surrogacy in 2009 iterated the importance of having a legislative framework in this matter. Moreover, it was also stated that commercial surrogacy should be banned and only altruistic surrogacy should be permitted. Consequently the Surrogacy Bill was drafted that first got lapsed and was re-introduced in 2019. The Bill also propagates that India is to permit only altruistic surrogacy. This can considerably deal with the varied complications that are encountered in a commercial surrogacy arrangement. However, since the law is yet to be passed, it is indeed commercial contracts that still continue to primarily regulate this matter. Although the ICMR Guidelines entail certain procedural aspects, but the lack of a legal framework might not suffice long.

VI. CONCLUSION

The arrangement of surrogacy being based on the contractual terms between the concerned parties makes the contract itself extremely crucial and significant. This significance is enhanced since the arrangement itself is extremely critical and attaches varied forms of uncertainties. The complexities

24. "Australian couple 'did not reject Down's baby' Gammy", The BBC News, April 14, 2016

and the debates that revolve round the very arrangement, highlights the crucial role of law in this respect. The gaps that have been discussed in the preceding paragraphs pose certain gross challenges on not only the social arrangement of surrogacy, but also on the legal setup of the country. Law plays a pivotal role in mitigating social conflicts and ensuring justice to the people. As such, it is extremely important that a legal framework is developed which can cover the aspects of surrogacy and provide for effective protection to the parties in a surrogacy contract. Most importantly, the interest of the child should be considered as paramount.

In this context, the importance of the legal framework does not need exaggeration. As propagated in the law, that no monetary compensation is permissible, making the arrangement an altruistic one, it can help to deal with the problems and ambiguity in the entire arrangement. The greatest challenge in dealing the matter through a contract is that certain essential aspects of the arrangement cannot be subjected to contract law owing to the nature and gravity of the matter. On one side, issues like health and protection of the surrogate, the consideration paid, the choice of abortion in case of any genetic disorder or otherwise, or in case the commissioning parents do not wish to have more than one child and the surrogate is pregnant with twins or triplets, completely depend on individual contractual agreements. On the other side, issues like the child's parentage, nationality, legitimacy, in case there needs to be an adoption by the genetic parents, abandonment of the child, are matters that cannot be dealt with under the law of contracts. This further strengthens the immediate call for the legal framework.

It is pertinent to note here, that unlike any ordinary business contract, which mostly aims at commercial transaction between the concerned parties, in respect of a surrogacy contract, the said agreement is entered into in such a way that it should not be purely a commercial or business transaction. This aspect not only elevates a surrogacy agreement at a level of advanced form of contract, but also gives rise to a very important debate as to the subject matter of the contract itself. Thus, in order to ensure that such contracts do not turn into adhesive contracts, owing to the vulnerability of the surrogates, it is essential to carefully design and conceive the entire arrangement so that both the parties may get their desired outcomes from the contract. As such, since such contracts exhibit advanced understanding and demand higher degree of diligence and precision, it is also crucial that while drafting such contracts, special care is taken to ensure equity and fairness.

PROTECTION OF PERSONAL DIGITAL DATA UNDER INDIAN LEGAL FRAMEWORK: A MYTH OR REALITY

*AJAY KUMAR SINGH**

ABSTRACT : Every human being is equal by birth and possesses some basic rights such as right to equality and right to live with all human dignity across the globe irrespective of cast, creed and religion. It gets more recognition under UDHR, 1948,[1] through which world community particularly UN members states have been promoting these rights provided under this international instrument. India being signatory member of UNO[2] has expressed its international commitment by incorporating right to life as fundamental right[3] under Indian constitution, but Supreme Court has given new impetus to right to life by expanding its horizon and recognized right to privacy as an integral part of right to life. Recently Supreme Court reaffirmed that every individual has right to maintain his personal data and disclosure of personal data shall amount to violation of right to privacy and even government cannot disclose personal data of an individual, as a result of that central government set up an expert committee to find way out of this issue, that committee also recommended to have such mechanism so that personal data can be protected for that reason the personal data protection bill 2019was introduced. There are many things in this bill which are debatable and needs to be modified. This paper explains the pros and cons of the data protection bill 2019 and its efficacy in India.

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1. Article 1 Universal Declaration of Human Rights, 1948 available at. https://www.un.org
2. UNO- United Nation Organization.
3. Article 21 of the Constitution reads: "No person shall be deprived of his life or personal liberty except procedure establish by law

KEY WORDS : Data Principal, Data Fiduciary, Human Rights, Right to Privacy.

I. INTRODUCTION

India did not have effective legislation regarding protection of digital (electronic) data received or transmitted from one source to other sources before commencement of the Information Technology Act, 2000. It is the basic law in India dealing with cybercrime and electronic commerce, and in pursuance of this Act the Information Technology [Reasonable Security Practices and Procedures and Sensitive Personal Information or data] Rules, 2011 (SPDI) Rules have been framed by the Central Government. As its name suggests only for commercial data and information which is exchanged in an electronic form and not those information received through non-electronic communication form.

When this IT Act, 2000 came in to force, all the provisions and procedures in the Act were inadequate to protect the people's sensitive information provided electronically. Considering the gravity of issues Indian Parliament amended this IT Act and eventually The Information technology (Amendment) Act, 2008 was passed and new provision section 43-A was inserted which provides that corporate body possesses or deals with any sensitive personal or information and is negligent in maintaining reasonable security to protect such data or information which thereby causes wrongful loss or wrongful gain to any person, then such body corporate shall be liable to pay damages to the aggrieved person. Further Section 72-A[4] deals with punishment for breach of lawful contract- According to section 72A whoever breaches lawful contract shall be punished with imprisonment for a term not exceeding three years or with a fine not exceeding up to five lacks rupees or with both in case of disclosure.

However, these amendments could not prove its efficacy that is why the Personal Data Protection Bill must be passed by the Parliament and it can be justified on the basis of report of different governmental agencies such as the Ministry of Electronic and Information Technology (MEITY). .Government of India[5] invoking its power under section 69A of the Information Technology Act, in view of the emergent nature of threats blocked 118 apps

4. The Information Technology Act,2000
5. www.legal500.com

which were involved in spreading defamatory contents against sovereignty and integrity of India, security of State and defence secrets. The concerned ministry had received several complaints from various sources. This step taken by the concerned ministry is to safeguard the interests of millions of Indian mobiles and internet users.

As per the statistics of Statista[6], presently there are about 700 million Indian who are using internet in India and by 2025 this figure may be over to 974 million users. Because in 2019 India was ranked the second largest online market. Considering the computer literacy of Indian it is necessary to have effective grievance redressal mechanism so that Indian people and their livelihood through internet can be protected in better way.

In this digital world, people knowingly or unknowingly share sensitive personal data on various digital platforms such as electronic commerce websites, mobile apps, net banking and e-wallets such as paytm, Bhim App, G-pay, Phone pay, etc. the users of these various platforms give their consent just by clicking I Agree with the terms and conditions 'with or without reading the privacy policy. This may provide an opportunity to the hackers to hack their accounts.

It is evident from history that right to privacy has got social recognition since inception of civilization. *Manu Smriti* clearly states that a person was not to be disturbed while mediating, sleeping or studying. It was prevailing in ancient period as social value[7] and even kings had to uphold this as a dharma because for *Upasana* or mediation it was necessary that people should be given liberty to establish link (spiritual) with their own God. This concept continued from ancient period to modern era and after adopting Indian Constitution our Constitution maker paid due respect to right to life and personal liberty and recognized this right as most precious right without which golden thread of Indian Constitution would be meaningless, though right to privacy was not expressly recognized under Article 21 of the Indian Constitution but Apex Court in a leading Case *Khark Singh v State of UP*[8] (a six judge constitution bench) by its majority judgment ruled that right to privacy is not a guaranteed constitutional right, In this case petitioner had filed a writ before the supreme court by challenging the impugned order of

6. https//www.staista.com
7. S. Radhakrishnan (ed), the cultural heritage of India (1970) Vol. I pp 349-50
8. AIR 1963 S.C 1295

surveillance by police provided under UP police regulation to visit the house of any suspect or criminal any time. In this case petitioner Kharak Singh[9] who was let off in a dacoity due to lack of evidence challenged regular surveillance by police authorities on the ground of infringement of his fundamental rights guaranteed under Art.19 (1)(d) (right to move freely throughout the territory of India) and Art. 21 (right to life and personal liberty).

The main issue for the consideration before the bench was whether surveillance under the impugned U.P Police regulation infringed the citizen's fundamental rights as guaranteed by the Indian Constitution. Though, the majority view was that right to privacy is not guaranteed as constitutional right by Indian Constitution. Subba Rao J in his dissenting opinion observed that the right to privacy was not expressly recognized as a fundamental right, it was also an essential ingredient of personal liberty under Article 21 and held that all surveillance measures to be unconstitutional. This dissenting opinion got recognition in *Justice K.S Puttuswamy and others v Union of India, 2017*[10]. In this case the nine- judge bench unanimously held that right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21, it expressly overrules previous judgment of the Supreme Court in which it had held that there is no fundamental right to privacy under the Indian Constitution.

In this case nine- judge bench of the Supreme Court assembled to determine whether privacy is a constitutionally protected value. The Court expressed its concern over the precious rights and liberties of Indian Citizens by saying that the emergence of new challenges is exemplified by this case, whether debate on privacy is being analyzed in the context of global information based society. In this era where information technology governs virtually every aspect of our lives the task before the Court is to impart Constitutional meaning to individual liberty in this interconnected world, the court has to be sensitive to the needs and opportunities and dangerous posed to liberty in this digital world. The constitutional bench while examining every aspect of right to privacy highlighted few important theories of jurists such as Thomas Hobbes[11] and seminal work of Ronald Dworkin titled "*Taking Rights Seriously*[12]" in which Dworkin states that "individual rights are political trump held by individuals".

9. https//indiankanoon.org.doc
10. 2017 SCC 10(1)
11. Thomas Hobbes, *Leviathan theory of justice* (1641)
12. Ronald Dworkin , *Taking Right Seriously* (1970)

II. MEANING AND DEFINITION OF PERSONAL DATA

Generally, data can be broadly classified into two categories personal and non-personal data. Personal data pertains to characteristics, trait or attributes of identity, which can be used to identify an individual. Non personal data includes aggregated data through which individual's identity cannot be identified for example many times different service providers use people's location to predict traffic follow, it is non personal data. Data protection signifies to policies and protection seeking to minimize intrusion in to privacy of an individual caused by collection and usage of their personal data by data controller.

According to section 3(2) of the Data Protection Act, 2018, personal data means any information relating to an individual or identifiable living individual, such as name, an identification number, location data, whereas personal data has been defined under section 3(28) of the Data Protection bill 2019 which means data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristics, trait, attribute or any other feature of the identity of such natural person whether online or offline.

Another significant provision of this act is 'Sensitive Personal Data' which is defined under section 3(36)[13] which means such personal data which may be related to financial data, health data , sex life , sexual orientation, biometric data, genetic data, religious or political belief or affiliation because of these sensitive personal data it is private individual as well as state cannot dare to misuse such sensitive data, people of this country have apprehension that data relating to political belief or inclination towards particular political party might be abuse, which is not good for the country like India, but this bill states that it has every kind of safety measures which should be seen in totality so it is here pertinent to discuss pros and cons of this bill.

III. PRIVACY ISSUES OF DATA PRINCIPAL AND DESIRABILITY OF THE ACT

Though the DPB 2019 clearly talks about informed consent of the Data principal[14], where any personal data is required, it can only be processed as per the mandate of section 12 of the bill which provides that personal data

13. Section 3(36) of the Data Protection Bill, 2019.
14. Data principle sec3(14) of the Data Protection Bill 2019

may be processed on the basis of the consent of the data principal at the time of the processing. It can only be done having regard to whether consent of data principal is obtained as per requirement of section 14 of the Indian Contract Act1872, It means in case of breach of contract Data principal Shall have right to get compensation against the wrongdoer under this proposed bill there are many reasonable circumstances under which processing of data is required such as for the purpose of whistle blowing, mergers and acquisitions, credit scoring , recovery of debt and prevention and detection of any unlawful activity including fraud, even sensitive data can also be processed with express consent of data principal if such processing is strictly necessary for any function of parliament or any state legislature or necessary for compliance with any order or judgment of any court or tribunal in India. Any Company or government while processing such data has to ensure the privacy and dignity of data principal, if there is any breach on the part of company or government, bill itself prescribes grievance redressal mechanism.

In addition to this there are other aggravating circumstances prescribed under the bill where disclosure of personal data will not amount to violation of right to privacy. They are exemptions Clause[15] where data fiduciary[16] is authorized to disclose personal data of the data principal those circumstances are identified as

a. Security of state

b. Retention, detection, and investigation of crime.

c. prosecution for violation of law.

d. Legal proceedings.

e. Journalistic purposes (press or electronic media)

Sections (42-45) of the proposed bill specifically Exempts the data from disclosure with specified objectives and this classification is based on reasonable criteria like integrity and sovereignty of India, public order, decency etc. Data fiduciary not only disclose such personal data of Data principal but can also transfer personal data cross border countries under specified circumstances of the bill, for the prevention of transnational crimes (i.e. Human trafficking, Smuggling of drugs and Arms, weapons, Terrorism). This is generally against the basic rule that Data fiduciary is not authorized

15. Section (42-45) Exemptions. Chapter(IX) of PDP Bill, 2019

16. Section 3(13) of the Data Protection Bill, 2019

for cross border transfer of personal data, but proposed bill also provides effective mechanism for the redressal of grievances.

IV. RIGHTS OF DATA PRINCIPAL AND REMEDIES

One of the most significant provision of this bill is the recognition of various rights of data principal so that they can be aware about their personal data disclosure status and be aware that for what purpose their personal data processed and to whom it was provided, by doing this, transparency in governance could be ensured. Under this bill, section (24-27) prescribes some important rights to the data principal which are as follows-

i. Right to Confirmation and Access

According to section 17[17] the Data principal shall have the right to obtain confirmation certificate from the data fiduciary whether the personal data of data principal has been processed or is being processed by the data fiduciary. The data principal can also obtain a brief summary of processing activities undertake provide the information to the data principal in a clean and concise manner.

The data principal can also access in one place the identities of the fiduciaries with whom his data information has been shared. The reason behind empowering the data principal is to give him guarantee not to misuse any information (digital) of the data principal secondly it will maintain the public confidence in the governance which is paramount necessity of good governance.

In continuance of this right data principal has also right to make necessary correction in his personal digital information under section 18[18]. He is also empowered to erase any misleading information or incorrect information. Data principal can also update his personal data that is out of date and can erase his personal data which is no longer necessary for the purpose for which it was processed. Where data principal is not satisfied with any activity of the data fiduciary he can ask to data fiduciary to take adequate step for the correction of data.

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17. Section 17 of the Personal Data Protection BILL, 2019
18. Section 18 of the Personal Data Protection Bill, 2019

ii. Right to Data Portability

As per section 19[19]of the proposed bill every data principal shall have right to receive data which has been processed through automated means, any data which has been generated in the course of provision of services or use of goods by the data fiduciary but this right is not applicable when the processing is necessary for functions of the state or in compliance of law and order of a court.This provision also fixes accountability of data fiduciary and enables to data principal to avail this right against data fiduciary.

iii. Right to be Forgotten[20]

Another significant right of data principal is right to be forgotten. As per section 20[21] of the proposed bill which empowers data principal to restrict or prevent the disclosure of personal data by the data fiduciary when it is no longer necessary to disclose the data or purpose for which it was disclosed has been achieved or when it appears that disclosure of personal data is contrary to the provisions of this act or any other law for the time being in force, But this right is subject to the satisfaction of adjudicating officer appointed under this act.

Though the bill guaranties the statutory right to the data principal for the benefit of protection of personal data but the procedure like data principal has to file a complaint before adjudicating officer by highlighting the grievances and burden of proof lies on the data principal that his personal data has been misused by the data fiduciary.

There is provision for penalty and compensation for breach of trust done by data fiduciary. If data fiduciary has failed to comply the prescribed procedures for the security of personal data and data is processed illegally or cross border transfer of unauthorized data, Data fiduciary shall be liable to penalize up to 5 crore rupees or 2% of the total turnover of it.

Undoubtedly these penal provisions would be effective against data fiduciary not to misuse the personal data of data principal. Where data principal is not satisfied with action of adjudicating authority it shall have right to make an appeal before data protection authority of India, apart from this the bill makes provision for auditing the policies of agency.

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19. Section 19 of the Personal Data Protection Bill, 2019
20. The European Convention 1995

iv. Audit of Policies and Conduct of Processing Agency

Under the proposed Bill, Section[22] 29 mandates that the significant data fiduciary shall have its policies and conduct of its processing of personal data audited annually by an independent data auditor. The data auditor shall evaluate the compliance of the data fiduciary with provisions of this act, including security safeguards adopted. Instances of personal data breach and response of the data fiduciary including the promptness of notice to the authority. This procedure is no doubt would be effective to ensure transparency and accountability of the data processing agency. Whether it is any company or governmental agency. The rating process of data auditor would also be an incentive for the significant data fiduciary and shall impose restriction upon negligent data processing agency; It shall put surveillance upon data fiduciary as well as personal data processing agency. Besides this the proposed bill prescribes code of practices[23] to which authority shall specify through regulations to ensure quality of personal data which may also include the manner for obtaining consent from data principal measures pertaining to retention of personal data and grounds for processing of personal data and data related to children and sensitive age verification under this act. In order to make this data protection law more effective section 82[24]declares re identification and processing of identified personal data, which states that any person who knowingly or intentionally re-identifies personal data which has been de- identified by a data fiduciary or a data processor without the consent of data fiduciary or data processor, then such person shall be punishable with imprisonment for a term not exceeding three years or with a fiduciary may extend to two lakh rupees or both. The nature of this offence shall be cognizable and non-bailable and wrongdoer shall be arrested without warrant which clearly shows the broader view of legislature.

V. TOOLKIT ISSUES AND DESIRABILITY OF EFFECTIVE DIGITAL DATA PROTECTION LAW

Recently toolkit issue has raised another controversy in Indian politics

21. Section 20 of the Personal Data Protection Bill, 2019
22. Section 29 of the Personal Data Protection Bill,2019
23. Section 50 of the Personal Data Protection, Bill 2019
24. Section 82 of the Personal Data Protection Bill, 2019

and accelerated the desirability of effective digital data protection law in India. This toolkit issue has got sensational recognition due to *Twitter* which is worldwide recognized electronic platform through which people are expressing their ideas. Earlier it was an effective tool of cultural exchange and people of one country could get information with respect to politics, art and culture and economic development happening in rest part of the world whether it is developed country or developing country. People are using Facebook or Twitter not only for fun but cultural exchange or to know the new development in science or business. Certainly these two important social platform have been effective in educating people across the globe. But Twitter attracted its attention on 4 February, 2021 when Swedish climate activist Greta Thunberg twitted a toolkit related to farmer's protest about New Farm Laws 2020 in solidarity with farmers.

What is a toolkit?[25] The toolkit is a document key to digital era protests and is similar to pamphlets and fliers that are used by the protestors on the streets. Simply it can be said that it is a document that educates and amplifies the cause of the protest and it also provide a roadmap on how to take the protest forward and what needs to be done, when and in what manner protest should be continued. Since in digital era people are using more and more social media platform like facebook or Twitter not only to share their personal feelings but also expressing their opinion about government's initiative, schemes and functioning, to some extent it is good for healthy democracy. People should have liberty to criticize the governmental initiative if government is not functioning well, but at the same time people should not cross the limit prescribed by the Indian Constitution in the name of freedom of speech and expression. Article 19(2) specifically prescribes the limit such as sovereignty and integrity of India, law and order or defamation etc., but on 4 February 2021 a toolkit used by Greta Thunberg guided people on how to stand in solidarity with the farmer's protest in India and that toolkit called for a digital strike on 26 or before 26 January 2021 Republic day. It had also highlighted a list of previous actions that were taken to amplify the farmer's voices online. That documents also mentioned various hash tags for Twitter storm such as #Ask India Why, farmers protest and the worlds watching, soon after the incident Delhi police asked Google and other social media companies to share information related to the toolkit like e-mail IDs, URL and social

25. https://www.timesofindia.indiatimes.com (17 February, 2021)

media account etc. Delhi police also filed FIR on 4 February 2021 against unknown people for creating and spreading the toolkit. On 14 February 2021, Delhi police arrested activist Disha Ravi for creating and editing toolkit which allegedly instigated the violence during the 26 January 2021 tractor Parade. According to Delhi Police, Disha Ravi created and shared the toolkit with Greta Thunberg. The Delhi police booked the accused Disha Ravi, Nikita Jacob and Shantanu Muluk under section 124(A) for Sedition. Section 153(A) for promoting enmity among sections of the society and section 120-B for criminal conspiracy under Indian Penal Code 1860. Again Delhi police on 24 May 2021 visited Twitter India's Delhi and Gurgaon offices to serve the notice in the case because Twitter had flagged some posts by ruling party leaders alleging a Congress plot to Malign the Prime Minister and the Central Government as 'Manipulated Media'. Meanwhile Central Government asked the Twitter to provide the details of origin of information and warned the Twitter to comply with the law of India. In response, the Twitter has written letter to the Central Government that Twitter "shall strive to comply the Indian laws". Here considering the gravity of toolkit issues the personal digital data protection bill needs to be amended so that no one can dare to spread hate speech or malign the cultural heritage of this great country in the name of freedom of expression.

VI. PEGASUS ISSUE AND EXISTING REGULATIONS IN INDIA

The desirability of effective digital data protection law in India has become essential particularly after Pegasus debate, whether Pegasus issue is correct or not, it is matter of investigation but if such type of spyware can be used for obtaining information from desired sources, definitely it is matter of great concern particularly for privacy issues. On June 18, The Wire[26]news agency reported that the phone numbers of about 40 Indian journalists were on a hacking list of an unidentified agency using Israel spyware Pegasus.

In an another news[27] an international media consortium has reported that over 300 verified India mobile phone numbers were on surveillance using Israeli firms NSO's Pegasus spyware. Pegasus is a spyware built and marketed by Israel Company NSO, which infects devices and spies on the victim by transferring data to a principal server in an unauthorized manner. It

26. www.freepressjournal .in
27. www.indiastoday.in

can also record speech, access the calendar and read SMS and emails. So far as Indian regulations are concerned there are two existing statutes which make surveillance – (i) Telegraph Act, 1885 and (ii) The Information Technology Act, 2000, while the Telegraph Act deals with interception of calls and the IT Act deals with interception of electronic data.

As per section 5 of the Telegraph Act, any authorized public official can intercept communications in the situation of any public emergency or in the interest of sovereignty and integrity of India or in the interest of security of state or public order. However, in order to maintain balance between citizens personal liberty and security of state, the Supreme Court, in case of *People's Union for Civil Liberties v Union of India*[28] pointed out lack of procedural safeguard and in the provision of the Telegraph Act and laid down certain guidelines for interceptions as a result of that rule 419 A has been inserted in the Telegraph Rules in 2007. According to rule 419A of the Telegraph Rules 2007 a secretary to the government of India in the ministry of Home Affairs can pass orders of interception in the case of Central Government and Secretary of Home Department of State can issue such directives where as section 69 of the Information Technology Act and the Information Technology (Procedure for safeguard for interception, monitoring and decryption of information) rules, 2009 were framed to strengthen the surveillance over use of digital data. In addition to this restriction, section 69 of the IT Act adds another aspect that for the purpose of investigation of serious offences any digital information can be intercepted, monitored and decrypted.

Though in democratic country government has to keep surveillance on suspected phone calls or emails so that any person or group of persons cannot challenge the sovereignty and integrity of the state but while doing so government should also observe minimum safeguard provided by the constitution to the citizens of state. So far as Pegasus spyware is concerned central government of India should set up an expert committee to look into the matter about nature of information, type of interception and destruction and retention of intercepted material in the light of right to privacy.

However, in digital world no democratic country can run without having effective surveillance mechanism and country like India where North- East States, have been demanding greater Nagaland, or Bodoland, Jammu and Kashmir is facing similar problem so in order to suppress the separatist

28. AIR 1997 SC 568

movement it is necessary for the central government to strengthen its surveillance system following the procedural safeguards provided in the statutes.

VII. CONCLUSION

After considering every aspect of the Personal Data Protection Bill 2019 it can be concluded that this bill is far better than previous regulations regarding protection of personal data. Currently personal data are being controlled by the information Technology Regulation 2011 of I T Act, 2000 which is inadequate to address the challenges caused by digital world. Such as under I T Regulation 2011 company is only accountable to maintain personal data inside and outside India but any agency of the 'state' is outside from the purview of the I T Regulation but this 2019 Bill is applicable all types of companies as well as state's instrumentalities for the protection of personal data. Since this 2019 Bill is based on the recommendations of the report of the expert committee and suggestions received from various stakeholders and it would be more effective.

The previous regulation does not have any specific provision about processing of sensitive data, personal data of children and cross border transfer of personal data but all these things are kept within ambit of the 2019 Bill just to maintain transparency and security of the citizen of this country. Under this bill data principal, data fiduciary ,sensitive personal data and exempted personal data have been clearly defined so there is less chances of misuse of the personal data even though in case of any miss-happening with personal data. Data principal being aggrieved can file a complaint to data fiduciary, if not satisfied with such mechanism he can knock the door of Data Protection Authority of India, even if aggrieved is not satisfied he can make an appeal to the Tribunal and lastly may go to the Supreme Court of India. This is all transparent grievance redressal mechanism.

Data fiduciary and data processing agency cannot go beyond that limit which has been fixed by the 2019 bill, Data processing agency will have to specify the purpose and its utility and any kind of deviation from desired statutory behavior make the data fiduciary and data processing agency liable under the bill 2019. In addition to this data processing agency cannot process any data without the consent of the data principal except under those circumstances which are clearly exempted from disclosure. Such as for the

purpose of investigation, research journalistic purposes and legal proceedings or in interest of national security and integrity of India

So with these observations it is concluded that the Personal Data Protection bill 2019 would certainly be helpful in maintaining right to privacy of Indian Citizen, provided that provisions like people's inclination towards political party percentage of vote etc. must not be disclosed by the data processing agencies for the betterment of citizens as well as the country. It is true that the country like India has less number of digital literacy, India is divided in to two parts one is digital India (Urban India) and another is rural India that is Bharat so we have to bridge the gap between urban India and rural India by implementing PMDISHA (Prime Minister Digital Shaksharta Abhiyan Garmin) and National Digital Literacy mission (NDLM) more effectively.

Many times we see that during filling any e-information on mobile regarding mobile network, banking business, or any commercial application we do not read entire information where we are transmitting the information and to whom, in such situation people are in risk zone. So at individual level we have to increases digital literacy and to promote usages of standard devices which are secured from cyber-attack. At private level investment in cyber security must be promoted by private players because they have sufficient human resources and at government level every state government should establish state computer emergency response team (SCERT) so that in case of cyber-attacks this team can prevent the misuse of data. Apart from this government should adopt cyber deterrence policy like USA and ISRAIL.

PROTECTION OF RIGHT TO HEALTH OF CHILDREN IN INDIA : A LEGAL STUDY

*ADESH KUMAR**

ABSTRACT : Health is the most precious aspect of life especially for children. It is the valuable commodity of children. An unhealthy child cannot enjoy his or her life completely. The definition of health has gone under several developments through the decades. Due to its importance, right to health has been recognized as human right in all human right conventions and treaties. After the establishment of the United Nations, the Universal Declaration of Human Rights 1948 is the first ever human rights document which expressly protects the right to health of children as human right. The United Nation Convention Rights of Child 1989 is the first binding documents to recognize the human rights of children including right to health. United Nations created a special agency World Health Organization (WHO) which is an inter-governmental organization works usually through the Ministries of Health of the countries affirms that the enjoyment of the highest attainable standard of health is a fundamental human right of a person. Under Indian legal system, right to health is not included expressly in Constitution of India, though it protects the right to health indirectly by virtue of preamble and fundamental rights and DPSP of Constitution of India. Part IV of Indian constitution is DPSP which imposes duty on States to protect health. These mandates given under DPSP of Constitution of India enable the state to prepare a national policy and to legislate on public health and food. Hence the National Food Security Act, 2013 was passed by Parliament of India with the objective to cater the need of food and nutritional security to all.

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KEY WORDS : Drug Addicted, Neglected, Health, International Instruments and Schedule

I. INTRODUCTION

Health is one of the most important aspect for human life. Health and Human development form integral components of overall socio-economic development of a nation. It is evident that health is most important commodity of human being. In spite of our differences of age, gender, history, social and economic background, health is our most basic and essential asset. An unhealthy person cannot live his or her life to the fullest enjoyment of life. The right to health of any person is associated with other fundamental human rights. The right to health of human beings is basic human rights which also ensure right to dignity of life. The right to the enjoyment of life with highest attainable standard of physical and mental health is not new[1]. The recognition of the right to health in any country implies that it will provide health services that are available in any circumstance and accessible to everyone. However, this does not mean that the country must guarantee good health to everyone because it will depend on the economic status of the country.

In 1946, World Health Organisation (WHO) in its Constitution defined the term health[2]. It expressly says that health does not mean mere absence of any disease but it is complete wellbeing of person in physical, mental and social form." This definition of health is enshrined in the preamble of Constitution of WHO[3] which is widely accepted. Later on, this definition has been amended to give more meaning to '*socially and economically productive life*'. These amendments in the definition changed the traditional perception of health which was limited to biomedical and pathology-based perspective. The incorporation of the mental and social dimensions of well being by WHO in the definition of the health at international level extended the area of health including the role and responsibility of health worker towards the society.

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1. The Right to Health, Fact Sheet No. 31, World Health Organization, Geneva, Switzerland. https://www.ohchr.org/Documents/Publications/Factsheet31.pdf (accessed on 21 August 2017)
2. WHO defined the term health as "state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity."
3. WHO, "Trade, Foreign Policy, Diplomacy and Health: Glossary Of Globalization, Trade and Health termshttps://www.who.int/trade/glossary/story046/en/ (accessed on 11 October 2015)

In its Constitution, WHO has expressed that it is the fundamental human right of every human being to enjoy the right to health with highest attainable standard and without distinction of race, sex, religion, political belief and economic or social condition. The Constitution also recognized that "the good health of all persons is fundamental to the attainment of peace and security and is attainable only by the fullest cooperation of individuals and states". This was the vision shared by all the member states, including India[4]. Current conceptions of children's health have evolved and expanded significantly from early notions of health as merely a state of being free of disease.

In 2004, Institute of Medicine Report on Children's Health, the Nation's Wealth provided the modern definition of health. It provided that health of children is the standard to which individual children or groups of children are able or enabled to develop, grow and realize their potential, satisfy their biological needs, and develop the capacities that allow them to interact successfully with their biological, physical, and social environments. This change in definition parallels the expansion of concerns in the practices of individual children's health care professionals.[5] This broader definition of children's health acknowledges the influences of the biological, behavioural, social, and physical environments on health trajectories. Professional organizations focused on children's health and well-being, such as the American Academy of Pediatrics and the Maternal and Child Health Bureau, have embraced this definition of children's health, and are operationalising this in funding mechanisms, programs, and policies.

II. RIGHT TO HEALTH OF CHILDREN UNDER INTERNATIONAL INSTRUMENTS

Right to health of children was under consideration in international law just after the establishment of League of Nations. In 1923, an International organization[6] adopted its charter which consists five-point declaration, which described the minimum conditions in relation to children. It was expected that a society should take care of these five values and shall provide adequate protection and care for its children. The organization "save the child"

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4. "Preamble to the WHO Constitution". Available at http://www.who.int/governance/eb/who_constitution_en.pdf (visited on 11 October 2015).
5. http://www.medscape.com/view/article/774785_4. (accessed on 25-4-2016)
6. named Save the Children

encouraged to the League of Nations to adopt the same declaration[7]. The League of Nations made attempts to this end which resulted in adoption of the Declaration of Rights of Child. The League of Nations meet in Geneva and the 1924 Declaration of the Rights of the Child came to be known as the "Declaration of Geneva."In the history of international law for protection of rights of child, Declaration of Geneva is first document which talks about the rights of child. This declaration adopts the core principle that 'mankind owes to the child the best that it has to give', the declaration adopted the five basic principles which are the basis requirement of child. The Declaration expressly made it clear that the care and protection of children is not the sole responsibility of families or communities or any individual countries itself but it is in the interest of whole world to ensure the welfare of all children.

i. Declaration of Geneva[8]

The Geneva Declaration is foremost document adopted for protection of human rights of child. It is a historic document at international level. This declaration recognised various human rights for care and protection of children and it also fix the responsibility of persons towards protection of rights of children. It ensured the right to health of child among its five principles.[9] Though the word 'Health' is not specifically written in this draft of Declaration but in its first principle of normal development both materially and spiritually, the protection of health of children is main concern. The other principles of the Declaration are also concerned with the health of children indirectly.

ii. Universal Declaration of Human Right[10]

Universal Declaration of Human Right is a comprehensive document for protection of human rights of human beings and it significantly protects the 'right to health' of children. It recognises that every person has the basic

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7. Savita Bhakhry, "Children in India and their Right", National Human Rights Commission, New Delhi p.17 (available at <http://nhrc.nic.in/Documents/Publications/ChildrenRight.pdf) visited on 4 February, 2016.
8. Geneva Declaration of the Rights of the Child, Adopted 26 September 1924, League of Nations
9. It provided that hungry child should be fed; sick child should be helped.
10. 1948

right to a standard of living adequate for the healthy life and well-being of himself and of his family. This declaration ensures that right to health includes right to security and safety in case of sickness and disability. It further protects to motherhood and childhood and ensures adequate special care and assistance of all kind. This protection is available to all children without discrimination either born in or out of wedlock.[11]

iii. United Nation Declaration on the Rights of Child[12]

The Declaration on the Rights of the Child, 1959 was the first international document which was adopted by the United Nations for the protection of child rights. It was a kind of moral direction to the countries and state authorities rather than legally binding framework. This Declaration on Right of Child expanded the five principles adopted in the Geneva Declaration 1924 to ten basic principles. The declaration protects the right to health of child in its principles and provides that every child shall enjoy special care and protection, and shall be given opportunities and facilities by law and by other means in order to enable him to develop in all respect. The declaration affirms that the best interests of the child shall be the paramount consideration[13]." It again ensures that "the children shall enjoy the benefits of social security for his or her protection[14]." He shall be entitled to grow and develop in a healthy manner. This declaration ensures the special care and protection to both i.e. children and his mother along with the adequate prenatal and post-natal care. The declaration says that the children are entitled to claim adequate nutrition and medical services etc. for better health.[15] It enhances its care towards the special child also. It provides that "physically, mentally or socially handicapped child must be given special treatment including education and care[16]." The declaration ensures the upmost priority to the child and provides that "The child will receive protection and relief at first in any case[17]."

11. UDHR 1948, Art. 25
12. The Declaration was adopted on 20 November 1959 by the U.N. General Assembly (resolution 1386, XIV)
13. UNDRC 1959, Principle 2
14. *ibid,* Principle 4
15. *ibid*
16. *ibid,* Principle 5
17. *ibid,* Principle 8

The 1959 Declaration was not be implemented by most of the countries because it consist mere good intentions. There was no mechanism to compel the state to enforce it. Apart from this, the Declaration considered the children as a matter of an investment. It never talked about their autonomy, right to participation etc. It leaves the child as an object of concern, rather than a person with self-determination.

iv. International Covenant on Economic, Social and Cultural Rights[18],

International Covenant on Economic, Social and Cultural Rights (ICESCR) considers the human right of as a right to the highest attainable standard of health[19]. This covenant is comprehensive document which recognises protection of right to health. It provides that "the right of every person to the enjoyment of the highest attainable standard of physical as well as mental health". It is significant that the Covenant is not restricted to physical health but includes mental health also which has often been neglected. Though this covenant does not speak specifically for protection of right to health to children but includes children in its purview.

v. Convention on the Rights of the Child[20]

The Convention on the Rights of the Child is first comprehensive document for the protection of human rights of child in all respect. It is an unparallel document in the sense that it not only recognises the rights, protect it but ensures the right to participation of child. This signifies a distinctive change in the position of the child, who as a rights bearer is accorded inalienable rights as an autonomous person, whom nobody, not even parents, has ownership over[21].

In the Convention on the Rights of the Child, the term child is defined as a person who has not attained the age of eighteen years, thereby extending

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18. 1966
19. ICESCR, Art. 12
20. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49
21. Brigitta Rubenson, Working Children's Experiences And Their Right To Health And Well-Being, p.13 available at <http://openarchive.ki.se/xmlui/brtstream/hendle> (visited on 7th February 2016)

childhood to include also adolescence. Under this convention right to health and development is interpreted in terms of right to life. It provides that that every child is conferred the inherent right to life without any discrimination[22]. It further provides that states parties shall provide and ensure the maximum extent possible of the survival and development of every child[23]." The convention considers the right to health in an inclusive manner which includes not only prevention from danger, health promotion with curative and rehabilitative services, but also to a right to grow and develop to their full potential and to live in those conditions that enable a person to attain the highest standard of health. A holistic approach to health protection places the realization of children's right to health within the legal framework of international human rights obligations. The convention provides that states parties recognize the right to health of the child with enjoyment of the highest attainable standard of health which is necessary[24]. States parties shall also ensure that there should not be any child who is deprived of right of access to such health care and medical services etc. It further provides that states parties shall recognize the full implementation of this right. The state parties shall also ensure the development of primary health care to curb diseases and malnutrition. The convention provides appropriate health care for mothers at pre-natal and post-natal stage. It provides that states parties shall take all effective measure to abolish traditional practices which are prejudicial to the health of children. It also directs to the states parties to promote and encourage international co-operation among the countries in order to achieve full realization of the right which are conferred in this convention. Towards this end, the special care should be taken by countries to cater the needs of developing countries[25].

vi. United Nations Children's Emergency Fund[26]

The United Nations Children's Emergency Fund (UNICEF) is a body for protection of child rights and it is established by United Nations. This primary object of this organization is to ensure humanitarian treatment to

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22. UNCRC 1989, Art. 6
23. *ibid*
24. *ibid,* Art. 24
25. *ibid*
26. The United Nations General Assembly created UNICEF on December 11, 1946.

children and provide developmental assistance to children and mothers especially in developing countries. UNICEF is among the members of the United Nations Development Group and its Executive Committee also. In its programmes, it provides emergency food and healthcare to children who are victims of War in different countries. It became a permanent body of the United Nations Organization and its name was also changed. It has a large global health presence in the world and strong collaborations with different governments and non-governmental organizations at national and community levels.

vii. World Health Organization[27]

In order to protect health of human beings, the United Nations created a special agency which is concerned with international public health known as World Health Organization (WHO). The WHO is a member of the United Nations Development Group. The constitution of the World Health Organization had been signed by 61 countries of this world on 22 July 1946[28]. It is an inter-governmental organization which works together with its member states usually through the Ministries of Health of the countries. The WHO Constitution affirms that the enjoyment of the highest attainable standard of health is a fundamental human right of a person. The constitution of WHO confers extensive powers to establish health-related standards. Exercising these powers, the WHO has adopted the International Code of Marketing of Breast-milk Substitutes[29] with other treaties and conventions, among which Framework Convention on Tobacco Control[30] was also adopted. The World Health Organization is under obligation to provide leadership on global health matters, prepare health research agendas, setting norms and standards for protection of health, to articulate evidence-based policy options, providing technical help and support to needy countries and monitoring and assessing health trends globally[31].

India became a party to the WHO on 12 January 1948. The first session of the WHO Regional Committee for South-East Asia was organised on 4-5

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27. Established on 7 April, 1948 and its headquartered is in Geneva, Switzerland.
28. http://en.mwikipedia.org/wiki/WHO, (visited on 20th February 2016)
29. 1981
30. in 2003
31. www.saro.who.int (visited on 21st February 2016).

October 1948 in the office of Ministry of Health, Government of India. It was inaugurated by then prime Minister of India, Pandit Jawaharlal Nehru. India is also a Member State of the WHO South East Asia Region.

II. RIGHT TO HEALTH OF CHIDREN UNDER CONSTITUTITON OF INDIA

Right to health is a fundamental right under Constitution of India 1950. It is not the responsibility of medical profession to protect the right to health of society but also lies in public functionaries such as legislators, administrators and judges[32]. According to the Seventh Schedule of Constitution of India, public health of citizen of India is subject matter of state government hence item 'public health' is kept in the State List. The Central Government have jurisdiction over international health matters, assisting and coordinating State activities for protection of health, establishing standards for its protection and promoting research and professional education. Most other health matters lies in the hand of state and their health departments. The state has responsibility in relation to mental health, food adulteration, drugs and vital statistics[33].

Right to health is not included directly in Constitution of India, neither in preamble nor as a fundamental right. Even though, the Constitution of India protects the right to health indirectly by virtue of preamble and various Articles of Constitution of India. It confers this duty on state government to render social and economic justice. The object of preamble has been amplified and given importance in the Directive Principles of State Policy[34]. The Constitution gives directions to the state to take measures to improve the condition of health care of the people.

i. Health of Children in the Preamble

The Preamble to the Constitution of India, secures to all its citizens social and economic justice. It guarantees the social political and economic

32. Address by Justice K. G. Balakrishnan, Chief Justice, Supreme Court of India, at "National Seminar on the Human Right to Health", (Organized by the Madhya Pradesh State Human Rights Commission at Bhopal), September 14, 2008, p.1, available at < supremecourtofindia.nic.in/speeches/speech2008.htm> visit on 2 March 2016
33. http://shodhganga.inflibnet.ac.in/bitstream/10603/43767/14/14_chapter%205.pdf
34. Hemant Kumar Varun, Right To Health, available at <www.legalindia.com>

justice without any discrimination. The Preamble to the Constitution refers to social, economic and political justice and also ensures equality of status and opportunity. Under the term social justice, access to health care facilities is included and the principle of justice also ensures the equality of access to these facilities. In a similar manner, the equality of status and opportunity may be taken to ensure equality of practice of the medical profession, access to the medical educational institutions etc. in order to enhance the citizens' socio-economic and health status[35].

ii. Right to Health of Children under Fundamental Rights

The Constitution of India has not expressly incorporated the term right to health i.e. right to enjoy the highest attainable standard of physical and mental health under any article in part IIIrd of Constitution of India. Under Article 21 of the Constitution of India, right to life has been guaranteed but the word 'Health' is not mentioned specifically in this article. However, it is the Indian judiciary which has enhanced the scope of Article 21 and included right to health as fundamental right, an integral part of right to life under Article 21 of the Constitution. Article 21 deals with 'Right to Life', which is a fundamental right and justiciable in courts. The Supreme Court of India has observed :

> "that the right to life under article 21 includes the right to live with human dignity and along' with the bare necessities of life such as adequate nutrition, clothing and shelter"[36].

The judiciary has expressly included the right to health under the right to life. In fact, the judiciary has gone far away to give the meaning of health and has substantiated the meaning of the right to life[37]. This interpretation of Article 21 by the apex court is an important development in Indian Constitutional jurisprudence. The Supreme Court imposed positive obligations upon the state to ensure better health. The right to health as included under Article 21 by judicial act relates protection of public health. The Supreme Court also held that preservation and protection of public health must be

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35. Prof. P. R. Panchmukhi, "*Health and The Indian Constitution*", CDMR Monograph Series No. 5, p.4
36. *Francis Coralie v. Union of India* (1981) 1 SCC 608.
37. Asha Bajpai," *Child Rights in India*", 3rd Ed. 2017, Oxford University Press, New Delhi.

paramount importance of the state.[38] The right to live with human dignity is derived from the right to life under Article 21 of constitution and the Directive Principle of State Policy and therefore includes protection to right to health[39]. Attending to public health of person in our opinion, therefore, is of high priority under constitution perhaps the one at the top[40]. The Constitution of India protects the right to health and medical care in case of children as a fundamental right[41] as it essentially makes the life of a person meaningful and purposeful with dignity of that person. The right to life protected under Article 21 of the Constitution not only includes protection of the health of children but mean more than mere animal existence. It has very broad meaning of life which includes right to earn livelihood, to ensure better standard of life, hygienic conditions at the workplace and leisure. The court held that "the state will protect right to health, strength, and vigour of the children worker during the period of employment, and leisure and health as basic essentials for a healthy and happy life[42].

iii. Protection of Health of Children under the Directive Principles of State Policy

The constitution framers did not include the term 'right to health' expressly in part III of the Indian Constitution rather they imposed this duty on the state to ensure social and economic justice. Under Part IV of the Constitution of India, which contains the Directive Principles of State Policy (DPSP), the duty to protect the health of children is imposed the states. The objective of protection of health of children is derived from the Preamble to the Constitution of India, in which it seeks to secure for all its citizens justice-social and economic. The constitution provides a framework for the achievement of these objectives provided in the Preamble. These objectives of Preamble has been amplified and elaborated in the DPSP[43]. The state is under obligation to secure a social order for the promotion of welfare of the people including children[44]. Article 39(e) and (f) are specifically relating to

38. *Parmanand Katara v. Union of India* (1989) 4 SCC 286.
39. *Bandhua Mukti Morcha v. Union of India* AIR 1997 SC 2218
40. *Vincent Panikulangara v. Union of India (*1987) 2 SCC 165
41. Constitution of India 1950, Art. 21
42. *Consumer Education and Resource Centre v. Union of India* (1995) 3 SCC 42
43. s*upra note 29*
44. Constitution of India 1950, Art. 38

protection of health which is available to children also. The Constitution of India expressly provides that the state shall, in particular, direct its policy towards securing and promoting the health of children[45]. Further the state is under duty to raise the level of nutrition and the standard of living of its people including children[46]. Article 39 provides that the "state shall direct its policy towards securing the health and strength of workers including men and women and the tender age of children are not abused". It also provides that the state is under obligation that citizens are not forced by economic necessity to enter into employment which is unsuited to their age or strength. It further provides that children should be given open opportunities to excel. The child must be provided facilities to develop in a healthy manner. It is necessary to ensure that childhood and youth are fully protected against any kind of torture, exploitation including moral and material abandonment. Article 39 (e) and (f) are evident that the Constitution framers were knowing that number of worker children are exploited in India hence they ensured the protection and safeguard to the interests and welfare of worker children at the time of drafting of the Constitution. Bhagwati J observed that:

"It is obvious that in a civilized society, the very importance of child welfare cannot be over emphasized because the welfare of the whole society, its growth and development depends upon the protection of health and well being of its children. Children are a supremely important national asset and the future well being of any nation depends upon how its children grow and develop in a healthy manner[47]."

The Supreme Court of India held that:

"A child is a national asset of any contry and therefore, it is the duty of the State to take care of the child with a view to ensure the means for full development of its personality."

In order to strengthen the protection of children, Clause (f) was modified by parliament of India through 42nd Constitution Amendment Act, 1976 with a view to emphasize the constructive role of the state[48]. The Constitution provides that "within its economic capacity and development the state shall make effective provisions for securing the right to work, right to education

45. *ibid,* Art. 39(e) and (f),

46. *ibid,* Art. 47

47. *Lakshami Kant Pandey v. Union of India* AIR 1984 SC 469

48. *Sheela Barse v. Union of India* AIR 1986 SC 1786

and public assistance in cases of unemploymen*t"*. Hence, these provisions provide that the state is required to provide and protect the public health and medical care preventives as well as curative and promotional services in the field of health for the children also[49].

Article 47 of constitution imposes duty on the state to raise the level of nutrition and the standard of living and to improve public health of children. In India, all the citizens do not have the same level of nutritional status due to their historical, socio and economic conditions hence the status of health is poor especially in case of children. It is evident that the children of the socially and economically deprived part of society are highly prone to various diseases due to the poor level nutrition. The constitution provides that "the state shall endeavour to protect and provide the pollution free environment for good health[50]." This article was inserted in the constitution by the 42nd Amendment Act 1976. It obligates the state to endeavour and protect the environment and to safeguard the forest, rivers and wildlife of the country. Art 39 (a)[51] of constitution of India imposes duty on the state to secure the health of the children and to protect and improve the environment of the country [52]"

iv. Health under Fundamental Duties

Part IV A of Constitution of India imposes fundamental duties on states that every citizen of India has the individual duty to protect and improve the natural environment which includes forests, lakes, rivers and wild life and to have compassion and love for living creatures.[53] In this sense, there is a joint responsibility from the state as well as the citizens towards the maintenance of human and animal health and also the long term issues relating to the improvement in the health conditions of the human beings and the animals.

III. RIGHT TO HEALTH OF CHILDREN AND NATIONAL FOOD SECURITY ACT 2013

In chapter IV of Constitution of India, Directive Principles of State Policy (DPSP) imposes certain duties in favour of citizens of India. Among

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49. *Supra note 39,* Art. 40
50. *ibid,* Article 48A
51. read with Art. 47 and 48-A
52. *M.C. Mehta v. Union of India* JT 2002 (3) SC 527
53. 51-A (g), Constitution of India 1950

these duties the state is under obligation to raise the level of adequate nutrition for the children including drug addicted and neglected children. The state is also enhancing the standard of living and improvement of public health of drug addicted and neglected children. The state shall also make efforts to prohibit the supply of intoxication drinks and drugs. These intoxicated drink and drugs are harmful to the health of children[54]. These mandates given under DPSP of Constitution of India enable the state to prepare a national policy and to legislate on public health[55] and food[56] to remove inequalities in various spheres of life. In order to remove infirmities and to ensure right to food to children, The Right to Food Bill was introduced in the Parliament of India. The National Food Security Ordinance was brought to cater the needs of the children in 2013. Later on National Food Security Act, 2013 which was passed in both Houses of Parliament[57], with the objective to cater the need of food and nutritional security and to ensure access to quality food with adequate quantity at affordable prices.

The National Food Security Act, 2013[58] also called as 'The Right to Food Act" has primary objective to provide subsidized food grains to needy people of India. This food security law aims to distribute the food for 75% of the rural and 50% of the urban population at subsidized rates [59]. The rest of the rural and urban population is under excluded category.

This Act aims to cover 2/3rd of the total population of India, under two categories of beneficiaries. First is Antodaya Anna Yojana[60] (AAY) households and second is Priority Households (PHH). The Food Security Act provides that children with the age of six months to six years are entitled for fulfilment of his nutritional needs without any charge through the local *Anganwadi* so as to meet the nutritional standards provided in Schedule II of the Act.[61] The

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54. *supra note 45,* Art. 47
55. *ibid*, Seventh Schedule, Entry 6 "Public Health and sanitation" in State List
56. *ibid,* Entry 23 "social security and social insurance" in Concurrent List
57. on 10 September 2013
58. Received assent of the President on the 10th September, 2013, NO. 20 of 2013
59. Seema Bathlaa, Paramita Bhattacharyab and Alwin D'Souza, "*India's National Food Security Act 2013: Food Distribution through Revamped Public Distribution System or Food Stamps and Cash Transfers*?" Agricultural Economics Research Review Vol. 28 (No.1) January-June 2015.
60. The Antyodaya Anna Yojana is a scheme launched by the Central Government in 2000.
61. The National Food Security Act 2013, sec 5(1)(a)

Act also provides that in the case of children up to class VIII or with the age of six years to fourteen years, whichever is applicable, shall have every one mid-day meal without any charge except on school holidays to meet the nutritional standards specified in Schedule II. It shall be available in all schools run by local bodies, state government and government aided schools.[62] The state government shall identify and provide meals without any charge to children who are victim of malnutrition, so as to meet the nutritional standards specified in Schedule II through *aganwadis*.[63] If the state government is unable to supply the required food grains or meals to entitled persons under Chapter II, such persons are shall receive food security allowance.[64] The state government shall identify the households which are to be covered under the Antyodaya Anna Yojana to the extent specified under sub-section (*1*) of section 3 within the number of persons determined under section 9 for the rural and urban areas[65]. The state government shall prepare a list of the identified eligible households and shall notify it in the public domain.[66] At the time of implementing the provisions of this Act and the schemes, the central government and the state governments shall give special focus to the needs of the vulnerable groups especially who resides in remote areas and other areas which are difficult to access for ensuring their food security.[67]

The Act categorizes the population into two groups first is Antyodaya Anna Yojana group which is priority group and second is an excluded category. The AAY category population shall be about 10 per cent of all households as per existing norms. The AAY group which is poorest of the poor group will receive 5 kg of food grain per person in every month.

The aim of the Act is to cover up to 75% population of rural areas and 50% population of urban areas. The Act confers uniform entitlement of 5kg food grains to each person in every month under TPDS. However, since Antyodaya Anna Yojana households are from poorest of the poor persons, hence they shall get 35 kg per household per month.

The Act includes the Midday Meal Scheme, Integrated Child

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62. *ibid, s*ec. 5(1)(b)
63. *ibid, s*ec. 6
64. *ibid, s*ec. 8
65. *ibid, s*ec. 10(1)(a)
66. *ibid, s*ec. 11
67. *ibid, s*ec. 30

Development Services scheme and the Public Distribution System. The Act also recognizes maternity entitlements. The Act has special provisions for nutritional support of women and children. The Act ensures meal to pregnant women and lactating mothers during pregnancy and six months after the childbirth. The Act provides that Children up to 14 years of age will be entitled to nutritious meals as per the prescribed nutritional standards. If the state government is unable to supply entitled food grains or meals, the beneficiaries will receive food security allowance. The centre government is under obligation to provide food grains to states governments based on the population to be covered in each state. In case where the annual allocation of food grains to any state government is less than the prescribed quantity of food grains, it shall be protected at those prescribed prices as fixed by centre government. The Act fixes the quantity of allocation of food grains to various states. The Act also provides that the centre government will ensure the required funds to the states when the supply of food grains falls short.

IV. CONCLUSION

Health of children has been a concept of international concern before the establishment of United Nations. In Britain the lady Eglantyne Jebb raised the voice for recognition of rights of children and established the organization" Save the Children". She made efforts to recognise the rights of the children at international level. The Geneva Declaration is an act towards this end in which five principles been adopted for protection of rights of children including right to health. After the establishment of United Nations the Declaration of Human Rights 1948 expressly protected the right to health of children. It was followed in Declaration of Rights of Child 1959. But these Declarations were not binding in nature hence the United Nations Convention 1989 was adopted on 30th anniversary of UNDRC 1959 which comprehensively recognised all rights of children and also protected the right to health as human rights. The World Health organization has developed the concept of health and expressly provided that the term health does not mean mere absence of any disease but it is complete wellbeing of person in physical, mental and social form. This definition has been amplified by considering the health beyond pathology-based perspective. Under the compliance of international provisions, the constitution of India has protected the right to health of children including drug addicted and neglected children. The Seventh Schedule of Constitution of India provides that public health of citizen of India is subject

matter of state government hence item 'public health' is kept in the State List. Though right to health is not included directly in any Constitution of India yet it is protected in preamble, fundamental rights and directive principles of state policy. The Indian judiciary has given wide interpretation of these provisions and held that Right to Life under Constitution also includes protection of the health of children. In order to fulfil this obligation the Parliament of India enacted the National Food Security Act, 2013 with the objective to cater the need of food and nutritional security to enrich the health. But the enforcement of the provisions of this Act is not satisfactory especially in case of children.

ABOLITION OF TRIPLE TALAQ IN INDIA: A CRITICAL REVIEW

HARUNRASHID A. KADRI*

ABSTRACT : Triple talaq had been at the epicenter of controversy in India for decades due to a demand for its abolition because it is unilateral, arbitrary, and violative of women's rights. On the other hand, there was a demand for its retention because it is their freedom of religion. The Supreme Court of India scrutinized the validity of triple talaq *(talaq-e-biddat)* and declared it void, and subsequently, the Parliament of India enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019,to enforce the judicial decision and to penalize the pronunciation of triple talaq by making it a cognizable & non-bailable offence. The present paper has critically examined he triple talaq's status in Sharia Law, its abolition by the Supreme Court, and subsequent abolition and criminalization by the Act of Parliament. The paper concludes that the abolition of *talaq-e-biddat* has brought the Muslim Law at par with Holy Qur'an and the Hadith and does not violate freedom of religion. It further concludes that the provisions of the Muslim Women (Protection of Rights on Marriage) Act, 2019 regarding punishment and bail are unreasonable and violative of Fundamental Rights.

KEY WORDS : Abolition of Triple Talaq, Criminalization of Triple Talaq, Instantaneous Talaq, Muslim Law of Divorce, Women's Rights.

I. INTRODUCTION

Talaq or divorce is the most detestable of permitted things[1] and most

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1. *The Qur'an, Chapter II, Verse 226-240.*

disliked by Almighty, however, it's a permitted.[2] It indicates that talaq has been discouraged by the Qur'an, although it is allowed in exceptional circumstances only. In muslim law, there are various modes of talaq (divorce) practiced by the husband and wife. Triple talaq is one of such modes practiced in certain parts of the country as well as in neighboring countries, namely Pakistan and Bangladesh where it has been abolished in the year 1961.[3] Triple talaq or '*Talaq-e-biddat'* is a mode of divorce by a muslim husband unilaterally pronouncing the word "talaq" or "*I Talaq You,*" thrice instantaneously, making the divorce irrevocable. This talaq may be given either in the wife's presence or in her absence, orally or in writing or through any other means, including electronic media. The triple talaq issue remained at the centre of controversy in India for decades, particularly from *Shah Bano's* judgment.[4] Although, triple talaq is treated as the most unapproved form of divorce and hence called -*biddah,* i.e. innovation in religion[5]. It was subjected to severe criticism because it is arbitrary,[6] irrevocable except through *halala* marriage and hence treated violative of women's human rights.[7]

The triple talaq issue was scruitinized by the Supreme Court in various cases, and the apex court declared such practice as void and unenforceable.[8] After that, the Parliament of India enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019 to abolish and criminalize the practice of

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2. Christel Gschwandtner, '*The Status and Position of Women In Islam'*, (Research Report, 25 November 2014) <http://radicaltruth.net/uploads/pubs/TheStatusAndPositionOfWomenInIslam.pdf>
3. Yasmin Taslima& Azad Emraan, '*The Ban on Triple Talaq: The Legal Context of Bangladesh and Pakistan* (Blog, 27 January 2019). <http://southasiajournal.net/the-ban-on-triple-talaq-the-legal-context-of-bangladesh-and-pakistan/>. The ban on triple talaq effected in Pakistan in the year 1961 has been continued in Bangladesh after partition in 1971.
4. *Mohd. Ahmed Khan* v. *Shah Bano Begum*AIR 1985 SC 945
5. ImamMuslim,*Sahih Muslim Hadith* (CreateSpace Independent Publishing Platform, Online, 2017) book 9: Kitab-Al-Talaq. <http://www.iium.edu.my/deed/hadith/muslim/009_smt.html>
6. Charles Hamilton, *The Hedaya* (Trans) (Kitab Bhawan, New Delhi, 1985) *c/f* Wasim Ali Mohd, '*Dissolution of Marital Tie by a Muslim Wife: Rights and Limitations* (Aligarh Muslim University, 1999).73<https://core.ac.uk/download/pdf/144509123.pdf>
7. Rashid Omar, 'Triple talaq a cruel and most demeaning form of divorce practiced by Muslim community: HC', *The Hindu* (Chennai, 8 December 2016) <https://www.thehindu.com/news/national/Triple-talaq-a-cruel-and-most-demeaning-form-of-divorce-practised-by-Muslim-community-HC/article16776863.ece1>

talaq-e-biddat by making the pronouncement of such talaq as a cognizable offence. In this paper, an attempt has been made to critically examine the issues relating to triple talaq.

II. CONCEPT AND HISTORY OF TALAQ IN ISLAM

i. Status of *Talaq-E-Biddat* in Sharia

According to the commandments of the Qur'an, talaq should be exercised strictly as per the procedure mandated in it requiring for resolution of the conflict between husband and wife, including the compulsory arbitration proceedings.[9] The verses of the Quran explicit that talaq is permissible only when all preliminary steps have been exhausted to reconcile the dispute; however, it could not be resolved, and there is a complete breakdown of the marriage. It should be adopted only when there remains no option other than the separation. The procedure and steps are laid down by the Quran to follow while giving talaq: (1) Talaq should be pronounced only during the period of purity, i.e. *tuhr*;[10] (2) Both the parties should continue to stay together for the period of *Iddat,*[11] giving them further opportunity to settle and reunite; (3) They may revoke the talaq by merely rejoining again anytime during the period of *iddat*, or (4) They may remarry after the lapse of *Iddat* period. Based on the above discussion, it may be stated that the Quranic law creates various avenues for reconciliation and revocation of divorce before and after the completion of *Iddat,* making the option of talaq by a husband a last resort.

Talaq-e-biddat is practiced mainly by the followers of the Hanafi School of thought.[12] This mode of divorce does not find any place in the text of the Qur'an or *Haddith* and is considered as a disapproved form of talaq. The term *biddat* itself suggests it as innovation and in Islam, any innovation is

8. *Shayra Bano* v. *Union of India* (2017) 9 SCC 1
9. *Qur'an, Chapter 65, Verse 1; Chapter II, Verse 226-240; Chapter II, Verse 231; Chapter 65, Verse 2*
10. Tuhr is the purity after menstruation. It is the period of cleanliness i.e. the period between the two menses without having sexual intercourse.
11. *Iddat* is a waiting period which a Muslim woman is bound to observe after the dissolution of her marriage before she can lawfully marry again. For detailed description of *iddat*,
12. Shahzad Iqbal Sham, 'Some Aspects of Marriage and Divorce in Muslim Family Law', (Research Paper, 25March 2015

considered not good.[13] However, the Hanafi School's followers justify it based on some extraneous source of evidence.[14] The talaq in general has been strongly discouraged in the original Islamic religious texts. However, *talaq-e-hasan* or *talaq-e-ahsan* an approved form of talaq is permitted only in rare and in exceptional circumstances under the guidelines given under the Qur'an.[15]

This kind of talaq has been subjected to severe criticism.[16] There is a firm belief amongst the Hanafi Muslims that, once three pronouncements are complete, the marriage between them comes to an end irrevocably closing all doors of reunion between them, unless the divorced wife undergoes a second marriage with a new man and that man divorces her after the consummation of the wedding, called as "*halala*" marriage.[17]

There is a limit on the revocation of talaq by rejoining during the *iddat* or by remarriage after the *iddat.* Such revocation of *talaq* is possible only two times (occasions) in life. However, such death or divorce should be part of a natural course of occurrence or conduct and not pre-decided or pre-planned. Any transgression of these limits set by Allah is considered a sin.[18] Therefore, it is crystal clear that talaq becomes irrevocable only after three independent talaqs given at different occasions during their lifetime between the same parties, and any transgression will amount to a gross violation of the commandments of the Quran.[19]

Therefore, it may be rightly concluded that when three talaqs are made at three different situations followed by separate *iddat,* it makes the third

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13. Imam Muslim, *Sahih Muslim Hadith* (CreateSpace Independent Publishing Platform, Online, 2017) book 9: Kitab-Al-Talaq, Number 3601.
14. Nehaluddin Ahmad,' A Critical Appraisal of 'Triple Divorce' in Islamic Law' (2009)23(1) *International Journal of Law, Policy and the Family*53-61
15. Abu Dawood, 'Sunan Abu Dawood - Kitab Al-Talaq', 2172-2173, <https://www.searchtruth.com/book_display.php?book=12&translator=3&start=0&number=0>; See also *Holy Qur'an, Chapter II, Verse 226-240*
16. Pradeep Saxena, 'Triple talaq in one go worst form of divorce: scholars' *Hindustan Times*(Blog, 21 September 2014) <http://www.hindustantimes.com/india-news/triple-talaq-in-one-go-worst-form-of-divorce-scholars/article1-1266854.aspx>
17. Shahzad Iqbal Sham, 'Some Aspects of Marriage and Divorce in Muslim Family Law', (Research Paper, 25March2015) <http://docshare03.docshare.tips/files/21020/210201460.pdf>
18. *The Qur'an, Chapter 65, Verse 1*
19. Peerzada, Shams, *Triple Talaq in the Light of Quran and Sunnah,* (Idaradawat ul Quran, Mumbai, 1996) 5

talaq irrevocable. It is not the third pronouncement that makes the talaq irrevocable, but the third divorce or *talaq* (to mean three divorces in whole life) makes it irrevocable, and both the parties are free to marry a new person. However, suppose the new husband dies by natural death or divorces her in the natural course of conduct by following the procedure laid down by the Holy Quran and the Hadith. In that case, she may remarry her previous husband after the *iddat* period as her second marriage has come to an end naturally; the remarriage with the previous husband is called a *halala* marriage. However, the practice of marrying a new man after the three pronouncements of divorce in one sitting by the first husband, with a pre-condition of divorce to be given by the second husband immediately after the consummation of marriage to make way for remarriage with the previous husband, has been started and was being considered as a valid *halala*. The issues involved in such *halala* marriage are separately discussed elsewhere.

In the instant triple talaq, all three talaqs are pronounced instantaneously in one sitting, without complying with other requirements mentioned above. In this situation, the reconciliation attempts have been skipped, or the talaq might not have been given during the *tuhr*. It might have been expressed without application of mind and a thought process—the chances of not complying with the commandments of the *Qur'an* and *Hadith* are apparent. Here, even the first pronouncement is incorrect as it is not in the period of "tuhr' and not in accordance with the principles of Muslim Law and hence it has no effect; therefore, the subsequent pronouncements are null and void. In another situation, if the first pronouncement is given as per the principles and procedure of the Holy Quran & the Hadith, it is one valid talaq, and subsequent pronouncements are only the confirmation of the first pronouncement. Hence, all three pronouncements together are counted as only one, and it always remains 'revocable'. This type of talaq is *talaq-al-ahsan* and is a valid form of talaq. A further discussion on this form of talaq is given in the subsequent paragraphs.

Hence, it is imperative to conclude that the 'triple talaq or '*talaq-al-biddat*'[20] given by husband in three pronouncements of *talaq* in a single

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20. Biddat or Biddai means innovation or new invention in the matters of religion. See for details AbuIyaad, 'A Concise Explanation of the Shariah Definition of Bidah and Its Proofs From the Prophetic Sunnah (Blog, 25 March 2015) <http://www.bidah.com/articles/rwmef-explanation-of-the-shariah-definition-of-bidah-and-its-proofs.cfm>; See also <www.sahihmuslim.com/sps/sp.cfm?secID=BDH&loadpage=displaysection.cfm> (Retrieved 25 March 2015).

instance and considered 'irrevocable' immediately has no basis in the holy scripts of Islam, namely, the *Qur'an* and the *Hadith*.[21] And it is nothing but innovation in the religion, which has been strongly forbidden by the *Qur'an* and the *Hadith* and hence invalid and bad in law.[22]

Talaq-e-ahsan is the most approved form of divorce in Islam and is possible when all the reconciliation attempts are failed. When pronounced, this form of talaq is considered one talaq, and it is revocable by rejoining immediately or by remarriage after the lapse of the *iddat* period. When such talaq has been given thrice one by one after revoking the talaq two times in their lifetime, the third talaq is considered irrevocable. Once the talaq becomes irrevocable, they have no option of revoking the talaq by rejoining or remarriage, except when she marries another man and that man divorces her after the consummation of marriage or he dies naturally. The remarriage between the woman and the first husband is possible only after the woman's second marriage and the subsequent divorce or death, called *halala*. The pre-condition of *halala* for remarriage is to protect the woman from harassment by divorcing and repeatedly remarrying an unlimited number of times. By inserting this condition of *halala*, a restriction has been imposed on multiple divorces and subsequently repeated remarriages, with a sword hanging on the wife that she may be divorced further. However, the condition of *halala* has also been misused at her cost, putting her in further worse situations.

Even the *halala* marriage has been misunderstood to mean that it is a temporary marriage with the pre-condition of divorcing her after consummating the marriage. The restriction of *halala* has been severely misused, putting women in the worse situations by requiring them to marry another person temporarily with the promise to divorce after consummation of marriage so that they can marry again with the first husband. This particular scenario has violated two fundamental principles of Sharia. Firstly, muslim

21. Peerzada, Shams, *Triple Talaq in the Light of Quran and Sunnah,* (Idar adawat ul Quran, Mumbai, 1996) 5.
22. An-Nasaa'ee (1/224) from Jaabir bin Abdullaah and it is Saheeh as declared by Shaikh ul-Islaam Ibn Taymiyyah in Majmoo' ul-Fataawaa (3/58), <http://www.sahihmuslim.com/sps/sp.cfm?secID=BDH&loadpage=displaysection.cfm>; See also Bukhaaree, '*Saheeh Hadith*, (12/41) and Imam Muslim, *Saheeh Muslim Hadith*, (9/140), <http://www.sahihmuslim.com/sps/sp.cfm?secID=BDH&loadpage=displaysection.cfm?> (Retrieved 25 March 2015).

marriage is permanent. It cannot be temporary[23] & cannot be performed with the pre-condition of divorcing after marriage consummation. Secondly, women's consent for marriage should be a free consent to enter into a sacred marital knot for life and not for getting the divorce from the groom immediately after the consummation of marriage to marry with the previous husband.

In many cases, husbands give talaq to wives on the spur of the moment by pronouncing the word 'talaq' three times simultaneously, regretting later for committing mistakes and expressing their will to reunite.[24] However, the religious clerics consider the three pronouncements given at one instance as three talaqs and treat it non-revocable except by undergoing *halala*. In such a case, the woman had to be convinced to temporarily marry another man with an unwritten condition that he would divorce her after sexual relations. And in this way, the new and mischievous practice of *halala* was brought into existence as a side product of triple talaq, ignoring the original objective behind the restriction of *halala* on multiple revocations and talaq. More importantly, this was being done under the guise of the religious requirement for remarriage with the first husband; hence, the woman had to be convinced or indirectly forced to consent to such temporary marriage.

III. JUDICIAL SCRUTINY OF TRIPLE TALAQ

The issue of triple talaq reached the High Courts and the Supreme Court of India through various cases, of which a few are discussed here.[25] In *Dagdu Chotu Pathan v. Rahimbi Dagdu Pathan,* the Mumbai High Court (Aurangabad Bench) refused the petitioner's claim of divorce (talaq) made in the maintenance pleadings and held that the factum of talaq is required to be proved in the court of law along with the conditions precedent, including the valid reasons there for. It maintained that the same is required to be proved by evidence, both oral and documentary. Indirectly, while adopting the most

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23. Mut'a marriage is valid only in Shias; however it is different than halala marriage. Mut'a is not performed by women for marrying with previous husband.
24. Brendan Dabhi, 'Man regrets triple talaq, returns to wife, but neighbours label relationship as illicit' *The Mirror News* (Online, 6 September 2017) <https://ahmedabadmirror.indiatimes.com/ahmedabad/cover-story/man-regrets-triple-talaq-returns-to-wife-but-neighbours-label-relationship-asillicit/articleshow/60383060.cms>; See also Arjum and Bano, 'Gave talaq in a fit of rage, now regret act, *Times of India*(Online, 7 April 2017). <https://timesofindia.indiatimes.com/city/kanpur/gave-talaq-in-a-fit-of-rage-now-regret-act/articleshow/58058275.cms>

approved form of talaq in the Sharia law, the High Court turned down the age-old practice of triple talaq given without reasons and without steps for reconciliation on the ground that this type of talaq lacks support from the Quran.[26]

In *Shamim Ara v. Union of India,* the Supreme Court, while dealing with the maintenance matter, held that the claim of the previous talaq taken in the written statement could not be treated as a valid pronouncement of talaq by the husband. It has held that triple talaq given capriciously and whimsically by the husband to his wife is arbitrary and invalid under the Sharia Law. It went further to adopt the Quranic version of talaq as a valid mode of divorce.[27]

From the above two judgments, it is evident that *talaq-e-biddat* is no more a valid mode of divorcing wife under the Muslim Law, at least from Shamim Ara's judgment in 2002.

The issue of triple talaq came for discussion again in *Shayra Bano* v. *Union of Indai*[28], in this case, the validity of triple talaq, polygamy and *nikahhalala* were challenged before the Supreme Court through a writ petition filed by a victim of triple talaq Shayra Bano and others, on the ground that the above three practices are violative of the Fundamental Rights under Articles 14, 15, 21, 25 of the Constitution. The court discussed the previous judgments, including *Shamim Ara; h*owever, refused to consider it as a *ratio decidendi* as the court, in that case, was adjudicating the dispute regarding maintenance under 125 of the Code of Criminal Procedure 1973, and the validity of triple talaq was not the issue before the court.

The decision of the five-judge bench of the Supreme Court in *Shayra Bano* was divided. The court could not rule on the constitutional validity of personal law, however, the court could gather the majority to declare the triple talaq practice as void. Khehar and Abdul Nazir JJ held that triple talaq is an 'integral part' of religion and is constitutional. It is difficult to digest such a view when there is not a single verse from the Qur'an or a single line from Hadith that supports triple talaq. Uday Lalit and Rohinton Fali Nariman JJ

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25. Mohd Wasim Ali, *Dissolution of Marital Tie by a Muslim Wife: Rights and Limitations* (Aligarh Muslim University, 1999)64-98<https://core.ac.uk/download/pdf/144509123.pdf>
26. *DagduChotu Pathan* v. *RahimbiDagdu Pathan*2002 (3) Mh LJ 602
27. *Shamim Ara v Union of India*, 2002 (7) SCC 518
28. *Shayara Bano v. Union of India* (2017) 9 SCC 1

observed that triple talaq violates the Fundamental Rights under Article 14 of India's Constitution. The Supreme Court further held that "the 1937 [Muslim Personal Law (Shariat) Application] Act, 1937 insofar as it seeks to recognize and enforce triple talaq, is within the meaning of the expression "laws in force" under Article 13(1) of the Constitution of India and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq."[29] However, this view is based on assumptions rather than reality. Surprisingly, this decision considers triple talaq as part and parcel of the Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter called as the "Shariat Act).

In contrast, the Shariat Act merely recognizes the 'Muslim Personal Law' as a whole, is applicable to the Muslims in their matters relating to marriage, succession, etc. It does not codify the muslim law as such. Moreover, this Act confers superiority of the Muslim Personal Law (Sharia) over the prevailing customs and usages. Sharia is the law based on the religious scripts of Islam, and it is derived mainly from the Quran and the Hadith.[30] If one needs to find the authority of triple talaq in the Shariyat, he has to look into the Qur'an or the Hadith. Therefore Courts should take into consideration the Qur'an and the Hadith while ascertaining the authority and validity of the triple talaq. The status of triple talaq in the Qur'an and the Hadith as discussed in the preceding sections of this paper prove that it is not part of any of the aforesaid sources of the muslim law; instead, it is merely a customary practice.

The Supreme Court judgment in *Shayra Bano* may be analysed on various fronts. Whether the judgment interferes with the muslim personal law and religious freedom provided under the Constitution? The All India Muslim Personal Law Board submissions were founded on the same lines. The appraisal is mainly based on two arguments. Firstly, Article 25 of the Constitution guarantees the Freedom of Religion to its citizens as a Fundamental Right. Triple talaq is part of religious practice; hence, it is protected under Article 25 of the Constitution and secondly, the court cannot strike down the practice of triple talaq because it is violative of fundamental rights under Articles 14 and 21 of the Constitution. The justification for such preposition is, the Personal Law is not a law within the meaning of Art 13(3) of the Constitution and hence cannot be tested on the touchstone of fundamental

29. *Shayara Bano* v. *Union of India,* A.I.R. 2017 S.C. 4609, p. 4832.

30. https://www.britannica.com/topic/Shariah/Development-of-different-schools-of-law

rights. This argument is founded on the judgment of Bombay High Court in *State of Bombay* v. *Narasu Appa Mali,* which held that Personal Laws are not 'laws' under Articles 13 and 372 of the Constitution.[31] The Supreme Court has affirmed the judgment of Narasu Appa Mali in various cases such as *Krishna Singh* v. *Mathura Ahir*[32]and *Maharshi Avdhesh* v. *Union of India.*[33]

The first argument does not hold as the discussion in the preceding paragraphs shows that triple talaq is not a valid mode of divorce in the fundamental scripts of Islam.[34] Therefore, triple talaq cannot be considered an integral part of the religion of Islam and in no way enjoys protection given under Article 25 of the Constitution. About the second argument, it is agreeable that the 'Personal Law' is not a law within the meaning of Article 13(3) of the Indian Constitution, as the Constitution of India retains personal laws of all communities and sects in India. It is perfectly constitutional to have separate and different laws for all such denominations until the Uniform Civil Code is applicable. Otherwise, all personal laws, which are separate and distinct for every religious sect, would have become unconstitutional under Article 14 on the day of adoption of the Constitution itself.

Further, the Constituent Assembly Debate[35] and existence of Article 44 prove that the framers of the Constitution intended to preserve the personal laws until the implementation of the Uniform Civil Code. Moreover, in various cases the Supreme Court of India has taken contradictory views. In some cases it attempted to test the Personal Law on the touchstone of Fundamental Rights, even without overruling the previous judgments.[36] Leaving apart the

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31. *State of Bombay v. NarasuAppa Mali* AIR 1952 BOM 84
32. *Krishna Singh v. Mathura Ahir* (1981) 3 SCC 689
33. *Maharshi Avdhesh v. Union of India.* (1994) Supp (1) SCC 713
34. *Holy Qur'an, Chapter II, Verse 226-240.*
35. Constituent Assembly Debates (23 November 1948) <http://loksabhaph.nic.in/Debates/cadebatefiles/C23111948.html> (Retrieved 10 April 2020).
36. The higher Courts in India have consistently refused to decide the Constitutional validity of personal law on the ground that 'Personal Law' is not a 'law' within the meaning of Articles 13 and 372 of the Constitution. For example, *State of Bombay* v. *Narasu Appa Mali* AIR 1952 Bom 84, *Krishna Singh* v. *Mathura Ahir* AIR 1980 SC 707 (712), *Ahmedabad Women Action Group* v. *Union of India* (1997) 3 SCC 573, *Maharshi Avadhesh* v. *Union of India*, 1994 Supp. (1) SCC 713). However, the Supreme Court of India in *Daniel Latif* v. *Union of India* (2001 7 SCC 740) tested Personal Law on the basis of violation of Fundamental Rights without overruling previous judgments and held that, the *Muslim Women (Protection of Rights on Divorce) Act, 1986* is not violative of Articles 14 & 21 of the Constitution.

conflicting views of the court, if it is assumed that the 'Personal Laws' cannot be tested on the touchstone of fundamental rights, still the practice of triple talaq would not survive as it is not a part of Personal Law as such. Triple talaq is a customary practice, and custom is law within the meaning of Article 13(3) of the Constitution.[37] Hence, it could have been declared unconstitutional, but unfortunately, this did not happen. Therefore, it is perfect to conclude that triple talaq is merely a customary practice that does not enjoy the protection that the Personal Law enjoys under the Constitution. Hence, the higher courts can test the validity of any customary practice, including triple talaq.

In the cases of *Dagdu Chotu Pathan* and *Shamim Ara,* the courts, while dealing with the matter of maintenance-claim of the wife, successfully eradicated the menace of triple talaq and declared it void. The issue of triple talaq was settled permanently. The same issue was discussed before the Supreme Court in *Shayra Bano's* case, although there was no need to bring it to the court when it was already decided back in 2002, and the triple talaq was invalidated. However, at that time, probably, the political parties could not reap the benefits of invalidating triple talaq. Hence, some women's groups approached the Supreme Court in 2016, when the political environment was highly prone to harvest any religious issue. It is also clear from the fact that the petitioners Ishrat Jahaan and Shayra Bano joined the Bharatiya Janata Party within a year of the Supreme Court judgment.[38] Some new issues were raised in the Supreme Court in the *Shayra Bano* case, such as violation of Fundamental Rights, etc. which were not raised in previous cases. However, the court could not resolve it due to a lack of consensus among the judges, and the concluding rule (ratio) could not be derived exclusively from the constitutional provisions. One of the petitioners, Ms Shayra Bano, a victim of triple talaq, could have sought legal remedy in the form of maintenance or

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37. Article 13(3) of the *Constitution of India, 1950* defines law as "unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

38. Op India Staff, 'After Ishrat Jahan, Shayara Bano, another triple talaq petitioner joins BJP, *Op India News*(Online, 8July 2018)<https://www.opindia.com/2018/07/after-ishrat-jahan-shayara-bano-another-triple-talaq-petitioner-joins-bjp/>

restitution of conjugal rights taking benefit of *Shamim Ara* judgment; however, she preferred to file a writ petition in Supreme Court challenging the Constitutional validity of triple talaq which was already declared void by the various High Courts and also the Supreme Court in 2002. Surprisingly, the Supreme Court entertained the Writ Petition challenging the dead law and attempted to test its Constitutional validity. Therefore, it is not wrong to state that the invalidation of triple talaq by *Shayra Bano* case rendered it to become a political invalidation rather than legal, as legal invalidation had been done long back in 2002.

Regarding issues of polygamy and halala-nikah, the court decided to deal with these aspects separately and chose the only point of triple talaq. Hence, those issues remained undecided should be touched. By invalidating the '*talaq-e-biddat*', the muslim law of marriage has been brought in line with the holy scripts of Islam, and women have been guaranteed what they were already entitled under the religious scripts.

IV. ABOLITION OF TRIPLE TALAQ: LEGISLATIVE ENACTMENT AND JUDICIAL APPROACH

The Courts in India have repeatedly declared the 'triple talaq' (*talaq-e-biddat*) as void and illegal, and the Government have enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019. The Act abolished the practice of '*talaq-e-biddat*' and made it a cognizable and compoundable offence punishable with imprisonment, which may extend to three years and a fine. The Section 3 of the Act declares void and illegal to the '*talaq-e-biddat*' or any other similar form of talaq having the effect of instantaneous and irrevocable divorce pronounced by a muslim husband upon his wife, by words, either spoken or written or in electronic form or any other manner whatsoever.[39] Thus, it is clear that the legislature intended to ban only instantaneous and irrevocable forms of talaq, and the approved forms of talaq/divorce such as '*talaq-e-hasan*' and '*talaq-e-ahsan*', which are recognized by the holy scripts of Islam, and these modes of divorce are continued to be valid and enforceable by law. In such cases, parties can revoke the divorce as per the Shariya, or both parties can separate permanently after the expiry of the *iddat* period and marry a new person of their choice.

39. See Section 2(c) of the *Muslim Women (Protection of Rights on Marriage) Act, 2019*.

As per the above provision, the customary form of *talaq-e-biddat* or any other similar form of instantaneous talaq ceased to be a valid mode of divorcing wife by a muslim husband, and any such attempt will not affect the marital status of the couple, as if there is no divorce at all, keeping all rights and duties intact. Henceforth, any such talaq (the unapproved form of talaq) by a muslim husband in the presence or absence of wife, given orally or in writing or on the telephone, Whatsapp, Facebook, Email or via any other electronic form, would not be a valid talaq. This provision is nothing but an enforcement of the decisions of the Supreme Court in Shamim Ara and Shayra Bano and effectually a harmonization of the law of divorce with the original Islamic texts. Section 5 of the Act entitles the married muslim woman upon whom triple talaq is pronounced and her dependent children to receive subsistence allowance from her husband and the custody of children. However, how the husband will pay the subsistence allowance when he is in jail as an under-trial or a convict has not been thought. This provision of maintenance for the married woman is an additional mechanism other than that under the Domestic Violence Act, 2005, the Code of Criminal Procedure 1973, etc.

Further, the Act criminalizes pronouncing of *talaq-e-biddat* or instantaneous talaq by the husband. It provides for imprisonment for a term that may extend to three years and a fine. The offence has been made cognizable and compoundable at the instance of the married muslim woman upon whom talaq is pronounced. This provision has been severely criticized as it has made talaq a serious offence equal to offences like Sedition, Rioting, Theft, Extortion, etc.[40]

As the offence under the Act is cognizable, the husband may be arrested by the police on the information given by the wife or her relatives about such pronouncement of talaq. However, the provision of bail under Section 7(c) of the act mandatorily requires the court granting the bail to call for appearance and hear the affected muslim woman on whom the instant triple talaq is pronounced. This provision is in addition to the say of the Investigation Officer required for final disposal of bail under the Code of Criminal Procedure, 1973. Therefore, the grant of bail under section 7(c) is now dependent more

40. Parliamentary Debates on The Muslim Women (Protection of Rights on Marriage) Bill, 2019, <https://www.youtube.com/watch?v=Y4cDo8OVIko&feature=youtu.be> (Retrieved 10 April 2020)

or less upon the appearance and filing of the say by the divorced wife. In such cases, there is every possibility of delay in filing the say by the victim on many counts, consequently prolonging the husband's stay in jail. The decision of the Kerala High Court on the bail application filed under section 7(c) of the Act, 2019 in the matter of *Shammas v State of Kerala* is the best example of how the accused persons are undergoing pain and agony due to this draconian law. In this case, the complainant wife has been impleaded as the additional respondent as required by section 7(c) of the Act of 2019, and a notice has also been served on her by Special Messenger. Despite that, she did not appear before the court, and the accused remained in jail for twenty days.[41] The basic principle of criminal jurisprudence, namely the "presumption of innocence,' i.e. 'every accused is presumed to be innocent unless proved guilty beyond reasonable doubt' should also play a crucial role even in the grant of bail, which seems ignored in this provision. However, the provision of bail under the Act, 2019 is framed in such a way that every accused person remains in jail until the wife files her say.

Further, the conditions imposed upon the accused by the Court in *Shammas* v *State of Kerala* while granting the bail are extremely stringent as if the accused is a hardened criminal, and his release on bail is likely to put the society at peril.[42] The High Court of Kerala in a subsequent case has diluted the effect of the above judgment and also section 7(c) of the Act to some extent in *Nahas v State of Kerala* (decided on 3 August, 2020) and ruled that, there is no complete bar on anticipatory bail application if an accused has grounds to show why he need to apply under section 438 Cr. P.C. instead of section 7(c) of the Act of 2019. The court further held that, presence of the accused is not required for hearing the bail application by the honorable Magistrate under section 7(c).[43]The honorable Supreme Court of India in a recent case of *Rahna Jalal v State of Kerala* also held that, there is no complete bar on granting anticipatory bail or an offence committed under the Muslim Women (Protection of Rights on Marriage) Act, 2019, provided

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41. *Shammas* v *State of Kerala*, Kerala High Court B.A. No. 7053 of 2019, decided on 10 October 2019, available at https://indiankanoon.org/doc/40769751/
42. *Shammas v State of Kerala (*Kerala High Court, B.A. No. 7053 of 2019, decided on 10 October 2019) <https://indiankanoon.org/doc/40769751/>
43. *Nahas v State of Kerala,* decided on 3 August 2020, available at https://indiankanoon.org/doc/80035681/

competent court must hear the complainant Muslim married woman before granting the bail.[44]

This condition of filing say by wife for grant of bail might have been inserted to require the husband to pay the amount of subsistence allowance payable under Section 5 of the Act. However, it will be purposefully misused by the complainant to harass the accused. This provision also hampers the rights of the accused under section 438 of the Code of Criminal Procedure, 1973, as section 7(c) of the Act of 2019 makes it mandatory to hear the victim in the grant of bail. It may act as a bar while hearing interim applications taking away the interim protection given to the accused as enjoyed by any other offender under the Indian Penal Code. Hence, the provision relating to the grant of bail under the Act of 2019 requiring the appearance and say of the victim is unreasonable and violative of Fundamental Rights under Article 14 & 21 of the Constitution.

Moreover, the bail under this Act may be granted only when the court is satisfied with reasonable grounds for granting bail. Such a provision imposing a burden on the accused to prove reasonable grounds for granting bail does not apply even to severe offences under the Indian Penal Code or other special laws. In regular criminal cases, the burden of proof lies on the state to prove that there are reasonable grounds for the refusal of bail and the court is bound to record reasons for denial, failure to which the accused is entitled to grant of bail. However, under this act, the burden of proof lies on the accused to prove that there are some reasonable grounds for the grant of bail. If he fails to prove and satisfy the Magistrate that there are reasonable grounds for a grant of bail, he will be dumped into jail for an unlimited period. The discretion conferred on the court is so broad that the judge may simply refuse the bail application on the ground that there are no reasonable grounds for grant of bail. Such type of reversal of the burden of proof in the grant of bail is not found even in offences of severe nature under the Indian Penal Code, special statutory offences under the Narcotic Drugs and Psychotropic Substances Act, 1985, *the Protection of Children from Sexual Offences* (POCSO) Act, 2012 etc. However, this stringent provision applies to a minor offence of 'pronouncement of triple talaq', although such pronouncement does not amount to 'divorce'. The reversal of the onus for

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44. *Rahna Jalal v State of Kerala,* decided on 17 December 2020, available at https://indiankanoon.org/doc/186756408/

bail application under this act may lead to denial of bail in most talaq cases, which would result in hardship on the accused. The provision of bail in the Act of 2019 conferring blanket powers on the court and imposing a burden on the accused to prove reasonable grounds for grant of appeal is disproportionate to the nature of the crime. Hence, the provision is arbitrary, unreasonable, and, therefore, unconstitutional.

Nevertheless, looking at the increasing divorce rate by triple talaq even after the Supreme Court's judgment in *Shayra Bano*, a punitive law was essentially required to control triple talaq.[45] The Act of 2019 is expected to positively impact the rate of pronouncing triple talaq due to its deterrent provisions, such as punishment up to three years and grant of bail only on reasonable grounds.

The Act of 2019 is further criticized for preventing the parties from peaceful settlement by revoking talaq. This criticism is based on the ground that the revocation of talaq by reunion during the iddat becomes impossible even if the parties are willing to revoke, in case the husband is in jail during the *iddat* period, either because he has been denied bail or he has been convicted.[46] The husband is in prison because of the wife's complaint, and he may not be willing to live with her anymore, or even if he is willing to reunite, he is not allowed to do so as he is in prison.

It is further argued that the Act of 2019 interferes with the Freedom of Religion guaranteed under Article 25 of the Constitution. This particular aspect has been discussed in detail in the preceding paragraphs and concluded that triple talaq is neither approved by the holy religious scripts nor an integral part of religion. Hence, there is no question of violation of Freedom of Religion under Article 25.

It is pertinent to note that the Act of 2019 does not abolish temporary *halala* marriage, probably because the legislature assumes that *halala* is the byproduct of triple talaq and would die with the triple talaq. This assumption is partly true as *halala* is not required in instantaneous talaq, as this talaq

45. Unknown, '100 cases of instant triple talaq in the country since the SC judgement' Times of India News (Online, 28 December 2017)<https://timesofindia.indiatimes.com/india/66-cases-of-triple-talaq-in-the-country-since-the-sc-judgement-law-minister/articleshow/62279519.cms>

46. Parliamentary debates on the Muslim *Women (Protection of Rights on Marriage) Bill, 2019*<https://www.youtube.com/watch?v=Y4cDo8OVIko&feature=youtu.be? (Retrieved on 10 April 2020)

does not affect the marital tie between the parties, particularly after the passing of the act. However, *halala* may still spread its tentacles through the unreported cases of triple talaq persuaded by the so-called religious heads (projecting triple talaq as a valid talaq) or in the cases of approved forms of talaq after the third procedural pronouncement. This statement supports the fact that the *halala* nikah is a source of income for many. They have formed syndicates for exploiting to the innocent and ignorant.[47] The Act of 2019 was also expected to criminalize the temporary form of *halala* nikah entered only with the agreement to divorce so as to marry the previous husband; however, the Parliament failed to reap this opportunity to ban it, and temporary *halala* nikah remained lawful. However, the marriage performed by a divorced woman and a man (not being the previous husband) with no intention to get a divorce, although it looks like a halala nikah, is a permanent marriage that needs protection.

V. CONCLUSION

Instantaneous triple talaq as a mode of divorce is nothing but innovation in the religion and hence named *talaq-e-biddat*. The honorable Supreme Court, in the case of *Shamim Ara* while dealing with the maintenance dispute, invalidated 'triple talaq' and attempted to restore the damage caused by this customary practice to the rights and dignity of women. However, the Supreme Court in *Shayra Bano's* case reconsidered the validity of triple talaq in the light of Constitutional principles. It held that the decision of the *Shamim Ara* case concerningthe validity of triple talaq is an *obiter dictum* and not a *ratio decidendi* as the question of the validity of talaq was ever raised before Supreme Court. Although the court could not come to a conclusive finding on the constitutionality of triple talaq, as the judges were divided in the ratio of 2-1-2 and lacked a majority, the court could successfully declare triple talaq as legally void with 2:3 majorities. With this judgment, it is finally settled that the instantaneous & irrevocable divorce given by the husband by pronouncing the word 'talaq' three times in a single stroke without following the conditions and procedure of the Holy Quran is void. To give effect to the

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47. Unknown, '*Times of India News*(Online. 28 December 2017) <https://timesofindia.indiatimes.com/india/66-cases-of-triple-talaq-in-the-country-since-the-sc-judgement-law-minister/articleshow/62279519.cms<https://www.indiatoday.in/india/story/nikah-halala-islamic-scholars-one-night-stand-divorced-muslim-women-marriage-1029887-2017-08-16>

judgments of the Supreme Court, the Parliament of India enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019 and abolished the triple talaq. It declared *talaq-e-biddat* or any other similar form of talaq having the effect of instantaneous and irrevocable divorce as void & illegal and also provided punishment in the form of imprisonment, which may extend to three years and fine.

The discussion above on the decisions of the Supreme Court and the Act of 2019 suggests that all the legal developments together have brought the Muslim Law in India at par with the principles of the Qur'an and the Hadith by abolishing the arbitrary practice of *talaq-e-biddat*. References from the period of Caliph Hazrat Umar suggest that he has discouraged the practice of triple talaq by punishing such persons.[48] Therefore, a statement that says that the abolition of triple talaq interferes with the freedom of religion does not hold good. The muslims of India could have avoided the confrontation with the Government either by introducing reforms jointly by the All India Muslim Personal Law Board and other organizations or by supporting the Govt. in abolishing the capricious and whimsical practice of triple talaq. That could have saved the community's image and prevented the political parties from using it for political purposes.

Although the Supreme Court invalidated the age-old customary practice, triple talaq cases continued to rise, suggesting a need for legislation criminalizing it.[49] The Act of 2019 aims to deter instant talaq; however, the punishment of three years imprisonment provided for the pronunciation of the word 'talaq' three times is quite severe, un-proportionate and unreasonable. The marriage between the parties remains intact as the pronouncement of instant talaq has no legal effect on the marriage. Therefore, a smaller sentence of one-month imprisonment would have been reasonable and sufficient to inflict the required pain. Further, the provision under section 7(c) providing bail only on reasonable grounds and on hearing the wife is also very harsh. However, this type of provision, which is not applicable even for Murder & Rape and generally applicable only to very severe and special offences, has

48. Mohd Wasim Ali, *Dissolution of Marital Tie by a Muslim Wife: Rights and Limitations* (Aligarh Muslim University, 1999)76<https://core.ac.uk/download/pdf/144509123.pdf>

49. Unknown, '*Times of India News*(Online. 28 December 2017) <https://timesofindia.indiatimes.com/india/66-cases-of-triple-talaq-in-the-country-since-the-sc-judgement-law-minister/articleshow/62279519.cms>

been made relevant to Instantaneous talaq. Generally, the objective of the law is to detain the accused to prevent further commission of a crime or to prevent the destruction of evidence.

In triple talaq, the blameworthy act is merely the pronouncement of the word ‘talaq’ three times in one stroke, making talaq irrevocable. There is no chance of repeating the crime once the third pronouncement is complete unless reunited or remarried. Further, there is hardly any chance of destruction of evidence in this offence, as its commission neither requires any weapon nor involves any property to be recovered. The only essential recovery is subsistence allowance, which I believe is more difficult to recover during his arrest if the husband has minimal resources. Further, the chances of purposeful delay in appearance and submission of say by the wife in the court of law cannot be overruled. Again, grant of bail on the Magistrate’s satisfaction that the applicant proves reasonable grounds for bail is burdensome and compels the Magistrate to lean more towards refusal to grant bail. Therefore, putting someone’s liberty at stake in such a mild offence would itself be unreasonable, unconstitutional and would cause injustice. In these circumstances, the individual freedom and dignity guaranteed by the Constitution should have been given primacy. Hence, Section 7(3) of the Muslim Women (Protection of Rights on Marriage) Act, 2019 needs amendment to bring the bail provision at par with Section 437 of the Code of Criminal Procedure 1973 and make it fair, just and reasonable.

SPORT FEDERATIONS' ROLE AND COMPETITION LAW-ISSUES IN INDIA

*SURENDER MEHRA**

ABSTRACT : Sports generate important values like tolerance, solidarity, team spirit and fair play among players all over the world. With increase in commercial activities and flow of huge amount of money in sports due to right of franchise, media rights to broadcasters and advertisement, the importance of sports federations has been increased. It is to be noted that sports federations have been authorized to take all decision relating to specific sport and other related economic activities. Now, in number of cases decided by Competition Commission of India, discussed below have pointed out that there is problem in the functioning of sports federations. Recently Tokyo Olympic 2021 medals have started a discussion and debate again on the performance of players and sports authority. it is being asked that why Indian players are not functioning or performing well enough as compared to other small and underdeveloped countries. Indeed, it is the sports federation working culture and functioning must be re-examined and re-evaluated. Some of the prominent reasons, sport policy, infrastructure and allocation of funds have been pointed out by outstanding players and Scholars. It has also been said that sport culture can bring glory for India. In this article, I have made my best endeavors to point out the reason of underdevelopment of sports in India and how Competition Commission of India is handling the competition issues (Collusion practice, abuse of dominance and denial of market access) by imposing fine against sports Federation, which are violating the Competition Act 2002.

KEY WORDS : Tolerance, Collusion Practice, Abuse of Dominance, Denial of Market Access

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I. INTRODUCTION

The importance of sports can be understood from the fact that the World Health Organization has set the goal that every person in the society should be aware of his good health and must try to get it. Society can progress only through healthy citizens. Sports have been continuously developing in India since independence and govt. is seen committed for it. Sports create equal opportunities for all without any kind of discrimination, India Hockey players Rani Rampal, wrestlers Geeta Phogat, Babita Phogat, Vinesh Phogat and Neeraj Chopra, Athletes Javelin Throw, etc various players confirm the above-mentioned point. At present, the attachment of youth to the game is increasing continuously; the numbers of spectators are increasing. As a result of which the number of spectators is increasing and the responsibility of the organization that organizes the games has also increased, today it has taken the form of business and got converted into various commercial activities. It includes infrastructure development, sponsorship, broadcasting rights, other business sectors due to sports. Such as tourism advertising and sponsorship, education, health, entertainment, technology, sports garments and sports equipment's also. Apart from this, sports have provided employment not only to the sportspersons but also to the management[1], skilled and non-skilled class. Being labor-intensive in nature, the industry provides employment to more than 500,000 people[2].

II. SPORTS AND ITS MARKET SIZE IN INDIA

According to the estimates of the year 2019, the business of sports in India is estimated to be more than Rs.91 billion. Today, there are about 100 game facilities in India that meet international standards. With the successful introduction of Indian premier league, the organization and management of sporting events has taken the form of a commercial activities and this is as important as any other market in India and this has solved the problems of Infrastructural development, talent search and training related problems. The

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1. "Competition Issues in the Sports Sector", volume no 36 January- March, the quarterly newsletter of Competition Commission of India, page no 24-25 (2021).
2. Sooraj Aurora," India's growing sports industry" *The diplomat*, July 27, 2016.*available at*: https://thediplomat.com/2016/07/indias-growing-sports-industry (visited on Sep.21, 2021).

development of league formats in all sports, right of franchise and advertisements have brought the flow of money in sports and have made sports financially prosperous. The flow of funds has also created many concerns. The scope of sports market is increasing all over the world, according to an estimate, its price has been made from 480 to 620 billion[3], at present the business of sports in India 2016 has been estimated at various media rates in the sports market in India and Pro Kabaddi and Indian Super League has also now made its place due to this, there has been an increase in the demand for media rights and sponsorship rights.

Apart from this, by providing interest rate money for social welfare games, the participation of players coming from there can be ensured on rural areas. There was a fold for the development of sports from where it is necessary to study sports facilities along with player's only hobbies. There is also a need for strong infrastructure for the people playing for sports, for this reason, along with the establishment of sports at the district, state and national level, construction of sports fields, development, maintenance of publicity have been started "the sports industry has grown by up to 10 percent by the year 2014," Karnik says national director for sports and live events at Group MESP[4]. The sports industry has indeed grown extensively from Rs. 43.7 billion in 2013 to Rs. 48 billion ($713 million) in 2015 mainly due to the emergence of new sporting leagues according to CVL Srinivas, CEO of Group M South Asia[5].

III. REASON OFUNDERDEVELOPEDSPORTSININDIA[6]

a) Mismanagement of funds by federations

Sport administration has been charged with corruption allegations. almost every game has been suffering from the corruption, which is very common in federations funds are being misutilized by them involvement of bureaucrats and politicians, who are heading the various sport bodies has

3. *Ibid*.
4. *Id*.
5. Sooraja Aurora," India's growing sports industry" *The diplomat*, July 27, 2016 *available at:*https://thediplomat.com/2016/07/indias-growing-sports-industry, (visited on Sep.21, 2021).
6. Shravan Nune," Sports in India: problems and reform measures" *Jagran josh,* Oct30, 2017 *available at*: https://www.jagranjosh.com/current-affairs/sports-in-india-problems-and-reform-measures-1508848667-(visited on Sep.21, 2021).

made the dream of becoming world super power in sports almost impossible.

b) Lack of effective sport policy

The entire sport administration almost headed by politician and bureaucrats, who have no experience of any game and they cannot understand the need and problems of players. They have no vision for any sport development, they are in administration to serve their vested interest only. That is the reason effective sport policy and its execution in not at priority.

c) Economic and social inequalities

Economic and social inequalities have inequalities has also have major role and these things adversely affect sport infrastructure, concentration of stadium and availability of sport avenues in cities are also amounted as denial of access to those who are in rural areas. Less girl's participation in games discourages sport culture in India.

d) Poor infrastructure

Poor infrastructure badly affects sports training of players and organization of tournament is impossible without having a good infrastructure funds are being granted to sports administration in order to develop stadium and other facilities by fixing accountability of top officials of sport administration, desired result can be achieved.

e) Less allocation of finance

In comparison to developed nations, India's allocation of financial resources is very less and poor.

IV. SPORTS FINANCIAL OUTLAY 2020-21[7]

The financial outlays for Budget Estimates 2019-20 and Revised Estimates 2019-20 and Budget Estimates for 2020-21are reflected in the following Table.

(rs in cores)

7. Annual Report 2019-2020, *available at:* https://yas.nic.in/sites/default/files/MYAS%20Annua l%20Report%20English_2019-20.pdf (visited on Sep.29, 2021).

Statement Showing Budget Estimates & Revised Estimates 2019-20 and

Sl. No.	Name of Scheme	Budget Estimates 2019-20@	Revised Estimates 2019-20@	Budget Estimates 2020-21@
Department of Sports				
1	2	3	4	5
E.	**Development in Sports Institutions**			
1.	Sports Authority of India	450.00	615.00	615.00
2.	Lakshmibai National University of Physical Education	50.00	50.00	50.00
3.	National Dope Testing Laboratory	7.50	4.50	4.50
4.	National Anti-Doping Agency	8.50	8.50	8.50
5.	National Centre for Sports Science and Research (NCSSR)	25.00	45.00	45.00
6.	National Centre for Sports Coaching	5.00	5.00	5.00
7.	Sports University in North East	40.00	50.00	50.00
8.	World Anti-Doping Agency	1.00	1.00	1.00
	TOTAL(E)	587.00	779.00	779.00
F.	**Encouragement and Awards to Sports person**			
1.	Awards	52.00	64.00	40.00
2.	Pension to Meritorious Sports Persons	37.00	47.00	30.00
3.	Assistance to National Sports Federation	245.00	300.85	245.00
4.	Human Resource Development in Sports	5.00	5.00	5.00
5.	National Sports Development Funds	70.00	77.15	50.00
6.	National Welfare Fund for Sports Persons	2.00	2.00	2.00
	Total(F)	**411.00**	**496.00**	**372.00**
G.	**Khelo India: National Programme for Development of Sports**			
1.	Khelo India	500.00	578.00	890.42
2.	SAI Stadia Renovation–CWG2010	70.00	96.00	75.00
3.	Enhancement of Sports Facility at Jammu & Kashmir	30.00	50.00	50.00
4.	Himalayan Region Sports Festival Scheme	1.00	0.00	0.00
5.	Expenditure on Seminar, Committees Meetings etc.	1.00	1.00	1.00
	Total(G)	**602.00**	**725.00**	**1016.42**
	Grand Total (E+F+G)	**1600.00**	**2000.00**	**2100.42**

V. NEERAJ CHOPRA'S COACH ALLEGATION AGAINST ATHLETICS FEDERATION ANDSPORTSMINISTRY[8]

Uvi Hohn international coach of Neeraj Chopra leveled allegation and raised questions about India's sports system. He said that it is very difficult to work with the Sports Authority of India (SAI) and the Athletics Federation of India. Hohn also attacked these federations' preparations for the Olympics.

Then Hohn said in a conversation with the Indian Express- "When I came here, I felt that I could change something. But may be it is very difficult to work with the people of SAI and AFI. I don't know if it is because of their knowledge. There is lack or just ignorance. Apart from camps and competitions, whenever we ask for necessary supplements for our sports persons, we do not get the right things. TOPS (Target Olympic Podium Scheme) mean those who can bring medals selected by the Sports Ministry it was the same situation for the players. If we could get something, we would have been very happy[9]."

VI. VINESH PHOGAT AND SONAM MALIK ALLEGATION AGAINST WRESTLING FEDERATION[10]

The wrestling federation has issued a charge sheet against Phogat.

a. Phogat decided not to stay in a room with her teammates at the Games village.

b. The wrestler chose to wear a Nike singlet for her bouts and not one provided by India's official kit supplier, Shiv Naresh.

The current WFI president, Brij Bhushan Sharan Singh, looking after the moves against the two wrestlers, cannot understand the problem of

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8. Kirti Vardan Miser, "Javelin throw: farewell to Neeraj Chopra, the coach who won two gold medals, these three controversies spoiled the whole game" Amar Uajjala, Sep. 14, 2021 *available at:* https://www.amarujala.com/sports/other-sports/reasons-why-uwe-hohn-indian-javelin-throw-coach-who-helped-neeraj-chopra-win-gold-medals-in-asian-and-commonwealth-games-has-been-sacked-by-afi?pageId=6 (visited on Sep.22, 2021).

9. *Ibid*.

10. Leslie Xevier, "Vinesh Phoghat and Sonam Maliks non sensical suspension a way for WFI to regain control " News Click, August13, 2021. *available at* https://www.newsclick.in/vinesh-phogat-and-sonam-maliks-nonsensical-suspensions-way-wfi-regain-control, (Visited on Sep.22, 2021).

wrestler, because he himself has not wrestled. He is heading WFI on account of his political party blessings, an MP of BJP, the ruling party. Brij Bhushan also said that funding schemes such as TOPS and the private entities that support the Indians in their greed of Olympic glory, are making the athletes egoist. The WFI do not have control in their training. The action against Phogat and Malik seems to be an extension of that statement. The federation is trying to make an example of the two wrestlers, to ensure that raising questions against the working of federation, cannot be accepted in the sport[11].

VII. LANDMARK JUDGEMENTS BY COMPETITION COMMISSION OF INDIA

In the case of *Department of Sports v. Athletics Federations of India* [12] the information has been filed against Athletic Federation of India for its anti-competitive behaviour. It has been told that Athletic Federation of India primary objective is to promote the sport activities along with the facilities for which government of India has given recognition to it. The Government of India provides financial fund also for the promotion. The Athletic Federation of India generate large sum of fund through media right, sponsorship and reality. it has been further stated that the decision taken by Athletic Federation of India in its meeting against the various units and other sport market players, who organised an unauthorised marathons is violating the rights of informants : “The House unanimously approved to take action against the state units/ officials/ athletes and individuals who encourage the unauthorised marathons and become part of such marathons where AFI permission was not taken and it was made mandatory to seek permission of AFI before organizing any road race/ marathon on national and international level.”

It has been alleged that this above stated objective of Athletic Federation of India is anti-competitive and against the development of sports and all those players who play at the grass root level. This kind of decision will adversely affect the sports and interest of sports person is also at state the objective of competition Act 2002 but has been mentioned in its Preamble can also be not achieved with this kind of Athletic Federation of India decision. It is stated on the website of OP that “it is the apex body for running and

11. *Ibid*.

12. *Department of Sports v. Athletics Federations of India* (2015) CCI *available at*:https://www.cci.gov.in/sites/default/files/26%281%29%20Order%20in%20Ref.%20Case%20No.%2001%20of%202015.pdf, (visited on Sep.21, 2021)

managing athletics in India and affiliated to the International Association of Athletics Federation (IAAF), Asian Athletics Association (AAA) and Indian Olympic Association. The AFI has as many as 32 affiliated state units and institutional units. The AFI came into existence in 1946 and the federation organizes the National Championships, trains the Indian Athletics National Campers, selects the Indian Athletics Teams for various international competitions, including the Olympics, Asian Games, CWG, IAAF World Championships, Asian Championships and other international meets, conducts the National Championships for various age categories. Besides, the AFI conducts international and national championships and various meets to promote the sport and popularize it amongst the masses and make athletics commercially attractive for the further growth of the athlete and the sport. The federation also supervises and assists its state units in their activities, plans and sets up special coaching camps, coaches training and takes initiatives for development programme and grass root promotion of athletics in India."

The competition Commission of India examined the allegation on the basis of record and stated that first of all weather athletic Federation of India is an enterprise within the meaning of s. 2(h) of the competition act 2002 or not that is to be judged. In the present case Athletic Federation of India has been organizing National and international athletic events and generating money through media rights royalty and sponsorship. This is economic activities and it can be said that prima facie The athletics Federation of India comes under the purview of enterprise as per section 2(h)[13]of the competition Act

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13. "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space. (3) Explanation.-For the purposes of this clause,— (a) "activity" includes profession or occupation; (b) "article" includes a new article and "service" includes a new service; (c) "unit" or "division", in relation to an enterprise, includes (i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods; (ii) any branch or office established for the provision of any service; s. 2(h),The Competition Act, 2002.

2002. Therefore, Competition Commission of India is of the view that the present case should be investigated by the Director General.

In this case of *Surinder Singh Burmi v Board of Control of Cricket in India*[14]the informants Surinder Singh Burmi leveled allegation against BCCI for its anti-competitive conduct in organization of various cricket tournaments. It has been stated that BCCI in India conducts and control all kind of cricket tournaments and frames rules for Matches and players, select teams and overall promote cricket. For this end government of India provided land at subsidized rate for the construction of Stadium along with other tax exemptions to BCCI. BCCI which is a society registered under the Tamil Nâdu society registration act 1975 and which is also full member of ICC and has been established for the promotion of cricket in India, including cricket for women. BCCI by organizing Cricket matches generate huge amount of money. As per financial statement of BCCI it gets money by the guarantee media rights to broadcasters, enter into franchise arrangements with corporate, business houses and raises sponsorships.

It has been noted that "the economic output associated with IPL matches in India for 2015 is estimated to be INR 26.5 billion (Rs. 2650 crore) and the contribution of GDP of INR 11.5 billion through 60 days event". As per the audited financials of BCCI, its financial surplus ranged between Rs. 53.77 crore in 2008-09 and Rs. 525.95 crore in 2013-14.

The BCCI economic activities are also acknowledged by ICC. Clause 32 of the ICC Rules has been relied upon by BCCI to justify one of its impugned conducts. It states that: "it is common for a sport's commercial partner to require certain commitments to protect their respective investment in the sport…. Members ought not to put themselves or the ICC in breach of their respective commitments to those commercial partners, as this would threaten the generation of commercial income for distribution throughout the sport." This brings out the factual position that members of ICC, including BCCI, generate income through cricket and for such purpose, they partner with other entities. Thus, the Commission has no hesitation in concluding that organization of IPL and the attendant activities mentioned above, are economic in nature and thus are covered within the ambit of Section 2(h) of the Act.

14. *Surinder Singh Burmi v. Board of Control of Cricket in India*, 2010 (CCI) *available at:* https://www.cci.gov.in/sites/default/files/61%20of%202010.pdf,(visited on Sep.21, 2021).

The DG has also concluded that :

> "There is no evidence of any price competition amongst sports. There is nothing to conclude that on lowering of ticket price of football events, the viewers of cricket will switch over to football match or if the price of cricket match ticket or channel subscription fee is increased, the viewer will switch over to other sports or events. The loyalty of fans of any sport is so strong that there is negligible chance of any cross elasticity of demand…The [supplementary] investigation has not found anything to indicate any kind of impact on the demand of cricket in case of any reduction or increase in prices".

The Commission had found BCCI dominant in the market for organization of private professional cricket leagues/events in India. The representation given by BCCI under clause 9.1(c)(i) of its IPL Media Rights agreement entered into with the broadcasters of Indian Premier League ("IPL"), that "it shall not organize, sanction, recognize, or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league" was found to be an exercise of regulatory powers for arriving at a commercial agreement. The said conduct of BCCI was found to be in contravention of Section 4(2)(c) of the Act.

Against the decision of commission, the BCCI approached the honorable competition appellate tribunal and tribunal by its order passed on 23 Feb. 2015 overruled the decision of commission on the ground of natural justice. The commission directed the Director General (hereinafter, 'DG') to conduct further investigation into the matter in accordance with the directions contained in the above order of COMPAT. In order to reach at a conclusion, the DG Considered the pyramid structure of cricket governing bodies; different types of cricket matches; differences between sport and entertainment programmes broadcasted on television channels, cricket and other sports, and professional domestic cricket leagues and other formats of cricket; and the similarity of rules and regulations for organization of cricket events across India.

The Commission considered the supplementary investigation report and Rule 29 of the BCCI which provide that: (a) no member, associate member or affiliate member of BCCI shall participate or extend help of any kind to an

unapproved cricket tournament; (b) no player registered with BCCI or its member, affiliate member or associate member could participate in an unapproved tournament; and (c) no umpire or scorer on the BCCI Panel shall associate with an unapproved tournament. Against this background, it appears that no private organizer could conduct any meaningful cricket match or tournament without the support of BCCI. Therefore, on the basic of the above stated reason, the BCCI is found to be in violation of the of the provisions of Section 4(2)(c)[15] of the Act."

In this case of *Hemant Sharma v All India Chess Federation*[16], Information has been filed by Mr. Hemant Sharma along with other informants and leveled allegation against All India chess federation for anti-competitive

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15. (1) No enterprise or group shall abuse its dominant position.] (2) There shall be an abuse of dominant position 4 [under sub-section (1), if an enterprise or a group]. (a) Directly or indirectly, imposes unfair or discriminatory— (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service. Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or (b) limits or restricts— (i) production of goods or provision of services or market therefore; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or (c) indulges in practice or practices resulting in denial of market access 5 [in any manner]; or (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market. Explanation.—For the purposes of this section, the expression— (a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to— (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour. (b) "predatory price" means the sale of goods or provision of services, at a. price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors. 3 Subs. by Competition (Amendment) Act, 2007 for "No enterprise shall abuse its dominant position" 4 Subs. by Competition (Amendment) Act, 2007 for "under sub-section (1), if an enterprise" 5 Ins. by Competition (Amendment) Act, 2007 (8) 6 [(c)"group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.] s. 4, The Competition Act, 2002.
16. *Hemant Sharma v All India Chess Federation*, 2011(CCI), *available at:* https://www.cci.gov.in/sites/default/files/Case%20No.%2079%20of%202011.pdf (visited on Sep. 22, 2021).

conducts. it has been said that AICF is registered society under Tamil Nâdu society registration act 1975 and this is known as national sport Federation, which has got recognition and sanction from international chess body "Federation International dash e Etches" (FIDE). AICF is the only body which select players, conducts National, Open and international tournaments, approves it and place restriction on players and unauthorized events. It has been alleged that registration form issued by AICF contains the declaration that player will not take part in any Championship which is not authorized by AICF. Registration is necessary in order to participate for National and international events and in case of participation of unauthorized event player will be banned for one year and made it mandatory to get deposit 50% of price money to AICF.

a. It has been found that AICF is an enterprise under section 2 (h) of Competition Act. Collection of registration fee, organising chess tournaments, collecting charges, and providing technical support to the tournament and chess player fall under section 2(h) and amounted as economic activities come Enterprise.

b. AICF dominance includes placing restriction on unauthorised Championship it becomes difficult for other competitors to get best resources and players due to the dominance of AICF.

c. ELO rating is considered important thing for chess players but this rating has been removed by a AICF, in case of their participation in unauthorised and approved chest event.

d. Practice of collecting EMD earnest money deposit out of grant amount as misuse of fund by AICF.

e. Special and donor entry for chess players and collection of entry fee up to the amount of 10000 Rupees is found to be unfair.

f. Practice of special and donor entry for those who can pay higher amount without having meritorious background again found to be in contravention.

g. Criteria of awarding certificate are also not justifiable.

It has been investigated that the relevant market has been found to be the market for "conducting and governing domestic and international chess activities for both men and women and the underlying economic activities in India". Accordingly, AICF has contravened the provisions of Sections

4(2)(a)(i), 4(2)(b)(i) and 4(2)(c) of the Act.

After taking into account the matter on record it has been stated that AICF, inter- alia, has been engaged in organization of chess events. For instance, as per the Annual Report of AICF for the Financial Year 2015-16 states that "the Central Council of AICF decided to honour the above medal winning Olympiad team members by organizing an India-China summit clash chess match with the prize fund of Rs. 10 lakhs sponsored by AICF. (Emphasis added)" The extracts from the website of FIDE also confirm that "to celebrate the historic bronze medal winning performance of India in the Tromso Olympiad 2014, All India Chess Federation organizes India – China Chess summit 2015, supported by Telangana State Chess Association at Marriot Hotel, Hyderabad from 2nd to 10th March". The same website, at another place, states that "The All-India Chess Federation (AICF) will organise the World Youth U-16 Chess Olympiad in Ahmadabad, India from 10th December (Arrival) to 20th December (Departure), 2017 conducted under the auspices of Federation Internationale Des Echecs (FIDE)". The Annual Report of AICF for the financial year 2011-12 states that "We [AICF] organized World Junior Chess Championships at Chennai and Asian Schools Chess Championships at New Delhi…". All these evidences have been rejected by AICF and have stated that none of these tournaments were "organized" by them but by the respective State Associations or clubs. The AICF conducts chess events through or in collaboration with the State associations/club; these would be deemed to have been organized by AICF making it an enterprise.

In addition to the above, the financial statements of AICF for the financial years 2008-09, 2010-11 and 2015-16 clearly show that AICF received income from sale of advertisement space, sale of media rights and sponsorship. It has further stated that use of the word's "advertisement" and "sponsorship" in the budget does not indicate that the advertisement rights are sold by AICF. The minutes of the Annual General Body meeting of AICF dated 20th June, 2008, inter-alia, state that "As recommended by the Central Council it was resolved to share the remuneration from Door darshan for telecast of our chess programmes with LIVE Tele Shows in the ratio of 40:60 (60% for LTS)". It has been stated by informant that AICF generates income from registration fee, recognition fees (i.e. share of prize money) entry fee, non-refundable earnest money deposits, donor entry fees, etc., which is evident from chart on money received by AICF in the Financial Year 2011- 12, 2012-

13 and 2013-14.

In order to establish the dominance of AICF, it would be relevant to refer to the Code of Conduct for the Players contained in its Constitution and Bye-Laws. The relevant extract is reproduced as under:

> "(x) Players desirous of participating in any official FIDE/ Asian/ Commonwealth Championships should have participated in the last year's respective age group, open National Championships. However, the Federation shall have the right to accept or reject any such requests.
>
> (y) Players shall strictly abide by the Constitution, Rules, Regulations and Orders/Instructions of the Federation in force from time to time and also abide by the Instructions of Arbiters and AICF office bearers.
>
> (z) No player shall participate in any tournament not authorized by All India Chess Federation or its affiliate members or District Association and units affiliated to them. The above violation shall attract disciplinary proceedings including cash penalties apart from debarring from participating in any tournaments in future." (Emphasis added)

AICF has also displayed warning on its website as:

> CAUTION "This is to inform all chess players/ organizers/ officials that any chess event organized under the banner of "Chess Association of India" is not recognized by All India Chess Federation."

This is to further remind all AICF registered players that you have signed a declaration in the players' registration form, which we quote for your ready reference. "I also declare that I will not participate in any unauthorized tournament/ championship". By playing in the tournaments or conducted by Chess Association of India, the registered players of AICF will attract disciplinary action and hence are cautioned against playing in the tournaments to be organized by the rival body. – Published on 09 December, 2009". The above stated things clearly show the conduct of AICF; therefore, the Competition Commission orders that: (a) AICF is found to be in contravention of the provisions of Sections 4(2)(b)(i) and 4(2)(c) read with Section 4(1) of the Act.

VIII. CONCLUSION

In order to achieve the fairness and transparency in the working of federation's role, there should be clarity and difference between regulatory and commercial functions of the federation. It should be ensured that federation's commercial matters should not be affected by regulatory powers. The process of issuing No Objection Certificates (NOCs) to the players for participating in events organized by foreign teams and clubs must be transparent. The grant of rights in an event must be given by proper following due procedure. Restriction on free movements of players should not be allowed. Foreclosing entry of the rival market players in leagues is prohibited as per Competition law[17].

17. *Super note*1

NOTES AND COMMENTS

HUMAN RIGHTS EDUCATION IN INDIA : ISSUES AND CHALLENGES

PRADEEP KUMAR*

ABSTRACT : Human rights education teaches us to develop and be sensitive to the understanding, skills, values of human rights in the creation and overarching goal of a universal human rights culture. Human rights education is concerned with the theoretical basis and respect for and awareness of human rights. Many serious efforts have been made at the level of the United Nations to give a concrete shape to the promotion of human rights education all over the world. One of its major objectives is to establish access to human rights to the masses. Without proper education of human rights in society, the concept of development and promotion of human rights is meaningless. With time, many new subjects were born in the order of human needs, and in this series, human rights were born in the middle of the twentieth century. The UDHR, 1948[1] was adopted by the General Assembly of the UN for the protection and promotion of human rights at the global level. The document became a global document to serve as a source of inspiration for governments around the world to adopt the principle of human rights. The Objective of education shall be the full growth of the human self-hood and the in duration of respect for human rights and essential freedoms.[2] It was a big challenge to take internationally developed human rights principles and laws to every corner of the world. As per the basic tenet of the National Policy on Education, 2020, the objective of the education system is to develop good human

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1. United Nations Resolution No. 217A.
2. Article 26(2), of the Universal Declaration of Human Rights, 1948.

beings, capable of rational thought and action, with compassion and empathy, courage and resilience, scientific thinking, creative imagination, moral values, and foundation. be. The objective of this policy is to produce such productive people who will contribute better to building an inclusive, pluralistic society as envisaged by the Constitution of India. Human rights education can be a vitally essential component to achieve the goals of the National Policy on Education, 2020, which will contribute directly to transform India into a vibrant and equitable knowledge society, making India a global knowledge superpower. In the present article, an attempt has been made to analyze human rights education in India and their related issues, challenges, and educational courses in their context.

KEY WORDS : Human Rights, Education, Curriculum, Higher Quality Education, National Education Policy 2020

I. INTRODUCTION

Human rights education is very useful for awakening the conscience of any society. Human rights education can be a powerful medium for the development of all human rights, civil defense, political, economic, social, and cultural rights to remove the discrimination prevailing in the society. Human rights which are derived from the individual being human, are the rights related to his life, liberty, and dignity. For the knowledge of this right to be accessible to all, it should be made compulsory not only by making it a law but also through its education from the primary level to the university level. Human rights education is a fundamental requirement for the development of a just and just society and for promoting national development. Human rights education is the key to India's sustainable progress and economic development in terms of social justice and equality, national integration, and cultural preservation. Human rights education is that proper medium by which the best development and promotion of the rich talent and resources of the country can be done for the betterment of the individual, society, nation, and the world.

Therefore, for better protection of human rights, by including it in the school curriculum according to the current environment, awareness about human rights should be created in the minds of children from the primary level, which will help them to become strong citizens in the society. Education is the only powerful medium through which inequality prevailing in society

can be removed. Although the Central Government has started some courses in this context by the Ministry of Human Resource Development, University Grants Commission, National Human Rights Commission, and National Council of Educational Research and Training, but no concrete start has been made at the primary level.

The knowledge of rights and freedoms, as much as that of others, is regarded as a fundamental tool to guarantee the respect of all rights for each individual. The basic premise of human rights education is that the aim of education is not only to produce trained professional workers but also to inculcate a sense of higher purpose in them. Human rights education aims to provide people and students with the potential for social change and public awareness.

II. ISSUES AND CHALLENGES OF HUMAN RIGHTS EDUCATION

The main issues of human rights education are regarding the curriculum of school education. What is the course curriculum? Should human rights be included in the curriculum for different subjects or should they be taught separately? The curriculum of human rights education has not yet been made at the primary level. The curriculum is there at the university level but it has to be made at par with international quality so that the competition of our students with foreign students can be level.

III. HUMAN RIGHTS EDUCATION AND ITS NEED

The first international Congress on the teaching of human rights (Vienna), 1978) elaborate this point by *inter alia* stating that "human rights education and teaching must aim at promoting the attitude of tolerance, respect and goodwill towards fellow human being." Looking at the changes taking place in society, it can be said that today every citizen should be fully aware of his fundamental rights, and also when, where, and how should these rights be used? Under the education of human rights, every citizen should learn how he can exercise his rights in different situations. Human rights education aims to develop the knowledge, skills, and values of human rights along with the creation of universal human rights. For this, it is necessary that the youth of the country should have the knowledge of their fundamental rights and how they are widely implemented in the interest of the public.[3]

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3. Farhanaz Khan, "Human Rights Education and Sensitization"15 *Manav Adhikar: Nai Dishayein*, 105 (2018).

i. Human Rights

Those rights of humans which are automatically acquired by birth are called human rights. Human rights are the basic and natural rights that are essential for the adequate development of human personality and the progress and happiness of any society. According to the Protection of Human Rights Act, 1993, "human rights" means such rights relating to life, liberty, equality, and dignity of the individual as are guaranteed by the Constitution or enshrined in international covenants and enforceable by courts in India.[4]

ii. Education

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. Education is that which creates harmonious relationships with all beings in one's life. It is only through education that he can be brought on the right path from the wrong path. Education is not limited to knowledge only, unless it introduces the values, ideals, and beliefs of life, then it is useless. This characteristic of education connects it to the feelings prevailing in mankind.[5]

iii. Aims and Objectives of Human Rights Education

The goal of human rights education is at best, a contribution to their larger aim. But then the drafters were not interested in arriving at narrow list of human rights with impeccable semantic credential. they were interested is an ampler list, in away the ampler of better, with some claims to being, or decent prospect of becoming, a standard that crossed culture, religion, borders, and power blocs. And so they made use without too much worry, of a deeply obscure, largely undefined notion of 'the dignity of human persons'. The relevance of human rights education at present is also important because it is necessary not only to improve the quality of life of the individual but also to empower the people socially, economically, and culturally. Education is the most suitable means for awareness and consciousness in the sense that the right to education includes the education of human rights.

4. Section 2(1)(d), of the Protection of Human Rights Act, (Act No. 10 of 1994) 1993.
5. *Supra note* 4 p. no. 103.

Here the purpose and scope of education are also very wide. In this, the overall development of personality is most important. It encompasses intellectual, mental, moral, and physical development. Only such education can prove effective in curbing exploitation and oppression in society. This will pave the way for compassion, tolerance, and peace. In human rights education, special attention will be given to practical aspects along with theoretical aspects.[6]

The aim of human rights education is that students and students develop the ability to bring change in society and take society along. Human rights education should be such that it can make the student's good citizens and enable them to engage with their full potential for socio-economic development.

iv. Human Rights Education and its Importance

Human rights education should be given from the primary level so that children understand their rights and responsibilities and can build a better society. United Nations human rights education initiatives, such as the ongoing World Program for Human Rights Education, encourage governments and civil society to develop effective human rights education programs. The United Nations Office of Human Rights provides the global coordination of the World Program. In 2011, all countries belonging to the United Nations reaffirmed their commitment to promote and ensure human rights education.

v. Human Rights Education and Training

The United Nations Declaration on Human Rights Education and Training, 2011 includes Human rights education means education, training, dissemination, and information efforts which are indicated in the objectives of the UN.

1. To develop a full awareness of honorable personalities and their respect;
2. To promote relations of tolerance, gender equality, and friendship between religious and linguistic groups of all nations; and
3. To enable all people to participate effectively in a free society.

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6. Justice Y. Bhaskar Rao, "Human Rights Education" 4 *Manav Adhikar: Nai Dishayein*3 (2007).

The United Nations General Assembly declared the goal of the UDHR, 1948. The spirit should be awakened, and progressively such national and international measures should be taken by which the people of the member countries and the people of their territories give the universal and effective acceptance of these rights and follow them.

IV. HUMAN RIGHTS EDUCATION AND ROLE OF NATIONAL HUMAN RIGHTS COMMISSION

Section 3 of the Protection of Human Rights Act 1993[7] talks about the establishment of National Human Rights Commission[8]. This act was amended in 2006[9] and 2019[10]. The Act is in line with the 'Paris Principles'. The National Human Rights Commission is a symbol of India's concern for the protection and promotion of human rights.

The National Human Rights Commission was mandated "to spread human rights literacy among different sections and protect these rights through publications, media, seminars and other available media[11]". To encourage the effects of non-government organization and institution working in the field of human rights. Similar duties have been entrusted to the State Human Rights Commissions in the respective States. University to spread awareness about human rights issues among college students, National Human Rights Commission organizes internship programs every year during summer and winter vacations.

The National Human Rights Commission also publishes monthly newsletters, annual magazines, annual reports and manuals, booklets, information booklets, posters, etc. on various subjects related to human rights in Hindi and English. The purpose of these publications is to generate new thinking related to the protection of human rights and the promotion of human dignity. A sourcebook on human rights has also been published in collaboration with the National Council of Educational Research and Training (NCERT) on material related to human rights education, which was later translated into

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7. Act No. 10 of 1994.
8. The National Human Rights Commission was established on 12 October 1993.
9. Act No. 43 of 2006.
10. Act No. 19 of 2019.
11. Section 12 (h) of the Protection of Human Rights Act, 1993

Hindi and Urdu[12]. The National Human Rights Commission has played an important role in imparting human rights education in India, including the spread and awareness of education, as well as making recommendations in terms of human rights education methodology and curriculum at the university level for those involved in teaching at the school level.

V. HUMAN RIGHTS EDUCATION AND EDUCATIONAL INSTITUTIONS

i. Human Rights Education in Schools

During the year 1994-1995, a series of meetings were convened with the concerned officials mainly focusing on four major issues. Review of existing textbooks, to remove parts from them which were contrary to human rights.

The National Human Rights Commission conducted a study in 2005 to prepare a status document on human rights education at the school level. The main objective of this position document was to ascertain whether human rights education at various levels is an integral part of the existing school curriculum. This study shows that human rights education is not found as a separate subject. However, the National Council of Educational Research and Training (NCERT) and the State Council of Educational Research and Training (SCERT), Delhi has approved various subjects from primary level to senior secondary level. The concept of human rights is included in it.[13]

ii. Human Rights Education in Universities

University Grants Commission (UGC) formulated a scheme to provide financial assistance for conducting various certificate, diploma, and degree courses in human rights along with organizing seminars, workshops, and seminars in colleges and universities are. At the request of the National Human Rights Commission

In 1999, on the suggestion of the National Human Rights Commission, the University Grants Commission prepared a Model Curriculum on Human Rights and Duty Education 2001, which resulted in its implementation in universities and colleges. As well as the Central Board of Secondary Education

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12. *Supra note*7, pp. 9-10
13. *Supra note* 7, p. 10.

(CBSE) U.G.C. National Eligibility Test (NET) Human Rights and Duty Test (Code No. 92) is conducted on behalf of so that the eligible candidates are considered eligible to apply for the jobs in the faculty of human rights and duties in Indian educational institutions.

VI. HUMAN RIGHTS EDUCATION AND NATIONAL EDUCATION POLICY 2020

National Education Policy 2020 is the first education policy of the 21st century that aims to fulfill the essential requirements for the development of our country. The National Policy on Education lays special emphasis on the development of the creative abilities inherent in every individual. This policy is based on the principle that education should develop not only basic abilities such as literacy and numeracy, as well as the higher level of reasoning and problem-solving cognitive abilities but also at moral, social, and emotional levels necessary.

The vision of the National Education Policy 2020 is an education system developed from Indian values, which will contribute directly to transform India into a vibrant and equitable knowledge society by providing high-quality education to all and making India a global knowledge superpower. It is envisaged in the policy that the curriculum and pedagogy of our institutions should inculcate among the students an awareness of their fundamental obligations and constitutional values, engagement with the country, and the role and responsibilities of a citizen in a changing world. The vision of the policy Students should take pride in being Indian not only in thought but also in behavior, intelligence, and actions, as well as in the knowledge, skills, values, and thinking that is committed to human rights, sustainable development, and living and global well-being so that he can become a truly global citizen. Human rights education can be a vitally essential component to achieve the goals of the National Policy on Education, 2020, which will contribute directly to transform India into an ideal society by making India a global knowledge superpower.

VII. CONCLUSION

In conclusion, we can say that human rights education in India is a process of empowerment, which helps to identify the problems of human rights and find solutions following human rights principles. Human rights

education has a fundamental role in preventing all forms of discrimination, combating discrimination as well as promoting equality and equal opportunities for all.

The discrimination of gender, caste, religion, language, and region in the society can be removed by giving human rights education from childhood itself. To develop human rights education, the government and the National Human Rights Commission develop a national action plan focusing on strategies to increase public awareness of human rights.

BOOK-REVIEWS

CONSTITUTIONAL LAW

(2nd edn. 2021) by Mamta Rao, Eastern Book Company, Lucknow, Pp LXXX + 979; Price Rs. 875/-Paperback Format: Paperback

The book under review is the *Constitutional Law* by Mamta Rao and published under the aegis of the Eastern Book Company of Lucknow. It is a comprehensive treatise on the constitutional studies in India.[1] The publisher has been credited with prestigious work on the constitutional law and governance catering the need of scholars and readers of constitutionalism in perfection. The present book is also thematic from the point of view of aims and aspiration of its people towards the Constitution of India. The constitution of any country reflects the national underpinnings and the erudite work on Constitutional laws by Mamta Rao gives a comprehensive overview of the subject with objectivity and lucidity. It delves deep in to the complete review of recent case laws to impart the best updated understanding about the recent developments in the field of constitutional law. The author writes that:

Since the publication of the first edition in 2013, the Supreme Court and high courts have had the occasion to interpret various provisions of the constitution in different areas. in the course of the of which a number of lucid interpretation have come to be recorded, principles extracted there from and constitutional amendments introduced.[2]

The blurb of the book, therefore, spells out the ambit and scope of the second edition of the book in 2021.To quote:

The second edition of Mamta Rao's *Constitutional Law* has been thoroughly revised with the latest constitutional amendments and case laws. Since the publication of the first edition India has witnessed historic developments in the field of constitutional law. This new edition incorporates the various judgments of the Supreme Court that have given a new dimension to the concept of liberty, equality and religious freedom on one hand and some long-drawn disputes have been put to rest on the other hand. Apart

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1. Mamta Rao, *Constitutional Law,* Eastern Book Company, Lucknow (2021)
2. *Id* at vii

from all the case laws, the constitutional amendments have been incorporated in this edition.[3]

The book on *Constitutional Law* opens with the historical anecdotes[4] followed by the Salient Features of the Indian Constitution[5] by laying down various unique and distinctive features of the Constitution of India. The volume discusses the importance and interpretation of the Preamble in the context of its need for adoption, development and the meaning attached to every terminology placed in the same.[6] It also gives a detailed account of the judicial review starting from its genesis to the adoption and the farsightedness of the makers of the Constitution of India for assuring the constitutionalism and constitutional guarantees in promoting and protecting national interests hoisting high the flag of the biggest democracy in the world.

The author also undertakes the study about the provisions for the Union and its Territory in the territory of India. The admission and establishment of new states in India and formation of new states along with alteration of areas of the existing states have been elaborately discussed.[7] The constitutional provision relating to *Citizenship* discusses the general rule regarding the acquisition of citizenship in India. The discussion also enumerates the rights of citizenship to the migrants of Pakistan.[8]

The *next chapter* is a detailed study on the Fundamental Rights which includes the general discussion on the concept of state and the rules regarding the inconsistency of the laws in derogation of the fundamental rights.[9] The volume also provides an extensive research on Right to Equality (Articles 14-18);[10] Right to Freedom (Article 19);[11] Protection in Respect of Conviction for Offences (Article 20);[12] Protection of Life, Personal Liberty and Right to Education (Articles21-A);[13] Protection Against Arrest and Detention (Article

3. Back flap of the book
4. *Id* at 1-23
5. *Id* at 25-40
6. *Id* at 41-61
7. *Id* at 63-66: arts 1–4
8. *Id* at 71-78: arts 5–11
9. *Id* at 81-104: arts 12 -13
10. *Id* at 105-188
11. *Id* at 189-244
12. *Id* at 247-259
13. *Id* at 261-319

22) ;[14] Right Against Exploitation (Articles 23);[15] Right to Freedom of Religion (Articles 25-28);[16] Cultural and Educational Rights (Articles 29-30);[17] Right to Property and Saving of Certain Laws (Articles 31 &c 31-D)[18] and Right to Constitutional Remedies and Application to Forces (Articles 32-35).[19] The author has also highlighted the judicial interpretations of various disputes arising out in protecting and promoting the fundamental rights guaranteed under the Constitution of India.

The discussion on the Directive Principles of State Policy provided under Articles 36-51 of the Constitution of India.[20] The author highlights the purpose of incorporating the Directive Principles for ensuring a better state mechanism in fulfilling the dream of the makers of the Constitution of India to establish a socio-welfare state. The volume also discussed the Fundamental Duties[21] inserted in the Constitution of India incorporated for making the citizens a pivotal part in ensuring a just-governed state with all the glories of the largest democracy in the world. The book provides a detailed study of the *Executive* which includes the Executive Power of the Union; Election of President; Qualifications for Election of President; Election of Vice-President; Discharge of President's functions and Power of President to grant pardons[22] Attorney and General for India (Article 76).[23]

The *volume* also elaborately discusses the constitution of the Parliament;[24] parliamentary privileges,[25] Legislative Procedure (Articles 107–122),[26] Union Judiciary (Articles 124–147),[27] Comptroller and Auditor General of India

14. *Id* at 323-340
15. *Id* at 341-344
16. *Id* at 345-361
17. *Id* at 363-375
18. *Id* at 377-382
19. *Id* at 385-429
20. *Id* at 431-459
21. *Id* at 461-462
22. *Id* at 465-504
23. *Id* at 505
24. *Id* at 507-526
25. *Id* at 527-535
26. *Id* at 539-551
27. *Id* at 553-616

(Articles 148–151),[28] State Executive (Articles 152–167) ,[29]Advocate-General for the State (Article 165),[30] State Legislature (Articles 168–211),[31] State Judiciary (Articles 214–237),[32] Union Territories (Articles 239–241),[33] the *Panchayats* (Articles 243–243-O),[34] the *Municipalities* (Articles 243-P–243-ZG),[35] the Scheduled and Tribal Areas (Articles 244 & 244-A),[36] the Co-operative Societies: Part IX-B (Articles 243-ZH–243-ZT) ,[37]Relations Between the Union and States (Articles 245–293),[38] Property, Contracts, Rights, Liabilities, Obligations and Suits (Articles 294–300),[39] Trade, Commerce and Intercourse within the Territory of India (Articles 301–307),[40] Services Under the Union and the States (Articles 308–323),[41] Public Service Commission's (Articles 315–323),[42]Tribunals(Articles 323-A & 323-B),[43] Elections (Articles 324–329),[44] Special Provisions Relating to Certain Classes (Articles 330–342),[45] Official Language (Articles 343–351),[46] with established canons of the statutory interpretation and case laws.

The author has also discussed about the Emergency Provisions provided under the Constitution of Indi.[47] The discussion also covers Miscellaneous (Articles 361–367)[48]Amendment of the Constitution (Article 368),[49]

28. *Id* at 621-623
29. *Id* at 625-643
30. *Id* at 645-646
31. *Id* at 647-671
32. *Id* at 673-720
33. *Id* at 727-735
34. *Id* at 737-744
35. *Id* at 745-753
36. *Id* at 755-757
37. *Id* at 759
38. *Id* at 807-825
39. *Id* at 827-834
40. *Id* at 837-843
41. *Id* at 845-866
42. *Id* at 869-876
43. *Id* at 877-880
44. *Id* at 885-894
45. *Id* at 895-910
46. *Id* at 913-918
47. *Id* at 19-930
48. *Id* at 941-949
49. *Id* at 951-957

Temporary, Transitional and Special Provisions (Articles 369–392) ,[50] Short Title, Commencement, authoritative text in Hindi and Repeals (Articles 393–395),[51] and Subject Index.[52]

The book not only covers entire aspects of constitutional law, but also presents comprehensive reading of the Indian Constitution. The book illuminates not only the conceptual analysis of Constitutional Law and judicial review of the Constitutional provisions with recent case laws. The author is successful in presenting the complex constitutional issues with lucid commentary on the constitutional provision written in a very reader friendly format and easy language. Though the book is primarily meant for students, the author provides a, it makes the subject interesting and easy to grasp, and in a simple style explains the different aspects of the Constitution like constitutionalism, rule of law, role of judiciary, public interest litigation, etc.

The key cases, definitions and points have been given in the margins for emphasis and easy reference by students and faculty. The new edition incorporates the various judgments of the Supreme Court that have given a new dimension to the concept of liberty, equality and religious freedom on one hand and some long-drawn disputes have been put to rest on the other hand. The author has updated the new volume with some of the remarkable latest case laws like *M. Saddiq*, *Ram Janmabhumi Temple case*; [53]*Young Lawyers Association case* (Sabarimala case),[54] *Joseph Shine case*,[55] (Adultery case); *K.S. Puttaswamy* (Aadhaar case),[56]; *Navtej Singh Johar* (Decriminalisation of Consensual sex between same sex partners case),[57]; *K.S. Puttaswamy* (Euthanasia case),[58] *Shayara Bano* (Triple Talaq case),[59] *Krishna Kumar Singh*(Ordinances case),[60] and *SCORA*(NJAC case).[61]

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50. *Id* at 963-976
51. *Id* at 977-8
52. *Id* at 979-999
53. (2017) 10 SCC 1
54. (2019) 11 SCC 1
55. (2019)3 SCC 39
56. (2019) 1 SCC 1
57. (2018) 7 SCC 192
58. (2017)10 SCC 1
59. (2017) 9 SCC 1
60. (2017)3 SCC 1
61. (2016) 5 SCC 1

Another milestone of the new edition of the volume is that it includes the latest constitutional amendments: 99th Amendment Act, 2014, 100th Amendment Act, 2015, 101st Amendment Act, 2016, 102nd Amendment Act, 2018, 103rd Amendment Act, 2019 and 104th Amendment Act, 2019. It also includes the Enactment of Jammu & Kashmir Re-organization Act, 2019. The second edition of this book, while discussing in detail the constitutional law of India, discusses Key cases, definitions and points have been given in the margins for emphasis and easy reference by students and faculty. This compilation also meaningfully discusses the constitutional amendments and the case laws can be proved very useful in having a rounded view on the topics like liberty, equality and religious freedom etc. in the real sense of term. The book is very articulate in presenting different aspects of the Constitution like constitutionalism, rule of law, role of judiciary, and public interest litigation. This comprehensive work will prove to be immensely useful to students of LL B and LL M, researchers, academicians, lawyers, judges and all those who strive towards better understanding of the Constitution.

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P S A PILLAI'S CRIMINAL LAW

(14th Edn, (Reprint), 2021), revised by K I Vibhute, Lexis Nexis, Gurgaon, Haryana, Pp. cxii+1133, Price Rs. 995.00-(Paperback), ISBN: 978-93-8854-839-7

Of all the branches of law, the branch that closely touches and concerns a man in his day to day life, is criminal law. The study and research of the law of crimes has always been one of the most attractive branches of knowledge since the early year of human civilization. Law of crimes has been as old as the civilization itself. As soon as people grouped themselves into an organized society, the need for criminal law was immediately felt. The law reflects the public opinion and it is particularly true about criminal law. In every organized society certain acts are forbidden on the pain of punishment. The problem arises as to what acts should be forbidden or what acts should be selected for punishment by the society or the state. Before the emergence of the modern organized political state, it was an individual's own responsibility to protect them. That is why Sir Henry Maine has called the ancient criminal law as the law of wrongs. After organized political State came into existence it shouldered the responsibility for maintenance of law, order and peace in the society.

Criminal law reflects the fundamental values of society; it is one of the most faithful mirrors of a given civilization. Crimes merits inclusion among the major social problem for reason cited by president's crime Commission in America[1] as:

"Every Citizen is, in a sense, a victim of crime. Violence and theft have not only injured, often irreparably, hundreds of thousands of citizens, but have directly affected everyone. Some have been afraid to use public streets and parks. Some have come to doubt the worth of a society in which so many people behave badly. Some have lapsed into the attitude that criminal behavior is normal human behavior and consequently have become indifferent to it, or have adopted it as a good way to get ahead in life. Some have become suspicious of those they conceive to be responsible for crime."[2]

1. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a free Society* (Washington, D.C.: US Government Printing Office, Feb. 1967. P. 1
2. Adward Eldefonso, *Reading in Criminal Justice*, (Canada: Glencoe Press, 1973), p.5

The characteristic that distinguish the criminal law from other set of rules regarding human conduct are politically, specificity, uniformity and penal sanction. However, these are characteristics of an ideal and completely rational system of criminal law and other set of rules for human conduct are not distinct. Moreover, the ideal characteristics of the criminal law are rarely features of the criminal law in action.[3]

The book under review has been classified into fifty-one chapters and most of its chapters are further divided into several parts. Book starts from the introductory part in which the role of State under Criminal justice system, concept and definition of crime along with some discussion on Criminal law and Morality, Criminal Law and Ethics has been explained. Second chapter deals with historical perspective of Criminal Law of Hindu system, Mohammedan Criminal Law, development of Criminal law during British rule in India and historical background of making of the Indian Penal Code.

Author had dedicated two chapters on element of Crimes out of which one chapter is exclusively focusing on the concept of *mens rea*. While analyzing the detailed fundamental principle of criminal liability author indicates that the principle is embodied in the maxim '*actus non facit reum nisi mens sit rea*' meaning thereby 'an act does not make one guilty unless the mind is also legally blameworthy'. No external conduct, however serious in its consequence, is generally punished unless the prohibited consequence is produced by some wrongful intent, fault or *mens rea*. Author describes *mens rea* as a technical term[4] and further explains that a criminal offence is committed only when an act, which is forbidden by law, is done voluntarily. The term *mens rea* has been given to the volition, which is the motive force behind the criminal act. An act becomes criminal only when it is done with guilty mind.

Author substantially focuses on the concept of General Exception and Private Defence under Indian Penal Code for which ten chapters are devoted. While making classification under General Exception author has opined that a careful reading and closer analysis of the 'general exception' reveals that these 'exceptions' can be grouped under two broad categories of defences: Excusable and Justifiable. The first category is where the law excuses certain class of persons, even though their acts constitute an offence. The second category is where the acts committed, though are offences, are held to be justifiable under certain circumstances and hence exempted from the provisions

3. Edwin H. Sutherland and Donald R. Cressey, *Principles of Criminology,* (New Yark: General Hall, Rowman & Littlefield Publishers, 1992), p. 4
4. *Ibid* p. 39

of the Indian Penal Code.[5] Under Right to Private Defence author analyses that it is based on the cardinal principle that it is the primary duty of a man to help himself. Self-preservation is the prime instinct of every human being.[6]

Author has mentioned three chapters on inchoate offences which include the concept of Attempt, Abetment and Criminal Conspiracy. He has also given attention on the concept of common intention and common object with the help of fundamental principle and relevant case law. Thereafter, author starts, one by one, discussing about specific offences under Indian Penal Code *viz.* Offences against State, Offences relating to Army, Navy and Air force, Offences against Public Tranquility, Contempt of the Lawful Authority of Public Servants, False evidence and offences against Public Justice, Offences against Human body, and Offences against Property etc. Provisions relating to punishment have also been discussed by the author.

The book under review has not only mentioned the criminal provisions but also recent amendment, recent and relevant case laws. Author successfully incorporated the Criminal Law (Amendment) Act, 2013 and 2018 respectively and gives much importance to the provisions. Case of *Joseph Shine v. Union of India*[7] has been analyzed on the Constitutional parameter in which the offence of adultery was held unconstitutional.

To put it in a nutshell, it can be said that this book is a comprehensive work of the author under which no aspect of the Indian Penal Code is left out. This book has not only discussed the general principles of criminal law but also deals the detail analysis of specific offences. The peculiarity of the work is the inclusion of relevant and latest case laws on almost every aspect. Offences are explained on the theoretical framework with the contours of legislative definitions and its descriptions bringing out the interrelationship of theoretical framework and legislative framework. Subject index and table of cases increases its utility. This book is useful for undergraduate and post graduate law students. It is also useful to those who are preparing for judicial services and law professionals *viz.* judges and lawyers. Price of the book is affordable.

GOPAL KRISHNA SHARMA*

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5. *Id, at pp. 59-60*
6. *Ibid*, at p. 157
7. AIR 2018 SC 4698

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