Journal of Law Teachers of India

Volume 8 *2018-2019*

Law Centre-I, Faculty of Law
University of Delhi
Delhi - 110 007

Mode of Citation: 8 JOLT-I p ___ (2018-2019)

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http://law.du.ac.in/

Annual subscription:
₹400/- (Domestic); US $25 (Overseas)

ISSN: 2231–1580 JOLT-India

Published by the
Professor-in-Charge
Law Centre-I, Faculty of Law, University of Delhi, Delhi - 110 007

Printed at
Delhi

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Editor's Note

Volume 8 of the Journal of Law Teachers of India is unique in many respects. To begin with, it would see the light of the day during the Golden Jubilee Year of Law Centre-I. LC-I would be completing 50 glorious years of its existence in 2020.

Then, it is the first volume through which LC-I aims to take the 'green initiative' seriously. It is no secret that cutting down of trees is necessitated substantially in order to fulfill the demand of paper. This is one of the biggest reasons for global warming. In order to cut down on the carbon footprint of the Centre, volume 8 of JOLT-India would be going 'paperless' on a trial basis. Besides being cost effective, it makes the journal easily accessible electronically by a wide range of interested parties. Of course, the print version would continue to be available on need basis. As abundant caution, I, must hasten to add that COVID 19 induced nationwide lockdown might prevent this issue to be available in its printed avatar.

Like all the previous volumes, this volume also has attracted some high quality submissions on a great variety of research topics including copyright issues, *nikah halala*, right to information (RTI), disability issues, domestic violence and a range of others reflecting on the research interests currently being pursued by Indian law academics-students and teachers alike.

Volume 8 also contains two winning entries of essays by students who had won the national level essay competition. To give a brief to the uninitiated, in order to encourage law students and further explore on the new advances and research in the arena of law and society, JOLT-India announced its Essay Competition with the theme as 'Law and Society: Contemporary Developments'. First Prize was won by Sourish Roy from Rajiv Gandhi School of Intellectual Property Law, IIT Kharagpur for the topic *Towards a Renewable Energy Policy for India and the* second prize was taken by Ketan Mor from our own Centre for the wonderful short essay on *Robotics and IPR in Contemporary Era.*

The review of the Juvenile Justice (Care and Protection of Children) Act, 2015: Critical Analyses has been done with depth of understanding.

Similarly, the review of Chit Funds in India: Analysis of Regulatory Framework is pithy and comprehensive at the same time.

Finally, time to share the best news that was intentionally saved for the last. From this volume onwards, JOLT-India would be guided by a 10 Member Advisory Board composed of international faculty and practitioners and also eminent personalities from the industry. The Advisory Board serves the crucial role of promoting goodwill for the journal across the globe in relevant disciplines besides providing most valuable perspective through counsel to the *Journal*'s editors on policy, management, and development.

JOLT-India is indebted to the following esteemed members for accepting to be on the Board and devote their precious time to the development of the Journal:

Prof. Manoj Kumar Sinha
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From Volume 9 onwards, the above list would appear at the designated place in the Journal.

Hope Volume 8 would also receive the same appreciation that the readers have been showering on JOLT-India for the past 10 years. Though all care has been taken to present the very best readership experience to you, we would be glad to consider all suggestions for improvement.

Dated: March, 2020

Prof. Sarbjit Kaur
Prof-in-Charge, LC-I

Judicial Approach for Justice:
Redefining 'Aggrieved Person' Under Domestic Violence Act, 2005

Alok Sharma*

Introduction

The hierarchical structure of family permits the sexual division of labour resulting in subordination of females and domestic violence is one of the tools to maintain this configuration and its continuance. In Indian context, it has an atypical dimension that it is inflicted by husband and other members of his family especially his mother. Shockingly now-a-days it is also inflicted by daughter-in-law or sister-in-law to the mother and sister of her husband respectively. However, generally people do not recognize its existence in the family and take it as a routine affair having social and cultural approval resulting in non-reporting of such cases.

Domestic violence has been known by many names like domestic abuse, intimate partner violence, and wife battering etc. and its definition varies according to the time, place and context in which it is used. According to Black's Law Dictionary, domestic violence means "*violence between members of the households, usually spouses, an assault or other violent act committed by one member of a household against other.*"[1] However, presently it has been defined very generally to include physical, sexual, psychological, emotional and economic abuses. Laws of many countries

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[1] BLACK'S LAW DICTIONARY, (7th Ed., 1999), p. 1564. *See also*, "According to the Merriam Webster dictionary, it is the inflicting of physical injury by one family or household member on another; also, a repeated/habitual pattern of such behaviour".

gradually define it as a process of exploitation, dominance, and dehumanization.[2]

The gravity of the situation is such that domestic violence has increasingly been recognized nationally as well as internationally as a serious problem over the last three decades. At the international level, many initiatives have been taken by the United Nations regarding Violence against Women in general and domestic violence in particular[3] emphasizing the need of taking immediate steps by States to end gender-based violence in family, in community and by State. At the National level, the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the Act') was enacted by the Parliament to protect women exclusively in the private sphere and provides many essential reliefs to them.

The present article deals with the concept and legislative definition of 'aggrieved person' under the Protection of Women from Domestic Violence Act, 2005 and its judicial interpretation from the initial cases to the latest one i.e. *Hiral P. Harsora* v. *Kusum N. Harsora*,[4] wherein the apex court has exercised its power of judicial review to provide justice to all women victim of domestic violence who are living in the domestic relationships with respondents irrespective of gender and age.

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[2] L. Waldorf, C. Arab and M. Guruswamy, *CEDAW and the Human Rights-Based Approach to Programming,* United Nations Development Fund for Women (UNDFW) (2007) *available at* http://www.unifem.org (last visited December 12, 2018).

[3] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by the UNGA in December, 1979, effective from September, 1981; The Committee on the Elimination of Discrimination against Women was established under art. 17, Part V of CEDAW; in 1989, the Committee adopted a celebrated General Recommendation (GR) No. XII (12); In 1990, the Economic and Social Council accepted a resolution recommended by the Commission on the Status of Women; Recommendation 19 issued by the Committee on Convention on the Elimination of Discrimination against Women (CEDAW) and the UN Declaration on Elimination of Violence against Women (DEVAW) (December 20, 1993).

[4] AIR 2016 SC 4774.

Contextual Need for Making Women as 'Aggrieved Persons'

The family has been considered as a private realm for centuries with implication of being immune from any legal intervention by the State. This scenario is quite blissful for males as they are free to do whatever they want being in the position of power and without any scrutiny thereby they subjugate women and confine them within the four walls of the house to deprive them of all rights and liberties. The State became an overt or covert institution for perpetrating domestic violence due to its failure to recognize it as a crime but merely a family matter especially till independence.

Law as an instrument for social change encounters many obstacles in private sphere but Indian governments have taken certain initiative to enter into it which resulted usually in the disadvantage of women. There were certain provisions preventing domestic violence but they were neither accessible nor beneficial to the victims because being confined they were unaware how to get their rights implemented. The civil remedies were available in the form of injunctions and compensation but that procedure was very slow and no emergency relief was available. The matrimonial remedies were also available but they were generally patriarchal in nature and subjugated women. Moreover, most of such remedies pertained to separation of the spouses and were discriminatory in nature. Special law in the form of Dowry Prohibition Act, 1961 was available but that was toothless therefore, completely ineffective. In the criminal law, there were general provisions against crime that could be used by domestic violence victims but the requirements to prove them were cumbersome and difficult. Therefore till 1983 there was no effectual remedy available.

At that time, young brides faced torture for dowry that sometimes resulted in their murder referred to as bride burning. Against this violence many women activists pressurized the government to change the law or bring new laws which resulted in criminalisation of domestic violence in the form of section 498-A, the cruelty provision in the Indian Penal Code, 1860. Even after this enactment, the dowry death continued at a large scale thus a new offence of dowry death was incorporated in the Indian Penal Code, 1860 in 1986 as section 304-B. The hard work of women's movement to resort to criminal law to interfere in family and protect women against violence has produced conflicting results as they

had been successful in shifting the boundaries of privacy where the State can legitimately interfere but it neither succeeded in removing the public/private distinction nor familial ideology that sustains it.[5] The judiciary also followed suit. The legal intervention into private sphere of family is reinforced through familial ideology.[6]

There was a pervasive feeling that Indian criminal justice system had failed to prevent violence against women due to many flaws in laws, biases of the State functionaries like the courts and police, low conviction rate and uniformly low quantum of sentence awarded. Further, these provisions led to the allegations of misuse by women for extraneous reasons as suggested by various reports and judicial decisions. The construction of an unworthy female victim coupled with the concept that the family was in peril served to erode the value of criminalization of marital cruelty. Moreover, these remedies were not of much use for victims as it did not provide any consequential reliefs' *viz*., right to residence, maintenance, custody of her children etc. The victim is left with two remedies to resort to either civil remedy of divorce or criminal remedy under section 498-A but either of it was proved quite ineffectual for them. Understanding the limitations of the legal framework provides a valid reason for Indian women's efforts to get a new civil law on domestic violence. There was no Law Commission Report on domestic violence prior to its enactment however, in its 243rd Report it mentioned about the Act.[7]

'Aggrieved Person' in Lawyers' Collective's Bill on Domestic Violence

In 1993, the National Commission of Women requested the Lawyers Collective, an NGO, to draft a bill on domestic violence. The first draft prepared by Lawyers Collective was called the Domestic Violence against Women (Prevention) Bill, 1999, (hereinafter referred to as L.C. Bill). The definitions of domestic violence, harassment, intimidation, economic, emotional and sexual abuses were very exhaustive much of

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[5] Ratna Kapur and Brenda Cossman, SUBVERSIVE SITES FEMINIST ENGAGEMENTS WITH LAW IN INDIA 131-132 (Sage Publication, New Delhi, 1996).

[6] *Id.,* p. 132.

[7] Law Commission, *Section 498A IPC,* Law Com No. 243 (Aug 2012) para 9, pp. 20–22.

which is not present in the Act but form a part of the Domestic Incident Report in the Domestic violence Rules.[8] The L.C. Bill was considered as an emergency law providing instant and effective relief to a domestic violence victim (woman) in the form of immediately stopping domestic violence and providing ways to protect *her* from more domestic violence. Furthermore, *victim* would require legal aid, shelter, medical aid, monetary relief, etc. so that *she* can think for *her* future and decide calmly about divorce, maintenance, reconciliation or criminal prosecutions.

The Lawyers Collective set discussions and consultations with diverse women's organisations and lawyers in various parts of the country on every aspect of the L.C. Bill to get their feedback between 1998 and 2001. The L.C. Bill was revised after every such consultation and it is a fact that the law has emerged from these debate and deliberation in women's movement. A popularly debated issue was about the gender-neutrality of the proposed law to extend its protection to men facing domestic violence in the home too i.e. considering men as 'aggrieved persons' but it was rejected. *There was a consensus as to gender-specificity of the law as its objective was to protect women from pervasive problems of gender inequality. As violence against women is a gendered phenomenon thus a gender-neutral law would defeat its purpose and further, men being powerful in their home they could misuse it to dispossess and disadvantage women.*[9] Thus, it was decided to include only females as 'aggrieved persons' in the L.C. Bill.

Further, in the initial draft, there was a definition of "applicant" who can be any parent or guardian who files an application on behalf of children facing domestic violence but it was rejected by women's groups[10] because if such power of representation of children is conferred on both parents, there may be every chance that abusive father uses this law against the child's mother. By tutoring the child to depose against his mother, father could indirectly attain what he is prohibited under the law to do i.e. depriving woman of her right to

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[8] Rukmini Sen, Women's Subjectivities of Suffering and Legal Rhetoric on Domestic Violence: Fissures in the Two Discourses, 17(3) INDIAN JOURNAL OF GENDER STUDIES 390 (2010).

[9] Emphasis Supplied.

[10] Emphasis Supplied.

reside in house. Therefore, the draft was amended to provide that only mother could bring an application on behalf of child.

Therefore, the second draft prepared after the consultation having certain changes was the Domestic Violence against Women (Prevention) Bill, 2001. The definitions as proposed in the LC Bill were introduced into the *Rajya Sabha* in 2001 by Sarala Maheswari with statement of objects and reasons having a significant paragraph which was omitted from the Bill later on. [11] When all the consultations, discussion and meetings among different women's group were completed, final draft of L.C. Bill was submitted to the National Commission of Women, Department of Women and Child Development and other government agencies for consideration but unfortunately at that time no immediate action was taken by the concerned authorities.

'Aggrieved Person' in the Government of India Bill, 2002

The National Democratic Alliance (NDA) government introduced its bill entitled, "Protection from Domestic Violence Bill, 2001" (hereinafter referred to as GOI Bill) in the *Lok Sabha* on 8 March 2002. The word 'protection' replaces 'prevention' and the protectionist paradigm of State in women-related legislations appear to be the ideology continuously.[12] For the first time it was an acknowledgement by government of the fact that domestic violence being a serious issue required specific legal intervention. However, the contents of the GOI Bill were not as per the expectation of the women's organizations rather it was feared that it might have precarious implications for women facing domestic violence as its emphasis was on preservation of family rather than preventing domestic violence against women.[13]

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[11] "[I]n case of domestic violence, because of the inherent inequality, upon which the family structure is based, it acquires social sanction and women are expected to suffer the pain silently, without even questioning … To see domestic violence only in terms of man-woman relationship or non-relationship would be to miss out the essence of the problem, i.e. the institutionalized nature of female second-class citizenship in this society. The role of ideology, the systematic propagation of woman as victim, woman as burden syndrome is equally a part of this institutionalization." As quoted in *supra* n. 8, p. 391.

[12] *Id*.

[13] Indira Jaising, *Bringing Rights Home: Review of the Campaign for a Law on Domestic*

Its scope was very limited in terms of categories of aggrieved persons and nature of reliefs available. It required respondent to be a "relative"[14] of aggrieved person *viz*., persons related by blood, marriage or adoption resulting in the exclusion of those women who were in relationships other than marriage i.e. narrowing down the ambit of 'aggrieved persons'.[15] The reason given by the State was that "such women as have been living in relationship akin to marriage without legal marriages were not included simply because the prevailing cultural ethos of the nation did not encourage such relationship."[16] Therefore, the GOI Bill has defined aggrieved persons very narrowly by excluding even those women who are not legally married but are in relationships in the nature of marriage.

As there was wide outrage articulated by women's organizations against the GOI Bill so it was referred to Parliamentary Standing Committee on Human Resource Development to inspect the provisions of GOI Bill. The Committee heard opinions of all stakeholders who informed it about the flaws and omissions in GOI Bill.[17] *The Committee submitted its report in December 2002 and accepted most of the suggestions made by all these organization including providing relief to a woman whose marriage is not lawfully valid thereby widening the ambit of 'aggrieved persons'*.[18] However, in February 2004, the *Lok Sabha* was dissolved resulting in lapse of the Bill.[19]

Law on Domestic Violence

The United Progressive Alliance (UPA) coalition came to power in May 2004. After extensive consultations, a final draft of the Bill was presented to the Minister of Human Resources Development in July 2004, which was accepted and referred to Department of Women and Child Development. For the period of July 2004 - June 2005, the Bill kept moving between government departments resulting in removal of

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Violence, xliv (44) ECONOMIC AND POLITICAL WEEKLY 54 (October 31, 2009).

[14] Government of India Bill, 2002, s. 2(i).

[15] Emphasis Supplied.

[16] *Supra* n. 13, p. 55.

[17] *Id*.

[18] *Id.*

[19] *Id.*

certain things from the final Bill that was presented to cabinet. *The definition of "applicant" was removed making it ambiguous as to how applications can be moved under the Act on behalf of minors especially the male child under the Act.*[20] *However, the said Bill has defined 'aggrieved persons' by including even those women who are not legally married but are in relationships in the nature of marriage*.[21]

'Aggrieved Person' in Legislative Debates on the Proposed Bill

The draft of Protection of Women from Domestic Violence Bill received the cabinet approval in June 2005, tabled in the Parliament in July and introduced in the *Lok Sabha* on 23rd August. The total time allotted for debate was four and half hours as the Bill on this issue was already debated twice extensively at the time of formulation of GOI Bill, 2002 and when recommendations of the Standing Committee were discussed.

The Bill was introduced by concerned Minister, Government of India.[22] She stated that millions of women in the country are facing domestic violence because society does not treat them well. Domestic violence is a violation of human rights and a major hurdle in development. She referred to the Vienna Accord, the Beijing Convention and India's obligation to enact a stricter law on domestic violence. She requested to support the Bill unanimously.[23] As the Bill has already been supported by all the political parties so there was no question of any opposition as such but surprisingly some of the male members of Parliament opposed it.[24]

Sumitra Mahajan vehemently supported the Bill but raised few concerns. There were many interruptions by male M.Ps. during her speech so much so that she had to say that they were not against any man so there was no need to get so excited. She was worried about protection being provided to live-in-partner and caution government to

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[20] *Id.*

[21] Emphasis Supplied.

[22] The Lok Sabha Debate (23rd August, 2005) *available at* http://164.100.47.132/LssNew/Debates/textofdebatedetail.aspx?sdate=08/23/2005, pp. 455-484 (last visited June 6, 2019).

[23] *Id*.

[24] *Id*.

take care of interests of legally wedded wives meaning thereby that *she was worried about widening the ambit of 'aggrieved persons' in this way. However, she wanted domestic female servants to be included within its purview as 'aggrieved persons' which was not accepted.*[25] During debate *certain members expressed reservations about inclusion of "relationships in the nature of marriage" in the protected categories of women as 'aggrieved persons' as it was alien to Bharatiya Sanskriti and send wrong message to society. Another area of concern was the probable misuse of the Act that has been expressed by almost all the speakers in debate. Apparently, there was an unrest among the members for widening the ambit of 'aggrieved persons' in the Bill.*[26]

'Aggrieved Person' under the Act

The Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the Act) entered the statute book in 2005 and became operative on 26th October 2006. The Act came into effect with the objective of providing "*for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family*."[27] This incantation of the Constitution in the preamble of the Act is noteworthy as application of constitutional principles in the private domain of family has always been resisted by the legislature and the judiciary.

Under the Act, a complaint can be filed by the 'aggrieved person' who has been defined as "any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent."[28] Further, if she is a married woman or a woman living in relationship in the nature of marriage then she can also be subjected to any act of domestic violence by the relatives of husband or male partner as the case may be and in this case the Act enables such woman "to file a complaint under the proposed enactment against any relative of the husband or the male

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[25] *Id*. Emphasis Supplied.

[26] Emphasis Supplied.

[27] The Protection of Women from Domestic Violence Act, 2005, preamble to the Act.

[28] *Id*., s. 2 (a).

partner but it does not enable any female relative of the husband or the male partner to file a complaint against the wife or the female partner."[29]

However, this definition has been criticized on many counts; *firstly*, under the Act the status of a child is hazy as section 2 (b)[30] defines a child but it does not make it clear whether or not a child can be the 'aggrieved person'. Further, section 2(a) talks about *woman only* thereby suggests that children would not be included within its ambit but section 18(c)[31] suggests that a child can be an 'aggrieved person'. In the Act, there is no clarification about male children to be considered as 'aggrieved persons'. It is a fact that children, especially orphans are the most vulnerable targets of domestic violence and the Act unfortunately does not sufficiently recognize their requirements thereby narrowly construing the term 'aggrieved persons'.

Secondly, no female relative of the husband or the male partner can be an 'aggrieved person' and file a complaint against the wife or female partner, e.g. the mother-in-law cannot file an application against a daughter-in-law. So, if in a case daughter-in-law is torturing any female in-laws then they have no remedy against her. Therefore, it narrows down the ambit of 'aggrieved persons' by prohibiting female relatives of husband or male partner to file a case against his wife. *Thirdly*, domestic violence by female family member and minor is kept out of the purview of the Act. *Fourthly*, the Act provides protection to women only and does not provide protection to males from the female domestic partners. Thus, the purview of the Act is much narrower in scope as compared to other developed countries' laws.[32]

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[29] *Id*., Statement of the Object and Reasons of the Act, 4(i).

[30] *Id*., s. 2 (b): 'child' means any person below the age of eighteen years and includes any adopted, step or foster child."

[31] *Id*., s. 18 (c): ...entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person."

[32] Vineeta Srivastava, *Domestic Violence in India: Challenges and Remedies*, xxx (2 & 3) THE INDIAN JOURNAL OF CRIMINOLOGY & CRIMINALISTICS 127 (2009).

Expanded Judicial Interpretation of 'Aggrieved Person'

Kusum Lata Sharma v. *State & Anr.*

In *Kusum Lata Sharma* v. *State & Anr.,*[33] the petitioner was one of the respondents in a Complaint Case titled as "*Ms. Shakuntala Sharma* v. *Nagender Vashishtha & Ors*" for which she received summons from the Court under section 12 of the Act for appearance. The petitioner stated that the complainant/respondent no. 2 was her mother-in- law who due to some property dispute with the petitioner's husband had registered the complaint.[34] The contention was that the Act's object is for redressal of married women who are subjected to cruelty by their husbands or his relatives thus it clearly states that it does not allow any relative of the husband or the male partner to register a complaint against the wife or the female partner. Therefore, husband's mother could not take recourse to the proceedings under section 12 of the Act to register a complaint against the daughter-in-law.[35]

The High Court of Delhi held that the relevant issue for consideration in the case was whether in view of the Statement of Objects & Reasons the expression 'aggrieved person' in section 2(a) of the Act had to be interpreted in a narrow sense just to include the daughter-in-law only and to exclude her mother-in-law, sister-in-law or daughter from its purview.[36] The court discussed the definitions of 'aggrieved person'[37] and 'domestic relationship'[38] to find an answer to this issue and held that

> *"any woman who is in a domestic relationship, the said domestic relationship being one between two persons who lived at any point of time together in a shared household related by consanguinity, marriage or*

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[33] Crl. M.C. No.75 of 2011 dated 2.9.2011.

[34] *Id.,* para 1.

[35] *Id.,* para 2.

[36] *Id.,* para 6.

[37] *Supra* n. 28.

[38] The Protection of Women from Domestic Violence Act, 2005, s. 2(f) 'domestic relationship' means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."

> *through a relationship in the nature of marriage, adoption or family members living as a joint family and alleges that she has been subjected to any domestic violence by the Respondent is entitled to relief under the Act."*[39]

The court further held that the expression 'aggrieved person' could not be interpreted narrowly in view of para 2[40] of the Statement of Objects & Reasons as it is clear that unlike section 498A, the Act addresses 'domestic violence' and not only 'domestic violence qua the daughter-in-law or the wife'.[41] The court stated that para 4(i)[42] clarified that even those women who were sisters, widows, mothers, single woman or living with the abuser were entitled to legal protection under the proposed legislation hence a mother who was being maltreated and harassed by her son would be an 'aggrieved person' and if the said harassment was caused through the female relative of the son, his wife, then she would fall within the purview of the 'respondent'. The court correctly opined that "*the phenomenon of the daughters-in-law harassing their mothers-in-law especially who are dependent is not uncommon in the Indian society.*"[43] Therefore, as per the above discussion, the court held that a female relative of the male partner or a respondent could not be

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[39] *Supra* n. 33, para 7.

[40] "The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498A of the Indian Penal Code. The civil law does not however address this phenomenon in its entirety."

[41] *Supra* n. 33, para 8.

[42] "4.(i) It covers those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or through a relationship in the nature of marriage or adoption. In addition, relationships with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection under the proposed legislation. However, whereas the Bill enables the wife or the female living in a relationship in the nature of marriage to file a complaint under the proposed enactment against any female relative of husband or the male partner, it does not enable any female relative of the husband or the male partner to file a complaint against the wife or the female partner."

[43] *Supra* n. 33, para 9.

stated to have excluded and therefore, mother being an 'aggrieved person' could file a case against the wife of her son.[44]

This approach of the High Court of Delhi to reject the later part of the para 4(i) is very progressive and highly appreciable in the prevalent conditions in our society where all earlier notions have gone and the impact of western society is very much apparent. Earlier domestic violence was generally used to be inflicted upon the daughter-in-law/ sister-in-law only. Now-a-days even mothers, mother-in-law and sister-in-law are facing domestic violence from son and his wife therefore, this interpretation is the need of the hour.

In *Hiral P. Harsora* v. *Kusum N. Harsora*,[45] Kusum N. Harsora and her mother, Pushpa N. Harsora registered a complaint against Pradeep, the brother/son, his wife and two sisters/daughters under the Act in April, 2007 alleging various acts of violence against them but that was withdrawn after three months with liberty to lodge a fresh complaint. After more than three years, they filed two separate complaints against them. Respondent Nos. 2 to 4 moved an application before the trial court for a discharge saying that the complaint under Section 2(a) read with Section 2(q) of the Act could only be filed against an adult male person, therefore, they required to be discharged not being adult male persons. The court passed an order in January, 2012, to refuse such discharge against which they filed a writ petition in the Bombay High Court which discharged them on a literal construction of the Act. That order has since become final.[46]The present case arose because daughter and mother filed a writ petition in Bombay High Court challenging the constitutional validity of Section 2(q) however, they did not pray to seek any interference in the earlier order dated 15.2.2012.[47]

A Division Bench of High Court of Bombay passed its judgement in September, 2014 holding Section 2(q) of the Act to be read down as: -

> *"…in our view, the complaint against the daughter-in-law, daughters or sisters would be maintainable under the provisions of the DV Act, where they are co- respondent/s in a complaint against an adult male person, who is or has been in a domestic relationship with the complainant and*

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[44] *Id.,* para 10.

[45] *Supra* n. 4.

[46] *Id.,* paras 3- 4, pp. 4776-4777.

[47] *Id.,* para 5, p. 4777.

> *such co- respondent/s. It must, of course, be held that a complaint under the DV Act would not be maintainable against daughter-in-law, sister-in- law or sister of the complainant, if no complaint is filed against an adult male person of the family."*[48] *This judgement is questioned in this present appeal.*[49]

It was argued that 'respondent' u/s 2(q) of the Act could mean an adult male person only and its proviso only extended meaning of 'respondent' when the aggrieved person was wife or female partner living in a relationship in the nature of a marriage for even inclusion of a female relative of the husband or male partner. It was further argued that the Court had read the proviso into the main enacting part of the definition of 'respondent' which was not permissible in law. It was also contended that the Act being a penal statute should be strictly construed and as there was no ambiguity in definition, the High Court in its impugned judgement could not dilute the expression 'adult male person'. Many judgements were quoted stating that in the plain language cases, *it was only for the legislature to make the changes as suggested by the High Court*.[50]

It was argued that the Act being a piece of social beneficial legislation to protect women from all kinds of domestic violence therefore, any definition restricting the scope of the Act would have to be either struck down being violative of Article 14 or read down. According to her, the object of the statute, the preamble and various provisions in the Act made it clear that *the expression 'adult male person' was a classification which was not based on any intelligible differentia and also not having any rational relationship with the object of the Act*[51] rather it went contrary to the object to afford the major possible protection to women from domestic violence inflicted by any person, male or female, who shared either a domestic relationship or shared household with the aggrieved person. In the alternative, she favoured the High Court judgement to read down to make it constitutional.[52]

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[48] *Id.,* para 6.

[49] *Id.*

[50] *Supra* n. 4, para 7, pp. 4777-4778. *Emphasis supplied.*

[51] *Id*., para 8, p. 4778. Emphasis supplied.

[52] *Id.*

The counsel further referred the definition of 'shared household' under section 2(s) of the Act and the amendment to the Hindu Succession Act in 2005 that made females the coparceners in a joint Hindu family and observed that the Act was not in tune with the development of other statutory laws. It was stated that the Act being a piece of beneficial legislation that afforded various remedies that were innovative in nature and the Court had to strike down/interpret it by purposive construction only. It was also pointed out that presently the sweep of the Act was such that if a mother-in-law or sister-in-law were to be an aggrieved person, she could be aggrieved only against adult male members and not against any opposing female member of a joint family, e.g. a daughter-in-law or a sister-in-law making the Act a dead letter insofar as these persons are concerned. This kind of interpretation would be violative of the object of the Act. She also argued that the Act would be not workable as reliefs were to be given against adult male members and not their abettors who might be females.[53]

The learned Additional Solicitor General argued that in Kusum Lata Sharma v. State,[54] the Delhi High Court held that the mother-in-law was also allowed to register a complaint against her daughter-in-law under the Act. The SLP filed against that judgment was dismissed by the Supreme Court. Therefore, it would be permitted to a mother-in-law to register a complaint against her daughter-in-law as well as her son and his other female relatives.[55] In short, she supported the impugned judgment.[56]

Decision of the Supreme Court

The apex court opined that *this appeal raises an important question for protection of the females generally* so it would first analyse the Statement of Objects and Reasons, the preamble and all the provisions of the Act to ascertain the exact object sought to be achieved by the Act.[57] The court inferred that

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[53] *Id.*

[54] *Supra* note 33.

[55] Emphasis Supplied.

[56] *Supra* n. 4, para 9, p. 4779.

[57] *Id.,* para 10.

> *"the phenomenon of domestic violence against women is widely prevalent and needs redressal. Whereas criminal law does offer some redressal, civil law does not address this phenomenon in its entirety. The idea therefore is to provide various innovative remedies in favour of women who suffer from domestic violence, against the perpetrators of such violence."*[58]

The Court then examined the preamble of the Act and found that

> *"the Act is to provide for effective protection of the rights of women who are victims of violence of any kind occurring within the family. The preamble also makes it clear that the reach of the Act is that violence, whether physical, sexual, verbal, emotional or economic, are all to be redressed by the statute. That the perpetrators and abettors of such violence can, in given situations, be women themselves, is obvious."*[59]

The curt also perused some of the relevant provisions of the Act including the definitions of 'aggrieved person',[60] 'domestic relationship',[61] 'respondent',[62] 'shared household'[63] and 'domestic violence'.[64] The court observed that the definition of 'domestic relationship' contained in section 2(f) is very wide including relationship between persons who live or have lived together in a shared household and are related in any one of four ways - blood,

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[58] *Id.,* para 14, p. 4782.

[59] *Id.,* para 16, pp. 4782-4783.

[60] *Supra* n. 28.

[61] *Supra* n. 38.

[62] The Protection of Women from Domestic Violence Act, 2005, s. 2. (q) 'respondent' means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

[63] *Id*., s. 2. (s) 'shared household' means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household."

[64] *Id*., s. 3.

marriage or a relationship in the nature of marriage, adoption, or family members of a joint family. The Court opined that domestic relationships involves persons belonging to both sexes and includes persons related by blood or marriage which covers male as well as female in-laws, quite apart from male and female members of a family related by blood.[65]

The court further observed that a shared household includes a household which belongs to a joint family of which the respondent is a member. The court also considered the amendment in section 6 of the Hindu Succession Act, 1956 which came into effect prior to the Act and which makes females as coparceners in the joint Hindu family and to have a right by birth in the property of such joint family. The court opined that in view of the said amended definitions, the restricted definition of 'respondent' must be given a relook under the changed definition of 'shared household' in section 2(s) of the Act. The Court further opined that now a sister can be a coparcener but she cannot be a 'respondent' under section 2(q) of the Act as the main part of the provision has 'adult male person' which is a glaring anomaly.[66] The Court analysed the definition of domestic violence and found it to be gender neutral as physical abuse, economic abuse, emotional abuse, verbal abuse and even sexual abuse in some circumstances can be inflicted by women against other women and therefore, is in consonance with the general object of the Act to outlaw domestic violence of any kind against a woman.[67]

The court further analysed the remedies provided under the Act to infer its true intent. Firstly, it analysed the right to reside in the shared household and observed that the aggrieved person cannot be evicted from a shared household by the 'respondent' except through the procedure established by law. The court pointed out that if 'respondent' is to be read as only an adult male person, then women who evict the aggrieved person are not covered then the object of the Act can easily be defeated by an adult male person not standing in the forefront, but putting forward female persons to get it done. The court opined that the object of the Act would not be sub-served by reading 'adult male

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[65] *Supra* n. 4, para 18, pp. 4786-4787.

[66] *Id*.

[67] *Id.,* para 19, p. 4787.

person' as 'respondent'.[68] It then examined the provisions relating to Protection orders. Under section 18(b) when a protection order is given to the aggrieved person, the 'respondent' is prohibited from aiding or abetting the commission of acts of domestic violence and it will not take within its ken females who may be aiding or abetting the commission of domestic violence, such as daughters-in-law and sisters-in-law, and would again stultify the reach of such protection orders.[69]

The court then examined the provisions relating to Residence orders and found that Section 19(1)(c) provides that the Magistrate may pass a residence order, on being satisfied that domestic violence has taken place and may restrain the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person is residing. The Court opined that a residence order will be toothless unless the relatives including female relatives of the respondent are also bound by it. However, as per definition of respondent, it can only be the case when a wife or a common law wife is an aggrieved person but not if any other woman belonging to a family is an aggrieved person. The Court observed that in the case of a wife or a common law wife complaining of domestic violence, the husband's relatives including mother-in-law and sister-in-law can be arrayed as respondents and effective orders passed against them but in the case of a mother-in-law or sister-in-law who is an aggrieved person, the respondent can only be an 'adult male person' and since his relatives are not within the main part of the definition of respondent, residence orders passed by the Magistrate against female relatives of such person would be unenforceable as they cannot be made parties to petitions under the Act.[70]

The court observed that a Magistrate may direct the respondent to pay monetary relief of various kinds to the aggrieved person. If the respondent is only to be an 'adult male person' then any compensation to a mother-in-law due from a daughter-in-law for infliction of domestic violence will not be available whereas the daughter-in-law, being a wife, will be covered by the exception to section 2(q) thus will be entitled to

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[68] *Id*.

[69] *Id.,* para 20.

[70] *Id.,* para 21, pp. 4787-4788.

any monetary relief against her husband and his female relatives including his mother.[71]

The court also examined the provisions relating to relief in other suits and legal proceedings and penalty for breach of protection order by respondent. The Court held in this regard as,

> *"23. When we come to Section 26 of the Act, the sweep of the Act is such that all the innovative reliefs available under Sections 18 to 22 may also be sought in any legal proceeding before a civil court, family court or criminal court affecting the aggrieved person and the respondent. The proceeding in the civil court, family court or criminal court may well include female members of a family, and reliefs sought in those legal proceedings would not be restricted by the definition of 'respondent' in the 2005 Act. Thus, an invidious discrimination will result, depending upon whether the aggrieved person chooses to institute proceedings under the 2005 Act or chooses to add to the reliefs available in either a pending proceeding or a later proceeding in a civil court, family court or criminal court. It is clear that there is no intelligible differentia between a proceeding initiated under the 2005 Act and proceeding initiated in other fora under other Acts, in which the self-same reliefs grantable under this Act, which are restricted to an adult male person, are grantable by the other fora also against female members of a family. This anomaly again makes it clear that the definition of 'respondent' in Section 2(q) is not based on any intelligible differentia having any rational relation to the object sought to be achieved by the 2005 Act. The restriction of such person to being an adult male alone is obviously not a differentia which would be in sync with the object sought to be achieved under the 2005 Act, but would in fact be contrary to it.*
>
> *24. Also, the expression "adult" would have the same effect of stultifying orders that can be passed under the aforesaid sections. It is not difficult to conceive of a non-adult 16 or 17-year-old member of a household who can aid or abet the commission of acts of domestic violence, or who can evict or help in evicting or excluding from a shared household an aggrieved person. Also, a residence order which may be passed under Section 19(1)(c) can get stultified if a 16 or 17-year-old relative enters the portion of the shared household in which the aggrieved person resides after a restraint order is passed against the respondent and any of his adult relatives. Examples can be multiplied, all of which would only lead to the*

[71] *Id.,* para 22, p. 4788.

> *conclusion that even the expression 'adult' in the main part in Section 2(q) is restrictive of the object sought to be achieved by the kinds of orders that can be passed under the Act and must also be, therefore, struck down, as this word contains the same discriminatory vice that is found with its companion expression 'male'."*[72]

The court held that

> *"A conspectus of these judgments also leads to the result that the microscopic difference between male and female, adult and non-adult, regard being had to the object sought to be achieved by the 2005 Act, is neither real or substantial nor does it have any rational relation to the object of the legislation. In fact, as per the principle settled in the Subramanian Swamy judgment, the words 'adult male person' are contrary to the object of affording protection to women who have suffered from domestic violence 'of any kind'. We, therefore, strike down the words 'adult male' before the word 'person' in Section 2(q), as these words discriminate between persons similarly situate, and far from being in tune with, are contrary to the object sought to be achieved by the 2005 Act."*[73]

The court applied the doctrine of severability in the present case and found that "An application of the aforesaid severability principle would make it clear that having struck down the expression 'adult male' in Section 2(q) of the 2005 Act, the rest of the Act is left intact and can be enforced to achieve the object of the legislation without the offending words. Under Section 2(q) of the 2005 Act, while defining 'respondent', a proviso is provided only to carve out an exception to a situation of 'respondent' not being an adult male. Once we strike down 'adult male', the proviso has no independent existence, having been rendered otiose."[74]

The court also compared the provisions of the Protection from Domestic Violence Bill, 2002 and the present Act. The Bill contained the definition

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[72] *Id.,* paras 23-24, pp. 4788-4789.

[73] *Id.*, para 36, pp. 4793-4794.

[74] *Id.*, para 40, p. 4795.

of 'aggrieved person'[75], 'relative'[76], and 'respondent.'[77] The Court observed that the 2002 Bill defined 'respondent' as meaning 'any person who is…' without prefixing the words 'adult male' which is in consonance with the object sought to be achieved by that Bill as well as by the present Act. The Court also analysed the definition of 'respondent' under Section 2(m) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 as, 'a person against whom …' again without prefixing the words 'adult male'. The Court opined that Parliament itself has thought it reasonable to widen the definitions of 'respondent' in both the 2002 Bill and the 2013 Act to be in tune with the object sought to be achieved by these statutes to protect women in various spheres of life.[78]

In the last, the Court dealt with the impugned judgment wherein the High Court had read down the definition of 'respondent' to include even female relatives of respondent in all cases. The Court observed that the doctrine of reading down is well settled in constitutional adjudication and has been mentioned in several judgments from time to time [79] where the Court stated that this doctrine would apply only when the general words used in any statute or regulation could be confined in a particular manner not to infringe any constitutional right.[80] The court opined that the doctrine of read down is inapplicable in the present case and also 'reading up' a statutory provision is equally not permissible.[81] The court, therefore, set aside the impugned judgment of the Bombay High Court and declared that

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[75] S.2(a): 'aggrieved person' means any woman who is or has been a relative of the respondent and who alleges to have been subjected to acts of domestic violence by the respondent.

[76] S. 2(i): 'relative' includes any person related by blood, marriage or adoption and living with the respondent.

[77] S.2(j) 'respondent' means any person who is or has been a relative of the aggrieved person and against whom the aggrieved person has sought monetary relief or has made an application for protection order to the Magistrate or to the Protection Officer, as the case may be.

[78] *Supra* n. 4, para 42, p. 4796.

[79] *Id.,* para 44, pp. 4796-4797.

[80] *Cellular Operators Association of India* v. *TRAI* (2016) 7 SCC 703, para 50.

[81] *Supra* n. 4, para 45, p. 4798; *See also B.R. Kapur* v. *State of T.N.* (2001) 7 SCC 231, para 39.

> *"the words 'adult male' in Section 2(q) of the 2005 Act will stand deleted since these words do not square with Article 14 of the Constitution of India. Consequently, the proviso to Section 2(q), being rendered otiose, also stands deleted."*[82]

Analysis of the Decision

It is an innovative verdict pronounced by the Supreme Court to widen the scope of the Act by deleting the words 'adult male', being discriminatory, from the definition of 'respondent' resulting in widening of the ambit of 'aggrieved persons' too. Now it becomes possible to prosecute all females *including daughter-in-law and sister-in-law* and non-adults for subjecting a woman relative *including mother-in-law and sister-in-law* to domestic violence of any type. Further, the remaining part of the Act, on the severability principle, has been kept intact and would be effective.

In this path breaking judgement, the apex court opined that in view of the object of the Act, the minuscule difference between female and male, adult and non-adult is neither real or substantial nor does it have any rational nexus to the object of the Act. Therefore, with this laudable pronouncement, based on principle of equality, any person irrespective of gender or age can be sued/prosecuted for causing domestic violence to any woman in a domestic relationship under the Act. In plainer terms, cases under the Act can be filed to claim reliefs by any woman (mother, sister, daughter, wife, daughter-in-law, *sister-in-law and mother-in-law*) against any other person, male or female residing in that shared household and also the respondent, male or female, can be adult or non-adult.

In the earlier scenario, it was quite possible for any man to use his wife to dispossess his mother indirectly e.g. by making her life a nightmare through various tortures that ultimately force mother to leave the house if she does not want to file a case against her son because of love and affection. Similar is the case of a sister when she does not want to file a case against her brother for the same reason. Evidently in both these cases, it is the wife of son/brother who is miscreant and not the man who is actually the brain responsible for all these problems but unfortunately the complaint could not be filed against his wife.

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[82] *Id.,* para 46, p. 4798.

However, in some cases it is quite possible that the wife is the actual person creating mis-happenings for her mother-in-law or sister-in-law. In that situation, a mother can file complaint against her son only and not against his wife, a sister against her brother only and not against his wife and a daughter against her father only which happens rarely as these females are very closely related to this male and do not want to create troubles for him by commencing proceedings against him out of natural love. Generally, the cases have been filed by the wife against her husband and his relatives including females under the Act. Therefore, now by virtue of this judgment, the law can prevent dispossession of mothers and sisters by their sons and brothers respectively through their wives who can presently be sued and prosecuted in their own names and can also be held liable under the Act.

India is the country which is one of the oldest civilizations and having rich culture wherein mother is considered like a Goddess and sister is respected too. But it is unfortunate to observe that nowadays these ingrained values are completely absenting from our society and considered as old fashioned. The society has become materialistic where money and material possessions have taken precedence over traditions, cultural and moral values. The situation has been reached to a level where the Indian Parliament had to enact a law titled, 'The Maintenance and Welfare of Parents and Senior Citizens Act, 2007' to provide maintenance and for welfare of the parents and senior citizens as the children are not taking care of them. This type of concept was completely unheard of in the Indian society but currently this scenario has become the order of the day in which the children neither want to keep their parents with them nor want to provide them with the necessities of life.

Therefore, in this disappointing scenario, the apex court has rightly modified the definition of respondent resulting in modification and widening of definition of 'aggrieved person' to enable mother or sister of a man to file a complaint even against his wife or sister who can be the actual culprit in some cases. The apex court has rightly followed the famous and oft-quoted principle relied by Lord Denning in *Seaford Court Estates Ltd.* v. *Asher*[83] wherein he held:

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[83] (1949) 2 All ER 155.

> *"When a defect appears a judge cannot simply fold his hand and blame the draughtsman. He must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written words so as to give 'force and life' to the intention of the Legislature. A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases". The apex court also consistently followed the aforesaid principles in many cases.*[84]

Thus, it is appropriate to say that the apex court has very well performed its primary duty to provide appropriate interpretation to the definitions of 'aggrieved person' and 'respondent' in present scenario having regard to the purpose sought to be accomplished by enacting the Act.

Conclusion

The Act has addressed domestic violence as a distinct human rights issue and constituted civil machinery for fighting the same. It represents a strategic planning to establish a discursive space inside home wherein patriarchal ideologies may be temporarily disrupted even if not entirely overturned therefore, provides a welcome opportunity to understand the wide-ranging impact of domestic violence on women's lives. It is interesting to note that in India, it is the first major endeavour to define domestic violence to cover live-in relationships. It was expected that the Act would prove to be very useful in providing reliefs to domestic violence victims as it was drafted from a new perspective free from patriarchal biases. The legislature has enacted it with a view to bring equality in home but its success highly depends on the extent to which required machinery are put in place by State, on how it is interpreted by the judiciary and most importantly the extent to which women will be able to invoke it or at least internalise the fact that domestic violence is something that cannot be tolerated.

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[84] *M. Pentiah* v. *Muddala Veeramallappa*, (1961) 2 SCR 295; *S. Gopal Reddy* v. *State of Andhra Pradesh*, 1996 Cri L J 3237; *State of Bihar* v. *Bihar Distillery Ltd*., AIR 1997 SC 1511; and *Ahmedabad Municipal Corpn. Anr.* v. *Nilaybhai R. Thakore* (1999) 8 SCC 139.

It has become explicitly clear that the Act being a benevolent piece of legislation to protect women from all kinds of domestic violence therefore, any definition restricting the scope of the Act would have to be struck down violating article 14. The Act *should not be considered as a safeguard available merely to the aggrieved wife or female partner against her husband or male partner and his relatives but rather it can be resorted to by any woman living in a domestic relationship who is suffering from any kind of domestic violence in whatsoever form and at whosoever's hands.* Therefore, it opens the possibility of utilizing the Act by husband's mother or sister/s who may face abuse and domestic violence at the hands of daughters-in-law or sister-in-law respectively in a shared household. Thus, in view of this judgement, the female relatives of husband are equated on par with the wife/female partner to be allowed to file complaint against the wife/female partner.

The Supreme Court has followed a firmly entrenched principle of interpretation of statutes that it is obliged to correct apparent drafting errors and accept the constructive role of finding the exact intention of Parliament from not only the plain language of the statute but also from many social conditions and considerations which gave rise to the law. Thus, in the present case, the Apex Court has taken purposive construction to struck down two words to make it meaningful and relevant by keeping of the constitutionality of the Act. While pronouncing the judgment, the Court even did not take into consideration the written words in para 4(i) of the Statement of Objects and Reasons which expressly exclude the mother-in-law and the sister-in-law from the purview of the definition of 'aggrieved person'.

Finally, although the Supreme Court's verdict modifying in rational perspective the definition of 'respondent' and 'aggrieved person' within the Act resulting in this judicial proposition's immediately come into force, the same does not relieve government from its duty. Therefore, the government must without any excuse and as soon as possible bring an appropriate Amendment Bill in the Parliament to formally amend the Act accordingly to provide a uniformity and clarity to the concerned stakeholders. The government must also take initiative for express inclusion of children and female domestic servants and employees in the definition of 'aggrieved person' under the Act to impart real justice to them.

This approach of the apex court is very progressive and highly appreciable in the prevalent conditions in our society and is the need of the hour. It is the hope that in future also the Court will exercise its power of judicial review to provide justice to all in view of the Constitutional principles.

A Critical Analysis of the Insolvency and Bankruptcy Code, 2016 of India

Ankeeta Gupta[*]

Introduction

India has been on the path of economic growth and corporate re-organisation since the coming of the new government in 2014. India has often been chided for having fallen behind in terms of development of corporate economy by failing to keep up with the global trends. In line with the vision of India's Prime Minister various initiatives have been undertaken so as to improve the image of India's corporate economy before the world. Some of these initiatives include the Make in India concept, paying due attention to the ranking received on the ease of doing business index authored by the World Bank, bringing far reaching amendments in existing laws pertaining to arbitration, labour laws and introducing ground breaking legislations which will go a long way in paving the path for economic growth and development in India.[1] The two most important legislations include the Goods and Service Tax Act, and the Insolvency and Bankruptcy Code 2016.[2]

The Insolvency and Bankruptcy Code (hereinafter referred to as **"the Code"**) provides for a consolidated mechanism for resolving insolvency in India. It seeks to induce efficiency within the insolvency and bankruptcy law regime by separating the commercial and judicial aspects of insolvency and bankruptcy processes. The Code marks a departure from the earlier approach of *"debtor in possession"* to *"creditor*

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[1] Mahesh Thakar and Jyptmala Thakar, *Insolvency and Bankruptcy Code, 2016*, 46 (9) CHARTERED SECRETARY 37 (2016).

[2] Deepak Jain, The Insolvency and Bankruptcy Code, 2016-An analysis of Opportunities for Insolvency Professionals under the Code, 38 CHARTERED SECRETARY (2017).

in possession". The Code stands on four pillars: Insolvency and Bankruptcy Board of India, IBBI (the regulator), National Company Law Tribunal and the National Company Law Appellate Tribunal (the unified adjudicatory authority), Insolvency Professionals and Information Utilities. The Code has revamped the earlier mechanism of debt resolution to be more efficient and effective. The Code has greatly strengthened the legal infrastructure pertaining to liquidation and rehabilitation and revival of failing commercial entities in India which promises to improve India's ranking on the Ease of Doing Business Index. The Code will play a vital role in the credit eco-system of the country.

The current paper aims at critically analysing the provisions of the Code in detail, delving into the history of insolvency and bankruptcy rules prior to the coming of the Code in Part one, Part two will detail with basic features of the Code, Part three will cover the challenges that the Code has thrown open and Part four concludes the arguments of the researcher.

Part I: History

India has had the dubious distinction of having chequered laws when it came to solving insolvency and bankruptcy cases. For a significant amount of time Provincial Insolvency Act of 1920 and Presidency Insolvency Act of 1909 were in vogue for addressing the bankruptcy and insolvency issues. Subsequently these laws were replaced by an array of statutes for dealing with insolvency and bankruptcy of companies, individuals, financial institutions etc. Provisions[3] relating to insolvency and bankruptcy for companies and financial firms were found in the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "SICA"), the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. Individual bankruptcy and insolvency was dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and was therefore dealt with by the Courts. The Reserve Bank of India has from time to time introduced various schemes, rules and regulations in order to reduce

[3] Insolvency and Bankruptcy Code, 2016, Statement of objects and reasons.

the instances of loan default and consequently the instances of non-performing assets with the intention of realizing as much of the loan amount as was possible, these measures included Corporate Debt Restructuring Scheme, Joint lenders Forum with strategic debt restructuring, and sustainable structuring of stressed assets. SICA was single most important statute pertaining to the insolvency and bankruptcy of companies to have been introduced while others were merely offshoots/extensions. Thus, SICA and Recovery of Debt Due to Banks and Financial Institutions Act, 1993, have been discussed in some detail herein below.

The Sick Industrial Companies (Special Provisions) Act, 1985

It was the result of a high-powered expert committee constituted by the Reserve Bank of India under the chairmanship of Mr. T. Tiwari which suggested that a robust mechanism was required to revive and rehabilitate the potentially sick industrial companies. Its jurisdiction included industrial companies which were listed in schedule I to the Industries (Development and Regulation) Act, 1951 along with government companies.[4]The onus of reporting sickness to the Board for Industrial and Financial Reconstruction (hereinafter referred to as the "**Board**", "**BIFR**") lay with the board of directors of the potentially sick company, Reserve Bank of India, Central Government, and/or Financial Institutions having interest in the company. The law provided that the reference was required to be made within a period of two months from the date of discovery of sickness of the company and the Board was mandated to deliver the verdict and ensure that the scheme of rehabilitation was implemented within a period of ninety days from the date of order. The law also provided for placing a moratorium on all transactions financial, commercial and legal till the scheme was finally approved by the Board. The Statute was well drafted; however, its drawbacks lay in the fact that a lot of discretionary powers had been extended to the Board which eventually led to unrealistic and unreasonable time extensions which in effect marred the all the chances of the company recovering from sickness. The law catered to only a

[4] M.S. Narayanan, *Industrial Sickness: Review of BIFR's Role 1994*, 29 (7) ECONOMIC AND POLITICAL WEEKLY 362-376.

specific set of companies which reduced the applicability and in effect the efficacy of the statute.

While analysing the reasons for requirement of the new law it was observed that even though the object behind SICA was revival of sick companies, not too many revivals took place and in the process a protective wall was created such that creditors failed to realise their debts from the debtors.[5] Thus the law proved futile in addressing the problems of corporate insolvency while at the same time increasing the mounting Non-Performing assets in banks.

Recovery of Debt Due to Banks and Financial Institutions Act, 1993

The statute was introduced pursuant to a felt need within the banking sector for a specialized law pertaining to and addressing the dire need of the banking sector of realization of debts due to banks and financial institutions. It is pertinent to note that the banking system forms the backbone of the corporate economy and it cannot be expected to function without adequate checks, balances and consequent realization of debts. The basic purpose and object of this act is recovery of debts due to banks so that such recovery could be adjudicated expeditiously. It is clear that scheme of the act is more to substitute the process of the courts in relation to the recovery suits as provided for within the Code of Civil Procedure. The basic purpose of the Act was to provide an alternate process of law for recovery of bank dues. The proceedings under the act were calculated to counter the dilatory tactics adopted by the recalcitrant litigants.[6] The act was a complete code in itself as far as recovery of debt was concerned. It provided for various modes of recovery of debts.

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[5] Srivastava. S.S. And Yadav. R.A, Management and Monitoring of Industrial Sickness (1986).

[6] G.S. Dubey, An Introduction to The Recovery of Debts Due to Banks And Financial Institutions Act, 1993- A Study, 16 CHARTERED ACCOUNTANT PRACTICE JOURNAL (2013).

Insolvency and Bankruptcy Code, 2016

Need for Insolvency Law

The primary objective of insolvency law is to ensure orderly resolution of the company's debt crisis either in the form of a peaceful liquidation or bringing the company back as a going concern. In either of the situation the law discourages individual enforcement of debts and in fact puts a moratorium on the existing liabilities of the corporate debtor. It is commonly understood that the assets of the bankrupt belong to the common pool which is available for realizing the debts of the creditors and that the creditors are paid *pari-passu*. This enhances the achievement of insolvency law's goals of efficiency and equity in treatment of claims and maximization of realizations.[7] There seems to be lot of misplaced faith on the procedural perfectness of the insolvency law which is making the process mechanical leading to dilution of an important fact that it is within bankruptcy where competition is sharpest and negotiations are the meanest. Meaning thereby that Insolvency laws should not merely be evaluated on the mechanical scale of number of companies getting wound up or getting their debt resolved rather their success should be weighed in terms of full credit realization and the manner in which the creditors are able to maximize the value of their investment and assets. This clearly indicates that the existing framework in vogue in India is wanting and a new set of principles is required to be incorporated so as to make a more effectual and robust legal system to deal with corporate insolvencies. It is worthwhile to note that the drafters of the Code have made significant efforts in ensuring creation of a holistic law by referring to global principles pertaining to Insolvency and Bankruptcy, most important being the United Nations Commission on International Trade Law's Legislative Guide to Insolvency, as discussed in the next section.

Applicability of the UNCITRAL Principles

The UNCITRAL *Legislative Guide on Insolvency*[8] is a benchmark guide governing the broad principles of Insolvency and it states the objectives

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[7] Elizabeth Warren, *Bankruptcy Policy 1987*, 54 Univ. of Chicago L. Rev. 775, 785.

[8] Text of the UNCITRAL Guide to Insolvency, *available at* https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (last visited March 20, 2019).

for a collective insolvency resolution regime. The Guide provides rules for ensuring certainty in the market to promote efficiency and growth, allow maximisation of value of assets, strike a balance between liquidation and reorganisation, ensure equitable treatment of similarly situated creditors, make provisions for timely, efficient and impartial resolution of insolvency. Thus apart the guide goes on to make provisions for the preservation of the insolvency estate to allow equitable distribution to creditors, while at the same time ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information.[9] The guide makes provisions for recognition of existing creditor rights and establishment of clear rules for ranking priority of claims and lastly the guide emphasizes on the establishment of a framework for cross-border insolvency. These principles have been derived from three core principles that have been adopted by the most well-developed bankruptcy and insolvency resolution regimes. These principles include[10] a linear process that both creditors and debtors follow when insolvency is triggered; a collective mechanism for resolving insolvency within a framework of equity and fairness to all stakeholders to preserve economic value in the process; a time bound process either ends in keeping the firm as a going enterprise, or liquidates and distributes the assets to the various stakeholders.[11] It will be seen from discussion about the Code in the next segment that a significant effort has been made to incorporate various provisions within the Code as well.

Provisions of the Code

The Code was introduced to plug the loopholes that existed in the erstwhile laws as mentioned in the previous section. The objectives of the Code are manifold the Code facilitates time bound insolvency resolution process and liquidation and aims at improving on the ease of

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[9] Ravi, Aparna, The Indian Insolvency Regime in Practice – An Analysis of Insolvency and Debt Recovery Proceedings, Working Paper, FRG IGIDR (2015).

[10] Sengupta, Rajeswari and Anjali Sharma, Corporate Insolvency Resolution in India: Lessons from a Cross-Country Comparison, Working Paper, FRG IGIDR (2015).

[11] Government of India, The Report of The Bankruptcy Law Reforms Committee, 2015 *available at* http://ibbi.gov.in/BLRCReportVol1_04112015.pdf,) p. 27 (last visited March 20, 2019).

doing business ranking in India and also set up better and faster debt recovery mechanism in India.[12] It is worthwhile to point out that the Code has made an attempt to incorporate various principles as mentioned in the UNCITRAL Principles governing Insolvency.

The Preamble of the Code clearly lays down that the primary objectives of the Code as follows:

1. *"to merge and modify the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner"*

   It has observed that some of the major problems engulfing the erstwhile mechanism for solving insolvency and bankruptcy issues were multiplicity of laws, overlapping jurisdictions and limited co-relation between the existing statutes.[13] It was these obstacles that ultimately resulted in delay in the entire process of resolution of insolvencies leading to extreme frustration amongst all the stakeholders more so the creditors who were deprived of their right to credit realization. With all the relevant laws coming under one roof with single authority adjudication and regulation there is hope that bankruptcy proceedings will get resolved within a time bound manner. It is for this reason alone that the Code has been made applicable to companies, Limited Liability Partnerships, Firms, and Individuals.

2. *"maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders"*

   It is important to have a robust mechanism for resolving insolvency issues and opting for appropriate mechanism in terms of revival and rehabilitation or liquidation of companies in shortest possible time. The delay often results in loss to the economy in terms of resources, production, employment and development of the industry concerned leading to poor growth. It also leads to a trust deficit amongst the creditors who in order to ring fence themselves lend selectively and are weary of investing in entrepreneurial initiatives or small-scale industries.

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[12] Rakesh Wadhwa, *Insolvency and Bankruptcy Code, 2016*, 46 (9) CHARTERED SECRETARY 23 (2016).

[13] M. S. Narayanan, Industrial Sickness in India: The Role of BIFR, 1994.

When creditors know that they have weak rights resulting in a low recovery rate, they are averse to lend. In India creditors have generally had limited or no powers when faced with default, the erring promoters and management continued to stay in control with limited liability towards creditors. The fact that the creditors have often been handed down a raw deal is evident from the fact that creditors were willing to take a 94% haircut in the hope that they will realize at least some part of their debt. In the first case that was settled under the Code the creditors were willing to take a mere INR 54 crore in lieu of the INR 900 crore that was due to them. As per the BLRC[14] report the lenders are able to realize only 20% of their dues. This clearly indicates the sad state of affairs that exists in the economy. A firm having the freedom of entry and freedom to business may however, fail to deliver as planned for various reasons which may or may not be economic, but may be social, policy driven and in few cases *mala-fide*. In any scenario the inability of one debtor should not dampen the spirit of lending. The Code thus addresses business failures either by rescuing failed businesses or releasing resources from failed businesses and thereby promoting entrepreneurship. The Code also enables the entrepreneurs to get in and get out of business with ease undeterred by failure.

The Indian economy has suffered in a number of ways due to the absence of appropriate mechanism for addressing default. One of the major setbacks suffered by the economy is poorly developed credit market as the lenders are unwilling to lend fearing a loss of investment and fearing lower availability funds at their disposal limiting their ability to re-lend. Further, low and delayed recovery raises the cost of credit which leads to expensive projects ultimately making them non-viable. Lack of adequate credit availability in a cash strapped economy has further resulted in stifling of corporate growth. Many of the labour-intensive industries have also taken a beating, as they have been starved of credit facilities.

Through provisions for resolution and liquidation, the Code enables lenders to recover funds from either future earnings, or post resolution or sale of liquidation assets. They can now distinguish price and credit

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[14] Government of India, The Report of The Bankruptcy Law Reforms Committee, 2015 *available at* http://ibbi.gov.in/BLRCReportVol1_04112015.pdf (last visited March 20, 2019).

risks across risk categories and offer differentiated and customized credit products across the value chain. Further, the inevitable consequence of a resolution process deters the management and promoter of the corporate debtor from committing a default and thereby minimizes the incidence of default. This increases the supply of credit, reduces the cost of funds, and develops a debt market. The Code thus addresses default and thereby enhances the availability of credit for business. There has been a marked improvement in the credit realization as there has been a sudden spurt of debt clearances by corporate debtors, as per certain reports about 2100 companies settled INR 83,000 Crore worth of dues after implementation of the Code.[15] The Code thus seems to be a welcome step as it aims at realization of dues in a timely manner with the intention of balancing the interests of all the stakeholders.

Further it needs to be pointed out that the Code facilitates better utilization of resources while preserving the enterprise value.[16]It enables the optimum utilization of resources all the time by:

a) Preventing the use of resources below the optimum potential,
b) Ensuring efficient resource use within the firm through resolution of insolvency; or
c) Releasing unutilized or under-utilized resources for resources efficient uses through closure of the firm.

The Code thus addresses inefficiency of resource utilization and thereby maximizes the value of assets. It is believed that if the resources, that are currently unutilized or under-utilized can be put to more efficient uses, the growth rate within the economy may well go up leading to marked improvement in availability of credit and entrepreneurship as observed by Jongho Kim.[17]

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[15] Owners settle Rs.83k-cr bank dues" Times of India (23rd May, 2018)17 *available at* https://timesofindia.indiatimes.com/business/india-business/owners-settle-rs-83k-crore-bank-dues/articleshow/64279946.cms (last visited March 20, 2019).

[16] Nilesh Sharma, Corporate Insolvency Resolution Process, under the Insolvency and Bankruptcy Code, 2016-An Analysis, 46(9) CHARTERED SECRETARY 56 (2016).

[17] Jongho Kim, Bankruptcy Law Dilemma: Appraisal of Corporate Value and Its Distribution in Corporate Reorganization Proceedings, NORTH-WESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS, Volume 29 Issue 1 Winter, 119.

After having discussing the primary objectives of the Code it is imperative to discuss various provisions of the Code which improves the current legal landscape pertaining to insolvency and bankruptcy law. These are discussed below:

1. *Detailed definition of important terms:*

   The Code has made significant efforts to streamline the various ambiguities which earlier existed within the definitions of stakeholders, creditors etc. and often resulted in flawed interpretations. The Code has identified different types of creditors giving them differential rights[18] has done away with the regular classification of creditors in the form of decree holders, bond – holders and creates new classes of creditors viz: *financial creditors, operational creditors and other creditors.* Financial creditors have been identified as those who have lent out any financial debt[19] while the operational creditors have been identified as those to whom the corporate debtor owes an operational debt including the rights of the employees and workmen. It is worthwhile to point out that the rights of employees were often in jeopardy whenever a company went into liquidation and thus the certainty brought out by the Code is a welcome step.[20] However, there continue to exist various ambiguities within these definitions itself. Recent cases viz: the Binani Cement Ltd.,[21] the Jaypee Infratech Limited,[22] *Col. Vinod Awasthy* v. *AMR Infrastructures Ltd*.[23] etc. have heightened the debate surrounding the actual definition of operational creditors, financial and other creditors.

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[18] Wood, Roderick J., *The Definition of Secured Creditor in Insolvency Law*, 25 BANKING & FINANCE LAW REVIEW 341 (2010), available at SSRN: https://ssrn.com/abstract=1710383 (last visited March 30, 2019).

[19] Insolvency Bankruptcy Code, 2016, s. 5(8).

[20] Bank of Maharashtra v. Pandurang Keshav Gorwardkar 2013 (6) SCALE 716.

[21] Decided on May 2, 2018 by Supreme Court of India.

[22] Decided on May 16, 2018, by National Company Law Tribunal, Kolkata.

[23] Decided on February 20, 2017, by National Company Law Tribunal, Principle Bench Delhi.

2. *Stringent Time lines*

The Code prescribes very strict time lines which are required to be adhered to for successful culmination of proceedings filed under the Code. The adjudicating authority has been mandated to hear and decide whether to admit, reject, point out defects in the application requesting a resolution of debt either by financial creditor, or by operational creditor or a corporate applicant within a period of fourteen days[24] from the date of filing of the application. Once the adjudicatory authority admits the plea for resolution the entire resolution process must be completed within a period of hundred and eighty days[25] with a maximum extension of ninety days[26] and the committee of creditors is mandated to fit all the procedural requirements within this time schedule. The Code provides punitive measures in the form of compulsory liquidation of the commercial entity in case the time lines set by the code are violated.[27] These time lines are one of the most important features ensuring that the objective of the code for timely resolution of debt is achieved. The Code has deliberately avoided giving of discretionary powers to the adjudicatory authority as were given under the erstwhile SICA to Board for Industrial Finance and Reconstruction.

3. *Going from Debtor in Possession to Creditor in Possession*

The Code has made a significant departure from the erstwhile concept of *debtor in possession* to *creditor in possession*. The Code allows creditors to assess the viability of the corporate debtor while keeping a check on the profitable assets and ensuring that the best practical decision is taken keeping all the stakeholders satisfied while at the same time ensuring that corporate debtor continues as a going concern.

Hence, the Code marks a shift from debtor centric liquidation process to creditor determined liquidation process. The idea of giving the debtor innumerable chances to survive with the fond hope that it will revive and rise as a phoenix from the ashes is done

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[24] Insolvency Bankruptcy Code, 2016, ss. 7, 8 and 9.

[25] Insolvency Bankruptcy Code, 2016, s.12(1).

[26] Insolvency Bankruptcy Code, 2016, s.12(3).

[27] Insolvency Bankruptcy Code, 2016, s. 33.

away with.[28] It should be noted that the Code marks a substantial change in legislative policy relating to corporate insolvency, wherein, creditors in general and financial creditors in particular are substantially empowered to obtain debts due to them. While the two-tier insolvency mechanism by default is a welcome development in the law, the approach of the Code, requiring the NCLT to admit insolvency resolution process invoking applications to be admitted *de hors* considerations regarding the sub-stratum of the company may be problematic.[29] The fate of the Code rests on the change in the mindset of the creditors and the services that insolvency professionals render.[30]

4. *Insolvency Professionals*

As discussed above Insolvency Professionals form one of the pillars of the Code, who would play a vital role in the efficient working of the insolvency and bankruptcy process. Any person willing to get the certification will have to become a member of an insolvency professional agency registered with Insolvency and Bankruptcy Board of India. The insolvency professional takes care of the administrative functions of the corporate debtor once the adjudicatory authority admits the application for CIRP[31] i.e. manages the affairs of the company since the promoters and the management handover control to the committee of creditors.[32] The Insolvency professionals also has the responsibility of collecting information relating to assets, finances and operations, determination of the financial position of the corporate debtor, collection and consolidation of claims from creditors and most

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[28] Salim, Mohammad Rizal, *Corporate Insolvency and the Protection of Creditors*, 3 UiTM LAW REVIEW 143 (2007), available at SSRN: https://ssrn.com/abstract=1462902 (last visited March 20, 2019).

[29] Sriram, *The Insolvency and Bankruptcy Code, 2016*, 46(9) CHARTERED SECRETARY 32 (2016).

[30] P.H. Arvindh Pandian, Corporate Insolvency Resolution Process under the Bankruptcy Code and its impact on the Companies Act 46(9) CHARTERED SECRETARY 62 (2016).

[31] S.3(19) and 207 of the Code.

[32] S. Eshawar, Information Utilities- Provider of Level Playing field in Insolvency and Bankruptcy Process, 46(9) CHARTERED SECRETARY 71 (2016).

importantly constitution of the committee of creditors.[33] They must adhere to the strict code of conduct as laid down by the Code and take reasoned and judicious decisions, comply with all the requirements and terms and conditions specified in the bye-laws of the insolvency professional agency and submit to the authority of the agency of which he is a member. The Insolvency Professional is in charge of conducting the entire resolution process including taking custody and control of all assets, representing and acting on behalf of the corporate debtor,[34] convening and attending meetings of the committee of creditors, preparing information memorandum and inviting resolution applicants to put forward resolution plans.

5. *Information Memorandum and Resolution Plan*

The resolution professional is required to prepare an Information Memorandum which consists of the information required by a resolution applicant to make the resolution plan and should include relevant financial information.[35] The resolution professional must invite prospective resolution applicants, who fulfil criteria laid down by him with the approval of committee of creditors and who will then, use the Information Memorandum to prepare a resolution plan. The invited resolution applicant shall not be eligible to submit a resolution plan if he is an undischarged insolvent, is a wilful defaulter, has an account classified as non-performing asset, has been convicted with imprisonment for more than 2 years, is disqualified to act as a director or does not comply with all other such provisions of section 29A of the Code. Further, the resolution professional must examine each submitted plan and verify whether it meets all the pre-requisites specified in the Act.

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[33] Vivek Tyagi, Corporate Insolvency Resolution Procedure under Indian Insolvency and Bankruptcy Code, 2016: A Comparative Perspective, THE CHARTERED ACCOUNTANT 1549, (2018).

[34] Deepak Jain, The Insolvency and Bankruptcy Code 2016-An analysis of Opportunities for Insolvency Professionals under the Code, 38 CHARTERED SECRETARY, (2017).

[35] CA. Anirudh Pradeep Kare, *Corporate Viaticum and Where We Stand in the World: An Analysis*, THE CHARTERED ACCOUNTANT, 1557 (2018).

6. *Regulatory Authority*

The Code envisages setting up of an Insolvency and Bankruptcy Board of India under section 188 of the Code. The Board will regulate all matters related to insolvency and bankruptcy, set out eligibility requirements of insolvency intermediaries i.e., Insolvency Professionals, Insolvency Professional Agencies and Information Utilities process, regulate entry, registration and exit of insolvency intermediaries, making model bye laws for Insolvency Professional Agencies, setting out regulatory standards for Insolvency Professionals, specify the manners in which Information Utilities can collect and store data and oversee the functioning of insolvency intermediaries and the resolution process.

7. *Adjudicating Authority*

The third pillar of the Code is the adjudicatory authority which comprises of National Company Law Tribunal and the appellate tribunal who have been mandated to adjudicate the provisions of the Code.

8. *Information Utility*

It is the fourth pillar that sustains the Code and helps it attain the objective of uniformity by ensuring that information asymmetry does not prejudicially affect the rights of the creditors. The Code simply defines information utility as that defined under section 210 of the Code. Chapter V of the Code in sections 209 to 216 details the broad framework for formation, governance, and core activities of the information utilities. The Core activities as envisaged by the Code include collection, collation, authentication, dissemination of financial information of debtors in a universally accessible format, so as to allow the creditors to access such information and ensure that there is no information asymmetry giving any undue advantage to the corporate debtor.

9. *Process of Insolvency under the Code*

Part II of the Code deals with matters relating to the insolvency and liquidation of Companies and Limited Liability Partnership Firms where the minimum amount of the default is Rupees one lakh and this amount can be increased up to Rupees one crore by the Central

Government.[36] The application may be filed either by the financial, operational creditor or the corporate applicant himself. The adjudicating authority shall within a period of fourteen days either accept or reject the application. Once the application has been accepted an automatic moratorium shall be imposed on all contractual and legal proceedings pertaining to the corporate debtor. Simultaneously an insolvency professional will also be appointed and a public announcement to the effect shall be made. The insolvency professional shall then convene a meeting of the committee if creditors which constitutes only financial creditors and work on a resolution plan to be submitted to the adjudicatory authority within a period of 180 days. In case the Committee of creditors is unable to reach a viable solution, the corporate debtor will move towards liquidation in which case the insolvency professional will become the official liquidator.

Challenges

It has been pointed out that no law is perfect from its inception and always comes with some grey, unchartered areas which create ripples in the beginning but with appropriate delegated legislation and judicial interpretation these differences can be ironed out. Given below are some of the challenges that have either arisen while dispute resolution in the court of law or are visible to the naked on a plain reading of the Code.[37]

1. *Stringent Time Lines*

   The stringent time lines under the Code are a welcome step as has been discussed above. However, these strict time lines are being considered a bane rather than a boon by various commentators. The law is clear that the entire process including listing of claims, settling disputes with operational creditors, to inviting bids, deliberating on them and accepting a final bid from prospective buyers for the company must end within 180-270 days. This seems to be unfair as many companies may not get adequate time to fully analyse the financial information about the company in question and respond within the stipulated time-period to the bid and make an adequate

[36] Insolvency and Bankruptcy Code, s. 4.

[37] Umarji, M.R. Challenges in Implementation of Insolvency and Bankruptcy Code, 46(9) CHARTERED SECRETARY 46 (2016).

representation. The stringent time lines leave no scope for the committee of creditors and the insolvency professional to be thorough with their approach and receive maximum offers for rehabilitation greatly reducing competition amongst bidders. The case at point is that of Bhushan Power and Steel, one of the forty cases that have been referred to the adjudicating authority by the Reserve Bank of India. The Company has over INR 50,000 crore in debt. The insolvency professional of the case was approached by two bidders i.e. Tata Steel and JSW Steel on the last day appointed for accepting bids. However, soon after the last date was over another proposal was received from the Liberty House a British Company. Since they had sent the bid after the closure of applications, they had to approach the adjudicating authority for permission to submit the bid for the auction. The adjudicatory authority making use of its discretionary powers allowed the bid to be submitted and directed the committee of creditors to evaluate it. While the strict time lines help creditors ensure timely resolution of debts, it is likely to affect the bids the companies receive for rehabilitation which eventually will affect the competition within the market. As on date it is only the large conglomerates who have managed to submit the proposals within the stipulated time.

Further it may be pointed out that the strict time lines are laying the foundation for excessive use of discretionary powers of the adjudicatory authority as has been recently witnessed in *Quantum Limited* v. *Indus Finance Corporation* wherein the extension application had been filed after expiry of the 180-day period. The appellate tribunal allowed the application on a narrow interpretation of the Code stating that the Code does not stipulate that the application for extension be made within the hundred and eighty days of beginning of insolvency proceedings. Similarly, in another case where the creditor stalled the resolution process without citing any reason the NCLAT directed the committee of creditors to re-evaluate the proposal for rehabilitation even though the mandatory two hundred and seventy days had lapsed. This decision of the appellate authority was based on the reasoning of larger public good.

2. *Differential Treatment meted out to the different classes of creditors*

An analysis of the Code demonstrates that there is differential treatment that is being meted out to different classes of creditors. As discussed above while there is a classification between financial, operational, secured and unsecured creditors; the committee of creditors[38] constitutes only financial creditors keeping out all the other creditors. The committee of creditors decides the path the corporate debtor eventually takes be it liquidation or resolution, other creditors have no say on the subject. Likewise, when it comes to settlement of dues as enumerated in the section 53 of the statute the uses the terms secured and unsecured creditors without naming financial or operational creditors. This differential treatment within the statute is likely to reduce the efficacy of a perfectly drafted statute.[39]

3. *Too much power in the hands of the Committee of Creditors*

It is imperative to note that the Committee of Creditors has been ordained with a significant power to decide the fate of the corporate debtor, whether it will be a going concern or whether it will get liquidated. In the absence of any specific guidelines with respect to the manner in which decision making will take place, the parameters on which the committee would decide it is likely that the Committee of Creditors will assume humongous powers over the corporate debtor which may not be in public interest.[40] In certain recent cases the prudence behind the decision of the committee of creditors has been questioned. In the case ***Rave Scans*** as pointed out earlier, the Committee of Creditors decided against the proposal even though the creditors were getting INR 51 Crore in response to a debt of INR 36 Crore without citing any specific reason. These situations need to be curbed in order to ensure that the efficacy of the statue is not ruined.

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[38] Insolvency and Bankruptcy Code, s. 21.

[39] G.M. Ramamurty, Position of secured Creditor in the winding up and in the liquidation of Corporate Debtor, 46 (9) CHARTERED SECRETARY 74 (2016).

[40] Vineet Chaudhary and Alka Kapoor, *Corporate Insolvency Resolution Process- Brief Analysis and Challenges*,46 (9) CHARTERED SECRETARY 50 (2016).

4. *Cross-border Insolvency*

The Code has missed the golden a opportunity of addressing the issue of cross-border insolvency which is a hugely debated issue in the light of recent scams that have engulfed the corporate economy of the India. In various cases it was found that many prompters of big corporate debtors after committing financial frauds would abscond and settle in other countries where Indian government could not penalize them.[41] Though the Code has grants the power to the Central government to enter into bilateral treaties with other countries to apply the Code in relation to assets of the corporate debtor situated outside India, it is highly inadequate. In order bring the erring promoters to book the regulatory authority must plug this loop hole immediately.[42]

5. *Liability of the Insolvency Professional*

As discussed above the insolvency professional has the entire responsibility to run the company during the period when the insolvency proceedings have been initiated and a moratorium on all the contracts, legal proceedings etc. has been imposed. The Code is silent with respect to the qualifications of the insolvency professional and the capability of the person to run the entire business as a caretaker. While the professional only takes care of the administrative functions one cannot be oblivious to the possibility of irreparable damage being caused to the corporate debtor. Further, the duties of the insolvency professional only mention good faith to avoid liability for taking erroneous decisions, it is imperative that rules and regulations be drafted to identify the exact job description of the insolvency professional.

6. *Silence on third party contracts*

The Code is surprisingly silent on the impact the third-party contracts that may arise between the committee o creditors and any

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[41] The case at point is that of Kingfisher Promoter Vijay Mallaya, who after having defaulted on loans from numerous banks fled the country and settled in England. Currently the Indian Government is making efforts to get him back to India and bring him to justice.

[42] Ranbir Singh, Challenges in Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016, 1 IBJ (2017).

outside party that could not bid at the auction either voluntarily or because it missed the deadline of supplying the proposal. There is no clause in the law which forbids the committee of creditors from accepting a profitable offer promising higher returns to the creditors and ensuring the company function as a going concern. The Code does not bar the creditors either collectively or individually from contracting with such third party. While the Code imposes a moratorium on the existing agreements and contracts that are operative between the stakeholders and the corporate debtor there is no such bar on creditors with third party interests.

7. *Information Utilities*

Limited information on information utilities, the manner in which the information will be stored and the allowed access is a cause of concern. The price sensitive information that the information utilities will be storing will be in the hands of a separate industry, which in the view of many sceptics is likely to create price wars for this information. It is the need of the hour that more regulation on the subject is brought out by the regulator to ensure that there is no misuse of the price sensitive price information.[43]

8. *Variance in behaviour of stakeholders at cross with the overall objective*

It is possible that each stakeholder will have its own interest and these interests would often de divergent for the stated overarching objectives of the resolution process. The stakeholders would be expected to behave in a manner so as to maximize the value for themselves. Without explicitly recognizing the variations in the interests and the likely behavioural patterns, the stipulated standard resolution process may not be the most optimal process. Hence the behaviour of the various stakeholders needs to be modelled in detail and should lead to appropriate allowances and improvisations in the design of resolution framework.[44]

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[43] Satish Pillai, *Information Utility-the eyes and ears of the Bankruptcy Code,* 1 INSOLVENCY AND BANKRUPTCY JOURNAL 5 (2017).

[44] Hemant Manuj, Insolvency Code: Variances in Behaviour of Stakeholders at Cross with the Overall Objective, 1 INSOLVENCY AND BANKRUPTCY JOURNAL 9 (2017).

Conclusion

The Insolvency and Bankruptcy Code has made significant efforts in revamping the entire credit ecosystem on the country by amending, repealing the archaic laws pertaining to the insolvency processes. The Code promises to bring about far- reaching reforms with a thrust on creditor driven insolvency resolution. It aims at early identification of failure of firms thereby maximizing the asset value of insolvent debtors. A unified regime envisages a structured and time-bound process for insolvency resolution and liquidation, which should significantly improve debt recovery rates and revitalize the ailing Indian Corporate bond market.

Enactment and implementation of the Code will not only improve the Indian rankings on world map in ease of doing business but will also improve credit market, GDP growth, FDI and business environment as a whole. However, the success of the said Code will be dependent on the manner in which its provisions will be implemented. As of now there is ample proof that that the law is on the right path to furitation with the number of successful resolutions hitting a double digit in less than two years. However, one should not become too complacent as there exist various challenges which have been discussed above in some detail. These pertain to legal, logical, procedural hurdles which are required to be scaled and the coming days will be crucial in ensuring that the challenges are addressed with least possible tweaking of the existing legislation. The Code also has provisions to address cross border insolvency through bilateral agreements and reciprocal arrangements with other countries.

Right to Education and Persons with Disabilities

Anand Gupta[*]

Introduction

It is said that 'Knowledge is Power'. Education is the most effective vehicle of social and economic empowerment. There is a need for mainstreaming of the 'Persons with Disabilities' in the general education system through Inclusive education.

Education is a social right that is intimately connected to the exercise of many other Human Rights. For example, education is important for the enjoyment of the right to work, right to participation into the political life etc. Education supports greater autonomy and freedom of participation in all aspects of society.

This paper will analyse the provisions of International Law and Indian Law which deal with the various aspects of the education of Persons with Disabilities. The most significant in this connection are the Convention on the Rights of Persons with Disabilities, 2006 (UNCRPD) which India has ratified and the rights of Persons with Disabilities Act, 2016 (RPD Act) which replaced the earlier Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. This Act was passed to make the provisions of the Convention the part of Indian Law. The Act has defined 'Disability' in broader terms and included 21 disabilities as compared to 1995 Act which mentioned 7 disabilities. The Act has also given a broader meaning to rights as compared to 1995 Act.

The Chief Commissioner for Persons with Disabilities established under the 1995 Act has passed landmark orders from time to time. Some of

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them which are relevant for this analysis will also be discussed in the present paper.

The two principles of 'Disability Rights Jurisprudence' namely 'Non-Discrimination' and 'Reasonable Accommodation' are applicable to the right of education of persons with disabilities. On one hand the right to receive education of every kind whether it is primary, secondary or tertiary or professional/ vocational should be available to them without discrimination and on the equal basis with others, on the other hand, 'Reasonable Accommodation' needs to be made with regard to accessibility of study material and mode of instructions, examination pattern, build environment of the institutions etc.

The Constitution of India although does not make specific provision for persons with disabilities, the provisions regarding the right to education are equally applicable to them. The Constitution not only recognizes right to education but also emphasizes its importance for the vulnerable and weaker sections.[1]

Article 46 commands inter alia that the State shall promote with special care of the educational and economic interests of the weaker sections of the people.

With the Eighty-Sixth Amendment, the right to free and compulsory education has become a fundamental right. Originally, this right was a part of the Directive Principles under Article 45. The fundamental right to education has been made as an extension of the right to life, as Article 21A.[2]

This Amendment has also brought early or pre-school education under the constitutional framework. It also added a new Duty. The duties of citizens are outlined in Article 51A of the Constitution[3].

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[1] The Constitution of India, 1950, Art.41: The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

[2] *Id.*, Art.21A: The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

[3] *Id.*, Art.51 A: It shall be the duty of every citizen of India-(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

The Right to Free and Compulsory Education Act, 2009 in Section 3, refers the 'Persons with Disabilities' as one of the disadvantaged sections of the society. The Act mandates 25 percent reservation of seats for the disadvantaged groups including Persons with Disabilities in government and private educational institutions.

The Right of Children to Free and Compulsory Education (Amendment) Act, 2010 has widened the net for disabled children bringing within its purview children with severe disability. Such children have the option of receiving education at home. Parents have the option of providing home-based education to children with severe disabilities.

Issues Relevant to Education of Persons with Disabilities

The International Covenant on Economic, Social and Cultural Rights in General Comment No. 13[4] (para.6) elaborates on the four main elements of the right to education: availability, accessibility, acceptability and adaptability. These parameters are useful in assessing whether the education has acquired capacity to respond to the needs of learners with disability. For an inclusive society it is important that all systems, services and procedures remain within the reach of all members. With regard to the education of persons with disabilities, a number of issues need to be addressed.

Non-discrimination in Education

In a country like India where a large number of people live below poverty line, the education of Persons with Disabilities becomes a challenging task. In majority of cases, Persons with Disabilities do not enjoy equal status in the family. They are considered as burden on society. There is stigma attached to them that they cannot lead a productive life in the society. As a result, society does not think it beneficial to invest its valuable resources on their education.

The Committee on the Rights of the Child in General Comment No.1[5] (para 10) notes that 'discrimination against children with disabilities is also pervasive in many formal educational systems and in a great many informal educational settings, including in the home.' Prohibiting such

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[4] National Human Rights Commission Disability Manual, 2005, pp. 87-88.

[5] *Supra* n.4, p. 85.

discrimination, the Committee states in the same comment, 'all such discriminatory practices are in direct contradiction with the requirements in Article 29(1)(a) that education be directed to the development of child's personality, talents and mental and physical abilities to their fullest potential.

General Comment No.4 (para12) inter alia provides that the discrimination can be direct or indirect. "Direct exclusion would be to classify certain students as "non-educable"[6] and thereby ineligible for access to education. Indirect exclusion would be imposing a requirement to pass a common test as a condition for school entry without reasonable accommodations and support."

Similarly, as far as possible every 'Person with Disability' should have the right to pursue any academic, professional or vocational education of his/her choice. There has been cases where they have been denied admission even those courses which they can pursue without or with minimal adjustment and with the aid of various assistive devices.

UNCRPD, 2006[7] provides inter alia that 'Persons with Disabilities' are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability. They can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.

RPD Act, 2006[8] deals with various education related issues. It mandates government run institutions to provide inclusive education[9] to the children with disabilities and for this purpose admit them without discrimination and also provide education and opportunities for sports and recreation activities equally with others. It also mandates to provide

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[6] Committee on the Rights of Persons with Disability, General Comment No. 4, 2016, para12.

[7] UN Convention on the Rights of Persons with Disabilities, 2006, Art.24.

[8] See. ss.16-17, 31-32 of the RPD Act, 2006.

[9] *Id.,* s. 2(m): Inclusive education means a system of education wherein students with and without disability learn together and the system of teaching and learning is suitably adapted to meet the learning needs of different types of students with disabilities.

books, other learning materials and appropriate assistive devices to students with benchmark[10] disabilities free of cost up to the age of eighteen years and also to provide scholarships in appropriate cases. It further provides inter alia that every child with benchmark disability between the age of six to eighteen years shall have the right to free education in a neighbourhood school, or in a special school, of his choice in an appropriate environment. All Government institutions of higher education and other higher education institutions receiving aid from the Government shall reserve not less than five per cent. Seats for persons with benchmark disabilities and they shall be given an upper age relaxation of five years for admission.

In *Shri Umesh Kumar* v. *The Secretary Department of Elementary Education & Literacy, Department of Ministry of Human Resource Development, New Delhi*[11] Complainant, the father of a hearing impaired child filed a complaint before Chief Commissioner for Persons with Disabilities (CCPD) regarding denial of admission to his son in class first due to overage. He submitted that his son was attending aural rehabilitation program and has started communicating verbally in short sentences and writing in complete sentences which would qualify him to enter mainstream education.

CCPD observed that the stand taken by *Kendriya Vidyalaya Sangathan* was not in line with the Principal of *Sarv Shiksha Abhiyan* which encourages grade appropriate mainstreaming and it was also not in line with the disabilities Act and national education policy which mandate to provide appropriate intervention for education and mainstreaming of children with disabilities.

In the meantime, the complainant submitted that his son was admitted in class two on the basis of the recommendation/instructions letter issued by CCPD.

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[10] *Id.*, s. 2(r): Person with benchmark disability means a person with not less than forty per cent of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority.

[11] CCPD Case No. 10315560 Dated 15.09.2010.

In *Shri Kishan Lal* v. *Kathak Kendra*[12] the complainant submitted inter alia that his son had passed 3 years course successfully and the respondent was denying him admission in the 4th year due to his disability.

The complainant stated inter alia that his child's Hearing Disability could be corrected with the use of hearing aid.

The respondent stated that the complainant's child needed special attention and the respondent institution had no resource and infrastructure for imparting training to persons with disability. However, if complainant insists to continue his child dance training at the respondent institution for another two years, the respondent had no objection to his readmission in 4th year of the course.

Since the respondent had agreed to admit complainant's child in the next session, CCPD advised the complainant to approach the respondent in the next session for admission. The respondent was also advised to help the complainant's child and facilitate teaching and learning process so that he could complete 5-year foundation course.

In *Amar Jain* v. *University of Petroleum & Energy Studies*[13] the complainant, a person with Visual Impairment, filed his complaint through e-mail alleging that University of Petroleum & Energy Studies, Dehradun was not allowing him to appear in the entrance examination for 5 years LLB Course on the ground of his disability. He stated that he needed facilities of scribe to write the exam.

The respondent submitted that the University of Petroleum and Energy Studies was a private self-financed university recognized by UGC under section 2(f). However, it is not entitled to receive any grant-in-aid or financial support or donations from any State/Local Authority/Central Government. Therefore, the University was not covered under the Disabilities Act. The respondent however later showed its willingness to extend the benefit of scribe and also allowed the complainant to sit for the exam.

CCPD observed inter alia that in accordance with section 9 of the University of Petroleum and Energy Studies Act, 2003 and the principles of equality enshrined in Articles 14, 15 and 16 of the

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[12] CCPD Case No. 12/1034/10-11 Dated: 22.11.2010.

[13] CCPD Case No. 1/1031-5240 Decided on: 15.5.2008.

Constitution of India, the respondent University cannot discriminate against person with disabilities for admission in any course of the University or its constituent colleges on merit.

CCPD further observed that the Disability Act makes beneficial provisions in the matter of education for providing equal opportunities & mainstreaming 'Persons with Disabilities'. CCPD disposed off the case with direction to the respondent to consider 'Persons with Disabilities' on merit for admissions and extend them benefit of relaxations in age etc. and provide appropriate interfaces to ensure level playing field to them.

Reasonable Accommodation

The study material and the medium of instruction need to be made available in format and suitable to the needs of the various types of disabilities. For example, the persons with Visual disability face various problems in accessing the study material because it is not available in Braille, Audio-books, Large Print, accessible e-text etc. Apart from this, the curriculum needs to be adapted to the special needs of persons with disabilities. *e.*g. For pupil with visual disabilities, graphs and diagrams needs to be supplemented by descriptive explanation. Similarly, pupil with hearing disability faces difficulty in following instructions because of the non-availability of 'Sign Language Interpreter' in educational institutions.

UNCRPD, 2006[14] deals with these issues. It mandates that Reasonable Accommodation of the individual's requirements should be provided; Persons with Disabilities receive the support required, within the general education system, to facilitate their effective education; Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion. GC 4 para 12 (f) "inclusive learning environments are accessible environments where everyone feels safe, supported, stimulated and able to express themselves and where there is a strong emphasis on involving students in building a positive school community[15]."

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[14] *Supra* n. 7. Art. 24(2)(c), (d) and (e).

[15] *Supra* n. 6.

RPD Act, 2016[16] defines reasonable accommodation. There is no "one size fits all" formula to reasonable accommodation, as different students with the same impairment may require different accommodations. Accommodations may include: changing the location of a class; providing different forms of in-class communication; enlarging print, materials and/or subjects in signs, or providing handouts in an alternative format; and providing students with a note taker or a language interpreter or allowing students to use assistive technology in learning and assessment situations. Provision of non-material accommodations, such as allowing a student more time, reducing levels of background noise (sensitivity to sensory overload), using alternative evaluation methods and replacing an element of the curriculum with an alternative must also be considered. To ensure that the accommodation meets the requirements,[17] the Act in Sections 16 and 17 *inter alia* deal with this issue. The Act mandates educational institutions to provide reasonable accommodation according to the individual's requirements, provide necessary support individualised or otherwise in environments that maximise academic and social development consistent with the goal of full inclusion, ensure that the education to persons who are blind or deaf or both is imparted in the most appropriate languages and modes and means of communication. Section 17 *inter alia* mandates governments to promote the use of appropriate augmentative and alternative modes including means and formats of communication, Braille and sign language to supplement the use of one's own speech to fulfil the daily communication needs of persons with speech, communication or language disabilities and enables them to participate and contribute to their community and society.

Copyright Amendment Act[18] 2012 allows persons with disabilities, their families, friends and non-profit organisations to convert reading

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[16] *Supra* n. 8. s. 2(y): Reasonable accommodation means necessary and appropriate modification and adjustments, without imposing a disproportionate or undue burden in a particular case, to ensure to persons with disabilities the enjoyment or exercise of rights equally with others.

[17] *Supra* n.6, Para 30.

[18] Indian Copyright Act, 1957, s. 52: Following shall not be deemed to be the infringement of copyright:
(zb) the adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format, by:

material into all accessible formats including Braille, audio and other formats that are useful for persons with disabilities, without requiring permission from publishers and without having to pay royalty to publishers provided the distribution is done on a non-profit basis. This amendment will go a long way in making available the printed material in accessible format to people with various types of disabilities.

The world Intellectual Property Organization (WIPO) concluded a treaty for visually impaired and print disabled persons. This treaty ensures free exchange of work suitable to print impaired persons across boarder without cost. This will go a long way in making available books etc. especially to people living in developing country like India.

Accessible Environment of Educational Institutions

The premises of educational institutions need to be made accessible for persons with disabilities. For example, in a large number of institutions, persons with loco motor disability cannot move freely within the premises of these institutions. Persons with Visual disability also face various problems while negotiating with the physical environment of these institutions. Apart from this, the public roads, busses, railways, etc are also highly inaccessible for persons with disabilities.

RPD Act, 2016[19] mandates governments and local authorities to provide transportation facilities to the children with disabilities and also the attendant of the children with disabilities having high support needs.

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1. any person to facilitate persons with disability to access to works including sharing with any Person with Disability of such accessible format for private or personal use, educational purpose or research; or
2. Any organisation working for the benefit of the Persons with Disabilities in case the normal format prevents the enjoyment of such works by such persons.

Provided that the copies of the works in such accessible format are made available to the Persons with Disabilities on a non-profit basis but to recover only the cost of production: Provided further that the organisation shall ensure that the copies of works in such accessible format are used by Persons with Disabilities and takes reasonable steps to prevent its entry into ordinary channels of business.

[19] *Supra* n.8. s. 16 (vii).

Scribe, Alternative Questions etc.

'Persons with Disabilities' such as 'Visually Disabled' and various types of 'Orthopedically Disabled' students who have difficulty in writing need to be provided with the facility of scribe or to be allowed to use computer during exams. The norms for availing scribe should be reasonable so that persons with disability do not face undue hardship. At the same time steps need to be taken so that the facility of scribe is not abused. Since writing exams through scribe requires more time, extra time needs to be given to write the examinations.

While formulating policy in this matter the technological development needs to be taken into consideration. E.g. persons with Visual disability should be allowed to use computer in place of scribe during exam. Option should be given to choose the mode for taking the examinations i.e. in Braille, computer, large print, or even by recording the answers. The use of assistive devices like talking calculator (in cases where calculators are allowed for giving exams) should be allowed. Reading material in Braille or E-Text or on computers having suitable screen reading software for open book examination should be provided. Similarly, online examination should be in accessible format i.e. websites, question papers and all other study material should be accessible as per the international standards laid down in this regard.

Alternative objective questions in lieu of descriptive questions for Hearing-Impaired persons should be provided in the same manner as alternative questions in lieu of questions requiring visual inputs, for persons with Visual Impairment is provided.

RPD Act, 2016[20] provides inter alia for making suitable modifications in the curriculum and examination system to meet the needs of students with disabilities such as extra time for completion of examination paper, facility of scribe or amanuensis, exemption from second and third language courses.

In *Ashwani Agarwal* v. *Secretary, Department of Education*[21] various difficulties faced by the blind students with regard to attempting questions based on diagrams and figures etc. were highlighted , Although the complaint was withdrawn because the relief sought was

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[20] *Id.,* s. 17.

[21] 2001 CCDJ 244 Case no. 667 of 2001 – Decided on 20.09.2001.

already given by the respondent, the brief facts of the case are mentioned below to highlight the difficulties faced by the blind students in these matters. Complainant sought relief from the Chief Commissioner for Persons with Disabilities in advising the Ministry of Human Resource Development to issue instructions to the paper setters to offer alternative questions in lieu of questions with diagrams and figures. The alternative questions should be of equal value to the question containing diagrams and figures. All questions based on figures or diagrams in the paper be provided with an alternative question of equal marks from the syllabus which blind students can attempt. This will allow them to attain marks which they failed otherwise, as the questions were exclusively visual based.

Inclusion of topics relevant to Persons with Disabilities in the Curriculum

The curriculum needs to incorporate learning Braille, mobility skills etc. 'Persons with Hearing Disability' are required to be trained in sign language. For this purpose, adequate number of teachers needs to be trained in these skills.

The convention, 2006[22] deals with the following issues in this matter: Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring; Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community; Ensuring that the education of persons, and in particular children, who are blind, deaf or deaf blind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

Conclusion

The above analysis clearly shows that there is shift in law towards the Right Based approach in dealing with disability. According to this approach, disability results not from the physical impairment in the

[22] *Supra* n.7. Art. 24 (3). *See also,* Committee on the Rights of Persons with Disabilities General Comment No. 4, 2016, para 35.

person but from various types of physical, social, attitudinal barriers. Disability is one of the Human Diversities. Persons with Disabilities are entitled to enjoy all the human rights without discrimination. Right to Education will be meaningless if reasonable accommodation is not made keeping in view the individual needs of the pupil with disability. Author is of the view that law has made enough provision to address the needs of Persons with Disabilities with regard to education. However, all the stake holders such as parents, teachers, officials etc need to be sensitised about these beneficial laws.

However, there is not enough provision to compel in case of non-compliance by authorities. RPD Act has slightly improved the position of the Chief Commissioner for Persons with Disabilities (CCPD) and State Commissioners. Now, the authorities need to communicate reasons of not implementing the decisions within 3 months to CCPD and State Commissioners as the case may be and the complainant. However, it is worth mentioning that this commission have the power only to recommend measures. They cannot enforce their decisions.

Further, role of private sector is increasing day-by-day. There has been a phenomenal growth in number of private educational institutions the RPD Act, 2006 like its predecessor 1995 Act does not put any obligations on private educational institutions. Thus, a large number of students who are studying in these institutions remain at the mercy of these institutions for implementing the beneficial provisions of the law.

It has been observed that with the coming of 'Persons with Disabilities' in the mainstream, more and more people are becoming sensitive towards the needs of 'Persons with Disabilities'. RPD Act, 2016 has defined rights in broader terms. If the provisions of law are made binding on private educational institutions and CCPD and state commissions are given more power to implement their decisions, it will go a long way in making education non-discriminatory, accessible and participatory for Persons with Disabilities.

Internet Streaming and Broadcasting:
Do they Sail in the Same Boat?

Tanvi Sehgal[*]

Introduction

Copyright law seeks to balance two opposing interests. On one hand, it confers certain exclusive rights upon the copyright owners so as to assure them with both commercial returns as well as creative control of their works. While on the other hand, the interests of those who wish to access such works are also kept in mind by including some provisions in the copyright regime that allow access to copyrighted works by the mandate of law.

A classic example of such provision is the grant of involuntary license. It is usually the owner of the copyright in a work who has the power to grant license to use his work. However, sometimes voluntary licenses do not get materialized for certain reasons, for example- unwarranted terms and conditions set by the owner of copyright, astronomical license rates etc. In such situations, non-voluntary licenses, obtained with the intervention of statutory provisions and authorities, comes to rescue and provides an escape hatch from a gridlock like situation. Hence, compulsory licensing (i.e. the fixing of rates of licensing after a dispute has occurred between the licensor and licensee) and statutory licensing (i.e. the fixing of rates before any dispute on a generally applicable basis), both of which are a part of the non-voluntary scheme of licensing, help to deal with the monopolistic conduct of a copyright owner.

The Copyright Act, 1957 (*hereinafter*, the Act) too, in an endeavour to maintain the above-mentioned balance of interests has provisions which allow the grant of involuntary licenses. In fact, the (Amendment)

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Act of 2012 has introduced three new provisions to the already existent regime of involuntary licenses. Of these, the statutory license granted under Section 31D of the Act to broadcasting organizations has been in the limelight for all the wrong reasons. From its very inception the provision has been alleged to have violated the fundamental rights guaranteed by the Constitution of India especially Article 14, 19(1)(g) and 21 to copyright owners since it impinges their right to exclusively exploit their work. While the Madras High Court in a recent judgement[1] upheld the validity of Section 31D of the Act by stating that such a provision provides a mechanism to deal with public interest *vis-à-vis* the private interest of copyright owners, a new controversy with regard to it, is said to have taken shape. This time it is the Internet broadcasters who have been consistently invoking the statutory licensing provision under section 31D of the Act, to broadcast sound recordings on the Internet. Such an act on their behalf is frowned upon precisely because the said provision explicitly mentions radio and television broadcasting only. What has added to confusion is an Office Memorandum issued by the Department of Industrial Policy and Promotion (hereinafter DIPP), Ministry of Commerce and Industry on 5th September 2016 extending the scope of section 31D to Internet broadcasters as well. While the legality of such a memorandum was being speculated, the same authority (i.e. DIPP) made public Draft Copyright Rules, 2019 on 30th May which seek to amend the Copyright Rules, 2013 pertaining to Section 31D so as to include Internet broadcasting within its ambit.

The article has been divided into two parts. The first part of the article deals with a bare analysis of the provision under Section 31D of the Act while the second part deals with the question whether the scope of the provision can be extended to internet broadcasters as well. Article makes an attempt to firstly, explain the statutory licensing provision under Section 31D of the Act and secondly, analyse if such a provision can apply to Internet broadcasting as well, keeping in mind the definition of the term 'broadcasting', the view of judiciary in this regard

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[1] *South Indian Music Companies* v. *Union of India*, W.P. No. 6604 of 2015- Court in in this case opined that a balance of interest has been maintained in Section 31D by including guidelines to determine royalty, granting an opportunity to be heard etc. to copyright owners while on the other hand allowing broadcasters who have obtained such a license to sustain their business of making copyrighted work available to the public at large.

and lastly, the role played by DIPP by issuing an Office Memorandum to this effect and a notification consisting of Draft Copyright (Amendment) Rules, 2019.

Statutory License for Broadcasting Organizations

Section 31D of the Act is an enabling provision that allows all broadcasting organizations which are desirous of broadcasting literary or musical work and sound recording (which have already been published) to the public, to do so by attaining a statutory license under this section. Although the term 'broadcasting organization' has not been defined anywhere in the Act, it can be assumed to mean any organization which engages in the act of 'broadcasting' as defined under Section 2(dd) of the Act[2].

Procedure to Obtain License

To attain such a license, the broadcasting organization is required to give a prior notice in the prescribed manner to both the Registrar of Copyright as well the owner of copyright whose work is to be broadcasted and the notice must also state the duration and territorial extent of such broadcast. Additionally, it must pay the copyright owner, royalties, as determined by the Appellate Board[3] that may also require the broadcasting organization to pay such royalties in advance. The royalties may be determined by the Appellate Board either *suo-motu* or when a request in this regard has been received from any interested person. While determining royalties, the Appellate Board invites suggestions from interested parties including copyright owners as to the rate of royalties to be fixed which includes different rates for different categories of work. It also takes into consideration other factors such as time slot, nature of use, prevailing standards of royalties etc.[4]

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[2] Copyright Act, 1957, s. 2(dd) - defines a broadcast as "communication to public (i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or (ii) by wire, and includes a re-broadcast."

[3] The term 'Appellate Board' has been substituted for 'Copyright Board' by Finance Act, 2017. It has been defined under s. 11 of the Copyright Act, 1957 to mean the Appellate Board established under S. 83 of the Trademarks Act, 1999.

[4] *See*, Copyright Rules, 2013, Rule 31.

Obligations on Broadcasting Organisation

Section 31D while providing easy access to broadcasters also includes provisions which safeguard the interests of copyright owners whose work is broadcasted by enjoining upon broadcasting organizations certain obligations. These include the requirement to announce with the broadcast, the name of the authors and principal performers of the work, except when the work is being communicated to public by way of performance.[5] The broadcasting organization that is communicating the work to public, shall not in any way alter the work that it is broadcasting except to the extent that it is technically necessary for the purposes of broadcasting. This includes the shortening of work to make it's broadcasting convenient. Also, Section 31D (7) read with Rule 30 of Copyright Rules 2013, requires such an organisation to maintain records and book of accounts, containing details such as total number of works broadcasted, their time slot, duration etc. at its principal place of business. These records shall be, on a previous notice given by the owner or his duly authorized agent, be allowed for their inspection who may be allowed to obtain copies of relevant extracts from such records at their cost.

Grey Areas in Provision

Section 31D is a self-complacent provision which provides in itself all safeguards that are required for the successful broadcast of work to public by broadcasting organizations who are ready to comply with its conditions. However, there still remain some unresolved issues that call for attention of the concerned authorities. *Firstly*, even though the Appellate Board has been given the authority to fix the rates of royalty and there are factors listed in the Copyright Rules, 2013 that it needs to borne in mind while deciding the rates, there is no express mechanism to challenge the rates that are fixed by the Board. *Secondly*, since Section 31D explicitly provides for the categories of works namely, literary or musical works and sound recordings that can be communicated by the broadcasting organization to public, it appears that the statutory license would be of restricted use to television broadcasters. The omission of cinematograph films from the provision signifies that the television

[5] Copyright Act, 1957, s. 31D (5).

broadcasters could at the most obtain synchronisation licenses for music that could be synchronised with other content such as television serials.[6] To broadcast cinematograph films the recourse to television broadcasters still remains the voluntary licenses executed between the owner of the work and broadcasting organization or a compulsory license under Section 31 (1) (b).

Another issue which was often raised by the stakeholders was that due to favourable construction of Section 31D for broadcasting organizations, the broadcasters would wriggle out of existing agreements. Such a concern is unfounded as Section 31 D (8)[7] preserves the legal sanctity of all agreements entered before the passing of (Amendment) Act of 2012.

Can Provision Under Section 31D Apply to Internet Broadcasting?

A bare reading of Section 31D and the Copyright Rules which govern it, lead to the uncontested conclusion that its scope is limited to radio and television broadcasting only. Such a claim not only finds support in the literal interpretation of the above provision but also from the intention of the legislature while formulating it, that can be judged from the parliamentary debates. Also, including internet broadcasting in this manner, would lead to anomalous consequences especially in the light of the definition given to terms like 'broadcast' and 'communication to public' under the Act.

Explicit mention of Radio and Television Broadcasters

It is pertinent to mention that the terms 'radio' and 'television' broadcasting find specific mention in Section 31D as well as in the Rules pertaining to this provision. Sub-clause (3) of Section 31D states that "*The rates of royalty for radio broadcasting shall be different from television broadcasting and the Appellate Board shall fix separate rates for radio*

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[6] Nandita Sakia, "Disability and the Indian Copyright (Amendment) Bill, 2010" *SSRN*, Feb 21, 2010 available at: http://ssrn.com/abstract=1600621 (last visited on 6th August 2019)

[7] Copyright Act, 1957, s. 31D (8) states that, "Nothing in this section shall affect the operation of any license issued or any agreement entered into before the commencement of the Copyright (Amendment) Act, 2012."

broadcasting and television broadcasting." Likewise Rule 29, 30 and 31of Copyright Rules, 2013 which deal with statutory licensing for broadcasting organizations mention radio and television broadcasting expressly so as to separate the two for the purpose of giving notice to copyright owners, maintaining records by broadcasting organizations, determining royalties etc. By maintaining this dichotomy throughout, the legislature clearly indicates its intention to restrict the provision of statutory licensing to radio and television broadcasters alone. Had this not been the case, it would have either completely refrained from using specific terms like radio and television broadcast or mentioned in the said provision that it applies to each mode of broadcast, keeping the scope of other modes of communication open in future.

Intention of Legislators

When Section 31D was introduced for the first time in the Copyright (Amendment) Bill 2010, it was titled as "Statutory license for radio broadcasting of literary and musical works and sound recording". This was so because initially the provision was incorporated keeping in mind the plight of radio broadcasters who require access to several copyrighted works simultaneously in order to run a successful radio station and if a major sound label refuses to license its work to them at a reasonable rate, it would scuttle their business. Moreover, the compulsory licensing provision under Section 31(1)(b) of the Act (which was there even before the 2012 amendment) was also of no use to radio broadcasters as it led to inordinate delays and most of the time their applications ended up in litigations[8].

Thus when this provision (i.e. Section 31D) was being deliberated upon by the Parliamentary Standing Committee, stakeholders such as the Indian Broadcasting Foundation welcomed it as a positive move by stating that "*with pre-worked terms and conditions, a broadcasting organization would have far greater certainty in terms of its operation cost and would also mitigate the disputes arising due to arbitrary and unreasonable demands of copyright owners*".[9]

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[8] Entertainment Network (India) Limited v. Super Cassettes Industries Limited 2008 (37) PTC 353 (SC).

[9] Department-Related Parliamentary Standing Committee on Copyright (Amendment) Bill 2010, 227th Report, para 15.3.

The HRD Minister too while discussing this provision in the Parliament at the time of passing the bill stated that "there was some debate as to whether this provision should be limited only to radio and TV should be kept out of it. But, ultimately, we decided that TV should be included in it." Consequently, when the bill was finally passed as the Copyright (Amendment) Act of 2012, the provision under Section 31D was titled as "Statutory license for broadcasting of literary and musical works and sound recording" and it equally applied to radio as well as television broadcasting.

All this makes it amply clear that the debate was limited to whether or not television broadcasting should be brought within the scope of Section 31D and that the cause of Internet broadcasters never once crossed the mind of legislators although streaming of content on the Internet was a common practice even then.

Meaning of 'Broadcast' and 'Communication to Public'

In order include 'internet broadcasting' within the purview of Section 31D it is important to analyse the definition of the term 'broadcast' for this purpose. Section 2(dd) of the Act defines broadcast to mean "*communication to public by (i) by any means of wireless diffusion or (ii) by wire, and includes a re-broadcast*." Hence, to constitute a broadcast there must be a communication to the public through wireless diffusion or by wire. What it implies in the act of transmitting the content to pubic by wire or wireless diffusion and not merely making it available for a diffusion that may take place later. Such a claim also finds support in the definition of the term 'communication to public'.

The expression 'communication to public' has a broader spectrum than 'broadcast' as it is defined under Section 2(ff) of the Act to mean the "*making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.*"

In the above definition the phrase *"whether simultaneously or at places and times chosen individually"* plays a pivotal role in including or excluding Internet streaming from its purview. For, if the said choice is that of the owner of the copyright, Internet streaming would be excluded and if it

is of the consumer, Internet streaming would be included as a type of communication to public. To solve this dilemma a further analysis of this definition is important. The definition begins with a reference to the copyright owner when it states *"making any work or performance available."* and this reference it seems is continued while using the phrase *"simultaneously or at places and times chosen individually"* for, the mention of the word 'public' is specifically made in the provision as and when a reference to them is indicated. Thus, communication to public involves the choice of the copyright owner with regard to time and place of such communication. This element is missing in the case of Internet streaming where the choice to access the work is of the user[10].

Also, in Internet streaming, it is not only access to a copyrighted work which is provided to users. The service providers say, those providing access to a sound recording make a copy of it on their server and rent or sell it to their customers. Both these activities (i.e. making a copy and selling or renting it) fall within the exclusive domain of a copyright owner for which separate permission is required.[11] Communication to public, which is separate right of a copyright owner is not invoked in this case. Therefore, for the purposes of Internet streaming the permission required from the copyright owner is not of his right to 'communicate the work to public' (which is done in the case of broadcast) but that of 'making copies' and 'selling or renting the same'. Such an interpretation of the term 'broadcast' is consistent with not only broadcast made on television and radio but also internet radio. Lastly, as far as the use of the expression 'individually' is concerned in the definition of 'communication to public' it is submitted that it could be used to include public performances as well as those made in theaters etc.

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[10] Swaroop Mamidipudi, "Section 31D of the Copyright Act Does Not Cover Internet Broadcasting" *SpicyIp,* March 8th, 2019 available at https://spicyip.com/2019/03/section-31d-of-the-copyright-act-does-not-cover-internet-broadcasting.html (last visited on August 10th, 2019).

[11] Copyright Act, 1957, s. 14(e)(i) & (ii) - grant the owner of copyright in a sound recording the right to "make any other sound recording embodying it including storing of it in any medium by electronic or other means" and "sell or give on commercial rental or offer for sale or for such rental, any copy of the sound recording" respectively.

What the above arguments seek to explain is that at least at present, the various provisions under the Act are inept to invoke Section 31D for the purposes of Internet streaming. If at any time the intention of the legislators changes they may make the necessary changes to allow this mode of communication to be included as well. After all, when the Act was amended in 2012, the Internet was a well-established mode of communication and if the legislators intended otherwise, the language of the provision under 31D would have differed (i.e. would not have been specific to include television and radio broadcasting only).

Memorandum issued by DIPP to include Internet Broadcasting

In an important development, the Department of Industrial Policy and Promotion (hereinafter DIPP), Ministry of Commerce and Industry issued an office memorandum[12] on September 5th, 2016 stating to include internet broadcasting organizations, in addition to television and radio broadcasting organisations, within the ambit of Section 31D.

This memorandum is clearly in contradiction to Section 31D (3) of the Act along with the several Rules which apply to it (as already discussed before), that have specifically mentioned the two categories of the broadcast which apply to it as radio and television. Although the memorandum very lucidly widens the scope of Section 31D, what is questionable is the authority of Central Government to issue such a memorandum and its legal validity for, the Act does not grant any such power to the Central Government. Moreover, it is doubtful if a memorandum to this effect can override the legislative intent with regard to Section 31D which manifests itself in the form of clearly laid statutory licensing scheme for radio and television broadcasters.

Section 73 of the Act grants the Central Government with the power to make rules for carrying out the purposes of this Act. But an office memorandum (which is an administrative order) cannot be compared to such rules which are required to be laid before each House of the

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[12] Office Memorandum, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry issued on September 5th 2016, available at: http://dipp.gov.in/sites/default/files/OM_CopyrightAct_05September2016.pdf (last visited on August 10, 2019).

Parliament and follow the procedure as laid down in the Act itself.[13]One does not underestimate the power of the Internet in the present times as a mode of communication and that if Internet broadcasting is included within the ambit of Section 31D it would not only allow more musical content on the web but would also guarantee a constant source of income for copyright owners.[14] However, the manner in which the above change is sought to be brought has to be right in the eyes of law.

Judicial Opinion on Section 31D

Wynk Media Case

The controversy created by the office memorandum issued by DIPP in 2016 was put to rest by the Bombay High in the case of *Tips Industries Ltd.* v. *Wynk Media Ltd.*[15] (hereinafter, "Tips" and "Wynk" respectively) wherein the scope of Section 31D held to be limited to television and radio broadcasting only. The judgement was passed on April 23rd, 2019 and it has analysed in detail the ambit of Section 31D of the Act along with the rules which lay the procedure to obtain a statutory license under it.

Facts of the Case

Wynk, an Airtel-owned music application allowed its registered users upon payment, to do two things with respect to sound recordings on its app i.e. firstly to download such sound recordings and store them on the app and second to have on-demand streaming of sound recordings.

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[13] Copyright Act, 1957, s.73(3) - states that, "Every rule made under this section shall be laid as soon as may be, after it is made, before each House of the Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if before the expiry of the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

[14] Rahul Bajaj, "Statutory Licensing Scheme under Copyright Act made Applicable to Online Broadcasting" *SpicyIp,* September 11, 2016 available at: http://spicyip.com/2016/09/statutory-licensing-scheme-under-copyright-act-made-applicable-to-online-broadcasting.html (last visited on August 6, 2019).

[15] Notice of Motion (L) No. 198 of 2018 in Commercial IP Suit (L) No. 114 of 2018.

Further with regard to the downloading feature of the app also, two things could be done depending upon the payment made by the user. If the users paid a monthly subscription fee they could download the song and store it on the app itself to access it offline during the continuation of the subscription. But, if the users paid an additional amount they could permanently download a song and store it in a device of their choice. To allow the working of its application in this manner, Wynk had entered into a license agreement with Tips. On the expiry of the said license agreement, the two parties tried to renew the agreement but failed in their attempt. Thereafter, Tips issued many notices to Wynk to desist from providing access to its work on their app which was ignored by the latter. Wynk finally invoked section 31D claiming itself to be an Internet broadcasting organization which comes within the purview of the provision against which Tips filed a copyright infringement suit.

Two broad issues which were framed before the court were:

1. Whether the provision in the app which permitted the users to download the sound recording, infringed Tips exclusive rights under Section 14(e)(i) and (ii)?
2. Whether the statutory licensing scheme under Section 31D of the Act applied to Internet Broadcasting organizations?

Exclusive Rights of Copyright Owner

The court held that the services provided by Wynk on its app to download music allowed its subscribers to make copies of such sound recordings and store them in an electronic medium. This is an exclusive right granted under Section 14(e)(i) of the Act[16], to owners of copyright in a sound recording and therefore prior permission of Tips (which is the owner of copyright) is required for this purpose. Also, when the customers of Wynk permanently downloaded the sound recordings on their app so as to have permanent access to them, it amounted to sale of such sound recordings. Even if such downloading was temporary (i.e. valid for the period of monthly subscription) it amounted to commercial rental of the sound recordings as such rental was not for a non-profit

[16] Copyright Act, 1957, s.14(e)(i) grants the owner of copyright in a sound recording the exclusive right to "make any other sound recording embodying it including storing of it in any medium by electronic or other means."

purpose by a non-profit library or educational institution[17]. The right to sell or give a sound recording for commercial rental also falls within the exclusive domain of a copyright owner under Section 14(e)(ii) of the Act.[18] Further, since broadcasting is a species of communication to public, the provision under Section 31D allowing statutory license to broadcast could only be invoked for the said purpose i.e. communicating a copyrighted work to public. Commercial rental and sale of copyrighted works being distinct from such communication were consciously excluded from the ambit of Section 31D and so the provision could not be invoked for the above-mentioned purposes.

Section 31D does not apply to Internet Broadcasters

Wynk claimed that its 'on-demand online streaming service' enabling its subscribers to hear sound recordings of their choice, did not amount to sale or commercial rental of them. It was mere communication to public that amounts to broadcast of such sound recordings and so Section 31D could be invoked with respect to them. It relied on the use of the expression "any broadcasting organization" under sub-clause (1) of Section 31D to support its claim. Tips opposed the claim stating that the said provision only applied to radio and television broadcasting as is evident from the other sub-clauses of the provision as well as the Copyright Rules that lay the procedure to obtain such a statutory license.

The court observed that Section 31D is a statutory exception to the exclusive rights granted to a copyright owner under the Act. Therefore, the same must be construed narrowly, keeping in mind the intention of the legislators. For this purpose, the court perused the reports of the Standing Committee of Rajya Sabha as well as the Statement of Objects and Reasons of the (Amendment) Act of 2012. Having done so, it concluded that the intention of the legislature was clearly to restrict the scope of the said provision to 'radio and television broadcasting' only, as the main object was to provide access to radio broadcasters whose business is brought to a standstill due to the whim of the copyright

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[17] Copyright Act, 1957, s. 2(fa) - Commercial rental does not include a rental for non-profit purposes by a non-profit library or educational institution.

[18] Copyright Act, 1957, s.14(e)(ii) grants the owner of copyright in a sound recording the exclusive right to "sell or give on commercial rental or offer for sale or for such rental, any copy of the sound recording."

owners. Moreover, when the 2012 amendment was passed (which introduced Section 31D to the Act), the legislature was very much aware of the prevalent technology such as internet streaming and downloading. If at all they wished to include Internet broadcasters, a specific mention of them could have been made or the provision could be laid in more general terms so as to include other modes of communication as well. A review of the Copyright Rules 29 and 31 (which lay the provision for obtaining a license under Section 31D), also coherently limit the application of the provision to radio and television broadcasters only.

Office Memorandum of DIPP rejected: The court also rejected the office memorandum issued by DIPP which included internet broadcasters under the purview of Section 31D. It questioned the authority of the Central Government to issue such a memorandum which interpreted the provisions of the Act in a contradictory manner. The court also observed that the memorandum lacked statutory flavour and so it was not bound to follow it.

Spotify Case

A recent addition to the controversy regarding Section 31D has been the invocation of the said provision by a Swedish music-streaming company named 'Spotify' which launched its services in India a few months ago. In order to provide access to its worldwide collection of sound recordings, it had been negotiating with various music production houses including Warner Chappel Music Ltd. (hereinafter WCM).

On 25th February 2019, Spotify invoked the statutory licensing scheme under Section 31D of the Act, by filing a public notice with IPAB (i.e. Intellectual Property Appellate Board) stating its intention to broadcast sound recordings, the rights in which were owned by WCM. The notice also included the reason behind Spotify using a statutory licensing provision for the purpose of obtaining a license. It stated that WCM had not given Spotify any reasonable justification for not granting license with respect to its works in India even though it had granted such licenses to various other services operating here. That, such an act on behalf of WCM would not only deny customers of Spotify, access to one of the leading music services but also would cause them irreparable

loss. It also deposited a sum of 5,28,000 EUR as an advance royalty with the Copyright Board. As per the provisions of the Act, royalty for the purposes of Section 31D is to be determined by the Copyright Board either *suo-moto* or upon a request from an interested in this regard.[19] Therefore, it is unknown as to how Spotify reached to such a sum as royalty in order to invoke Section 31D. In response to this notice WMC sued Spotify in the Bombay High Court as it anticipated infringement.

On 26th February 2019, Justice Kathawalla issued an order wherein it stated that Spotify could not use Section 31D for obtaining a statutory license for the purpose of streaming sound recordings on its online application. However, at the same time, it allowed Spotify, without any voluntary or statutory license to use the music in which WCM had rights by depositing a sum 6.5 Crores with the High Court, till the time a remuneration is fixed when the case is finally decided. Such an arrangement on behalf of the court is absurd for it has no legal sanction in the absence of a voluntary or statutory license between the two parties. Nevertheless, it is apprehended that the decision in the *Tips case* (discussed above) given on 23rd April 2019, wherein sound reasoning was given by the Bombay High Court in excluding internet streaming from the purview of Section 31D, is likely to affect the fate of this case as well.

Copyright Draft Rules, 2019

Another twist to the already existing controversy of internet broadcasters and the prevalent statutory licensing regime for broadcasters, has been the proposal made by the Department for Promotion of Industry and Internal Trade to amend the Copyright Rules. These Draft Rules have been made available to the general public on 30th May 2019, inviting suggestions and objections. One of chief objective behind this proposal of amending the Copyright Rules has been to bring internet broadcasters within the ambit of Section 31D thereby putting an end to their precarious position especially in the light of judgement delivered by the Bombay High Court in *Tips case.*

Rule 29 to 31 of the Copyright Rules, 2013 exclusively deal with the procedure required to be followed in order to obtain a statutory license

[19] Copyright Rules 2013, rule 31.

under Section 31D of the Act and the manner in which the royalties pertaining to it are to be determined. In these rules, a specific mention of radio and television broadcasters has been made time and again which restricted their scope to them *per se.* The Copyright Rules, 2019 proposes to replace this specific mention of radio and television broadcast with "each mode of broadcast". Such a replacement has widened the purview of statutory licensing for all modes of broadcast in a clear and coherent manner under the Copyright Rules.

Cart Before Horse like Situation

Under Section 78 of the Act, the Central Government has been empowered to "*make rules for carrying out the purposes of the Act*" by publishing a notification to this end in the Official Gazette. Therefore, it is well within the powers of the Central Government to make or amend the existing rules pertaining to the Act. However, what makes such an amendment bad in law is the fact that they are in direct contradiction to the existing provision of statutory licensing under Section 31D of the Act.

Sub-clause (3) of Section 31D expressly mentions that the rates of royalty for radio and television broadcasting shall be fixed separately. In fact, the main reason for including a statutory licensing regime for broadcasters under the Act was to address the problems exclusively faced by such broadcasters. The intention of the legislature and the report of the Standing Committee (discussed earlier) also point towards such exclusion. Thus, the Copyright Rules, 2019 seem to travel beyond contours of the substantive provision under the Act. It is one of the fundamental principles of law that rules which go beyond the boundaries of the Act under which they are issued, are to be quashed as void[20].

Making changes to Copyright Rules without amending the substantive provisions in the Act not only leads to an anomaly in the Act but also

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[20] *General Officer Commanding-in Chief* v. *Subhash Chandra Yadav,* 1988 AIR 876 - Supreme Court in this case elicited two conditions for a rule to have the effect of a statutory provision i.e. (i) it should be in conformity with the Act under which they are issued and (ii) it must be within the rule making power of such authority. This position has been affirmed by the Supreme Court in the case of *Laghu Udyog Bharti* v. *Union of India (*1999 AIR 2596).

can be compared to a situation where the cart is put before the horse. To maintain consistency in the Act, it is important to either amend the statutory provision under Section 31D of the Act so that internet broadcasters can be included within its realm or to avoid making such changes in the Copyright Rules alone.

Conclusion

The provision under Section 31D has been very lucidly stated which barely leaves any scope for it to be interpreted otherwise. The legislature has limited its scope to radio and television broadcasters by expressly making a reference of them in Section 31D as well as the rules pertaining to it which lay down the procedure to obtain such a license. In fact, the said provision was primarily introduced for radio broadcasters whose business is often at loss due to the whimsical behaviour of copyright owners who refrain from negotiating a voluntary license. Even the case of television broadcasters was included only later, as is known from the reports of Standing Committee. Internet which was a well prevalent technology in 2012 found no mention in the debates of legislators, as the provision focusing Internet was never included.

The Office Memorandum issued by DIPP in 2016 and the Draft Copyright Rules, 2019 both have endeavoured to change the position of law by including Internet broadcasters within the ambit of Section 31D. While the Office Memorandum was rejected by the Bombay High Court on account of it lacking statutory flavour, the Draft Copyright Rules, 2019 are in direct conflict with the existing statutory provisions which make them bad in law. Hence, it seems that neither of them would able to stand the test of legality. Moreover, on-demand internet services can barely fit within the definition of 'broadcast' which is a form of communication to the public that involves the choice of broadcaster with respect to time and place of such communication, rather than that of the consumer.

Internet, today has become one of the most significant means of communication and the speed of its development cannot be impeded by rigid statutory provisions. However, the basis of such provisions needs to be legally sound so that they are formulated in a manner which best caters to their specific needs. Before the rules are amended, it is important to change the basic provision pertaining to statutory licensing

for broadcasters. Rules merely explain further what the substantive provisions entail and how the latter can be implemented in accordance with law. Therefore, if the legislature considers it exigent to include the case of Internet broadcasters under Section 31D, it must replace the expression 'radio and television broadcasting' with 'each mode of communication' in the said provision as well.

The Statutory Position of Information Commissioners under RTI Act, 2005 with Special Reference to Right to Information Amendment Bill, 2019

Varun Chhachhar[*]

Introduction

The first two decades of the post-Indian independence era witnessed relatively clean, smooth and foresighted governance, mainly because of the fact that those who were at the helm of the government were the top leaders and the persons who had actively participated in the Indian freedom movement and sacrificed their lives for the cause of the nations. They were genuinely concerned with the welfare of the people and upliftment of the downtrodden and margined sections of the society. The socio-economic, industrial and agricultural development during 1950's and 1960's and the socio-welfare legislations that evolved during this era amply testify this trend in the realm of the governance of the country.

The path set by the framers of the Indian Constitution and followed by their illustrious successors such as Dr. Ambedkar, Moraraji Desai, Lal Bahadur Shastri and Dr. Zakir Hussain to name a few, gradually started drowning in cynicism and hopelessness which touched its climax during the Emergency period from 25 June 1975 to 21 March, 1979 under the Late. Prime Minister Smt. Indira Gandhi's regime.[1] Gradually, political manoeuvring of power, corrupt practices, use of muscleman, violence and criminalization of politics threw the ideals of democracy to the winds and people participation remain utopian to the society in the absence of fair and transparent election process. The concentration

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[1] *ADM Jabalpur* v. *Shrikant Shukla* [1976] SC 1207.

of political and administrative power in the management of the country's economic and social resources led to wide spread corruption jeopardizing the universally acknowledged principle of good governance namely democracy, liberty and rule of law. Democracy in turn requires Accountability, and transparency through devolution of information and effective participation citizens in decision making. The ideals of democracy and of political participation remain utopian to the society in the absence of fair, transparent and regular elections. The voters have the elementary right to know the full details of the candidates who represents them in the Parliament or Assemblies, as the case may be. The right know about the candidate is natural right flowing from the concept of democracy and is an integral part of Article 19(1) (a) of the Constitution of India. The candidate must ensure that they provide maximum information about themselves, on the basis of which the electorate may select worthy and public-spirited persons representing them in the governance of the country.[2]

While taking over the reign of the Union Government of India, Hon'ble Prime Minster Shri Narender Modi on 27 May, 2014 addressing the nation observed that it is time to move from politics to perform and therefore, it is necessary to break barriers within the system. The Ministries of the Union Government should send a message of clarity, transparency and accountability in the system of governance. He exhorted bureaucrats to work with vision and follow seven Cs-commitment, compassion, confidence, communication, competitiveness, consistency and creativity as key principles to prosperity and innovation in the governance of the country. The need of the time is to move beyond officialdom and work a part of movement for nation building.[3] This truly reflects on the commitment of the new government to transparency and good governance.

The Right to Information law which was implemented in India nine years ago remains a potent weapon to fight opacity in public offices and politicians continue to fear its unwarranted brake on their freedom of arbitrary decisions or actions. Central Information Commission time and again played an important role in realizing the dream of right to

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[2] *Resurgence India* v. *Election Commission of India* [2013] 11 SCALE 348.

[3] '*Sampark*', *Samanvaya* and *Samvad* were the Essential Attribute of Good Governance", Times of India. (Delhi, 2 June, 2014) 4.

know through its Judgements. Let us understand the role and position of Central Information Commission as tool of administration of justice in India.

Central Information Commission

The Central Information Commission (CIC) is responsible for general supervision, direction and management of the Central Information Commission.[4] There shall be Central Information Commission.[5]There shall be a Chief Information Commissioner and 10 members as Information Commissioner's in Central Information Commission.[6] The Chief Information Commissioner & other Information Commissioner's shall be appointed by the President of India.[7] The Chief Information Commissioner or an Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union territory, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursing any profession.[8] The Chief Information Commissioner and Information Commissioner shall be a person of eminence in public life wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance. The Chief Information Commissioner shall hold office for a term of five years on the date he or she assumes office or till the age of 65 years, whichever is earlier.[9] The Chief Information Commissioner or an Information Commissioner may, at any time, by writing under his hand addressed to the President, resign from his office, Provided that the Chief Information Commissioner or an Information Commissioner may be removed in the manner specified under section 14.[10] The Chief Information Commissioner or any Information Commissioner can be removed by the President of India on the ground of proved misbehaviour or incapacity, after a Presidential Reference to the

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4 Right to Information Act 2005, s 12(4).

5 *Id.*, s 12(1).

6 *Id.*, s 12(2).

7 *Id.*, s 12(3).

8 *Id.*, s 12(6).

9 *Id.*, s 13 (1).

10 *Id.*, s 13(4).

Supreme Court. The Supreme Court inquired into the matter and reported that the Chief Information Commissioner or any Information Commissioner, may be removed on the ground.[11]

The President may by order the removal of the Chief Information Commissioner or any Information Commissioner, if the Chief Information Commissioner or an Information Commissioner, as the case may be, —

(a) is declared as an insolvent; or
(b) has been sentenced in an offence which, as per the opinion of the President of India, includes moral turpitude; or
(c) engages in an Office of Profit; or
(d) is, in the opinion of the President of India, is declared as unfit to continue because of infirmity of mind or body; or
(e) has acquired such financial or other interest as is likely to affect prejudicially his functions as the Chief Information Commissioner or an Information Commissioner.[12]

State Information Commission

There shall be a State Information Commission.[13] The State Chief Information Commissioner and Other State Information Commissioner shall be appointed by the Governor of the State.[14] The Stat e Chief Information Commissioner and the State Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.[15] The State Chief Information Commissioner or a State Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union territory, as the case may be, or hold any other office of profit connected with any political party or carrying on any business or pursing any profession.[16] The term for the State Chief Information Commissioner or an Information Commissioner shall be of five years from the date of appointment or till he/she attains 65 years of age,

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[11] *Id.*, s 14(1).
[12] *Id.*, s 14(3).
[13] *Id.*, s 15 (1).
[14] *Id.*, s 15(3).
[15] *Id.*, s 15 (5).
[16] *Id.*, s 15 (6).

whichever is earlier. There shall be no reappointment of the State Chief Information Commissioner or an Information commissioner. He/She shall be eligible to get appointed as the State Chief Information Commissioner after evacuating office, by the procedure mentioned in sub-section (3) of section 15.[17]

The resignation of the State Chief Information Commissioner may be connoted to the Governor, at any time, such that he/she is relieved of his/her services by a procedure mentioned under section 17.[18] The removal of the State Chief Information Commissioner or a State Information Commissioner can only be done by an order of the Governor in cases of proved misbehaviour or incapacity, following a prescription by the Supreme Court, on a recommendation of the Governor, in an inspection, that the State Chief Information Commissioner or the State Information Commission, whichever the case be, ought to be removed on these grounds.[19]

There shall be full independence given to State Information Commission. The State Information Commissioner shall be endowed with the ordinary supervision, authority and administration of the business of State Information Commission. He/she may carry out all the powers and perform all those actions and affairs, which are to be performed by the State Information Commission and shall not be bound by the mandates of any other body mentioned under this Act.[20]

However, the rules relating to the procedure to be adopted by the Commission are to be framed by the respective State Governments as per section 27 (e).

Power and Function of Information Commission, Appeal and Penalty

The Commissioners can receive complaints and appeals and enquire into them. It can pass suitable orders for ensuring compliance of the Act. It shall be the duty of the Central Information Commission or State Information Commission to receive and enquire into a complaint

[17] *Id*., s 16(2).
[18] *Id*., s 16(4).
[19] *Id*., s 17(3).
[20] *Id*., s 15(4).

received from, any person.[Section 18(1)][21]. The power of Civil Court has been vested in the Central Information Commission and the State Information Commission under Code of Civil Procedure, 1980.[22] For example, it calls for and obligates the attendance of the persons and urge them for giving evidence on oath, orally or in written, and to generate before them the documents or other entities, necessitating the revelation and analysing of the written records, collecting affidavits of the evidences, demanding from any office or court, the public record or copies of such documents, for scrutinising the documents or witnesses, issue summons.

In cases when a person has not received any particulars from the Central Information Commission or the State Information Commission, whichever the case be, they may advance an appeal to an officer, who, in post, is higher to the Central Public Information Officer or State Public Information Officer.[23] The appeal should be preferred within thirty days of expiry of the period thereof or from the time such a decision was received. Under sub-section (1), an appeal, subsequent to the first one, against the decision, may be advanced to the Central Information Commission or State Information Commission, within ninety days' date from when the decision was actually received or should have been pronounced.[24] Binding shall be the decision given by the Central Information Commission or State Information Commission, whichever the case be.[25]

In cases where, while deciding a given appeal or grievance, the Central Information Commission or the State Information Commission, whichever the case be, opines that the Central Public Information Officer or the State Public Information Officer, whichever the case be, has, with no just reason, denied to accept a plea for particulars regarding an issue or refrained from providing certain details in a period of time mentioned under sub-section (1) of section 7 or with ill intent, turned down a demand for furnishing some details or deliberately provided wrong, inadequate or deceitful particulars or

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[21] *Id.,* s 18(3).
[22] *Id.,* s 19 (1).
[23] *Id.,* s 19 (3).
[24] *Id.,* s 19 (7).
[25] *Id.,* s 20(1).

demolished the very material, which was the subject of question or caused a hindrance of any sort in the administration of such details, they shall be liable to pay a fine amounting to two hundred and fifty rupees per day till the complaint is received or the specifics are produced. Nevertheless, the sum total of the fine thus imposed shall not be over and above twenty-five thousand rupees.[26]

In cases where, while deciding a given appeal or grievance, the Central Information Commission or the State Information Commission, whichever the case be, opines that the Central Public Information Officer or the State Public Information Officer, whichever the case be, has, with no just reason and also obdurately and incessantly, declined from accepting a plea for particulars regarding an issue or has abstained from providing certain facts in a period of time mentioned under sub-section (1) of section 7 or with ill intent, turned down a demand for furnishing some details or deliberately provided wrong, inadequate or deceitful particulars or demolished the very material, which was the subject of question or caused a hindrance of any sort in the administration of such details, it shall prescribe strict undertakings detrimental to the Central Public Information Officer or the State Public Information Officer, whichever the case be.[27]

AMENDMENT TO THE RIGHT TO INFORMATION BILL, 2019

The Bill aims to revise the term of the Information Commissioners, which currently is fixed, and the salary and service conditions be made under the executive rules which are to be provided by the government. Currently under the unaltered Right to Information Act, the Chief Information Commissioner and the Information Commission serve 'for such term as may be prescribed by the "Central Government"'.

In the same manner, the term of office of State Information Commissioner is curtailed by the amendment. This is through amendment made in Section 16.[28]

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[26] *Id.,* s 20(2).

[27] Right to Information Amendment Bill, 2019, s 16.

[28] Right to Information Amendment Bill, 2019, s 16

Section 16 of the Proposed Right to Information Bill which is passed by both the Houses is as follows:

In section 16 of the principal Act, —

(a) in sub-section (1), for the words "for a term of five years from the date on which he enters upon his office", the words "for such term as may be prescribed by the Central Government" shall be substituted;

(b) in sub-section (2), for the words "for a term of five years from the date on which he enters upon his office", the words "for such term as may be prescribed by the Central Government" shall be substituted;

(c) for sub-section (5), the following sub-section shall be substituted, namely: —

"(5) The salaries and allowances payable to and other terms and conditions of service of the State Chief Information Commissioner and the State Information Commissioners shall be such as may be prescribed by the Central Government:

Provided that the salaries, allowances and other conditions of service of the State Chief Information Commissioner and the State Information Commissioners shall not be varied to their disadvantage after their appointment:

Provided further that the State Chief Information Commissioner and the State Information Commissioners appointed before the commencement of the Right to Information (Amendment) Act, 2019 shall continue to be governed by the provisions of this Act and the rules made thereunder as if the Right to Information (Amendment) Act, 2019 had not come into force.".

The State Government, in accordance with section 27 (e), has been enshrined with the responsibility to shape the principles regarding the method to be accepted and followed by the State Information Commission.

This means that the tenure of the Information Commissioner can be fixed as per the executive rules framed by the Central Government. Furthermore, by the virtue of this amendment the Central Government shall have the power to fix the salaries and allowances of Chief Information Commissioners and State Information Commissioners.

The salary and allowances of the Chief Information Commissioner and Information Commissioner are equal to the Chief Election Commissioner and Election Commissioners, respectively, and are able to become fixed by the virtue of the Constitutional provisions. To guarantee a sense of independence and autonomy in their work, the Act has provided for identical position and benefits to the Information Commissioner, to those of Election Commissioner.

But by the virtue of the reason and statement of the amendment in the Bill states "the mandate of the Election Commission of India and Central and State Information Commissions are different. Hence, their status and service conditions need to be rationalised accordingly".

The Proposed Amendment in this context is as follows:

In section 27 of the principal Act, in sub-section (2), after clause (c), the following clauses shall be inserted, namely: —

> *"(ca) the term of office of the Chief Information Commissioner and Information Commissioners under sub-sections (1) and (2) of section 13 and the State Chief Information Commissioner and State Information Commissioners under sub-sections (1) and (2) of section 16".*

The terms and condition of appointment as well salaries and allowances etc, of the Chief Information Commissioner and the Information Commissioners and the State Chief Information Commissioner and the State Information Commissioners shall be decided by the Central Government.[29]

Conclusion

It is important to understand that Central Information Commission has six Information Commissioners. Some posts are lying vacant with that the opposition citing reason to accuse government of weakening the institution. The Original RTI Act was passed by the government, after it was discussed and passes by the parliamentary standing committee. In the original Bill at that point of time, the salaries of Chief Information Commissioner and Information Commissioners were equivalent to Secretary and Additional Secretary Govt. of India respectively. But

[29] *Id.*, s 27.

Parliamentary committee recommended it to the level of Chief Election Commissioner and Election Commissioner respectively.

Power has an intrinsic bent to prompt governments to coax or control institutions. It is important that less interference from Government and pressures provide the necessary atmosphere where one can work with an absolute commitment to the cause of transparency. Integrity and honesty coupled with discipline in life, facilitate a constitutional functionary to be fair. Its existence depends upon numerous routinely things like security in tenure, freedom from ordinary monetary worries, freedom from influences and pressures.

In the words of the Supreme Court, "The right to get information is a natural right flowing from the concept of democracy. That right has reached new dimension and perseverance. That right puts an important responsibility upon those who take upon the responsibility to inform".

Instead of diluting the powers, what is required is to open more access to justice. The institutions are facing real challenges of pendency of applications, vacancies and qualitative decline in adjudication standards. I feel access to justice is more often an important aspect of administration of justice and hence must be restored and protected.

Robotics and IPR in Contemporary Era

Ketan Mor[*]

Introduction

The scope of intellectual property rights has increased widely in the 21st century. With the rise of new avenues in the technological field, it has created both pros and cons for the people who are dealing with it. Robotics has become a new focus area in the field of technology. From the industrial use of robots to serving tea in the restaurant, it has covered the long journey of innovation and made people's life easy in many ways. But this has also created complex issues for the legal fraternity dealing with IPR. Earlier, when there is any conflict between parties, they are mainly related to specific branch of IPR such as conflict only related to Patent or Copyright or Design or Trade Secrets but with the new innovations involving above IPR branches in single product made the litigations complex. Even companies are in confusing state regarding protection they should seek to protect their inventions. In this paper we will try to find out innovations in the field of robotics and its interface with different branches of Intellectual Property Rights.

Interface between Robotic and Patent

Patent is the special branch of Intellectual Property Law which provides protection for new inventions in different fields. But recently in the past 10 years, its importance is more recognized in the Artificial Intelligence area. It is true that some major development is taking place in very few developed and developing countries but its usage demands is increasing in all over the world. Therefore, its importance becomes more relevant in this technological field. It required a large amount of

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capital investments in Research & Development, prior to commercialization and the need for regulatory approval. Patent rights allow companies to recover their investment and secure a competitive commercial advantage. It is useful in protecting those innovations which can easily be reverse engineered[1].

Humanoid Robotics is the extended form of Artificial Intelligence with increasing demand all over the world. It is the next version of software program which is capable of understanding and processing data more easily and come out as helping hand for people. Thus, it becomes more important to protect the computer software from your competitors and, there Patent law play an important role. It provides computer program strength and wide area of protection. Protection under Patent Law will prevent all other from making, using, or selling the patented invention. While the copyright which was earlier provided under Berne Convention as copyright in literally work which, ultimately give protection only to expression of idea and not the idea itself, patent protection protects the basic principle behind that invention[2].

World trends shows that patent protection give adequate protection to the programmer. This is the reason; more than 128 countries are providing patent to computer software. In one of the cases, appeal filed by IBM put forth the argument that the computer programs principle are not capable of protection under copyright law as literary work and should be protected under patent law which has wide spectrum[3].

It is advisable to have patent protection as its benefits are beyond one's expectation, as demonstrated in *Stac Electronics* v. *Microsoft Inc*. Stac Company claimed for 'Copyright Infringement' of data compression software which was developed in joint venture, they also claimed the

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[1] C. Andrew Keisner, Julio Raffo and Sacha Wunsch-Vincent, *Breakthrough technologies- Robotics and IP*, WIPO (Dec., 2016) *available at* https://www.wipo.int/wipo_magazine/en/2016/06/article_0002.html (last visited Oct. 16, 2019).

[2] SIDBI Innovation and Incubation Centre, IIT Kanpur, *Why Protect Computer Program through Patent*, *available at* http://www.iitk.ac.in/siic/d/content/why-protect-computer-programs-through-patent (last visited Oct. 14, 2019).

[3] *Id*.

breach of contractual obligation under trade secret but they only manage to win case on the ground of patent infringement[4].

There are several criteria after fulfilling which you become eligible for patent protection. The first is invention must be related to patentable subject matter; (ii) Invention must be capable of industrial application; (iii) it must be new (novel); (iv) it must involve an inventive step (be non-obvious); (v) invention must hold certain formal and substantive standards in patent application[5].

Another point in favour of patent protection is that invention of new software and technology required lots of investment of skilled human resources, infrastructure and time of companies. So if the developer will not get the adequate protection under law, it will demotivate them for further research and ultimately can impact the industrial growth of the company.

Knowledge is the key to any invention and patent gives the inventor exclusive rights to use that invention. Therefore, every invention in the field of Robotics creates a potential barricade for others**,** who sell product in the same technological area. Robotic devices comprise of multiple disciplines such as mechanical, electronics, software, medical, etc. Thus, gaining an understanding in relevant technology will help in reducing the patent conflict[6].

After 1980s, Patent applications flowed in few developed countries with increased fourfold in automation factories. It again surged in mid-2000 as more new development came on stream related to particularly Humanoid robotics. Figure shown describe the patent application filed by worldwide for robotics[7].

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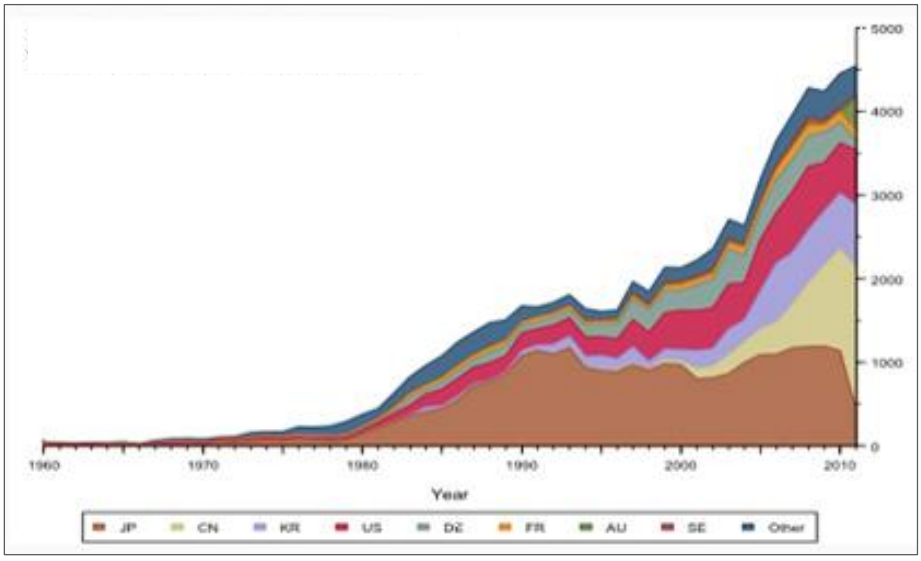
4 *Id.*

5 Miyamoto Tomoko, *Patenting Software,* WIPO, *available at* https://www.wipo.int/sme/en/documents/software_patents_fulltext.html (last visited Oct. 15, 2019).

6 Linda J. Thayer and Rachel L. Emsley, *Be Competitive: Patent Planning for Robotics Companies*, Finnegan (July/Aug., 2011), *available at* https://www.finnegan.com/en/insights/be-competitive-patent-planning-for-robotics-companies.html (last visited October 2019).

7 *Supra* n. 206.

Number of First Patent Filings Worldwide for Robotics: 1960 to 2012



The number of first patent filings worldwide in the robotics space between 1960 and 2012. The graph shows the emergence of the Republic of Korea in the early 2000s and of China more recently

Most applications are filled by automotive and electronics companies but there are new actors emerging. Earlier few developed countries such as USA, Germany UK, Japan, and South Korea led the way for patent filling but the emerging companied in the field of Robotic and AI, China is giving competition to these countries irrespective of its developing nature. Different Robotic companies are analysing the patent document just to have knowledge about the latest technological developments and gain insights about the market view and competitors' strategies.[8]

Copyright and Robotics

Copyright law provided limited protection to only expression of idea and not the idea itself. Previously, Computer Software received the protection under Berne Convention as copyright of literary works. India was also giving protection under the Copyright Act, 1957 but it only protected the source code, object code and screen display under "look

[8] *Id*.

& feel" theory. Other reason is, extend of rights available under patent is wider than copyright law. Under Copyright law, companies can only prevent the copying of expression of an idea. In case of computer program, copyright law protects the complete copy of a software program which mean literal copying, as well as copying portion of the software code[9].

Design and Robotics

As we say "First impression is the last Impression". This even applies to robot's appearance. Design act protects the Robot's look- its shape and form. It also plays a crucial role in promoting marketability of products and helping companies to generate the returns they invested in research and development wing[10]. There are many factors which play an important role in commercial market. When in a developing industry, Robot is first in market, its strong after-sales services, reputation and brand become critical in its success as compare to past robotics innovation. When selling directly to consumer, brand became very important in identifying the product. This is the reason why robotics companies sometime prefer their trademark those of their robots[11].

It is an indisputable fact that, Robots became much more consumer-facing than ever before. Global Market for consumer robots has increased drastically in last one decade. We think about any work, we find Robots assisting us everywhere of our life such as Roomba from iRobot for household routine or Mindstorms from Lego for entertainment and in medical surgery too, robots are playing an active role. Robots overall physical appearance and its increased visibility, plays an importance role in determining the success or failure of robotics products in the marketplace[12].

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Elizabeth D. Ferrill, Linda J. Thayer and Robert D. Wells, *Design-Patent Protection*, Robotics Business Review (July 1, 2014), *available at* https://www.roboticsbusinessreview.com/legal/design_patent_protection_what_to_do_when_the_face_of_your_robot_becomes_the/ (last visited Oct. 15, 2019).

A robot's outer design comprises of various aspects of its look and feel such as facial features and facial expressions. It shape and colour combination helps in identifying the product in the market and become brand value in influencing people to purchase them. In that situation, it is important for companies to protect their intellectual investments that go into creating such appearance and feel of their products. General rule of protection under design act everywhere is that it must be applied to an article which ultimately gives new appearance to the eyes. In case of robots, it may cover the whole design of the robots or any such innovative part such as robot's face[13].

Companies try to protect their robots design for different reasons. First, it takes shorter time in application processing and also less expensive as compare to other patent application. Design protection is valid for 14 years from the date of approval. Application for design protection must be filled before disclosing it to the public. Second, design protection rights are enforced like trademarks. If the design of opposite party similar to design-patented, also deceiving the public and public likely is relating it to former product then it will amount to infringement of owner rights and he can claim damages for the losses he suffered due to this confusion. But there is hardly any litigation related to design-patented issue. If there are any, companies try to resolve them without litigation. It is true that earlier companies preferred only patent protection but with the changing time they also realised the importance of protecting the efforts they put into designing the look of their products.

Roomba, robot by iRobot was created with significant amount of research and development by company. Therefore, they cannot ignore the value of their investment in creating that unique design which should be protected under design law. Protect of your design prohibits competitor from making the same which ultimately give that product recognition and consumer also identify the product coming from where.

Trade Secrets and Robotics

Globalization has brought the world together with the new innovations and technologies. With the evolution of new machinery and its growing complexities in robotics system, trade secrets became the first option for

[13] *Id*.

companies to protect their innovations. There are number of reasons which support this view. *Firstly*, there are few people who are expertise in reverse engineering of this complex system. In that case, trade secrets protection will give them full rights over the details of their innovations. *Secondly*, it is impossible to reverse engineering of high expensive robots which are difficult to hold. *Thirdly*, patent application has become so costly and time consuming, therefore, small companies' tries to avoid such filing of patent application. Another reason for companies to prefer trade secrets is that patent is provided for the very short time. But their product takes decades to come in market for commercial use, till the time patent had expired[14].

Robotics technology is changing very rapidly with new innovation. Every company tries to build more user-friendly Robots, which can help any person according to his/her requirement. This brings these companies to have strict agreement with their employee when they move to competitors. Also, every country has its own Patent law to provide protection to innovations. So, this reason also tilts the balance in favor of trade secrets[15].

Intellectual Property plays an important role in data driven world. There are various issues arising with the data usage processed by robots. It is directly related to the right to privacy of individual. Legislatures, Executives and Policymaker need to find out whether the trade secrets adequately address or deal with such situations, which may arise in data driven economy[16].

India's Position in Robotics

Automation industry is increasing adopting the industrial robotics in their manufacturing of products. Countries like Germany and Japan have achieved the industrial robotics up to 90 % in their production units. The main reason behind this shifting is the ageing population of

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[14] C. *Andrew* Keisner, Julio Raffo and Sacha Wunsch-Vincent, *Breakthrough Technologies – Robotics, Innovation and Intellectual Property*, Economic Research Working Paper No. 30 WIPO (Nov., 2015), *available at* https://www.wipo.int/edocs/pubdocs/en/wipo_pub_econstat_wp_30.pdf (last visited Oct. 15, 2019).

[15] *Id*.

[16] *Id*.

these countries, where 50 % people are between 60 to 65 years of age. Due to this reason, labour cost is high in these countries and people like to prefer robots for their help rather than employing any person. But the situation is completely different in India. India has the world second largest population consists of mainly young population between 30 to 35 years of age. Since India is still developing country, therefore, automation levels are less in comparison to foreign countries. Similarly, cost of trade is also less as compare to robots due to availability of cheap labour[17].

The government strategy is to attain "automation" i.e. process where industrial robots and human being can work alongside. It was noted that till June 2015, around 30 to 40% automation was standard across all big automation plants. It is an undeniable fact that, automatic manufacturing have several advantages over the manual work. First, it helps in reducing the cost of production with better utilization of resources. Second, human productivity decreases faster with repeated task whereas robots can function efficiently with same result on repeated task. Most of the time people with ITI training and diploma remain underpaid for their repeated work, irrespective of the fact that they can even perform the skilled work. It also helps in increasing the production of the company without any hurdle which company may face with their employee. Robots can be made use any time without any such restriction of work hours. Company can recover its initial cost easily in procuring robots in its few years of production. And the labour saved from such work can be utilized for skill enhancement of labour, employee and development activities[18].

Another reason is that, the quality of automated product is better and less prone to defects which are not same in case of human being. Automation process is the result of calculated algorithm on which robot performs, but there is no such thing in case of human. They are affected with various deviations in course of their work due to faulty human supervision. Robotic technology will also help in building industrial peace between both employer and employee. The strong presence of

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[17] Arya Tripathi, *Industrial Automation and Robot Law in India* (July 19, 2017) *available at* http://www.mondaq.com/india/x/612028/new+technology/Industrial+Automation+And+Robot+Law+In+India (last visited Oct. 16, 2019).

[18] *Id*.

trade union, frequent strike and wage revision demand, adversely affect the industrial peace. This problem can be eliminated by moving toward industrial robotics[19]. Usage of robotics will also promote sustainability in the automotive sector. This will help in reducing waste generated during production and also bring efficiency in the field. Robots can be program and reprogram in order to get the desire result. Robots can function accurately with environmental parameters and maximum utilization of resources. They can be deployed in hazardous activities where human have fear for life.

There are certain law on robots given by different writers such as Asimov's in scientific context. It stated that robot may not harm human through its action or injure human being. It will obey all the instruction given by human beings except the conflicting order to its programming. Amisov quoted "a robot may not harm humanity, or by inaction, allow humanity to come to harm." His law on robots industry can act like a core guideline in regulating the interface between man and machine but doesn't provide solutions for complex problems. His law not able to justify robot made for military purposes where they cause harm to human using, drone surveillance involved in privacy breach and industrial robots taking livelihood of human being. Different countries are forming the policies to regulate the use of robots such as European Union Parliament is making guidelines to regulate Robots and South Korea came up with code for robo-ethics. India has no such specific law dealing with robots. With the increase in robotics field, we need to find out as whether present law is sufficient in regulating the new development in robotics field or we needs new law to regulate it.[20]

Challenges with Robotics

There will be various obligations which will arise with the robots taking place of human being. India, having a strong trade union bond, may face opposition from various stakeholders who will be against such retrenchment of workers due to robots. The issue regarding the relationship between employer and robot, and the arising legal obligation need to be defined somewhere. The question of giving legal

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[19] *Id*.

[20] *Id*.

personality status to Robots who has self-learning abilities, predictive technology and artificial intelligence, is also need a deep consideration because then we also need to talk about the its rights and duties. Therefore, our policy makers need to adopt certain policies which can build and support alternative job creations with larger percentage of skilled workforce who can help in increasing the manufacturing capability in SMEs with new innovations[21].

Liability for Damages

There is another question regarding the liability when certain damage has been occurred due to default in robot's software or hardware. It may give rise to civil and criminal liability. There is incident happened related to this like in 2015, a workman was killed by robot when robot arm grabbed the man and crushed him against metal plate in Germany. The liability problem can become more complicated when Robot are self-learning with abilities to process data through sensors and each to certain conclusion with the help of artificial intelligence[22].

Other issues may arise when the robot is taken on lease from manufacture. When the robot is taken into new environment and working condition, it may cause certain default in it. The robot prior to lease may analysed the various data and behaviour pattern which might not be re-program effectively when exposed to new atmosphere. This may lead to risk at the work place which will require the fixation of responsibilities. If there occur any incident due to above mention carelessness, then who will be held responsible? Manufacture who is owner or the lessee who has taken it for his work? Although the law related to vicarious liabilities and strict liabilities is settled now in many judgements, but with the evolving technology we need to develop the reason behind such act.

Various other issues related to fixation of absolute liabilities and whether the lessee should opt for the insurance scheme to indemnify the robot action which resulted in damage to property or human being. Moreover, Technology and software involves in functioning of Robots which can be term as Artificial Intelligence will allow the auto

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[21] *Id*.

[22] *Id*.

update to the software involved. This will again involve the multiple players such as algorithm writer, designers and assemblers. Thus, these issues will give rise to complex litigation at the stage of conflict[23].

Case Laws in re Robotics

iRobot v. *Robotic FX*[24]

iRobot has filed two cases in the federal court in Massachusetts and Alabama against his former employee Jameel Ahed and his company Robotic FX Inc. for trade secret misappropriation and patent infringement. US District Court of Alabama, in patent infringement suit ruled out that, Jameel Ahed and his company Robotic FX Inc. knowingly infringed the iRobot patent right and hence granted injunction against the Robotic FX company. In another suit in Massachusetts also, court found Jameel Ahed and his company, guilty of violating fair trade practices by using the iRobot's trade secrets and confidential information and granted permanent injunction against Robotic FX Negotiator product. Court also prohibited Ahed from competing in robotics industry for 5 years.

InTouch v. *VGo Communications*[25]

InTouch Company is the owner of several patents in the field of robotics. It filed the case against VGo Communications against the infringement of its patent related to remote teleconference robot systems. The District Court found that the accused VGo did not violated any law as asserted by InTouch and also held that 357 patent and the 030 patent, which InTouch owns, were invalid based on obviousness. InTouch filed an appeal on the argument that the term used in '030 patent is "arbitrating to control" and in '357 patent "arbitrator" should

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[23] *Id*.

[24] iROBOT Corporation, *iRobot Prevails in Lawsuits Against Robotic FX, Nasdaq: IRBT* (Dec., 21, 2007) *available at* https://investor.irobot.com/news-release/news-release-details/irobot-prevails-lawsuits-against-robotic-fx (last visited Oct, 16, 2019).

[25] United States Court of Appeals, Federal Circuit, *InTouch* v. *VGo Communications, available at* https://caselaw.findlaw.com/us-federal-circuit/1666011.html (last visited Oct, 16, 2019).

be interpreted as the first requesting user to completely control the robot. The Federal Circuit agreed with the argument of InTouch Company and reversed the judgement of district court. It further held that VGo's representatives failed to provide reason as to why they combine the prior art which is already patented and evidence for non-obviousness of the product.

ISR Group v. *Manhattan Partners*[26]

In the year 2013, ISR Group was in serious talks with Manhattan Partners on potential acquisition but the deal failed and later the two employees of ISR Group joined the Manhattan Partners. So ISR Group sued the Manhattan Partners for trade misappropriation in Tennessee state court. This shows that how companies are prompt in saving their trade secrets and later both parties settled the case outside the court. Similar case was filed in 2013 by MAKO Surgical[27] against Blue Belt Technologies for trade misappropriation issue when Blue Belt hired two of its employees. MAKO was successful in taking the permanent injunction against the Blue Belt.

Conclusion

In the conclusion, we can say that these issues have just risen with advancement of technologies. In future, it is not surprising if we find more complex questions rising to solve the conflict between man and machine. IPR has different branches to protect the originality and invention by person. It is true that every branch provide protection in its dealing area and one has advantages over other. But the situation become different when a single product deal with the variety of IPR branches such Patent, Copyright, Design, Trade Secrets, etc. And we can clearly see this challenge in case of technologies related to robotics. Robots comprises of several intellectual property rights such as patent for its functioning, copyright for its software code, design for its looks and many more. Therefore, it is advisable for us to have transparent policies related to this field of innovation so that we can effectively

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[26] *Supra* n. 219, p. 32.

[27] *MAKO Wins Permanent Injunction against Blue Belt Technologies*, Robotics Business Review, (Apr. 9, 2013) *available at* https://www.roboticsbusinessreview.com/legal/mako_wins_permanent_injunction_against_blue_belt_technologies/ (last visited Oct, 16, 2019).

deal with the challenges we will be facing in the future. Many countries have started modifying their IP laws so that they can properly deal with the changing time and new development in this technological field.

Towards a Renewable Energy Policy for India

Sourish Roy[*]

Introduction

The term 'Sustainable Development' first came into being through the Brundtland Report back in 1987. As the term gained prominence in its true sense, there came a shift in the way people think about economic and social development along with the concern for a degrading natural environment; debate on sustainability versus progress gained immense importance. In short, Sustainable Development can be defined as a pattern of economic and social growth by way of efficiently using the resources of the natural environment. Such growth takes into account optimum and efficient usage and is achieved without harming the prospects of not only the present generation but also safeguarding the needs of future generations. As recently as September, 2015, the United Nations came out with a set of Sustainable Development goals when the United Nations General Assembly (UNGA) adopted the premises of 'Universal, Integrative and Transformative' as a theme for the 2030 Agenda for Sustainable Development. Even as far back as 2000, the Millennium Development Goals advised us to "ensure environmental sustainability". Various legislations around the world have been enacted since then so as to make Sustainable Development a reality not only at the local levels but also at a global scale. Delving further, one can clearly see how the different member nations have taken steps so as to ensure greater enforceability of the goals.

Background

The first conference pertaining to environmental concerns was the Conference on Human Environment which was held at Stockholm,

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Switzerland in 1972 and is often regarded as the 'Magna Carta of Human Environment'. It had also put forth the idea that natural resources are the representative samples of the natural ecosystem and hence should be conserved in a manner that benefits both the present & future generations through effective planning and management. Additionally, it suggested twenty-two (22) legal principles so as to ensure environmental protection and sustainable development.

The basic or primary convention pertaining to climate change is the United Nations Convention on Climate Change, one of the three conventions that were signed at the Rio Summit of 1992 which aimed at providing the human beings with a healthy and productive life in harmony with nature. This was succeeded by the Kyoto Protocol of 1995 which reiterated the need to bring a more comprehensive & stringent legal regime so as to effectively tackle emissions. While the first commitment period has ended and has been a success to an extent, the second commitment period has begun in January 2013 and is slated to end in 2020. It is the second commitment that is covered under the Doha Amendment by virtue of which the member nations have to lower their emissions by up to 18% below the 1990 levels. Thereafter, the Paris Agreement has emphasized the need for a definite legal framework to administer and facilitate lawfully the change in the paradigm from conventional fuel resources to newer environment friendly fuels. Thus, it can be said that the Paris Agreement is an attempt to envision and put into practice the beneficial emission norms. The Republic of India is one of the key benefactors and an important stakeholder to this vision with the global headquarters of the International Solar Alliance having been set up Gurugram, India, which happens to be a progeny of the same agreement.

Renewable Energy and Indian Context

A new concept which has gained currency during recent times is that of 'carbon trading' which puts forth the idea that the remedy to reduce the increasing global warming caused due to excessive use of non-renewable energy in the form of fossil fuels could be curbed if the ever increasing emission of carbon dioxide could be curtailed. The idea behind carbon trading is to limit carbon dioxide emissions to a certain extent by way of a limiting permit and any emission made beyond such

permit would be penalised. This would not only ensure a strict compliance of the permissible limit of carbon dioxide emission but also would indirectly go a long way in promoting the use of alternative fuels so as to reduce the level of pollution and also keep the level of carbon dioxide emission within the limit as prescribed by the permit granted.

At this juncture, it is pertinent to reiterate that slowly and steadily the environmentally friendly energy resources are gaining ground in terms of usage and is truly leading the way to a possibly sustainable future. The Draft National Renewable Energy Act, 2015 has for long been the need of the hour. The Draft Act is primarily an initiative of the Ministry of New and Renewable Energy, which through a lot of initiatives like the Jawaharlal Nehru National Solar Mission, National Bio-gas and Manure Management Programme, etc aims at redefining the use of traditional sources of energy and paving the path to reduction of the pollution levels as a whole. Further, it would aim at providing the legal framework and platform for development of Renewable energy resources and thereby enforcing the compliance with the global standards and benchmarks of carbon emissions. Furthermore, it also tries to ensure the fulfilment of various national and international objectives of increasing the use and development of more Renewable Resources in an effective manner. Also, it seems, the Draft Act has the potential to go a long way towards successfully curbing the voids that were left by the Conservation of Energy Act, 2001; as the Draft Act strives to reduce the energy intensity of the national economy and thus indirectly tackle the burning concern of mounting environmental pollution which is plaguing the society and threatening the future of humanity. Hence, with the possible enactment of the Draft National Renewable Energy Act, 2015 the research and development efforts towards more energy efficient means and techniques could be successful in considerably deterring the factors pertaining to environmental pollution; in their entirety and for good.

Towards the Objective

"The current energy sector planning is based largely on techno-economics and discounts climate, environment, social and economic impacts and other

qualitative considerations related to long-term national risks. But these issues may be critical from the perspective of long-term energy policy"[1].

"Renewable Energy Law will essentially provide the requisite backbone and a framework which would in turn facilitate an increase in the use of renewable energy for all relevant application including electricity, heat and transport in an effective, sustainable and coordinated manner; which would be well integrated with the existing energy and electricity system. To do so by developing a supportive ecosystem would require creation of an institutional structure, and thereby bringing in a framework for transparent and effective incentive structure"[2].

It is pertinent to note that a Bill has been introduced to amend the existing law relating to electricity namely the Electricity (Amendment) Bill, 2014. It is indeed a forward-looking statute for it proposes to introduce umpteen provisions that promote the use of renewable energy and which includes within its ambit decentralised mode of production of such renewable energy e.g. small community-driven biogas plants in rural areas. In furtherance of promoting renewable energy the bill provides for the formulation of a National Renewable Energy Policy which would be framed by the Central Government in consultation with the State Governments so as to ensure a holistic development of the power generation and distribution system based on optimal utilisation of hydel and renewable sources of energy. The Act envisages promotion of production of renewable energy on a commercial scale. Accordingly, adequate and relevant deterrents as well as incentives would be required to be in place in order to provide an impetus to generation of power from renewable energy sources like small hydro, wind, solar, biomass, co-generation, geothermal and other sources as may be notified from time to time by the Central Government.

The proposed amendment to the draft Electricity (Amendment) Act, 2018 has given birth to two new concepts: i) Renewable Purchase Obligation (RPO); ii) Renewable Generation Obligation (RGO). The RPO is like the commitment to buy the energy generated from recommended sources by the States under their particular guidelines and committed prices. A key inclusion is the arrangement is of

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1 *See,* www.questin.co (last visited Oct, 16, 2019).

2 *See*, www.mnre.gov.in (last visited Oct, 16, 2019).

particular punishments/damages in regard of an inability to consent to the RPOs. The punishment has been attached to the per unit deficit in gathering the RPO. As respects the RGO - coal or lignite-based warmth creating stations are required to produce or acquire and sell a predefined measure of energy which is produced from sustainable power source. The quantum of the RGO would be advised by the Government. While the revisions as to sustainable power sources constitute an appreciated move, it would be significant for the Government to guarantee that sufficiently balanced governance framework is set up in order to guarantee that both the RPO and the RGO are upheld. As has been largely found at present, in spite of having codified guidelines in regard of RPOs, states have found it inconceivably hard to authorize such obligations and implement on the ground. Accordingly, satisfactory levels hindrances for negatives or motivating factors for positives in this regard would be required to be set up; so as to give a stimulus to actual generation of energy from sustainable power sources.

Legal Framework

Since inception, the Indian Constitution, unlike many other countries has been largely silent regarding environmental protection of the nation - barring occasional mention in the Directive Principles. However, the Indian Judiciary has since long played a pivotal role in the protection and promotion of the environment through its vibrant pronouncements. Further, it has gone on to interpret that the Right to a Clean and Healthy Environment is a Fundamental Right within the meaning of Article 21of the Constitution of India, making such right enforceable. The Apex Court recently had the occasion to decide a matter pertaining to environmental concerns where it has ruled that the right to a clean and healthy environment is an essential facet of the right to life and personal liberty as enshrined under Article 21 of the Constitution and regarded that such right is of paramount importance to all citizens. It also reiterated that the Court is constitutionally bound to address such grave concerns and remedy them in an expeditious fashion.

Until then, the other provisions namely Article 48 A & 51A (g) which are in the nature of duties and guidelines are being primarily utilized

by virtue of the 42nd (Constitution Amendment) Act, 1976 to implement the objectives put forth by the Stockholm Declaration, 1972. The right to a clean environment, although stands guaranteed as a Fundamental Right, always requires a balance to be maintained between the protection of the environment and development - due to pressing economic needs. Delving further, if one refers to the catena of judgements of the Apex Court it can be said that the right to a clean and healthy environment goes on to include within its ambit an environment which is free from any form of danger, disease, pollution etc just to name a few but in doing so it should not hinder development directed to economic upliftment for the country and the population at large.

Conclusion

To conclude, it can be said that in the present day, the gravest of all human concerns is that of the environment. For, it is the environment which acts as the base on which all modern-day advancements have been made and such advancements are often made at the cost of the ecological balance which is necessary to be maintained. Hence, first and foremost, there lies the dire need to introduce a holistic legal framework to promote the use of renewable energy in all segments so as to bring down the disturbances that has for long been foisted upon the environment. Further, all existing Energy Laws need to be suitably amended so as to promote the use of renewable energy and all Bills pertaining to the same should be enacted at the earliest to ameliorate the plight of the day. Furthermore, there lies an ardent need for "an integrated energy resource mapping and planning with the right set of institutional and structural support mechanism"[3] so as to ensure effective implementation of renewable energy resources that would pave the path to an environment friendly and sustainable tomorrow for mankind.

[3] *See,* www.reconnectenergy.com (last visited Oct, 16, 2019).

Nikah Halala: An Unconstitutional Facet of Muslim Personal Law

Stuti Bhandari*

Introduction

Muslim women have recently been freed from the shackles of an demeaning practice called, "*triple talaq*". This practice of triple talaq was declared to be unconstitutional by the Hon'ble Supreme Court[1], which was followed by making this practice a penal offence by passing of The Muslim (Protection on Rights of Marriage) Bill,2019[2] .That been done, another unscrupulous practice called *Nikah Halala*, is exploiting the Muslim women (sexually and financially). In most of the cases, *Nikah Halala* is considered an offshoot of triple talaq. Recently, President Ramanath Kovind, addressed the joint meeting of the members of both the Houses of Parliament, wherein he called for eradication of triple talaq and *Nikah Halala* altogether, for ensuring equal rights for women and upholding the dignity of women.[3]

In this article, the basic aspects of *Nikah Halala* deteriorating the social status of Muslim women and how it is against the basic tenets of our constitution has been briefly discussed. The practice of *Nikah Halala* involves a woman marrying someone else, consummating the marriage and getting a divorce, after which she is allowed to remarry her first husband. Therefore, if a man divorces his loving wife in a fit of rage

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1 *Shayara Bano* v. *Union of India* (Writ Petition (c) No.118 of 2016).

2 The Woman (Protection on Rights of Marriage) Bill, 2019 was passed in the Lok Sabha on July 25, 2019 and Rajya Sabha in July 30, 2019.

3 Justice Markandey Katju, *Triple Talaq and Halala*, Daily Times (June 23, 2019) *available at* http://dailytimes.com.pk (last visited, Aug. 8, 2019).

someday and then want to take her back after realizing his mistake wants to take her back, the practice of *Nikah Halala* has to be observed by his wife[4]. *Nikah Halala* today has become a widely accepted practice in Muslim society. In the garb of this practice, various *Maulvis* and religious Muslim clerics are flourishing their business of providing *Halala* services.

Analyzing the basic aspects of *Halala*, it is crystal clear that it is causing financial and sexual exploitation of women at the hands of first and second husband.

Halala is a bizarre misogynic practice observed in Muslim personal law where the woman has to undergo this painful orgy for the irresponsible talaq given by her husband. No logic can justify this exploitation and the stigma the suffered by the divorced wife who observes this practice of *Nikah Halala*, that too for the mistakes of her husband.

Moreover, these days Maulvis make arrangement for the *Halala* services. Wherein they make arrangements for divorced women who wish to remarry their first husband. They arrange for a man, who marries such divorced women at a stipulated fee charged for a stipulated time period. Recently this practice of administering *Halala* by the *Maulvis* has been flawed with corrupt practices. It has become an unethical way of minting money and an opportunity to keep a mistress for a short period of time.[5] These *Halala* services are being offered even in Western countries like Brussels, England etc., by the managing committee of the mosques.

Though mainly the practice of *Nikah Halala* is observed in the cases of triple talaq or irrevocable divorces, but it is also observed after the revocable divorces. If a husband pronounces a revocable form of divorce, he then reconciles with his wife and resumes cohabitation. After few years, he again pronounces revocable divorce under provocation. Thereafter he reconciles and resumes cohabitation. Two talaqs being pronounced, so now the next divorce if pronounced by him would be treated as third talaq. Owing to the finality to this third talaq,

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[4] Sohail Arshad, *Halala*: *The Most Vile Custom Among Muslims*, New Age Islam (December 13, 2012) *available at* http://newageislam.com (last visited Aug. 7, 2019).

[5] *Id*.

his marriage would stand dissolved irrevocably and *Nikah Halala* would be observed.[6]

Undoubtedly, not only *Nikah Halala* violates the basic fundamental rights of the Muslim women enshrined in our Constitution, but also is against the basic Islamic values enshrined in Quran. The practice of *Halala* observed today and what is mentioned in the Quran is different. The Holy Quran says:

> *"So, if a husband divorces his wife (for a third time), he cannot, after that remarry her until she has married another husband and he has divorced her. In that case, there is no blame on either of them if they reunite, provided they can keep the limits ordained by Allah by which he makes plain to those who know." (2:230)*[7]

The literal interpretation of the above verse lays down that if a man permanently pronounces three Talaqs on his wife he cannot remarry her. However, if the woman decides to have a second marriage to spend the rest of her life and at any point the second husband also divorces her willingly (coincidentally), then in such a case if the woman wants to get back with her first husband, she can remarry him. This entire process was the practice of *Halala*.[8] The underlying motive behind this practice was to deter the husbands from pronouncing talaqs on their wives arbitrarily. Hence if they divorced her for the third time, they could not remarry her. However, the practice of *Halala* which is observed today is flawed with misinterpretation and misuse of The Holy Quran.[9]

Today, the clergy and Maulvis have made the practice of *Halala* a business by managing it as a Muta marriage (temporary marriage) by planning and back staging the second marriage of a divorced woman, by arranging a man who is paid to marry her by charging an amount of money, then their marriage is consummated, finally he divorces her within a mutually agreed time. After undergoing the entire arrangement, the women can lawfully remarry her first husband. This kind of *Halala* is equivalent to *Haram* (punishable) in Islam and hence

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6 Ashraf Ali Thanvi, BAHISHTI ZEWAR (Islamic Book Service, 2010).

7 *See*, Verse (2:230): The Holy Quran.

8 *Supra* n. 239.

9 *See* Verse (2:230): The Holy Quran.

prohibited. The Quran and Hadith accurse such individuals who observe such practices. Thus, *Nikah Halala* is in clear contravention of Quranic ordainments.[10]

Even the Holy Prophet looks down upon and criticizes the practice of *Halala* being observed as he considers it a misrepresentation of the verses of Quran. According to the Hadith, the holy Prophet said,

> *"The curse of Allah be upon the one who marries a divorced woman with the intention of making her lawful for her former husband and upon the one for whom she is made lawful."*[11]

Herein the Holy Prophet cursed both the men (one who divorces the women and the one who married her with an intention to divorce her). They are considered the detractors of Islam. Because of these men the woman undergoes a psychological torture and humiliation. The one who divorces her does not care about her wellbeing and ruins her life and the one who marries her with an intention to divorce her treats her like a sexual object.[12]

Umar (579-644), The Second Caliph of the Rashidi Caliphate even regarded those husbands who pushed their wives to undergo the practice of *Nikah Halala* as sinners and said, "*I will sine to death such persons*."[13] Therefore, it can be clearly established that the form of *Halala* practice as it stands today is against the basic tenets of Islamic belief and is condemned even by the Holy Prophet.

The Constitution of India, 1950 is the law of the Land, and acts as supreme guardian of the fundamental rights. Any law, custom or practice which is against our fundamental rights is unconstitutional and therefore void. The practice of *Halala* violates the fundamental rights of the Muslim women, however is still observed in India.

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[10] *Supra* n. 239.

[11] This Hadith was reported by Hadhrat Ali ibn Talib (R.A.) (Sunan of Abu-Dawood Hadith 2071).

[12] *Supra* n. 239.

[13] Radhika Iyengar, *What is Nikah Halala, ow is it established and where it stands in Modern India*, The Indian Express (March 26, 2018) *available at* http://indianexpress.com (last visited Aug. 8, 2019).

With the *Triple Talaq* being declared unconstitutional[14], the Supreme Court has a pending write petition on *Nikah Halala* and polygamy. The All India Muslim Personal Law Board (AIMPLB) claims that *Nikah Halala* cannot be challenged since it is qur'anic, whereas the Centre is set to oppose these evil practices.[15] The practice of *Nikah Halala* has been laid down under Sec 2 of the Muslim Personal Law (*Shariat*) Application Act. The petitioner BJP Leader, Ashwini Upadhaya, contends that this provision should be declared unconstitutional since it violates the Article 14, Article 15 and Article 21 of the Constitution of India. It is also contended that practices like *triple talaq*, *Nikah Halala* and polygamy fail to stand the test of gender justice, equality and, are discriminatory. The petitioner is joined in this writ petition by the *Bhartiya Muslim Mahila Andolan* (BMMA), who fight for the rights of divorced Muslim women who have suffered injustice owing to practices of *triple talaq*, *Halala* and polygamy.

There have been many inhumane instances where the divorced woman fell prey to this practice of *Nikah Halala*. Many sting operations have been conducted by the TV channel reporters on mosque officials and other prominent Muslim holy figures even in metropolitan cities like Delhi, Mumbai, Hyderabad etc. These people were captured on camera asking for huge sum of money, for observing the marriage, consummation and divorce from the second husband of the divorced woman, i.e. *Nikah Halala* within a stipulated period of time.

In a series of incidents this atrocity of *Halala* was inflicted on the Muslim woman. In Bareilly a man allegedly forced his divorced wife to observe *Halala* with his father after the divorce. After some years he again divorced the wife and asked her to observe *Halala* with his younger brother. Such inhumane instances of *Halala* highlight the ordeals and atrocities carried out by their husbands under the guise of triple talaq. They take away the basic rights guaranteed by our Constitution via. Article 21 and Article 15, to live with dignity and should not be discriminated against.

Many Muslim Countries, even whose religion of State is Islam have reformed their personal law by undergoing extensive reformation. They have purged their law from ill practices which were present due to

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[14] *Supra* n. 236.

[15] *See*, http://rightlog.in (last visited Aug. 8, 2019).

misrepresentation of Islamic beliefs and were not an integral part of Islam. It is a sorry state of affairs, that even countries like Pakistan had banned the evil practice of triple talaq long before this issue was raised in the Indian parliament. Therefore, India should abolish such inhumane and discriminatory practices as soon as possible (being violative the fundamental rights guaranteed in our constitution).

Islamic law was the first law which guaranteed inheritance rights to women. It made education of girls a sacred duty of the parents, and gave them right to own and inherit the property. Islam also imposed the consent of women as a condition for legitimate marriages. Still if practices like *triple talaq* and *Halala* are prevalent in Islamic law in this 21st century, this would flaw their beliefs and would deteriorate the condition of women. Moreover, the fundamental rights enshrined in our constitution guarantee equal treatment to be given to women, and they should have a right to live with human dignity. But if such practices are allowed in our country, we are ripping such Muslim women from the basic fundamental rights in our Constitution, which is against its foundation.

Therefore, *Nikah Halala* is a practice observed in the Muslim personal Law which reflects the patriarchy and misogynic approach of our society. Such practices are lop sided and favour men and hence are unconstitutional. They are archaic and tend to debilitate the status of Muslim women. These laws should be challenged and discarded subsequently.

Book Review

The Juvenile Justice (Care and Protection of Children) Act, 2015: Critical Analyses

Authored by Professor Ved Kumari; Published by LexisNexis, 2017;
ISBN: 978-93-5035-987-7

CA. Rahul Aggarwal*

The Child is Father of the Man – William Wordsworth

Children are the building blocks of any society. This has also been the official stand of the Government of India since 1974, when National Policy for Children was adopted.[1] Most of us have fond memories of our childhood, as one of the best times of our lives when we were young, carefree and ready to explore as we wished.

But have we ever wondered that for a large number of children in India, everyday becomes a struggle, where they might have to scramble for basic necessities of life such as food, shelter and education? Some of these little souls get astray and end up committing acts of criminal nature, but without any inherent malicious intent.

It is true that some crimes have been done by certain children, who have good financial support and backing from their parents. Yet, it appears that in this age of social media ubiquity, coupled with the ill-effects of TV/violent video games and constant barrage of sexual innuendo in

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1 National Policy for Children (1974), *available at* http://childlineindia.org.in/CP-CR-Downloads/national_policy_for_children.pdf (last visited Nov. 23, 2018).

print and online media, often few children fall prey to such temptations which may assume magnitude of criminal proportions.

The Juvenile Justice (Care and Protection of Children) Act, 2015 [2] ('Act' or 'new Act') was perhaps a reaction in the wake of national outcry due to the ghastly Nirbhaya rape and murder case.[3] It seems that because of the juvenile involved in this case, the Government intending to provide some justice to Nirbhaya's parents enacted this new Act, which consists of the much-debated and contentious provision of transfer of 16-18 year old children to adult criminal system in certain situations. Professor Ved Kumari believes that one bad case does not make for a good law and asserts that this new Act takes India back to 1920s where children could be put behind bars in certain exceptional circumstances.

In her, Prof. Kumari had indicated that while children may be exposed to loads of information these days, yet it is mostly without parental guidance[4] or discretion and often distorts reality in their minds. Therefore, the notion that children nowadays attain so called 'maturity' at an earlier stage is a specious proposition. Indeed, we may recollect the Ryan International murder case of 2017, partly due to the sensational media coverage, wherein a 16-year-old school boy studying in Class XI, had been accused of murdering a junior student in Class II in school premises. In this case,[5] it was widely reported that the accused boy had

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[2] Act No. 2 of 2016, received assent of President of India on 31st December, 2015 and notified w.e.f. 15th January, 2016 *available at* http://wcd.nic.in/sites/default/files/JJ%20Act%2C%202015%20_0.pdf (last visited Nov. 23, 2018).

[3] *Mukesh & Anr.* v. *State of NCT of Delhi & Ors.*, Criminal Appeal Nos. 607-608 of 2017 arising out of SLP (Criminal) 3119-3120 of 2014 (judgment dated 05-May-2017). The Supreme Court of India upheld the death sentence of all the accused, treating the matter falling squarely in the category of 'rarest of rare' cases. The juvenile involved in this matter, got the maximum penalty of 3 years confinement in a juvenile home, as per Juvenile Justice Act, 2000 and was released in December, 2015.

[4] Ved Kumari, THE JUVENILE JUSTICE SYSTEM IN INDIA - FROM WELFARE TO RIGHTS (Oxford India, New Delhi, 2nd Edn., 2010) [first published in 2004], p. 365, Epilogue.

[5] *Available at* https://timesofindia.indiatimes.com/city/gurgaon/ryan-juvenile-coaxed-victim-to-accompany-him-to-toilet/articleshow/61620821.cms (last visited Nov. 23, 2018).

exam-phobia and wanted to avoid exams at any cost on the day of the killing. While the loss of a young life is extremely unfortunate, the question which begs an answer here is why? Why could not the teenager approach his parents or any teacher in the school to help him out? Why was he prompted to take such a horrible and brutal step? Is this incident an indication of 'early' maturity in a child by any stretch of imagination? Moreover, will punishing this one child will lead to a reduction of similar crimes in the future?

Another story was reported in Hindustan Times[6], where a 15-year-old child killed his classmate since he did not want to return a 'friendship band' to that classmate. The accused claims that he felt remorse later and now continues to feel miserable for his hasty act, done while being 'blinded by rage' in his own words. One wonders that why children are so angry over such trivial matters. Is counselling not available or perhaps children are not seeking it, because then they might be considered weak. Such stories are unfortunately becoming commonplace in India and hence there is all the more need to understand the psychology behind a crime committed by a child. Indeed, it is really disturbing when a young one who might be a victim himself chooses a wrong path in life.

This is where Professor Ved Kumari's lifelong research and dedication into Juvenile Justice System comes into picture and becomes a guiding light for lawyers, students, judges, legislators, social workers and anyone else interested in well-being of a child. Prof. Kumari is widely regarded as a leading expert in this complex socio-legal field and has written three volumes[7] on this subject, including the current book under review. All together, these three books cover the entire gamut of the law relating to juveniles in India. The current volume is divided into seven chapters and while it is not a section-by-section commentary, the author has done a rather remarkable job by including all the important provisions of the Act in relevant chapters, for enabling the reader to get a firm grip on this new legislation.

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[6] *Available at* https://www.hindustantimes.com/india-news/let-s-talk-about-teenage-violence-i-am-a-15-year-old-accused-of-murder/story-aI9JegE56VVEJ5sMQWHZBP.html (last visited Nov. 23, 2018).

[7] Ved Kumari, TREATISE ON THE JUVENILE JUSTICE ACT, 1986 (Indian Law Institute, Delhi, 1993) and the book under review.

Chapter 1 gives an overview and historical perspective of Juvenile Justice in India. The term 'Juvenile Justice' as commonly understood is a specialized branch of law, dealing with persons below the age of 18. The history of this branch in India dates back to 1850 in the Apprentices Act, wherein children below the age of 15 were usually to be sent to reformatory school, instead of being imprisoned. Children are presumed to have an innocent frame of mind and hence they do not have the sufficient mental capacity to bear criminal intent or *mens rea*. This is described by the legal Latin maxim *doli incapax* which literally means 'incapable of doing harm' and under General Exceptions (Chapter IV), the Indian Penal Code, 1860 ('IPC') goes so far to say that nothing is an offence which is done by a child below the age of 7 years[8] and by a child below the age of 12 years not having sufficient maturity[9].

In author's viewpoint, throughout the 20th century, there has been a gradual march from mere welfare to rights of a child. The passing of Children Act in 1960 and the public interest litigation filed by journalist Sheela Barse[10] in 1980s in Supreme Court of India led to the passing of Juvenile Justice Act, 1986, which was the first of a kind uniform law on this subject in India. Nearly after 14 years and to bring India's Juvenile Law in consonance with various International Conventions, the Juvenile Justice (Care and Protection of Children) Act, 2000 ('2000 Act') was passed which resulted in uniformity of definition of a child for both boys and girls under the age of 18 years. The 2000 Act went through two amendments in 2006 and 2011 to clarify certain important issues such as the applicability of juvenile law at the time of commission of a crime and better treatment of children with disabilities. Thus, the author provides a bird's eye view on the long and varied history of juvenile law to form a solid background for the reader.

Chapter 2 is a detailed one, where the new Act has been introduced in a comprehensive manner. It may be remembered that this Act is essentially a welfare legislation, which aims at providing a child-friendly approach and acting in the best interests of children along with

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[8] Refer to Indian Penal Code, 1860, s. 82 – This is an absolute defense.

[9] Refer to Indian Penal Code, 1860, s. 83 – This is a rebuttable defense, if it can be proven conclusively that the child between the age group 7-12 possessed sufficient maturity to understand consequences of his action.

[10] *Sheela Barse & Ors* v. *Union of India & Ors,* AIR 1986 SC 1773; for more details please refer to Chapter 7 of author's book at *Supra* n. 5.

their social re-integration. The book contains numerous references to International Conventions such as UN Child Rights Convention ('CRC') (1992), Beijing Rules (1985), UN Rules for Protection of Juveniles (1990) and the Hague Convention for Inter Country Adoption (1993) and often stresses on the obligations of Government of India under Public International Law for juvenile justice.

Broadly the scheme of the Act has been explained, which consists of ten Chapters and contains 112 Sections. The chapter includes discussion on the nature of over-riding application of the Act due to the non-obstante clause contained in sub-section (4) of Section 1 thereby ensuring that this beneficial legislation would apply over any other laws in force in case of a child without exceptions[11]. Important definitions under the act as provided under Section 2 have been discussed and commented upon in detail among which definitions of 'Child', 'Child in Conflict with Law', 'Child in Need of Care and Protection' have received special attention. Other definitions such as 'Adoption', 'Abandoned Child', 'Orphan Child', 'Surrendered Child', 'Aftercare', and 'Sponsorship' have been explained as well.

The General Principles as found in Chapter II, Section 3 of the Act have been analysed adequately with emphasis on principles of Presumption of Innocence, Best Interest of child, Non-Stigmatizing Semantics and the ever-important principle of institutionalization as a matter of last resort. The state machinery to be employed such as District Child Protection Unit ('DCPU'), Special Juvenile Police Unit ('SJPU') etc. for an effective implementation has been described. The author writes that adequate funding must be provided to these institutions to make them function effectively; otherwise they would merely remain a legal creation on paper.

The regressive step of selective classification of offences into petty, serious and heinous by reference to the number of years of imprisonment as defined in IPC and other laws have also found mention in this chapter. The author is vocally critical of this virtually unheard concept as introduced in the Act and according to her; this kind of classification is not necessary and indeed has the potential of

[11] For example, provisions of Juvenile Justice Act, 2015 will override even strict laws such as the Narcotic Drugs and Psychotropic Substances Act, 1985 so far, a child is involved.

harassment and public scrutiny in media-hyped cases. She buttresses her point by arguing that children tried as adults have shown higher rates of recidivism, compared to those dealt with by Juvenile Justice System. It may also be noted, that even in these so-called heinous offence cases, death penalty or life imprisonment without possibility of release have been expressly ruled out[12] to allow giving the child in conflict with law another chance.

Chapter 3 deals with Children in Conflict with Law and begins with a brief history of caring for juveniles in India and abroad and discusses Article 40 of the CRC, which provides for protection of rights of children in conflict with law and implores States to make laws in their respective jurisdictions to deal with children in a non-adversarial and friendly manner.

The author underscores the Constitutional conundrum of the sub-classification of 16-18-year olds to be tried as adults, which basically goes against the scheme of protection of children below 18 years of age. This is not a reasonable classification as it would not satisfy the objective of the entire juvenile law scheme. The author contends that the Government could have chosen to define child as a person below the age of 16, but once it has decided the cut off age to be 18, then there could not be any more sub-classification without reasonable basis and hence is liable to be struck down as violating Article 14 of the Constitution of India, which affords equality before law and equal protection of laws within the territory of India.

As regarding the main adjudicating authority i.e. Juvenile Justice Board ('JJB' or 'Board') it has been suggested that besides one Judicial Magistrate, the two social workers should not be practicing professionals in law, which may result in procedural formalities rather than creating a child friendly atmosphere. The JJB has been given wide powers to deal with any matter relating to all proceedings in relation to children found in conflict with law and no other body can take cognizance of such kind of matters. The procedure, duties and powers of the Board have been elucidated, especially the one to direct the

[12] Refer s. 21 of the new Act, which states that, "No child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release, for any such offence, either under the provisions of this Act or under the provisions of the Indian Penal Code or any other law for the time being in force."

probation officer or a social worker to prepare a social investigation report in relation to the circumstances in which the child has committed the alleged offence within 15 days. However, the author is not very sure whether real justice would be delivered if the Board is under pressure to dispose of cases before it in merely 4 months. The important issue of raising the claim of juvenility at any stage (even after the judgment) and the significance of ossification test being accurate only if done before the age of 20 years has been well explained.

Detailed discussion has been done relating to 16-18 years old children in conflict with law and the powers/duties of Children's Court. It has been aptly pointed out that Section 19(1)(i) of the Act, clearly requires the Children's Court to pass orders considering the special needs of the child, in a fair trial, while ensuring to maintain a child-friendly atmosphere in the Court room, thereby underlining the overall protective scheme of the Act. The author appeals to her readers to ponder, that while it is certainly important for victims to be cared for, yet keeping children in jail for years altogether is not the ideal solution. She proposes that victims of crime can be better cared for by providing monetary compensation and psychological support by the state.

Chapter 4 focuses on Children in need of care and protection and here the author begins with elaborating certain basic rights which a child should have, under the UN CRC which are right to name, right to survival, right to participation and right against violence/exploitation. To achieve these objectives, the Act requires each state to have at least one Child Welfare Committee ('CWC') in each district to look after children in need of care and protection. The composition of CWC, its functions and responsibilities as per Section 30 of the Act have been discussed. As with JJB, here also the author has expressed reservations to allow lawyers being a part of CWC to avoid legal quandary.

Procedure to be followed by the Committee in relation to children in need of care and protection is given as per Chapter VI of the Act within Sections 31 to 38. Notable mention has been given to Section 33 of the Act, which makes it mandatory for every person to report a child found (and taken charge of or handed over) in need of care and protection to the appropriate authorities i.e. childline services or nearest police station or to a CWC or DCPU or a registered child care institution within

24 hours and if not done so, then it is considered an offence punishable under Section 34 with 6 months imprisonment or fine or both!

Adoption and its detailed procedure including various technicalities have been illustrated nicely in this chapter. The role of Central Adoption Resource Agency or CARA, has been explained which plays a pivotal role, particularly in inter-country adoptions. Of course, adoptions under the existing Hindu Adoptions and Maintenance Act, 1956 have not been disturbed and are to be governed as per the existing provisions of that Act. It is pertinent to note that there are three categories of children[13] who may be declared legally free for adoption by the Child Welfare Committee *viz*. orphan, surrendered and abandoned.

The striking feature of adoption under this Act is that there is no bar on matching the religion of the prospective adoptive parents with the child to be adopted. This is indeed a progressive measure, since the main objective of the Act is to promote rehabilitation of a child and efforts must be made to provide a family environment as far as possible and extraneous considerations like religion or region should be not be deciding factors in adoption matters. However, the author sounds a note of caution that adoption should not become a business for unscrupulous people to exploit helpless children for doing domestic work or for sexual perversion.

Chapter 5 on Residential Care begins with author pointing out the fundamental principle enshrined in Beijing Rules and CRC, which say that institutionalization should be only be used as a method of last resort. This means that children should never be sent to an observation home, if at all it is possible to restore them to their original parents. Therefore, the thrust lies on allowing the child to continue growing and living in their natural environment, rather than a special home, unless situation specifically demands so.

This chapter throws light on the statutory requirement of compulsory registration of child care institutions. This indeed is an important step to ensure that only right-minded people are running such places with no profitable or ulterior motives except well-being of children. Such institutions are mandated to provide basic services of subsistence like

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[13] As defined in ss. 2(42), 2(60) and 2(1) of the Juvenile Justice (Care and Protection of Children) Act, 2015 respectively.

food, clothing and shelter and adequate educational, skill building and recreational facilities. Children with special needs or disabilities must be treated with respect and provided extra care as necessary. Inspection of these institutions is to be made by district level inspection committees to be formulated under rules of the Act which have to submit their report periodically to the District Child Protection Unit.

Institutional care has been discussed with reference to observation homes, special homes, place of safety and children's home to be formed and defined[14] under the Act. The author feels that there is a need to encourage people to become foster families to children who require care – both for short term and long term as per their willingness to honour the commitment. Towards the end of this chapter, the author provides examples which depict the deplorable conditions in these special homes, often forcing children lodged therein, to try running away from there just to find an escape. Hence in regards to these shelters, she calls for actual implementation of certain minimum standards of living, to really call them homes.

In Chapter 6, the dichotomy of offences committed by a child against another child has been clarified by the author. In such situations, as per Section 89 [15] of the Act, the accused child is also to be considered as a child in conflict with law and should be treated with care accordingly. Thus, all kinds of offences by children have to be dealt with the JJB in the first instance regardless of their nature or the age of the victim.

Some offences described in this chapter are non-disclosure of identity of children, punishment for cruelty to child, making a child beg, giving substance abuse materials to child or handling by them, exploitation of child employee, adoption without legal procedure, sale of children, corporal punishment, use of child as militants and kidnapping/abduction as per IPC.

It is interesting to note, whether provisions of corporal punishment will be applicable to parents or teachers in regular schools who are in the depraved habit of beating up their children, since Section 82 is only

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[14] Refer ss. 2(40), 2(56), 2(46) and 2(19) of the Juvenile Justice (Care and Protection of Children) Act, 2015 for definitions.

[15] S. 89 of Juvenile Justice (Care and Protection of Children) Act, 2015 provides that "Any child who commits any offence under this Chapter shall be considered as a child in conflict with law under this Act."

applicable to child care institutions. The author is disappointed to find that many of these offences have been made non-cognizable and bailable and in her wise experience, this has effectively watered down the otherwise possible deterrent effect of various offences against children as mentioned in Chapter IX of the Act[16], making them purely symbolic.

Finally, Chapter 7 is a miscellaneous chapter consisting important issues such as age determination, right to a lawyer, appeals and concludes with some insightful suggestions offered by the learned author. Age determination has remained a vexed issue because the machinery of juvenile justice only comes into motion, when the accused is declared to be below the age of 18, as on the date of commission of offence. Evidence of age has been systematically discussed as per sub-section (2) of Section 94 where preference has been given to documentary evidence over medical determination and this is a consistent good practice taken from the 2000 Act. In borderline cases, the benefit of doubt of age has to be given to the accused child up to 1 year[17].

Extensive rule making power has been given to the Central and State governments as per Section 110 of the Act. The 1st Draft Model Rules under the Act were put on its website, by the Ministry of Women and Child Development on 25-May-2016. These draft rules, as per the author had left many gaps to fill, on which she had specifically sent her comments to the Ministry, on the provisions relating to transfer of children. The author is surprised that the final Model Rules (2016) notified on 21-Sep-2016 have done little to clarify on the most crucial changes brought on by Act – such as preliminary assessment by the Board, transfer of children to Children's Court to be tried as adults and orders thereafter.

Towards the end in conclusion, the author reiterates her anguish at the newly introduced system of children between 16-18 age group to be tried as adults in case of heinous offences by the new Act. She notes that even in this modern era, revenge and retribution are taking over the

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[16] Refer ss. 74 - 89 of the Juvenile Justice (Care and Protection of Children) Act, 2015 Act.

[17] Model Rules 2007 under 2000 Act and decision of the Supreme Court in *Rajinder Chandra* v. *State of Chhattisgarh & Anr* (2002) 2 SCC 287.

protection and care principles. Prof. Kumari is incredibly disheartened at this thoughtless and populist approach by the legislature and hopes that people will understand the rationale behind juvenile justice system in a holistic manner, which might help them develop compassion towards children who end up committing crimes. However, it may also be profitable for the author to delve a bit into the issue of increasing spate of crimes especially those against women by juveniles[18] and whether such crimes should go unpunished solely because they are done by a person under the age of 18. While the object of the Act is certainly laudable, yet it seems that the Act might be misused by some juveniles to deliberately commit crimes without any fear of consequences that might follow. This may itself undermine the faith of society at large in the overall criminal justice system of which juvenile justice is a part and hence there is a pressing need to address this legitimate concern.

To put in a nutshell, Professor Ved Kumari's in-depth work and decades of rich experience have all been succinctly summed up in this volume. One distinctive feature of the book is that relevant portions of Sections/Articles have been reproduced as footnotes right on the same page, thus not needing to constantly refer Bare Acts or Conventions. It must be appreciated that Prof. Kumari has not tried to thicken the book unnecessarily with appendices filled with legislation, international conventions, rules and forms, which are readily available on the internet or any well-equipped library. Thanks to the simple writing style adopted by the author and avoidance of unnecessary legal jargon, anyone should be able to develop rational thinking as to why the entire scheme of Juvenile Justice exists. Her current book is like a concise commentary full of knowledge with all the salient features, key concepts and suggestions given in her conclusions at the end of every chapter on improving the Juvenile Justice System in India and hopefully Prof. Kumari may consider bringing revised and enlarged volume(s) on this important subject in future for benefit of all.

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[18] *Available at* https://www.livemint.com/Politics/OXMgavUpaJqPeEtth9g8MP/Kathua-rape-case-puts-spotlight-on-crimes-against-women-by-j.html (last visited November 23, 2018).

Book Review

Chit Funds in India:
Analysis of Regulatory Framework

*Authored by **Ankeeta Gupta**; Published by **Alpha Editions, New Delhi, 2017;** pp. xi+220, price Rs. 450 (Paperback)*

Sumiti Ahuja*

In an age where financial markets have been bubbling with money multiplier schemes, times when general public is being duped off their hard earned savings and the knowledge about financial instruments is limited, a study of one of the oldest money saving schemes has been attempted in this book titled Chit Funds in India: Analysis of Regulatory Framework by Ankeeta Gupta. The author through her work has made a bold attempt of defining the most indigenous savings mechanism being practised the world over, in an effort to reduce the stigmatization it has been subjected to over the last few years with it being referred to as "cheat fund" rather than "chit fund".

Chit Fund in India can be termed as oldest mechanism of saving and financial security.[1] It has always been a means of saving by the poor who have no access to formal channels of finance and provide a viable link between credit and savings. Chit Funds in India have been in vogue since the earliest of times and were in fact the first institutionalised community based saving mechanism wherein the people of the community entered into an agreement to contribute to a fund in equal proportions for a fixed duration of time divided into small intervals of

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1 Hemchhaya De and Kavitha Shanmugam, 'Meet the Good Chit Funds', *The Telegraph*, Sunday, April 28, 2013, as cited in Ankeeta Gupta, CHIT FUNDS IN INDIA: ANALYSIS OF REGULATORY FRAMEWORK 1,4 (Alpha Editions, New Delhi, 2017).

time.[2] The contribution collected at the end of the small interval of time would then be handed out to the member who most needed it or, be distributed by way of a chit lottery system (thus, the name chit fund).[3] In this manner, the entire process would continue and every member would win the collective contribution at one point in time and would continue to make the contribution to ensure that the process is a success. This allowed the members of a community to make small savings with a moral obligation towards other members of being regular in making contributions. Since the scheme entails obligation towards one's own community members, instances of fraud were minimal as pointed out by William Logan in 1887[4], the then collector of Madras Presidency. This grandma's saving scheme has been the underbelly of the economy and has sustained masses in those areas where formal channels of finance failed to penetrate prior to coming of the *Jan Dhan Yojna* in 2014-15, and thus contributed immensely towards mobilization of small savings and capital formation.

The study and research incorporated in this book relates to the time period prior to coming of the *Jan Dhan* Scheme and has indicated that the lack of knowledge about the financial model for working of chit funds led many to believe it to be an illegal transaction used only for unlawful purposes. Thus, the Chit Fund is the most misunderstood concept and regularly confused with the Ponzi Schemes. Lack of literature on the subject and low priority accorded by the policy makers in executing and implementing the related laws has led to extreme misuse of the chit fund concept. Most of the scams unearthed in the recent past pertained to various money multiplier schemes having little or nothing to do with chit funds.[5] However, lack of proper legislative direction and executive machinery, allowed the various unscrupulous parties to exploit the regulatory arbitrage to avoid liability and escape

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[2] Nachiket Mor, Reserve Bank of India, Committee on Comprehensive Financial Services for Small Businesses and LOW-INCOME Households, January 2014. *Id.*, p. 119.

[3] E. J Cox, Sim, PRIMITIVE CIVILIZATIONS, p.568, Vol. l (1894), courtesy Google Books online contributed by the Harvard Law Library. *Id.*, p. 13.

[4] William Logan, THE MALABAR, p.172, (1887). *Id.*, p. 12.

[5] James Butler Cash Jr, When Is an Equity Participant Actually a Creditor? The Effects of In re AFI Holding on Ponzi Scheme Victims and the Good Faith Defense, 98 Ky. L.J. 329 2009-2010. Id., p. 80.

the process of the law leaving a large population tricked off their hard-earned money.[6]

The author has defined and discussed the concept of chit funds, compared it with the international informal savings scheme i.e., Rotating Savings and Credit Association schemes used across the globe in the absence of proper channels of finance for the poor and low-income groups. While names may be different, they all work on the basic idea of community savings which ensures zero default and development of small savings.[7] Further a discussion on the economics of savings and public's interest in participating in the money multiplier schemes without due diligence has been discussed. The author has also deliberated threadbare the Chit Fund Act, 1982, and brought out some significant criticism and suggestions as to how the law can be improved. It is worthwhile to note that the entire study has been inspired by the transpiring of the Sarada Scam and the Rose Valley scam, and therefore to keep the things in perspective a detailed analysis of these scams has been given.[8] The book thereafter proceeds to highlight the quandary of regulatory arbitrage that has been faced in the issue of chits and the problem of identifying the actual authority to regulate the chit fund.

The Chit Fund Act, 1982 was enacted so as to provide for regulation of Chit Funds and for matters connected therewith. The author has done an in-depth analysis of the Regulatory Framework governing Chit Funds in India under chapter three of the book raising various significant issues. For example, The Act envisaged issuance of a notification in respect of every state. Interestingly while notification for Karnataka was issued in January 1984 for Andhra Pradesh it was issued in September 2008. In nine states and UTs it was not issued at all. There was also confusion regarding the State Act and Union Act while it is a well settled position that the state specific laws automatically stood

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[6] *Shriram Chits (K) Private Limited* v. *The Additional Registrar of Co-Operative Societies (Industrial Co-Operative Societies)* ILR 2013 KARNATAKA 559, 2013(3) KARLJ 31, 2013(2) KCCR1429. Id., p. 58.

[7] F. J. A. Bouman, *The Rosca: Financial Technology of An Informal Savings And Credit Institution In Developing Economies*, 4 (3), Savings and Development, 253-276 (1979) available at http://www.jstor.org/stable/25829714?__redirected. *Id.*, p. 31.

[8] *Subrata Chattoraj* v. *Union of India* (UOI) and Ors, Decision dated 9/05/2014, Writ Petition (Civil) Nos. 401 of 2013, 402 of 2013 and T.P. (C) No. 445 of 2014. *Id.*, p. 78.

repealed once the Central Act had been enacted. The absence of notifications made the entire process a non-starter. The author has also done an empirical study regarding appointment of Registrar of Chits within the States. It has been found that in most of the states where the law has been notified, the states have failed to create the office of the Registrar of Chits, notable exceptions being Kerala, Karnataka, Tamil Nadu and Uttar Pradesh. It has also been highlighted that even the Ministry of Corporate Affairs does not maintain the list of the Registrar of Chit Funds on the same lines as Registrar of Companies. Many other conceptual, definitional and legal issues have been highlighted which have contributed to poor designing and implementation of regulatory framework.

Apart from analysing the problems of regulatory arbitrage, misuse and lack of understanding of the concept,[9] it is commendable to note that the author has made some fascinating suggestions while making use of the existing infrastructure in most cost-effective manner. Since it is lack of knowledge on part of the investors which aggravates cases of fraud, a viable mechanism is needed for spreading awareness amongst the public with respect to financial instruments and saving tool.[10] For this purpose the author suggests that the State must make use of Panchayats and *Anganwadis* which have a semblance of trust to inform the public about financial transactions and hold awareness camps. This could be in the form of awareness and sensitization campaigns or getting financial experts to speak to the people periodically addressing their concerns individually.

One more important proposition made by the author is, it is understood that the poor, low income and migrant workers fall prey to the financial scams, financial saving mechanisms must be improved with the post offices being given the power of banks for addressing the problem of last mile connectivity as these have a vast network and have made inroads in remotest parts of the country.[11] With the systemic changes

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[9] *Basabi Rai Chowdhury* v. *Union of India*, W.P. No. 12163 (w) of 2013, CAN Nos. 4735, 5092 and 5093 of 2013 and W.P. No. 12974 (W) of 2013, decided on 19.06.2013. *Id.*, p. 97.

[10] B. Seth McNew, Regulation and Supervision of Microfinance Institutions: A Proposal for A Balanced Approach, 15 Law & Bus. Rev. Am. 287 2009. Id., p. 132.

[11] Ajay Shah, Expert Committee Report: Harnessing the India Post Network for

within the legislative framework in terms of identification of the concepts, illegalities and imposing liabilities, it is hoped that the implementation of the law will see an improvement.[12]

It is worthy to note that the analysis and suggestions offered by the author is in line with the proposed amendments in the latest Fraternity Bill and Chit Funds Amendment Bill, 2019, wherein recognition has been extended to the Rotating Savings and Credit Association Schemes as well. Overall it is an interesting read which aims at simplifying and demystifying the concept of chit funds and educating the reader of the subtle differences that exist between various financial instruments and pitfalls of lack of knowledge about these.

Financial Inclusion, 2010. *Id.*, p. 123.

[12] Dr. Mudit Kapoor and Dr. Antoinette Schoar, *Chit Funds as An Innovative Access to Finance for Low-Income Households*, IFMR Research Paper available at http://www.ifmr.co.in/wp-content/uploads/2011/03/REPORT-Chit-Funds-Innovative-Access-to-Finance.pdf. *Id.*, p. 117.

Statement of Ownership
and Other particulars about the Journal

Place of Publication	New Delhi Law Centre-I, University of Delhi Delhi – 110 007
Language	English
Periodicity	Annual
Printer's Name, Nationality and Address	LC-I, Delhi
Publisher's Name and Address	Prof Sarbjit Kaur Professor-in-Charge Law Centre-I University of Delhi Delhi – 110 007
Chief Editor's Name and Address	Prof Sarbjit Kaur Professor-in-Charge Law Centre-I, University of Delhi Delhi – 110 007
Owner's Name	Law Centre-I University of Delhi Delhi – 110 007

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Sd/-

Dated: March 2020 Prof Sarbjit Kaur

JOLT-INDIA (JOLT-I)

JOLT-I is published by Law Centre I.

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E-mail: jolti.editor@gmail.com

This volume of JOLT shall be cited as: 8 **JOLT-I p ___ (2018-19)**

Copies of the Journal can be obtained by writing to the above address.

ISSN: 2231–1580 JOLT-India