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1.

Community Corrections

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Abstract

Community corrections are the programs to oversee offenders outside of jail or prison. These programs are set up for convicted adult offenders and adjudicated juveniles. These institutions aim to ease institutional crowding and excess cost. It addresses the victim's needs by restoring them the justice and helps in reforming the offenders through surveillance, rehabilitation, and other reformative programs. The various components of community corrections include electronic monitoring, day reporting centers, and others. The programs offered by the community corrections differ at different stages i.e. stage 1 being 'before conviction' and stage 2 &3 being 'at the sentencing decision' and 'at re-entry' respectively. According to Van Keulen, the current criminal justice theory holds the various modes of sentencing such as incapacitation, rehabilitation, deterrence, retribution, and restitution. Community corrections offer certain theories regarding criminal behavior such as social learning theory, subcultural theory etc. The feminist theory deals with the population of female offenders. The community corrections results in many advantages such as reduction in costs ease in overcrowding of prisons, boot camps, allowing the offenders to financially support themselves or their families. Along with advantages, the community corrections have some disadvantages too. The major one being, the public safety may be compromised as the offender stays in the community. Community corrections result as an alternative to the prison system. Different countries have different correctional programs. In India, there are the provisions of Bail, plea bargaining, Probation, and many more provided by the code of criminal procedure, 1973 and also by the Indian Constitution guaranteed by Article 21. In Nutshell, community corrections have become the need of the hour. Without it, the criminal justice system can't function properly.

Keywords: criminal justice system, community corrections, institutions, crime, community.

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CHAPTER 1

Introduction

'Community corrections' is a hollow term having no particular meaning. It can differ from person to person. For some persons, it is just related to Probation and Parole, while for others it is more of a community service and reformative programs. Community corrections are the programs that do not employ incarceration i.e. which do not contain the prison system. The idea behind formulating the community corrections programs instead of incarceration is that it is in the benefit of the society that offenders should be reformed into a good human rather than sending them to jail or prison and punishing them for their deeds.[1]

Community corrections are the programs set up for the convicted adult offenders and adjudicated juveniles. The fact that there is not enough housing for incarcerating the offenders is also a reason behind the setting up of community corrections. These programs aim at easing the institutional crowding and reducing the excess cost. These programs keep in mind the need of the victim by restoring them the justice and also helps in reforming the offender through surveillance, rehabilitation, and other reformative programs.

Community corrections are helpful in both front-end and back-end alternatives. For the front-end alternatives, the concept of Probation has been used to avoid further crowding in Jails and Prisons. While, for the back-end alternatives, Parole is used as a means to act as release valves which ease the overcrowding of the prisons by the use of early release mechanisms, where the offender is kept under the supervision until his original sentence expires.

The essence of the community corrections lies in the re-integration of the offender in the community. The re-integrative nature of the community corrections is crucial from both society's perspective and the perspective of the offender. The society can realize familial, financial, and community benefits associated with the re-integration of the offender. First, the employed offender becomes capable of generating payment for victim compensation, court fines, and treatment programs. Second, the successful reintegration of the offender makes him capable for the payment of government taxes and so the govt. can generate extra revenue. Third, a reformed offender can contribute financially to the expenses of his/her children, parents, and

[1] Hanser, R. D. (2019). Essentials of community corrections. Sage Publications, Inc.

their expenses. Apart from these benefits, the offender may also be involved in some religious activities, volunteer activities, or even may participate in the anticrime activities to help reducing the crime likely to be committed by the youth.

Community corrections are considered to be an important aspect of the Criminal Justice System by the passage of time.

1.1 Evolution of Community Corrections

The history of the Community corrections can be traced back to the United States. In the USA, there are two offenders on Probation or Parole per every individual serving time in the prison. In Community corrections, many evidence-based practices are yielded that are proven successful in reducing recidivism and are much cheaper than incarceration. In the USA, the concept of 'recognizance' emerged as a popular measure in the 19th century. 'Recognizance' as a corrective measure referred to the release of the guilty offender because of his regret. It is generally applicable in the case of a juvenile. Recognizance plays a dual role, on the one hand, it allows the offender to escape from the complete criminal liability and on the other hand, it reserves the right of the court to punish the offender from the original crime if the offender commits any further violation.[2]

The traces of community corrections can be found in England in the early 18th century where the judges were at discretion to sentence 'judicial reprieve' as a mode of punishment. 'Judicial reprieve' is a form of punishment where the offender is convicted of a crime while his/her freedom of citizenship still sustains.

In India

During the Hindu and Mughal period in India, the reformation of the offender was not considered as a mode of punishment. The offenders were given only deterrence based punishment such as hanging, flogging, whipping, branding, and starving to death or death sentence. Prisons were considered to be a torturous place. In the British era, the prison reforms were given a little significance. With the prison reforms, corrective measures were also introduced as a part of the reformative system.

[2] Van, D. (1983). Criminology and criminal justice. University Of Cape Town.

Open prisons was adopted as the first corrective measure to reform the offenders. The concept of open prisons was first appreciated by the honorable Supreme Court in the case of *Ramamurthy v. State of Karnataka*[3]. Dacoits, rapists, and thieves were not entitled to open prisons. India has many other corrective measures such as Parole, Probation, and many other programs too.

1.2 Theories of Community Corrections

There are many theories related to community corrections. The basic aim behind the introduction of these corrective theories is to analyze the criminological and psychological perspectives of the community corrections programs. The theories ascertain the social behavior of the offender while complying with the sentence given to them under the community corrections programs.

The major theories of community corrections are:

1) Routine activities theory

As the title itself specifies, this theory focuses on analyzing the routine activities of the offender. The duty under this theory is imposed upon the law enforcement authorities and the community corrections personnel. The duty of both the authorities is interlinked. Firstly, the law enforcement authorities shall determine the "hot spot" areas i.e. areas that are more prone to the commission of a crime and then the corrections personnel shall take measures by restricting the offenders who are on Probation or Parole from entering into such hot spot areas and commit a crime.

The theory is based on the threefold notion:

i) The offender must be in the vicinity of the victim.

ii) Such an offense shall occur as a result of the routine activities that take place between the offender and the victim.

iii) There shall not be any guardian who might impede the criminal behavior.

The authorities shall focus on re-integrating the offender into the community without adhering to any illegal activity themselves.

[3] (1997) 2 SCC 642 (659)

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2) ***Social learning theory***

This theory specifies the behavior of the offender that he adopts from the society or by vicarious reinforcement. The vicarious reinforcement is based on the discerning capacity of the individual where he imitates himself in the position of the others. Also, the offender establishes his behavior based on the reward or punishment that he receives in his life. This theory makes it clear how a person learns criminal behavior from his surroundings.

3) ***Sub-cultural theory***

This theory is an extension of the social learning theory. This theory specifies that in some areas criminal behavior is acquired as a valuable norm. In some areas, the criminal activities tend to take place comparatively more than the other areas and hence the offender learns the criminal activities from one particular location, disturbing the proportionate crime ratio of the locality. In such cases, it becomes necessary to separate the particular offender from the family or even the community. There are many female offenders too who get indulged in the sexual exploitation in the influence of drugs. The treatment of such offenders is to exclude them from the community and to put them in the community corrections programs for their reformation as a decent human being.

4) ***Social disorganization theory***

This theory claims that crime generally occurs in a disorganized society. The societies which lack the community support to fight against the criminal element are more likely to be more prone to criminal activities. Society generally includes law-abiding citizens who do not indulge in any criminal activity but they are too intimidated by the others committing criminal acts that they can’t take any action to prevent such activities.

5) Strain theory

This theory talks about the strain that an individual gets by the pressure that comes with the non-fulfillment of the success goals set up by the individual. This strain often tends the individual to get involved in criminal behavior. The offenders usually aim to achieve unrealistic goals and also they are not taught the skills to achieve the goals in one go which ultimately leads to shaking of their conscience. The personnel shall make a realistic assessment of the situation and then guide the offender accordingly.

6) Labeling theory

As per labeling theory, once the offender is labeled as 'criminal', 'offender', 'convict' etc., he becomes stabilized in that role. The label affects the stigma of the individual to an extent that he accepts himself as an offender or criminal and this self-acceptance becomes an impediment in the way of him reforming himself as a better human being. The authorities shall try not to label the criminal term with the offender to make him feel a little better about himself

7) Feminist theory

This theory typically talks about the female offender. While talking about assistance, female offender gets priority over the male offenders. But, the patriarchy system still sustains in some areas where the needs of the men is put over that of a woman. Female is the element of victimization which is generally sexual. The community corrections programs shall aim at providing rehabilitation for such victimized female offenders and shall secure their interest against the men.

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CHAPTER 2

Community Corrections Programs

Community corrections are generally described as court-ordered sanctions in which the offender serves at least a part of the sentence in the community. To pull off this criterion of sentence serving various community corrections programs are introduced. A community correction program aims to attain goals like the ease in institutional crowding, reduction of costs, and reformation of offenders by re-integrating them into the community.

The notion of community corrections rests upon three assumptions:

1. Not everyone who breaks the law is dangerous or violent. The offender shall be allowed to revamp the harm he has done. He shall be allowed to be put in employment and manage his familial relationships by staying in the community.
2. The community sentence seeks to root out the behavior of the offender about why he committed the offense. The community correction provides various programs that are accessible to the offender in the community rather than in jail or prison.
3. The people incarcerated in prison mutate well when they are released with superior supervision.

2.1 Components of Community Corrections

The major components of Community Corrections profiteering include:

1) Electronic Monitoring

EM includes various software systems that track down the location of the offender every 15-16 seconds such as GPS (Global Positioning System). This may include wrist bracelets, voice verification systems, drug and alcohol testing devices etc. This technology is used for both front-end and back-end offenders. If the person has impaired the device or is not in an approved location, the alarm rings giving the information of the same to the supervising authorities.

2) Day reporting centers

Day reporting centers are the centers where the offender is required to participate in the wraparound activities during the day time, while giving them the liberty to go back to their homes at night. These programs operate as 'one-stop-shop'. Originally, the offenders used to visit to the day reporting centers once a day to their Probation or Parole officer, but with the enhancement of the technology, the offender can check in from a remote location through an electronic device via kiosk.

3) Intermediate sanction facilities

These facilities claim that if there is any technical violation of the conditions of the Parole or Probation such as a positive drug test, missed appointments with the Probation or Parole officer, further violent act etc. then the community sentence can be revoked and the offender can be sent back to the prison or jail. These facilities are usually set up for a shorter period such as 90-180 days to determine the nature of the violation and to give counseling and treatment to the offender.

4) Residential re-entry centers

They are commonly referred to as 'halfway houses' focuses on providing housing to the early release prisoners or those released on Parole. These centers also help in the reintegration of the offender in the community by providing them the employment opportunities and financial education counseling and guiding them on moral ethics about how to live in the community.

2.2 Types of Community Corrections

The Community Corrections programs differ at different stages of sentencing. The different stages of the community correction programs are as follows:

2.2.1 *Before Conviction*

On the commission of the crime, the police arrest a suspect and if the prosecution office frames a charge against the suspect then he/she shall be called as the "pre-trial

defendant". While some suspects are released on their recognizance, those who are not released shall be dealt with correctional measures. Community Correction programs before conviction are:

a) **Pre-trial Supervision:** It is a court-ordered sanction where the defendant is not convicted but enters into an agreement with the court to appear on the next scheduled date and that on the fulfillment of the required conditions, the charges against him shall be dismissed completely. It allows the pre-trial defendant to look after his family needs and also to assist his lawyer in the preparation of the case.

   The court-ordered sanctions include scheduling of appointments, regular mental health evaluation, avoiding contact with victims, and restriction on further criminal activities. If the pre-trial defendant violates the terms of the court order then his conviction shall become permanent.

b) **Electronic Monitoring:** As discussed earlier, electronic monitoring allows the community corrections authorities to keep an eye on the released offender. It tracks down the location of the offender on Probation or Parole and submits the information to the supervisory authority.

c) **House arrest:** This program ensures that the offender stays at his or her home for a certain specified period. It can be ensured through the help of electronic monitoring whereby the location of the offender can be easily tracked down through this technological device.

2.2.2 *At the sentencing decision*

The various Community Correction Programs at the sentencing decision are:

a) **Probation Supervision:**

   It is the most commonly used Community Correction practice. India adopted the concept of Community Corrections in the year 1958 via "The Probation of Offenders

Act, 1958". Under this program, the probation officer must collect the data about the offender and forward it to the court and then the court can decide about the validity of the Probation.

The offender is allowed to stay in the community on the fulfillment of the various conditions such as full-time employment, court permission before leaving its jurisdiction, avoiding interaction with persons having criminal background, and appearing before the court when called upon.

b) **Day Reporting Centers:** As discussed earlier, Day Reporting Centers are the institutions where the offender who is released on correctional program shall report at least once a day to the concerned authorities.

c) **Community Drug Treatment Programs:** These programs are set up for the offenders having a problem with drugs or alcohol. These institutions require the offender to visit 1-3 times a week to the authorities. The programs are tailored for chronic abusers and the occasional abusers including ways to deal with cravings and stress. They provide medication which produces a negative reaction when the alcohol is ingested in the body. Sometimes, they take the help of the family as a support system in the drug treatment of the offender.

d) **Restitution:** Restitution is the mode of compensating the victim by the offender for the harm caused. Earlier, the offender used to escape the liability of restitution if he has been sentenced to jail or any other form of punishment but with the passage of the time, the victim demanded that the restitution be paid to them irrespective of the fact that whether the offender is incarcerated or not. Hence, restitution is generally made to the victim. India adopted the concept of the "Victim Compensation scheme" in the year 2009 under The Coe of Criminal Procedure, 1973.

e) **Correctional Boot Camps:** Boot camps are formulated for the young felony offenders. It allows them the chance to rebuild their character by spending 90-180 days in the boot camp. These programs are based on military training programs such as digging, draining swamps, facility maintenance, cutting firewood for elderly citizens etc.

These are some of the major programs. The offender can be released based on other reformative programs such as community service or by paying the fine for the less heinous offense.

2.2.3 At Re-entry

Community Correction programs help the offenders during their re-entry in the community after they have served the sentence in prison. Some of the re-entry programs are:

a) **Pre-Release Facility:** A Pre-Release Facility commonly known as halfway houses, community centers, and residential community correction facilities, allows the offender to adjust in a freedom-based environment. The offender can save money and earn an independent living on Parole. The Pre-release facilities allows the passes to the offenders for some specific reasons including job searching, building family relationship, find affordable housing, obtain a bus pass etc.

b) **Parole and Post-Release Supervision:** This program focuses on the discretionary release of an offender on Parole for a certain reason such as Housing, employment etc. by the Parole Board consisting of 3-12 members. The board decides who will stay in the prison and who can be released on the parole. On the other hand, in the post-release program, the officers must release a person after he has served a percentage of his sentence in Prison.

CHAPTER 3

Community Corrections: An Alternative of Incarceration

A man is not a born criminal. He shall be given the right to reform himself into a better human being. Earlier, incarceration (commonly known as the Prison system) was considered to be the major mode of punishing the offenders. There are many problems associated with incarceration. The primary one being there are chances of higher recidivism, i.e. the chances

that after being released from prison, the offender may again get involved in the criminal activities. Also, the spacing is not enough in the prison to provide shelter to every offender. Moreover, the prisoners are always in danger of getting hurt by the other heinous offenders. Prisons were not considered as cost-friendly for the authorities. Keeping in mind the above issues, it was settled that there is a need to set up the institutions that help the offender in his reformation and is also useful for the institutions. However, some alternatives to incarceration existed in the previous years too and the correctional programs got modified with the passage of the time.

3.1 Early Alternative Sanctions

Early Alternative Sanctions are the Correctional programs used by the authorities in the old times for sentencing the offenders. The Early Alternative Sanctions include:

1) ***Sanctuary***

   Sanctuary as a mode of sanction was of two types. The first one was secular and the second one was strictly implemented in the case of Christians. Sanctuary was the majorly used mode of leniency. It required the offender to flee from the particular cities and get settled somewhere else with a *Sine Qua Non* that he shall not return to the place where he committed the crime, without the explicit permission of the crown. And, if he so returns then he shall be granted immediate punishment.

2) ***Benefit of Clergy***

   The benefit of clergy was a mode of punishing the members of the various churches including clerics, monks, and nuns. It required the offending church representative to be sent to the church authorities for punishment. It was the concept that emerged in England where ecclesiastical courts were set up to deal with the offender. By this mode, the offender could escape the full punishment. It was more of a political power program and those who were financially well-off could only be able to get the benefit of this sanction.

3) ***Judicial Reprieve***

The concept of Judicial Reprieve emerged in England in the late 18th century. Judicial Reprieve used to be a discretionary power of the judges where a judge can suspend a sentence where he feels that incarceration is not necessary. It is generally offered to the person who has committed some minor offense or who did not have any prior criminal record. Once the period of suspension expires, the offender had to apply to the crown for a complete pardon of the case. In India, 'the president holds the power of judicial reprieve and pardoning'[4].

4) Recognizance

Recognizance as a mode of sanction was generated in the United States through a famous case[5] where the Judge Peter Oxenbridge Thacher suspended the imposition of the sentence on a woman guilty on her plea. The defendant assured the court to appear before the court on the next scheduled date and hence she was released on her recognizance.

3.2 Current Community Sanctions

As the time passes by, the authorities executed some more Community Correction Programs. While some of the Community Correction Programs are discussed in Chapter 2.2 of this paper, the other currently used Community sanctions are:

- ***Discharge***

  If the law does not prescribe any mandatory minimum punishment, the judges are at discretion to offer the offender an absolute or conditional discharge. The source[6] of this authority lies in The Code of Criminal procedure, 1973. If the absolute discharge is granted then there is no criminal record against the accused and if the conditional discharge is granted, then there will be no criminal record if the accused adhere to the conditions of the discharge.

[4] Article 72 of The Constitution of India
[5] Commonwealth v. Chase, (1830)
[6] Section 239 and 245 of The Code of Criminal procedure, 1973

- ***Suspended sentence***

  A suspended order can also be ordered along with the term of probation. If the offender contravenes the provisions of the order then he shall be brought back before the court. The court may impose a new sentence at this stage and also he may be liable for breaching the Probation order.

- ***Probation and admonition***[7]

  The offender can be released on his good conduct or by giving him the warning not to commit any further offense.

- ***Community service***

  The offender can be released for giving services to the community such as seeking employment; this will ultimately help the government as the number of taxpayers will get increased in the community.

- ***Fine***

  In case of less heinous offenses, the offender can be released on the payment of a specified amount in the court as a fine and with a personal bond that he shall not commit any further offense.

Some of the already discussed correctional programs include Restitution, Boot camps, Drug tests etc.

[7] Section 360 of The Code of Criminal Procedure, 1973

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CHAPTER 4

Consequences of Community Corrections

As every coin has two faces, similarly Community Corrections have both Positive and Negative consequences.

4.1 Positive Consequences

1. Community Corrections are ***cost-friendly***. They are much cheaper compared to jail or prison. Offenders can continue financially supporting themselves and their families by staying in the Community.
2. ***Ease in overcrowding*** of prison facilities by allowing the convicted offenders to involve in reformative programs such as drug programs, boot camps, etc.
3. Community Correction programs are ***flexible***. They can be used at any stage of the trial. They can be used during pre-trial, at the time of sentencing, and post-trial too.
4. It ***protects the offenders*** from exposing them to the risk of getting hurt by other prison inmates.

4.2 Negative Consequences

1. It may cause a situation of ***net widening*** i.e. it may include the offenders who should have received less severe sentences. This situation arises when the judges and prosecutors fill up the program spaces with the offender not requiring such a higher degree of care.
2. ***Public safety*** may be compromised. While the offender stays in the community, he may probably indulge in criminal activities again.
3. The ***non-functioning of the programs*** in a proper way such as missing daily attendance, non-use of electronic devices, rare drug tests etc. may destroy the purpose of setting up of the correctional programs.

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CHAPTER 5

India vis-à-vis other countries: A Comparative study

Incarceration has failed to minimize the crime rate across the globe despite being the most commonly used method of punishment. The Prison system in various countries including India fails to provide proper accommodation facilities, health care facilities, conducting reformative programs for the treatment of offenders resulting in various repercussions. Construction of more prisons will also not provide an amicable solution. Prison damages the mental and sociological health of the offender making the re-integration process more difficult and challenging.

However, there are some countries which put Rehabilitation before punishment such as:

- Ethiopia – Financial literacy for Prisoners
- Slovenia – Working for the weekend
- Uruguay – Working and studying behind bars
- Poland – Making minimum wage for Prisoners
- India – Study for free
- Italy – Reading for freedom

Here is the comparative analysis of the criminal justice system of various countries.

A. INDIA

In India, various alternatives to imprisonment are provided by The Indian Penal Code, 18600, and by The Code of Criminal Procedure, 1973. In India[8], the correctional measures are permitted at three different stages i.e. *pre-trial, sentencing, and post-trial* stage.

[8]Siddique, A., & Afzal, M. (2017). *Ahmad Siddique's criminology, penology & victimology*. Eastern Book Company.

1. Pre-trial stage

The pre-trial stage is the stage where there is no establishment of case. It is the stage where the matter is still under the process of investigation but the alleged accused is suspected of the offense committed.

(i) **Bail:** Bail is the most commonly used pre-trial detention alternative. Bail allows a person accused of an offense to be released on bail on his bond with or without sureties. The Code of Criminal Procedure, 1973 also ensures the right to bail under Chapter XXXIII of the Code. The Supreme Court through a case held that 'Bail is rule and jail is an exception'[9]. Reaffirmed by the Supreme Court in the case of Moti Ram & Ors. V. State of M.P.[10]

(ii) **Time limit on pre-trial detention:** The right to a speedy trial is a fundamental right guaranteed under Article 21 of the Constitution of India. However, The Code of Criminal Procedure, 1973 also contains provisions regarding the limit on detention of offenders in custody. The authority to effectuate the right of speedy trial is accessed from the Sections 258, 309, and 311 of the Cr.P.C.

Section 167 of Cr.P.C. provides the maximum limit of 60 or 90 days for the detention of a person in the custody before the filing of the charge sheet. However, there is no upper limit for detention after filing of the charge sheet. To prevent the accused from this mockery in the criminal justice system, an Amendment was made in the year 2006 by adding Section 436-A which specifies the maximum time limit in custody for under trial prisoners.

(iii) **Plea Bargaining:** The concept of 'Plea Bargaining'[11] enshrined in Chapter XXI-A consisting of Sections 265A-265L was added in the Cr.P.C. In India, we have the concept of sentence bargaining unlike England, where there is Charge bargaining. Plea bargaining is permissible only when the offense is not punishable for more than 7 years. It is not allowed when the offense is committed against Women and Children.

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[9] State of Rajasthan v. Balchand @ Baliay, (1977)
[10] 1978 AIR 1594
[11] The Criminal Law Amendment Act, 2005

(iv) **Diversion:** Diversion implies parting from the criminal justice process and involving in community correction programs for the rehabilitation of the offender.

There are some other pre-trial sanctions such as: **Free Legal aid** guaranteed by *section 304* of Cr.P.C. and also by *The Legal Services Authorities Act, 1987,* **Compounding of offenses** under *Section 320* of Cr.P.C and **non-penal fines.**

2. Sentencing stage

It is the trial stage where charges have been made and the arguments are made on admission and denial of charges framed. Alternatives used during the sentencing stage are:

(i) **Compensation:** The court may order the offender to pay to the victim under section 357 to 359 of The Code of Criminal Procedure, 1973 any amount of money as compensation as the court thinks fit.

(ii) **Probation and Admonition:** section 360 of The Code of Criminal Procedure, 1973 deals with releasing the offender on probation or Admonition. It is granted to first time offenders in case of minor offense committed. Probation is granted on the condition of good conduct and admonition is granted by giving a warning to behave well after his/her release.

(iii) **Community-based Sentence:** The court may grant the offender a community-based sentence where the offender serves his sentence by staying in the community. This process is used for the reintegration of the offender in the community.

The Court may also grant absolute discharge or conditional discharge as the form of correctional measure as discussed earlier too.

3. Post Sentencing stage

It is the stage after the trial has come to an end. To avoid incarceration and the re-integration of the offender in the society, the criminal justice system has adopted various alternatives at the post-sentencing stage too. These alternatives are:

(i) **Parole:** Parole is a conditional suspension of the sentence for a shorter duration to allow the offender to take care of their personal affairs such as family needs, harvesting etc. it is allowed only in case of emergent needs.

(ii) **Remission of sentence:** Remission can be granted by the Head of the prison or by the State Government as an incentive for maintaining peace in the prison and for keeping good behavior.

The other post-sentencing alternatives include **Pardon** and **Open Prisons** as discussed previously through this paper.

B. UNITED STATES

The Criminal justice system of the USA[12] has various correctional measures for offenders. USA adopted the process of Community Corrections back in the 1800s. The system was not much developed during that era. The major alternatives to incarceration were ***Sanctuary, Benefit of Clergy, Judicial Reprieve, and Recognizance***. These alternatives are discussed in Chapter 3.2 of this paper.

With time, the federal Courts of USA demanded a proper system of Probation, and hence ***The Probation Act of 1925*** was enacted signed by the then President Calvin Coolidge where the prisoners were released from the prison-based on some superior supervision. In the United States, John Augustus is considered as the father of modern Probation. In 1907, New York became the first state in the United States to adopt Parole as a correctional measure. By the end of 1942, the entire country and the federal government adopted the Parole system.

[12] Bosworth, M. (2002). *The U.S. federal prison system*. Sage Publications.

C. UNITED KINGDOM

"Reducing crime – Changing lives" is the objective of the Prisons in England. The National Offender Management Service (NOMS) in England is an Executive Agency that works under the Ministry of Justice in the United Kingdom. The NOMS aims to rehabilitate the offender by sentencing them into Custodial Prison or Community sentence by keeping in mind the safety of the public as there are chances of recidivism. England enacted ***The English Penal Servitude Act of 1853*** which used to provide various rehabilitation programs to deal with the convicts.

With the view of adopting the Probation as a correctional measure in the United Kingdom, ***The Probation of Offenders Act. 1907*** was enacted by the Parliament of the United Kingdom. To release the Prisoners on Parole, Parole Board was constructed for England and Wales. Parole Board is governed by the *Parole Board Rules 2016* formulated by the Parliament of the UK under The Criminal Justice Act, 2003.

D. RUSSIA

Earlier in Russia, the offenders were dealt with by the Main Prison administration off the Russian Interior Ministry set up on 27 February 1879. The Department then got shifted to the Russian federation in 2006 which introduced dealing with prisoners with correctional measures. The federation emphasized on the preparation of the Correctional system to be enforced in an emergency. It suggested the need for protecting the territorial security to the public where correctional programs are to take place.

Russia focuses on using open prisons as a correctional measure. Probation as a means of Community corrections is authorized by Article 73 of ***The Russian Criminal Code***. Pardon was introduced in Russia in 1992 and the prisoners became eligible for parole in 2017.

E. AUSTRALIA

Australia used to serve the penal colony of Britain from 1787 until 1852. The Prisoners from America, Britain were sent to Australia. 750 convicts were transported to Australia

by cargo in the first instance. Australia had the concept of 'ticket-of-leave' proposed by *Maconochie* wherein, the convict was permitted to leave in return for his good conduct.

Australia has no unified correctional system. It differs from state to state. It is the responsibility of State and Territorial governments in Australia to look after the correctional system, to keep a check on the rehabilitative activities. The Community Corrections provides various benefits to the offender and the authorities too. It lights up the burden of the incarceration authorities and it helps the offender in seeking a personal life for himself.

CHAPTER 6

Judicial Pronouncements

With the enhancement in the Criminal Justice System, Correctional measures have now been considered as a major part of sentencing by the courts also. Some of the case laws supporting Correctional measures in India are:

- ***Ramamurthy v. State of Karnataka***[13]

  In this case, the Supreme Court openly appreciated the concept of 'Open Prisons' as a Correctional measure which is a departure from Incarceration. The Court held that "though open prisons create their problems i.e. of management issue, the good of the society lies in the coming out of the offender from jail as a reformed person and hence the managerial issue is not of much concern. To start with, this can be done at all the District Headquarters of the Country".

- ***Ramji Missar v. State of Bihar***[14]

  In this case, the Supreme Court emphasized on adopting 'Probation' as a Community Correction measure. The Court held that the objective of The Probation of offenders

[13] (1997) 2 SCC 642 (659)
[14] AIR 1963 SC 1088

Act is to separate the young offenders from the hardened criminals. The aim is to reform them. In the concept of Probation, there is no sentence; the offender just stays in the supervision of the authority. Though section 360 of CrPC also deals with Probation but it has some lacunas to be filled up by the Probation of Offenders Act, 1958.

The provisions of the Act of 1958 and section 360 of CrPC will not apply to the Prevention of Corruption Act.[15]

- ***Hiralal Mallick v. State of Bihar[16]***

  The Supreme Court in this case highlighted the 'Parole' as a Community Correction measure. The SC held that a prisoner may become de-humanized if his family ties are splintered for long and that is why he shall be released on Parole periodically.

Some cases of the United States dealing with Community Corrections are:

- ***People v. Wilhite[17]***

  The Judgment was delivered by the Supreme Court of Colorado, En Banc on October 7, 1991. The Supreme Court granted placement in the Community Correction facility to the class 4 felony offender.

- ***Davenport v. Pikes Peak[18]***

  Judgment was delivered by the Supreme Court of Colorado En Banc on June 29, 1998. The Supreme Court granted Probation to the offender who committed second-degree burglary and who was earlier rejected by the Community Correction facility.

[15] State of T.N. v. Kaliaperuma , (2005) 12 SCC 473
[16] (1977) 4 SCC 44
[17] 817 p.2d 1017 (1991)
[18] 962 p.2d 963 (1998)

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CHAPTER 7

Conclusion

It is a well-established phenomenon that no society is free of crime. We can never get rid of the crime no matter how rigorous the law is. Procedures shall be adopted to reform the offender into a social being so that he can contribute in his best possible way towards his family and society. The idea of "Hate Crime not Criminal" shall be adopted. A criminal shall not be severed from the society rather he shall be provided treatment so that recidivism can be avoided.

Community corrections have come a long way. The process of re-integration shall not be jeopardized at any cost. There are different shapes and methods of each correctional measure and the community supervision functions shall be adopted very wisely. The members of the Community may be added to the supervision facility as they help assist in the re-integration of the offenders.

7.1 Suggestions & Recommendations

Here are some suggestions for the better implementation of the Community Corrections and the much finer rejuvenation of the offender in the community:

- Regular assessment of the offenders in the Community Correction facility.
- Implementation of the supervision functions under the control of experts.
- Reformation and no punishment shall be the motto.
- Cruel behavior shall be avoided with the victims.
- First-time offenders shall be separated from the hardened criminals.
- Family ties shall not be severed.
- Programs and events shall be conducted to purify the moral and mental health of the offender.

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2.

LGBTQ-Marriage rights

By: Shivani Singh

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Abstract

The basic fundamental human right is to be regarded as equals and with respect irrespective of who or what one is. In 2018, Section 377 was partially struck down by a unanimous decision of the five-judge bench of the Supreme Court, it decriminalized homosexuality and was a noteworthy success for the LGBTQ community. But since gay marriage despite everything hasn't been legally recognized, this implies even in situations where there is social approval for it, these people keep on enduring discrimination on different fronts for example – adoption, bequest of property, tax planning, life insurance policies. There should be uniformity. Let others have indistinguishable rights from hetero couples. In heterosexual relationships, such rights and duties arrive in a bundle. While an LGBTQIA+ couple can freely address such issues, to date no laws are present in our nation that can guarantee their entrance to these rights. Moreover, even the Special Marriage Act does not have any provisions for heterosexual couples. It doesn't even mention transgender people. Same-sex marriage has been sanctioned in twenty-eight nations, yet it stays prohibited in numerous nations and the growth of extensive LGBTQ+ privileges has been imbalanced worldwide.

An individual's sexual orientation is inherent to their existence. It is associated with their personality and identity. A category which differentiates between people based on their inborn nature, would not only be discriminatory but is also an infringement of their fundamental rights. This paper deals with marriage rights of the LGBT community, its acceptance by the society and our nation, legalization of marriage for same-sex couples around the world, case laws, and movements that brought a change in LGBTQ rights. The paper also traverses the problems faced by these people in their fight for equality and the injustice served to the LGBT community by not granting them marriage rights.

Keywords: homosexuality, gay, LGBT, same-sex marriage, discrimination.

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CHAPTER 1

Introduction

The LGBT community are the people who belong to sexual minorities, lesbian/ gay/ bisexuals whose sexual yearning differs from others, and these individuals battle for their opportunity, freedom, and for equivalent citizenship which frequently end up in contravention. Dishonor and prejudice repeatedly leave LGBT people in a condition of poverty and leave them exposed to violence and HIV/Aids. Living openly, or even just being recognized as, or linked with, an LGBT person, various times mean danger of losing one's employment, housing, education, and access to health care. Homosexuality in India was deemed as an Unnatural sexual offense according to section 377 of the Indian Penal Code, 1860.

Same-sex orientation and behavior have been abandoned in India since the 1970s by modern medicine and psychiatry but the truth is that Homosexuals do not have any objective psychological dysfunction or Injuries and the reason is too multifaceted therefore we can clearly state that homosexuality was not a disorder. Numerous petitions were filed before the honorable Supreme Court to affirm Section 377 of the Indian penal code as Unconstitutional. After the decriminalization of homosexuality, LGBT people lastly became free from criminalization before the law and free from the risk of arrest and the ruling gave confidence and dignity to LGBT individuals in the eyes of law.[19]

Still, marital equality is an elementary right for a citizen and the LGBTQ+ community is still devoid of it. Even though reading down of section 377 was historic, we have just scratched the surface yet, marriage is still a far-fetched vision, and until there are no marital rights for the LGBT community there cannot be any adoption rights or inheritance of property and any other benefits or advantages that every other married couple in the country enjoy.

[19] Revathy, V. (2018). THE VIOLATION OF HUMAN RIGHTS AGAINST LGBT COMMUNITY IN INDIA CRITICAL STUDY legislation for marriage of LGBT people and the government has to take remedial actions for them otherwise those people will suffer a lot of exploitation from the people. *International Journal of Pure and Applied Mathematics*, *120*(5), 4875–4884. https://acadpubl.eu/hub/2018-120-5/4/396.pdf

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CHAPTER 2

Recognition of LGBT Community

The interdependent relationship between well-being and human rights is well recognized. Human rights are indivisible and absolute rights due to every person. LGBT individuals in many states are afraid and in danger of unfairness, exploitation, poor health, and death that is the ultimate human rights violation.

In 2011, the United Nations Human Rights Council issued its first resolution acknowledging LGBT rights, following which the United Nations High Commissioner's office for Human Rights issued a report detailing violations of the constitutional, civil, and human rights of LGBT people, including hate crimes, legalization of homosexual activity, and discrimination. Resulting in the issuance of the report, the United Nations advised all countries which had up till now not done so to enact laws protecting necessary LGBT rights.[20]

Legal matrimony delivers several additional benefits and protections to couples. Only a small number of administrations to date, recognize LGBT rights to marry and form a family. In 1996, South Africa, turned into the first country to embrace sexual orientation in its Constitution as a status protected from discrimination. In Brazil, public and national laws forbid prejudice based on sexual orientation, inheritance rights are given to same-sex couples. Several European countries (Denmark, Sweden, Norway, Finland, the UK, France, Germany, Switzerland, Portugal, Slovenia, Croatia, and Iceland) as well as Israel and New Zealand have some welfares for same-sex couples, but those are not equal in comparison to that of heterosexual couples. Within the US, only one state i.e. Massachusetts as of May 2004 allows civil marital rights to homosexual couples, but these are only the rights provided by the state.[21] Many other countries including India have taken a step in the right direction by decriminalizing homosexuality, although there is still a long way to go to provide the LGBTQ+ community equal rights in every sense, it is still better than nothing, recognition is the first step to equality.

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[20] *UN issues first report on human rights of gay and lesbian people*. (2011, December 15). UN News. https://news.un.org/en/story/2011/12/398432-un-issues-first-report-human-rights-gay-and-lesbian-people

[21] Marks, S. M. (2006). Global recognition of human rights for lesbian, gay, bisexual, and transgender people. *Health and Human Rights*, *9*(1), 33–42. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5451102/

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CHAPTER 3

Acceptance by the Society

The effect of decriminalizing homosexuality can be seen as by the changing attitude of the society and the families that are altering their viewpoint and accepting their children as who they are. Society's anti-LGBTQ outlook has changed and the world is now acknowledging the changes and more awareness is being forwarded through education, counseling, and many other ways. There is more growth in self-acceptance and confidence is being built up in the people.[22]

Even though the government has decriminalized homosexuality and many people have changed their perceptions regarding the LGBT community, nevertheless, a lot of people out there who don't even understand the concept of being homosexual, and until they do there is next to no hope to change their view about it.

Also, the lack of marital rights to these people shows that the country is still far from completely accepting these people as one of our own, and providing them equal rights and opportunities. Now, there are two sides of marriage, one is the social facet in which two adults decide to go through a ceremony and act toward his or her partner as a spouse.

In India, after the Supreme Court ruling to decriminalize Section 377 of the Indian Penal Code, a lot of LBGT people can openly do that. But, there is a legal facet of marriage that grants privileges and duties on two people. These contain, for example, property inheritance, upkeep of the spouse, and so on. In heterosexual marriages, these privileges and duties come in a set. Although an LGBT+ couple can freely address such complications, there are no laws in our country that can guarantee their right of entry to these rights, which is again a big setback for these people.[23]

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[22] Gambhir, P. (n.d.). *LGBT acceptance around the country India*. Www.Legalserviceindia.Com. Retrieved August 15, 2020, from http://www.legalserviceindia.com/legal/article-2264-lgbt-acceptance-around-the-country-india.html

[23] Chakraborty, S. (2019, June 25). *Despite social marriage, gay couples still yearn for legal rights - Times of India*. The Times of India. https://timesofindia.indiatimes.com/life-style/spotlight/is-gay-marriage-a-reality-in-india/articleshow/69928813.cms

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CHAPTER 4

LGBT rights in India

The Apex Court of India has, over a long period of jurisprudence, passed judgments directed at protecting couples and relationships that went against societal norms. While the legal proceedings against the sodomy law began almost 15 years before 2016, no LGBT people themselves went to court challenging the law. Finally, in 2016 the Supreme Court request observed LGBTQ+ people file petitions in their names.[24]

LGBT community in our country has limited rights and might encounter social problems which the non-LGBT people never have to face. India has repealed its laws that openly victimized against gay sex and transgender credentials, but a lot of legal protections have not been established for including anti-discrimination laws and same-sex marriage.[25]

In October 2017, a set of people put forward a composed plan of a new Uniform Civil Code that would make legal same-sex marriage to the Law Commission of India.[26] It explains marriage as "the lawful unison as given under this Act of a male with a female, a male with another male, a female with another female a transgender with another transgender or a transgender with either male or female. All married couples shall be allowed to adopt if they wish to. The carnal nature of a married couple shall not be a block to their entitlement to adoption. LGBT people will be just as authorized to adopt a baby ".[27]

In attendance at present are several petitions pending with the courts about same-sex marriages. The Uttarakhand High Court on 12th June 2010 acknowledged that even though LBGT

[24] Sahgal, K. N. (2020, May 18). *Same-Sex Marriage In India: Unveiling The Marriage Project*. Feminism In India. https://feminisminindia.com/2020/05/19/same-sex-marriage-india-unveiling-marriage-project/

[25] Dash, D. K., Jul 29, amp; S. Y. | T. | U., 2011, & Ist, 00:33. (2011, July 29). *In a first, Gurgaon court recognizes lesbian marriage | Gurgaon News - Times of India*. The Times of India. https://timesofindia.indiatimes.com/city/gurgaon/In-a-first-Gurgaon-court-recognizes-lesbian-marriage/articleshow/9401421.cms

[26] Chishti, seema. (2017, October 18). *Drafting change: What the new 'progressive' intervention in Uniform Civil Code debate entails*. The Indian Express. https://indianexpress.com/article/explained/drafting-change-what-the-new-progressive-intervention-in-uniform-civil-code-debate-entails/

[27] Dey, A. (2017, October 13). *A new UCC for a new India? Progressive draft UCC allows for same sex marriages*. CatchNews.Com. http://www.catchnews.com/india-news/a-new-ucc-for-a-new-india-progressive-draft-ucc-allows-for-same-sex-marriages-85386.html

marriage may not be permitted in our country, "live-in relationships" and cohabitation are sheltered by the law.[28]

Article 15 of the Constitution of India says that discrimination on grounds of religion, race, caste, sex, or place of birth is strictly prohibited, and no person on the grounds of the same should be treated unequally or stopped from using anything or going to any place that is partly or fully supported by the state provided funds and is reserved to the use of the public.

In the justification of Navtej Singh Johar v. Union of India, the Supreme Court pronounced that the Constitution of India prohibits unfairness and discrimination based on sexual inclination by the category of "sex". In the same way in the case of National Legal Services Authority v. Union of India, the Apex Court said that discrimination based on gender identity is constitutionally illegal.[29]

The Transgender Persons (Protection of Rights) Act, 2019 prohibits unjust discrimination against transgender individuals in scholastic establishment and facilities, employment, healthcare facilities, access to the use of any goods, housing, service, resource, benefits, privilege, or opportunity devoted to the use of the common public or normally available to the public, the right to movement, reside, acquisition, rent or occupy any property and the chance to stand for or occupy public or private office, and in government or private institutions.[30]

The Supreme Court of India in a landmark case perceived that both gender and genetic attributes form individual elements of a human. Genetic individualities include genitals, DNAs, and subordinate sexual features, but sexual characteristics include one's self-image, the innate mental or emotional sense of sexual individuality and personality. The prejudice in the view of sex under Articles 15 and 16 of the Indian Constitution comprises discrimination based on gender identity. The utterance "sex" is not just confined to the genetic sex of a man or a woman, but is envisioned to embrace people who consider themselves neither a man nor a woman. Both these articles have also been inferred to provide social equality to these people such as equivalence in public employment, it provides that the states shall have the power to make any

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[28] M, A., & hani. (2020, June 19). *Can't marry, but same sex couples have right to live together: Uttarakhand High Court*. ThePrint. https://theprint.in/judiciary/cant-marry-but-same-sex-couples-have-right-to-live-together-uttarakhand-high-court/444706/

[29] *Wayback Machine*. (2014, May 27). Web.Archive.Org. https://web.archive.org/web/20140527105348/http://supremecourtofindia.nic.in/outtoday/wc40012.pdf

[30] *"Transgender Persons (Protection of Rights) Act 2019*. (n.d.). Http://Socialjustice.Nic.in/Writereaddata/UploadFile/TG%20bill%20gazette.Pdf. Retrieved August 16, 2020, from http://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20gazette.pdf

specific proviso for the improvement of these susceptible minority who are now included within the category of publically and educationally backward classes.[31]

Further, a lot of rights are not granted to these people who are freely and unequivocally present to every other Non-LGBT person in India. First and foremost Same-sex couples are not allowed to adopt a child in India. Then No known anti-discrimination laws exist for sexual orientation or gender identity for the LGBT community, which also means until this happens they cannot get any housing permissions.

CHAPTER 5

Legislation of Same-Sex Marriage around the World

The beginning of conjugal equality has varied by state and surfaced through legislative change to marriage law and court rulings based on constitutional guarantees of equality, an acknowledgment that it is allowed by existing marriage law[32], or by direct popular vote and initiatives. The acknowledgment of same-sex marriage is deemed to be a human right plus a civil right as well as a political, social, and religious issue.[33]

The major support factions of same-sex marriage are human rights and civil rights organizations along with the health and technical communities, while the most prominent adversaries are spiritual fundamentalist groups. A rising number of governments around the globe are because of whether to give authorization of legal acknowledgment to same-sex marriages. Up until now, thirty nations and territories have passed national laws allowing same-

[31] Revathy, V. (2018b). THE VIOLATION OF HUMAN RIGHTS AGAINST LGBT COMMUNITY IN INDIA-A CRITICAL STUDY legislation for marriage of LGBT people and the government has to take remedial actions for them otherwise those people will suffer a lot of exploitation from the people. *International Journal of Pure and Applied Mathematics*, *120*(5), 4875–4884. https://acadpubl.eu/hub/2018-120-5/4/396.pdf

[32] *Same-sex Oklahoma couple marries legally under tribal law*. (2013, October 22). KOCO. https://www.koco.com/article/same-sex-oklahoma-couple-marries-legally-under-tribal-law-1/4295748

[33] *Wayback Machine*. (2013, March 16). Web.Archive.Org. https://web.archive.org/web/20130316191210/https://ecf.cand.uscourts.gov/cand/09cv2292/files/09cv2292-ORDER.pdf

sex people to marry, commonly in Europe and the Americas. Also, in Mexico, certain authorities permit same-sex couples to marry, while the rest do not.[34]

The approval of same-sex relationships was particularly apparent in northern Europe and in countries with cultural ties to that area. In 1989 Denmark became the first country to form registered partnerships—a thinned version of marriage—for same-sex couples. Shortly after that similar laws, typically by means of precise terminology such as domestic partnership, civil union, registered partnership, civil partnership to distinguish same-sex ties from hetero marriages, as an outcome went into effect in Norway in 1993, Sweden in 1995, Iceland in 1996, the Netherlands in 1998, and other places in Europe, consisting of UK in 2005 and Ireland in 2011.[35]

To assemble the countries where same-sex marriage is officially legal, 24/7 Wall St. reviewed lots of news articles and information from the Pew Research Centre. Countries where same-sex marriage is permissible in some parts but not countrywide were omitted. Even now, only 29 out of the 195 countries in the world have legalized same-sex marriage, which in comparison is a very small no. but if with time this much acceptance is given to the LGBT community, the ratio is something to look forward to. Disagreement to legalizing same-sex marriage every so often comes from religious groups who assert that it obliterates the sacredness of marriage. However, a U.S. analysis has revealed that heterosexual couples split-up in higher proportions as compared to homosexual couples.[36]

LBGT marriages are lawfully performed and acknowledged either nationwide or in a few dominions in Argentina, Norway, Australia, Portugal, Austria, Belgium, Colombia, Costa Rica, Denmark, Ecuador, Finland, France, Mexico, New Zealand, the Netherlands, Spain, Sweden, Germany, Canada, Iceland, Ireland, Luxembourg, Malta, The United Kingdom, Taiwan, The United States, Brazil, South Africa and Uruguay.[37]

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[34] Masci, D., Elizabeth Podrebarac Sciupac, & Lipka, M. (2019, May 17). *Same-Sex Marriage Around the World*. Pew Research Center's Religion & Public Life Project; Pew Research Center's Religion & Public Life Project. https://www.pewforum.org/fact-sheet/gay-marriage-around-the-world/

[35] *Same-sex marriage - Same-sex marriage and the law*. (n.d.). Encyclopedia Britannica. https://www.britannica.com/topic/same-sex-marriage/Same-sex-marriage-and-the-law

[36] Green, J. (2019, June 13). *29 countries where same sex marriage is officially legal*. USA TODAY; WLST. https://www.usatoday.com/story/money/2019/06/13/countries-where-same-sex-marriage-is-officially-legal/39514623/

[37] *Same-sex marriage*. (2020, August 15). Wikipedia. https://en.wikipedia.org/wiki/Same-sex_marriage#:~:text=Same%2Dsex%20marriage%20is%20legally

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CHAPTER 6

Problems faced by the LGBT community-

Lesbian, gay, bisexual, transgender (LGBT) persons suffer huge complications growing up in a civilization where being heterosexual is the only acceptable orientation and homosexuality is regarded as unusual and abnormal. At present, homosexuality and queer individualities might be okay to youth of our country more than ever before but still inside the boundaries of our families, homes, and schools, acknowledgment is a continuous struggle for LGBT people.

Every year, a vast number of LGBT people face enormous issues related to violence, unemployment, discrimination, poverty, and lack of healthcare. Prejudiced people have issues with the way people from the LGBT community manage their lives.[38]

The elimination and discrimination have long-lasting and damaging impacts on the lives of the LGBT community people. This has stemmed in the following:

- Dropping out of school
- legal injustice
- victims of animosity, crimes, and viciousness from people
- inadequate health care, affordable accommodation, or other social services
- Leaving Home and Family
- Unable to find regular jobs, have fewer options than others do.
- Ignored in the community and isolated.
- Lack of family and social support
- Transfer to other nations in search of secure and safer livelihood and recognition
- Rejected from Religion (Esp. Muslim and some Christian Fundamentalist sects)

[38] Choudhury, S. (2018, January 24). *Problems Faced By LGBT People In India*. Youth Ki Awaaz. https://www.youthkiawaaz.com/2018/01/dont-ever-be-afraid-to-show-off-your-true-colours/

- Attempt suicide[39]

Not only this but LGBT people experience narrow-mindedness, inequality, judgment, harassment, and the threat of brutality due to their sexual orientation, then those people who identify themselves as straight or homosexual. This is because of homophobia. The factors that support homophobia on a wider scale are principled, religious, and political opinions of the domineering faction. Living in homophobic surroundings compels many LGBT people to conceal their sexuality, for fear of the bad reactions and consequences they might have to face.[40]

CHAPTER 7

Case Laws and incidents that brought a change in LGBT Rights

September 6th, 2018 was not an average day. A historic decision was made that brought a new ray of hope amongst the people of the LGBT+ community, who have been exposed to hundreds of years of tiresome injustice. The judgment that made the day except for the LGBT+ community was that the Supreme Court of India passed a historic judgment legalizing/decriminalizing homosexuality by partially striking down Section 377 of the IPC 1860.

The LGBT community all around the country erupted in the triumphant celebration relishing their victory against the 200-year-old British-era law that criminalized same-sex affiliation. The implication of this whole judgment can be inferred considering the statement made by Justice Indu Malhotra while reading her 50-page verdict that "History owes an apology to the members of LGBT community and their families, for the prolong delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries". [41]

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[39] Chatterjee, S., & Researcher. (2014). Problems Faced by LGBT People in the Mainstream Society: Some Recommendations. *International Journal of Interdisciplinary and Multidisciplinary Studies (IJIMS)*, *1*(5), 317–331. https://www.ijims.com/uploads/cae8049d138e24ed7f5azppd_597.pdf

[40] *Supra* at 22

[41] Rai, D. (2020, June 21). *Evolution of LGBT Rights in India and taking the narrative forward*. IPleaders. https://blog.ipleaders.in/evolution-of-lgbt-rights-in-india-and-taking-the-narrative-forward-living-free-and-equal/

Though, it took more than seventy years and nearly two decades of the long and tiring struggle to scrape down this old age law. But before continuing to see how the current laws in India, significantly after the striking down of Section 377, are lacking in tying down essential human rights to the LGBT+ people group in India. Let us first follow back the historical backdrop of the LGBT rights development in India, talking about the milestone Judgements and their effect on the LGBT Rights development to have a thorough understanding.

7.1. NAZ Foundation Government vs. NCT of Delhi

The NAZ Foundation Organization is an NGO established in New Delhi that has been functioning on HIV, AIDS, and sexual wellbeing since 1994. The organization filed a writ petition in the Delhi High Court challenging the statutory validity of Section 377 of the Indian Penal Code. They put forward that Section 377 violates the fundamental rights ensured under Articles 14, 15, 19, and article 21 of the Constitution of India. It produced the act in the public interest on the foundations that its work on preventing the spread of HIV AIDS was being hindered. Together the Ministry of Home Affairs and the Ministry of Health and Family Welfare submitted legal views with respect to the writ petition. Ministry of Home Affairs was not in favor of this change whereas the health ministry backed the Naz Foundation.[42]

However, In 2009 High Court of Delhi held that Section 377 of IPC forced an irrational restraint over two consenting adults involving in sexual intercourse in private. Hence, it stood in direct infringement of their primary fundamental rights protected under Articles 14, 15, 19, and 21 of the Indian Constitution.[43]

7.2. Suresh Kumar Koushal vs Naz Foundation

The decision of Naz Foundation Government. v. NCT of Delhi was appealed against in the Supreme Court of India in the Suresh Kumar Koushal and another v NAZ Foundation and

[42] Jha, J. (2019, December 31). *Recent Case Laws on LGBT Rights*. Indianlegalsolution.Com. https://indianlegalsolution.com/recent-case-laws-on-lgbt-rights/#_ftn
[43] *Supra* at 24

Others case and it was held that the Delhi High Court was wrong in its conclusions and was also incorrect in reading down the section to permit consensual activities between two consenting homosexual persons. The apex Court held that Section 377 does not violate Articles 14 15 and 21 and that carnal intercourse, as intended and defined by the petitioners to mean unnatural lust should be punished. Justice Singhvi also mentioned that Section 377 is pre-constitutional regulation and if it were violative of any of the rights assured under Part III, then the Parliament would have observed the same and revoked this section long back. Established on this reasoning, he declared the section to be constitutionally effective. He moreover stated that the doctrine of severability and the procedure of reading down a particular law/section streams from the belief of constitutionality and that in the said case the decision of Delhi High Court to read down the section was incorrect for the reason that there is no part of the section that can be severed without affecting the section as a whole. So, the Supreme Court held that Section 377 of the Indian Penal Code does not suffer from any constitutional infirmity and left the topic to the competent legislature to consider the advantages and rightfulness of erasing the Section from the statute book or altering it to allow consensual sexual activity between two homosexual persons in private.[44]

7.3. National Legal Services Authority vs. Union of India[45]

In the National Legal Services Authority v Union of India, the Apex Court had to resolve the question of whether there was a need to identify the hijra and transgender population as a third gender for the reasons of public health, education, employment, reservation, and other welfare schemes. The Supreme Court in its momentous judgment molded the 'third gender' status for hijras or transgender. Earlier, the transgender people were required to label themselves as either male or female, but after the judgment, these people can proudly recognize themselves as transgender. Further, the points that made this judgment so specific was that it put down the

[44] Jha, J. (2019, December 31). *Recent Case Laws on LGBT Rights*. Indianlegalsolution.Com. https://indianlegalsolution.com/recent-case-laws-on-lgbt-rights/#_ftn1

[45] *National Legal Ser.Auth vs Union Of India & Ors on 15 April, 2014*. (2014). Indiankanoon.Org. https://indiankanoon.org/doc/193543132/

framework to ensure the transgender people a whole scale of basic human rights which can be surmised as follows:

1. The court apprehended that non-recognition of their identities violated Article 14, 15, 16, and 21 of the Constitution of India.

2. The Supreme Court additionally commended the Government to take into consideration the fellows of "Third Gender" as an economic and social backward group.

3. It was also specified that administration must make appropriate plans for the transgender population in the light of Articles 15(2) and 16(4) to ensure fairness of prospect in education and employment according to the judgment, the third gender would be regarded as other backward classes [OBC] to confer them the benefit of reservation in relation to government jobs and educational institutions.

4. The court also took cognizance that a conflict between one's birth gender and identity is not essentially a pathological condition. Therefore, instead of adopting a "treatment of the abnormality", the emphasis should be on "resolving distress over a mismatch".[46]

7.4. K.S. Puttaswamy v Union of India (2017)

A nine-judge bench of the Supreme Court of India held in unison that the right to privacy was a constitutionally safeguarded right in India, as well as being related to other freedoms guaranteed by the Indian Constitution. The case, brought by retired High Court Judge Puttaswamy, questioned the Government's proposed scheme for a uniform biometrics-based identity card which would be mandatory for access to government services and benefits. The Administration contended that the Constitution did not confer specific protection for the right to privacy. The Court deduced that privacy is a vital component of fundamental liberty or free will guaranteed under Article 21 which provides that: "No person shall be deprived of his life or personal liberty except according to procedure established by law". This case will prove to be a milestone that will most probably lead to constitutional judgments to an extensive range

[46] Rai, D. (2020, June 21). *Evolution of LGBT Rights in India and taking the narrative forward*. IPleaders. https://blog.ipleaders.in/evolution-of-lgbt-rights-in-india-and-taking-the-narrative-forward-living-free-and-equal/

of Indian statutes, for example, legislation criminalizing same-sex relationships as well as bans on beef and alcohol consumption in many Indian States.[47]

7.5. Sreeja vs. Commissioner of Police Thiruvananthapuram and Others

The petitioner raised an accusation that her 'lesbian companion, Ms. Aruna, aged 24 years (hereinafter referred to as the alleged detente) is under unlawful confinement by her parents, against her free will. The petitioner seeks a writ of Habeas Corpus for commanding the production of the corpus of the alleged detente and to set her at liberty. The alleged detente had informed the petitioner that her parents had admitted her in the Government Mental Hospital at Peroorkada Prima facie there is a case of wrongful confinement however the question is whether she is allowed to lead a life with being in a relationship with the same gender and solemnize a valid marriage. The appellant placed much confidence in the judgment of the Apex Court in Navtej Singh Johar V. Union of India.

The court said that it realized that the live-in relationship between the petitioner and the alleged détente within any manner does not insult any provisos of law nor it will turn into a misconduct in any manner. Whereas, if the jurisdiction bestowed on this court is not implemented, it will amount to allowing a violation of the Constitutional right to perpetrate."[48]

7.6. Navtej Singh Johar V. Union of India

The Supreme Court of India in unison held that Section 377 of the Indian Penal Code, 1860, which forbade ‘sexual intercourse against the order of nature’, was unconstitutional in so far as it criminalized consensual sexual conduct amongst homosexual adults. The petition, put on record by Navtej Singh Johar, opposed Section 377 of the Penal Code on the argument that it infringed the constitutional rights to privacy, freedom of expression, fairness, human self-

[47] *Puttaswamy v. India*. (n.d.). Global Freedom of Expression. Retrieved August 20, 2020, from https://globalfreedomofexpression.columbia.edu/cases/puttaswamy-v-india/#:~:text=A%20nine%2Djudge%20bench%20of

[48] Supra at 27.

esteem, and shelter from discrimination. The Court rationalized that discrimination on the grounds of sexual orientation was violative of the right to equality, that forbidding consensual sex amongst adults in private was violative of the right to privacy, and that sexual orientation creates an intrinsic part of self-identity and denying the same would be an infringement of their right to life, and that fundamental rights cannot be denied based on the ground that they only concern a very small portion of the population.[49]

CHAPTER 8

Resolution for LGBT Equality

There is no alternate way that can address the issues confronting numerous LGBT people in over the world. However, the following suggestions can be followed to make sure that these people feel equal and respected among others.

- Support the most disregarded of the LGBT community—individuals of color, low-income, young, elderly, and transgender people
- Establish partnerships on cross-issue work that comprises LGBT issues involving low-income and gender discrimination.
- Engage groundwork staff in public education around issues affecting LGBT low-income people and LGBT people of color, especially as they correlate to transgender issues.
- In schools, teacher training programs are crucial positions where LGBT issues and concerns need to be addressed.

[49] *Navtej Singh Johar v. Union of India*. (n.d.). Global Freedom of Expression. Retrieved August 20, 2020, from https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-unionindia/#:~:text=Case%20Summary%20and%20Outcome&text=The%20petition%2C%20filed%20by%20dancer

- To alter public outlook media has to take part and play a responsible role by broadcasting on LGBT problems and encouraging a culture of freedom for minorities.
- Authorized funds need to be generated that can take on Public Interest Litigation on LGBT issues.
- Training needs to be organized for health professionals to increase their understanding of LGBT identity as a possible risk factor for self-harm suicidal behavior and depression.
- Relevant authorities should guarantee that physical, mental health and social care services are provided in such a manner that is within reach and appropriate to LGBT people.[50]

Same-sex marriage and adoption, are issues that need to be legalized to initiate any sort of human equality to take place. Marriage is a relationship between two individuals, not just a man and a woman. The resistance to same-sex marriage is one of the main obstacles the LGBT community faces. If marriage was permissible to every person, the progress in the direction of human equality would be much easier. Not only this but the undermentioned are also the reasons why the LGBT community should not be denied marriage rights:

- Forbidding them is a violation of religious freedom (civil and religious marriages are two separate institutions).
- Conjugal benefits (such as joint ownership, medical decision-making capacity) should be available to all.
- Homosexuality is a recognized lifestyle today with evidence strongly supporting biological interconnection.
- Rejecting these marriages is a form of minority discrimination.
- The amount of adoptions will surge since gay couples cannot pro-create.

[50] Chatterjee, S., & Researcher. (2014). Problems Faced by LGBT People in the Mainstream Society: Some Recommendations. *International Journal of Interdisciplinary and Multidisciplinary Studies (IJIMS)*, *1*(5), 317–331. https://www.ijims.com/uploads/cae8049d138e24ed7f5azppd_597.pdf

- It inspires the public to have deep-seated family ideals and give up high-risk sexual lifestyles.
- The same financial welfares that apply to man-woman marriages will apply to same-sex marriages.
- LGBT marriages should not even affect straight marriages. If one is not gay, then there is no insinuation with them and the LGBT community.[51]

CHAPTER 9

Conclusion

In the end, it is important to note that merely working towards decriminalization of same-sex acts is not sufficient but it is also essential to seek legal acknowledgment for same-sex marriage and inspect several options that could be followed to achieve such legal recognition so that the LGBT community also has equal rights and opportunities just as every other person.

Open conversation issues identified with sex and sexual conduct or nature in India are still off-limits and offensive. In the given societal restrictions, same-sex marriage in India is amongst one of the utmost troublesome issues. Despite the reality of the situation that section 377 has been decriminalized, even today no law in our country legitimately perceives a marriage between people of the same sex. Laws in India are yet to perceive a similar arrangement of rights and duties regarding wedded gay couples that they accomplish for heterosexual wedded couples.

Rejection of the preference of marriage to same-sex couples supports unfairness and bias by giving them different treatment and laws. In a nation that treats marriage with such spiritual importance, the most appropriate development would be the legalization of same-sex marriages under the law.

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[51] *Solutions - LGBT Rights*. (n.d.). Sites.Google.Com. Retrieved August 20, 2020, from https://sites.google.com/site/lgbtrightsx/solutions

EQ. Citation: BNWJ-0920-099

3.

Software Protection: International Instruments and Trends

By: Vanshika Malik

Pg. No.: 45-63

EQ. Citation: BNWJ-0920-099

Abstract

Programming improvement in the course of the most recent decades speaks to a pace of progress unheard of since the Industrial Revolution. Programming is unavoidable, influencing essentially every part of human life in all pieces of the world. From licensed innovation rights (IPRs), talk and discussion centers around how programming ought to be secured, yet besides on a bunch of issues mirroring the numerous jobs that product plays in computerized dissemination of imaginative substance. This paper sums up a portion of those issues and gives data on current exercises of WIPO that address them.

WIPO began to consider the topic of the legitimate insurance of PC programs during the 1970s, and, first, working out a sui generis framework developed. The sui generis insurance secured each of the three components of PC programs: object code, source code, and documentation. "Source code" is the first code of the PC program written in program dialects which can be perused and comprehended by people, especially the individuals who are spent significant time in this field; "object code" is a rendition of the program that is straightforwardly usable by a PC, in paired structure, a progression of "zeros" and "ones" that PC processors may see, yet individuals can't except if it is "decompiled", that is changed into source code. Be that as it may, the WIPO Model Provisions on the Protection of Computer Programs which accommodated a sui generis framework were not trailed by national administrators, and the thought started to win that copyright ought to be applied for the assurance of PC programs. In February 1985, WIPO and UNESCO assembled in Geneva a joint Group of Experts on the Copyright Aspects of the Protection of Computer Programs. At this gathering, based on an intensive report and an enlivened discussion, an advancement occurred towards the acknowledgment of PC programs.

Thus, the following research paper focusses on the protection of the software nationally as well internationally and what can be the provisions for protecting them simultaneously. Also, it talks about the recent trends that have been going on in the international market for software protection and how WIPO and UNESCO are involved in protecting the software market.

EQ. Citation: BNWJ-0920-099

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CHAPTER 1

Introduction

Initially, PC makers circulated "PC programming" just as a component of the entire PC framework. They considered "programming" to be innately connected with "equipment." In the late 1960s, in any case, PC makers stopped this "packaging" practice. From that second, the product business extended. Programming items are very defenseless against "theft." Competitors "privateer" programming by making a precise of a program and selling it under their name. Even though product originators contribute colossal measures of time and cash to build up a business programming program, a precise can be made immediately and at negligible expense.' Fundamentally, the product business is lawfully secured against theft. Not exclusively does exacting duplicating compromise the business yet "cloning," which has risen recently, has additionally purportedly imperiled the business. A clone, which isn't a precise yet rather depends on an intensive investigation of the first programming, has capacities indistinguishable from those of the unique programming. Since cloning can spare contenders the extensive innovative work costs brought about by the first programming maker, it gives them an extraordinary upper hand. On the off chance that contenders can pick up advantage so effectively, organizations have pretty much nothing motivating force to grow new programming.[52] Numerous nations have declared laws confining programming robbery and cloning inside their fringes. Programming in its easiest sense can be comprehended as a lot of guidelines gave to the PC to deliver the ideal outcome. As such, when the projects, clarifications, systems, orders, and so forth are so structured or organized that a specific errand is performed it very well may be named as a product. Much the same as some other protected innovation, programming is a result of the brain. It includes a noteworthy commitment of time, work, and expertise. The most widely recognized strategies for programming theft are softlifting, hard circle stacking, unapproved leasing, and hard plate stacking. What's more, the simplicity of duplication and high caliber of pilfered programming represents an extraordinary danger to the product business. At the point when a product is duplicated, there is scarcely in

[52] Szabo, H. (2001). *International Protection of Computer Software: The Need for Sui Generis Legislation Recommended Citation COMMENTS International Protection of Computer Software: The Need for Sui Generis Legislation*. https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1095&context=ilr

recognizable contrast in quality.[53] This suggests that the arrival of the colossal speculations made on innovative work to make a product can't be delighted in by the maker of programming. Accordingly, programming insurance by method of protected innovation rights is important to guarantee that the maker has satisfactorily profited and to support imagination and innovativeness later on. Different global instruments and the enactments in numerous nations stretch out-licensed innovation security to programming also.

CHAPTER 2

Software Protection Laws Prevailing In India

2.1. How can one protect their software?

Protected innovation is a benefit your organization claims that give it separation and an upper hand in the commercial center. While a few organizations perceive the significance of their licensed innovation, numerous organizations disregard both securing and improving their protected innovation. All things considered, protected innovation is an elusive resource, hence, it is difficult to put a genuine incentive on its value. In this way, you might be thoughtless in furnishing it with satisfactory assurance to guard it. Concerning your licensed innovation, you need to guarantee that it is secured so nobody can take what you have gone through the years to create. Without the best possible insurance set up, you could wind up taking a gander at another person benefitting off of your innovative thought for your product. To maintain a strategic distance from this from happening you have to take the best possible measures to shield your licensed innovation from falling into inappropriate hands.[54]

[53] Miyashita, Y. (1991). Article 3 Winter 1991 International Protection of Computer Software, 11 Computer L.J. 41 (1991) Recommended Citation Yoshiyuki Miyashita, International Protection of Computer Software, 11 Computer L. *The John Marshall Journal of Information Technology & Privacy Law*, *11*(1), 41. https://repository.jmls.edu/cgi/viewcontent.cgi?article=1390&context=jitps

[54] Marshine, P. M. A. (2003). Software Protection : International Instruments and Trends. *www.Academia.Edu*. https://www.academia.edu/8316249/Software_Protection_International_Instruments_and_Trends

To keep the licensed innovation of your product secured, utilize the four after strategies:

1. **Record a Copyright:** A copyright is the assurance of a thought or other data that has been created by the copyright holder. Copyright laws secure the initiation of music, books, motion pictures, tunes, engineering, and programming. Even though copyright insurance is conceded when your work is first made and given an unmistakable structure, you despite everything should give it the correct assurance and register it—enlisted copyright. Enlisting your scholarly data with the U.S. Copyright Office furnishes it with the correct assurance that gets perceived in court.[55] At the point when you register your copyright, it is noted for open record which pulls out that you have asserted lawful copyright security for your scholarly data. Another advantage of a copyright is that it gives you the capacity to sue any individual who encroaches upon your copyright. Along these lines, a copyright is required if you need to seek after lawful activity against the individuals who utilize your scholarly data for their benefit without your authorization.
2. **Record for a Patent:** A patent awards property rights to the designer of another creation. On the off chance that your product has an unmistakable element that isolates it from your opposition, you will require a patent to secure your upper hand. The advantages of a patent for your product include:
    - ***Right Exclusivity:*** The elite privileges of a patent award just you complete proprietorship and utilization of your product for a long time from the date of the recorded patent application.
    - ***Building up advertise situating:*** Since your rivals can't utilize your protected programming, you lessen the danger of rivalry, giving you a bit of leeway in the commercial center
    - ***Expanded profits for ventures:*** Having restrictive rights permits you the likelihood to create higher income since your opposition can't give a similar worth just you can deliver.
    - ***Chance to permit or sell the development:*** You don't need to accomplish the difficult work of showcasing and selling your product if you sell it or permit it

[55] *Copyright Protection of Computer Software*. (2019). Wipo.Int. https://www.wipo.int/copyright/en/activities/software.html

to another organization that will accomplish all the work for you (if you share a portion of the created income).[56]

3. **Contemplate Source Code Licenses:** If you utilize a source code permit, you are giving a licensee a non-select and non-adaptable permit to your product; authorization to utilize and adjust your authorized programming. This is a hazardous move to take since you are potentially permitting your source code outside of your association. This seemingly debilitates your organization's proprietary innovations as the source code is done being kept a mystery. To dispense with these issues utilize a source code escrow to guarantee the privileges of your product are secured. A source code escrow ensures all gatherings of a product permit by hosting a third get-together escrow operator hold the product's basic data. This helps guard the source code while as yet giving the insurance a licensee needs. [57]
4. **Have Developers Sign an IP Assignment Agreement:** The designers who are building up your protected innovation need to consent to an IP task arrangement expressing that all work created inside the organization has a place with the organization.

This assists with discouraging a person from offering your scholarly data to a contender or utilizing it to benefit from their utilization. On the off chance that one of your engineers goes in either direction, you can utilize this record to take quick, lawful activity. Your licensed innovation as a significant resource should be very much secured. These four hints can help give you security and an upper hand.

2.2. Laws and Regulations of Software or Data Protection in India

Information Protection alludes to the arrangement of security laws, approaches, and strategies that expect to limit interruption into one's protection brought about by the assortment, stockpiling, and dispersal of individual information. Individual information by and large

[56] *Copyright Protection of Computer Software*. (2019). Wipo. Int. https://www.wipo.int/copyright/en/activities/software.html

[57] *Software Protection: International Instruments And Trends*. (2018). Www.Legalserviceindia.Com. http://www.legalserviceindia.com/legal/article-3-software-protection-international-instruments-and-trends.html#:~:text=Instruments%20And%20Trends-

alludes to the data or information which identity with an individual who can be distinguished from that data or information whether gathered by any Government or any private association or an office. The Constitution of India doesn't concede the basic right to security.[58] Notwithstanding, the courts have added the privilege to security to the next existing essential rights, ie, the right to speak freely of discourse and articulation under Art 19(1)(a) and the right to life and individual freedom under Art 21 of the Constitution of India. In any case, these Fundamental Rights under the Constitution of India are dependent upon sensible limitations given under Art 19(2) of the Constitution that might be forced by the State. As of late, in the milestone instance of Justice K S Puttaswamy (Retd.) and Anr. versus Association of India and Ors., the constitution seat of the Hon'ble Supreme Court has held the Right to Privacy as a major right, subject to certain sensible limitations. India by and by doesn't have any express enactment overseeing information assurance or security. Be that as it may, the pertinent laws in India managing information assurance are the Information Technology Act, 2000 and the (Indian) Contract Act, 1872. A classified law regarding the matter of information security is probably going to be presented in India sooner rather than later. The (Indian) Information Technology Act, 2000 arrangements with the issues identifying with installment of remuneration (Civil) and discipline (Criminal) if there should arise an occurrence of illegitimate revelation and abuse of individual information and infringement of legally binding terms in regard of individual information. Under area 43A of the (Indian) Information Technology Act, 2000, a body corporate who is having, managing, or taking care of any delicate individual information or data, and is careless in executing and keeping up sensible security works on bringing about unfair misfortune or illegitimate addition to any individual, at that point, such body corporate might be held at risk to pay harms to the individual so influenced.[59] It is critical to take note of that there is no maximum breaking point indicated for the remuneration that can be guaranteed by the influenced party in such conditions. The Government has advised the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.[60] The Rules just

[58] *Copyright Protection of Computer Software*. (2019). Wipo.Int. https://www.wipo.int/copyright/en/activities/software.html

[59] Szabo, H. (2001). *International Protection of Computer Software: The Need for Sui Generis Legislation Recommended Citation COMMENTS International Protection of Computer Software: The Need for Sui Generis Legislation*. https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1095&context=ilr

[60] *Copyright Protection of Computer Software*. (2019). Wipo.Int. https://www.wipo.int/copyright/en/activities/software.html

arrangements with security of "Touchy individual information or data of an individual", which incorporates such close to home data which comprises of data identifying with:-

- Passwords;
- Money related data, for example, financial balance or Visa or check card or other installment instrument subtleties;
- Physical, physiological, and emotional well-being condition;
- Sexual direction;
- Clinical records and history;
- Biometric data.

The principles give the sensible security practices and methods, which the body corporate or any individual who in the interest of body corporate gathers, gets, have, store, arrangements, or handle data is required to follow while managing "Individual touchy information or data". If there should be an occurrence of any penetrate, the body corporate or some other individual following up for the benefit of the body corporate, the body corporate might be held obligated to pay harms to the individual so influenced. Under segment 72A of the (Indian) Information Technology Act, 2000, divulgence of data, purposely and purposefully, without the assent of the individual concerned and in the break of the legitimate agreement has been additionally made culpable with detainment for a term stretching out to three years and fine reaching out to Rs 5,00,000 (approx. US$ 8,000). It is to be noticed that s 69 of the Act[61], which is a special case to the overall standard of upkeep of protection and mystery of the data, gives that where the Government is fulfilled that it is important in light of a legitimate concern for:

- the power of honesty of India,
- guard of India,
- security of the State,
- well-disposed relations with unfamiliar States or
- open request, or
- for forestalling prompting to the commission of any cognizable offense identifying with above, or

[61]Miyashita, Y. (1991). Article 3 Winter 1991 International Protection of Computer Software, 11 Computer L.J. 41 (1991) Recommended Citation Yoshiyuki Miyashita, International Protection of Computer Software, 11 Computer L. *The John Marshall Journal of Information Technology & Privacy Law*, *11*(1), 41. https://repository.jmls.edu/cgi/viewcontent.cgi?article=1390&context=jitps

- for examination of any offense.

It might by request, direct any office of the proper Government to capture, screen, or decode or cause to be caught or checked or unscrambled any data produced, sent, got, or put away in any PC asset. This segment enables the Government to block, screen, or decode any data remembering data of individual nature for any PC asset. Where the data is with the end goal that it should be revealed in broad daylight intrigue, the Government may require exposure of such data. Data identifying with hostile to national exercises that are against national security, penetrates the law or legal obligation or misrepresentation may go under this classification.[62]

CHAPTER 3

International Instruments used for Software Protection

3.1. What are International Instruments?

The Trade-Related parts of Intellectual Property ("TRIPS"), Berne Convention, and World Intellectual Property Organization ("WIPO") have included arrangements for the security of programming. Copyright laws all through the world have broadened insurance for programming.

Worldwide Instruments

Programming is advertised either through customary channels (retailers, e-posteriors (1), and so on) or dispersed from a site with a "tick wrap" (2) permit understanding. Such a game plan leaves a great deal of space for unlawful duplicating of programming. Legal insurance of programming has, in this manner, become progressively significant. The greater part of the nations have altered their copyright laws to incorporate programming inside its ambit. Under copyright laws, assurance is accessible just to the structure or articulation of a thought and not

[62]Marshine, P. M. A. (2003). Software Protection : International Instruments and Trends. *Www.Academia.Edu*. https://www.academia.edu/8316249/Software_Protection_International_Instruments_and_Trends

to the thought itself. The object of copyright assurance in a PC program isn't the fundamental thought, yet the coding languages used to communicate that thought. The coding of the program is done autonomously. All things considered, the thought basic the program is communicated such that varies from how the originator of the program has communicated this thought. The new code accordingly comprises the statement (of the hidden thought) and is ensured however the strategies and calculations inside a program are not secured. [63]Calculation is a rundown of all around characterized guidelines for finishing an errand. It is a lot of directions on what steps are basic to process data by the PC and in what explicit request it needs to play out these activities to do a predefined task. In this way, calculations are minor thoughts which can't be ensured under the copyright law. Source code (3) and article code (4) are the results of calculations; they are the statements of the thoughts contained in the calculations and, along these lines, they can be secured against strict replicating under copyright law (5). "Look and feel" of a PC program given by a software engineer or an interface fashioner additionally can be named as the declaration of thoughts of the developer and the interface creator. Even though this is a non-exacting articulation, it has been managed insurance under the U.S. copyright law. These and different issues concerning programming assurance have been managed in the worldwide instruments. [64]

3.2. Significance and Provisions

Following is a record of the different worldwide instruments for programming assurance with its significance.

i. **TRIPS:**

This is the primary global Treaty to expressly incorporate PC programs inside the illustrative rundown of copyrighted works. Outings presents three unique types of insurance for programming: copyright, patent, and proprietary advantage system. Outings remembers a particular arrangement for Article 10 that explicitly requires part

[63] Miyashita, Y. (1991). Article 3 Winter 1991 International Protection of Computer Software, 11 Computer L.J. 41 (1991) Recommended Citation Yoshiyuki Miyashita, International Protection of Computer Software, 11 Computer L. *The John Marshall Journal of Information Technology & Privacy Law*, *11*(1), 41. https://repository.jmls.edu/cgi/viewcontent.cgi?article=1390&context=jitps

[64] *Software Protection: International Instruments And Trends*. (2018). Www.Legalserviceindia.Com. http://www.legalserviceindia.com/legal/article-3-software-protection-international-instruments-and-trends.html#:~:text=Instruments%20And%20Trends--

states to secure programming, regardless of whether in source or item code, as artistic works under the Berne Convention.[65] In any case, the part nations reserve an option to give more broad security of protected innovation rights inside their national lawful frameworks. Article 27.1 perceives patent insurance for programming related creation for the part states insofar as the innovation fulfills different necessities (6) for patentability which are nation explicit. Along these lines, programming might be conceded patent insurance in a specific nation if it satisfies the particular conditions set out under the laws of that nation. Article 39 of TRIPS gives a choice to copyright assurance. It discusses assurance for undisclosed data and offers a proprietary advantage system for programming security. The proprietary advantage system is material for the insurance of proprietary advantages that may incorporate programming. A specific programming may contain part of important and private data about an organization that shapes its proprietary innovation. Common and criminal activities are accommodated in most enactment against the unapproved revelation or utilization of classified data. For this situation, there is no elite right, however a circuitous sort of assurance dependent on an authentic quality of the data (its mystery nature) and its business esteem. In contrast to licenses, proprietary innovations are secured as long as the data is left well enough alone. In this way, TRIPS doesn't block extra types of security for PC programs and a part can offer patent, copyright, and proprietary innovation insurance for PC programs. Remembering the better expectations of imagination required by patent law the product designer can pick any type of insurance which is generally attractive to him. As the source code is understandable just by a prepared developer and not by typical people, the owners by and large ensure the source code under the proprietary innovation system and the item code is secured as a copyright. Figuring out (7) is one practice that is normal to programming. There has been a discussion with regards to whether figuring out sums to encroachment. Excursions permits figuring out of PC programs just by legitimate roads. Discount duplicating of PC programs is precluded under TRIPS. Duplicating with adjustments to a great extent is allowed and replicating adding up to reasonable use is additionally allowed under the copyright laws of numerous nations. Thus, the act of re-actualizing

[65] Miyashita, Y. (1991). Article 3 Winter 1991 International Protection of Computer Software, 11 Computer L.J. 41 (1991) Recommended Citation Yoshiyuki Miyashita, International Protection of Computer Software, 11 Computer L. *The John Marshall Journal of Information Technology & Privacy Law*, *11*(1), 41. https://repository.jmls.edu/cgi/viewcontent.cgi?article=1390&context=jitps

utilitarian parts of an ensured program in "clones" isn't restricted. It is appropriate to specify here that programs that are autonomously coded and convey a similar useful exhibition or conduct as the originator's product are not said to encroach the last's privileges in his product as this will add up to reasonable use. This energizes rivalry and development by firms in all nations.[66]

ii. Berne Convention:

The Berne Convention doesn't expressly specify PC programs in its illustrative rundown of copyright works. In any case, according to TRIPS, part states ought to perceive PC programs (programming) as abstract works. Article 2 (7) of the Berne Convention makes the insurance of works of applied workmanship dependant on local enactment for example the degree to which assurance might be allowed and the conditions under which such works will be secured is dependant on the rule of the specific nation where the work started. Works specified in Article 2 of the Berne Convention are minor delineations of the sorts of attempts to which copyright may broaden. These representations are not comprehensive. Accordingly, works, for example, PC programs that show utilitarian qualities and contain expressive components can be brought under the ambit of work of applied workmanship. Be that as it may, Article 7 (4) of the Berne Convention absolves, entomb Alia, crafted by applied craftsmanship from the overall term of insurance and sets up a base term of just 25 years from the creation of the work[67]. As article 2 (7) makes the assurance of works of applied craftsmanship dependant on household enactments, the term of insurance might be appropriate in like manner concerning various nations.[68]

iii. Universal Copyright Convention ("UCC"):

Under the UCC's national treatment arrangements, programming made by a U.S. creator or first distributed in the US is ensured in other UCC part nations to the degree

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[66] Miyashita, Y. (1991). Article 3 Winter 1991 International Protection of Computer Software, 11 Computer L.J. 41 (1991) Recommended Citation Yoshiyuki Miyashita, International Protection of Computer Software, 11 Computer L. *The John Marshall Journal of Information Technology & Privacy Law*, *11*(1), 41. https://repository.jmls.edu/cgi/viewcontent.cgi?article=1390&context=jitps

[67] *Copyright Protection of Computer Software*. (2019). Wipo.Int. https://www.wipo.int/copyright/en/activities/software.html

[68] *Software Protection: International Instruments And Trends*. (2018). Www.Legalserviceindia.Com. http://www.legalserviceindia.com/legal/article-3-software-protection-international-instruments-and-trends.html#:~:text=Instruments%20And%20Trends-

that the part nation's copyright laws secure programming. The UCC gives that any part nation that requires, as a state of copyright insurance, consistency with conventions, (for example, enrollment, store or notice) must regard such customs as fulfilled if every single distributed duplicate of a work bear the image "©", the name of the copyright owner and the time of first distribution. This arrangement applies, notwithstanding, just to works that (I) were first distributed outside the nation requiring the recognition of the customs, and (ii) were not composed by one of that nation's nationals. As opposed to the Berne Convention, customs, for example, enlistment are allowed under the UCC to bring an encroachment suit. India being a part of the UCC, creators of programming in the US will get insurance in India likewise according to the terms and conditions set down in the Indian Copyright law.

iv. WIPO Copyright Treaty:

In 1996, two copyright settlements were haggled under the protection of WIPO. These settlements are: WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT"). The WCT of 1996 is a unique consent to the Berne Convention and requires consistency with the Berne Convention. This deal makes expresses that PC programs are ensured as scholarly works under the Berne Convention. It likewise expresses that assemblages of information for which the choice or course of action of the substance are adequately unique are ensured as aggregations. Programming creators are allowed an option to control rentals of PC programs. It requires arrangement countries to give sufficient and compelling security against the circumvention of specialized estimates that confine the capacity of others to practice the rights claimed by the copyright proprietor. Among the nations where topic insurance exists for programming, there are considerable contrasts in the laws and guidelines administering security. For instance, the creator of a "U.S. starting point" work who wants to record a suit for copyright encroachment in the US should initially enroll the work with the U.S. Copyright Office. This isn't the situation with the most different nations. In certain nations, enlistment gives certain evidentiary advantages. In Japan, for instance, the lawful impact of one sort of discretionary enlistment is to make a rebuttable assumption that the program was made on the date pronounced in the application, yet a program must be enrolled inside a half year of its creation. In Venezuela, except if a U.S. writer has just enlisted its product in the U.S. Copyright

Office, when the creator looks to enlist its copyright in Venezuela (which one may do to demonstrate unique

CHAPTER 4

Recent trends used in the Market for Software Protection

The essential job that cybersecurity plays in securing our protection, rights, opportunities, and everything up to and including our physical wellbeing will be more noticeable than any time in recent memory during 2020. Increasingly more of our indispensable framework is coming on the web and powerless against computerized assaults, information penetrates including the break of individual data are getting more regular and greater, and there's an expanding consciousness of political obstruction and state-authorized cyberattacks. The significance of cybersecurity is without a doubt a developing matter of open concern.[69]

We put our confidence in innovation to tackle a significant number of the issues we are confronting, both on a worldwide and individual scale. From cell phones and AI individual collaborators to space travel, restoring malignant growth, and handling environmental change. In any case, as the world turns out to be progressively associated, the open doors for trouble makers to exploit for benefit or political finishes definitely increments. This is what will be head of the plan with regards to cybersecurity over the coming year: +

1. **Man-made consciousness (AI) will assume an expanding job in both digital assault and guard:**

   Computer-based intelligence is the new weapons contest, however dissimilar to prior arms races, anybody can get included there's no requirement for such assets that were already just accessible to governments. This implies while AI is without a doubt being explored and created as the methods for devastating a foe state's polite and resistance framework during war, it's likewise effectively deployable by groups of thugs and fear-based oppressors associations. So as opposed to between countries, the present race is between programmers, saltines, phishers and information hoodlums, and the specialists

[69] *Copyright Protection of Computer Software*. (2019). Wipo.Int. https://www.wipo.int/copyright/en/activities/software.html

in cybersecurity whose activity it is to handle those dangers before they cause us hurt. Similarly, as AI can "learn" to spot examples of happenstance or conduct that can flag an endeavored assault, it can figure out how to adjust to mask a similar conduct and stunt its way past our resistances.[70] This equal advancement of hostile and protective capacities will turn into an inexorably present subject as AI frameworks become more perplexing and, significantly, more accessible and less difficult to send. Everything from spam email endeavors to fool us into uncovering our Visa subtleties to refusal of-administration assaults intended to incapacitate basic framework will develop in recurrence and refinement. Then again, the tech accessible to assist us with abstaining from falling casualty, for example, profound learning security calculations, mechanization of frameworks that are powerless against human blunder, and biometric personality assurance, are showing signs of improvement as well.

2. Political and monetary divisions among east and west lead to expanded security dangers as it appears to a great many people, the web and the online world is a global element generally liberated from outskirts or limitation on the free development of data and thoughts. It's been assembled that way since its draftsmen comprehend the significance of worldwide collaboration with regards to getting to ability and assets. In any case, that is all only a fantasy. The enterprises, systems, and affiliations that give the foundation in the background are lawful elements obliged to follow national laws and guidelines. In 2019, we additionally observed the US government adequately banning organizations between US tech firms and the Chinese versatile mammoth Huawei, because of fears over the nearby connections among Huawei and the Chinese state. On the off chance that more hindrances like these go up, it could undoubtedly have the impact of forestalling global collaboration on both the innovative and administrative difficulties of cybersecurity, and that is just prone to profit the trouble makers.[71]

[70]Marshine, P. M. A. (2003). Software Protection : International Instruments and Trends. *Www.Academia.Edu*. https://www.academia.edu/8316249/Software_Protection_International_Instruments_and_Trends

[71] Miyashita, Y. (1991). Article 3 Winter 1991 International Protection of Computer Software, 11 Computer L.J. 41 (1991) Recommended Citation Yoshiyuki Miyashita, International Protection of Computer Software, 11 Computer L. *The John Marshall Journal of Information Technology & Privacy Law*, *11*(1), 41. https://repository.jmls.edu/cgi/viewcontent.cgi?article=1390&context=jitps

3. **Political obstruction progressively normal and progressively modern:**

Directed disinformation battles planned for influencing general assessment have nearly become an acknowledged element of vote based system today. With a US presidential political decision coming up in 2020, it appears to be sure that they will stand out as truly newsworthy indeed. Up until now, cybercrime focusing on decisions has taken two structures. The first includes the spreading of "counterfeit news" and bogus accounts – normally intended to slur an applicant – by means of web-based life. The second is immediate assaults against applicants' or advanced discretionary foundation. Countering the bogus stories implies building frameworks, either robotized or manual, that can filter out untruths, purposeful publicity, and dishonesty by breaking down both substance and metadata – where the data begins from, and who is probably going to have made it. Facebook and Google have both put resources into innovation intended to decide if political informing fits designs that recommend it could be a piece of a focused on "counterfeit news" crusades. This is a direct result of the staggering proof that these strategies are in effect progressively received by state entertainers with the point of causing political turmoil. The Chinese government has been associated with endeavoring to push a supportive of China story around decisions in Taiwan and common fights in Hong Kong utilizing counterfeit online networking records, and applicants' private messages were hacked and delivered in both the 2016 US races and the 2017 French races. [72]

4. **The cybersecurity aptitudes hole keeps on developing:**

During 2020, research proposes the number of unfilled cybersecurity employments will increment from only 1 million of every 2014 to 3.5 million. This shortfall of abilities is probably going to turn into a developing matter of open worry during the early piece of this new decade. The dangers we face in the internet today, from cheats endeavoring to clone personalities to do extortion, to political disinformation crusades intended to adjust the course of popular governments, will just turn out to be more exceptional except if there are adequate individuals with the abilities to counter them getting through the pipeline. Without putting resources into preparing existing staff on the best way to forestall or moderate cyberattacks in their field, just as employing specialists

[72] *Software Protection: International Instruments And Trends*. (2018). Www.Legalserviceindia.Com. http://www.legalserviceindia.com/legal/article-3-software-protection-international-instruments-and-trends.html#:~:text=Instruments%20And%20Trends-

with the aptitudes to spot new dangers not too far off, the industry stands to lose a huge number of dollars. The current normal expense caused by an organization in the US that ensures information penetrates remains at $8.19 million. Among associations that have actualized completely robotized cybersecurity resistances, that cost drops to $2.6 million. Actualizing these develop protections expects access to a talented, experienced cybersecurity workforce – something that is probably going to progressively turn into a test in the coming years.[73]

5. **Vehicle hacking and information robbery increments:**

Indeed, even before we get into the subject of self-driving vehicles, vehicles today are fundamentally moving information manufacturing plants. Present-day vehicles are fitted with a variety of GPS gadgets, sensors, and in-vehicle correspondence and diversion stages that make them an undeniably productive objective for programmers and information criminals. Hoodlums have figured out how to piggyback into private systems through associated home machines and keen gadgets, because of the absence of security guidelines among a huge number of gadget producers and specialist organizations. In like manner, the vehicle is probably going to progressively turn into the secondary passage of decision in the coming years because of the developing measure of information they gather and store about our everyday lives. Aggressors will have the decision of focusing on either the vehicles themselves, maybe utilizing them to get to email records and afterward close to home data, or the cloud administrations where our information is routinely sent for capacity and investigation. Enormous scope reaping and resale of this information on the bootleg market is exceptionally rewarding for cybercriminals. Another genuine risk is that pernicious entertainers could figure out how to bargain the advanced controls and wellbeing highlights of present-day vehicles. Hijacking self-ruling vehicles and assuming control over their controls may appear to be unrealistic at present, however, it's a danger that is being paid attention to by the car business just as legislators. During 2020, we're probably going to see more discussion over this part of the wellbeing of self-driving vehicles, as the administrative system that will permit them to work on our streets keeps on coming to fruition.[74]

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[73] *Copyright Protection of Computer Software*. (2019). Wipo.Int. https://www.wipo.int/copyright/en/activities/software.html

[74] Marshine, P. M. A. (2003). Software Protection : International Instruments and Trends. *Www.Academia.Edu*. https://www.academia.edu/8316249/Software_Protection_International_Instruments_and_Trends

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CHAPTER 5

Conclusion

Pilfered programming influences programming engineers, retail location proprietors, and all product clients. Besides, the unlawful duplication and conveyance of programming significantly affects the economy. This requires its more grounded lawful assurance. The essential assurance of programming in India is found in the Copyrights Act, 1957. There are not many cases relating to assurance of programming in India, the greater part of them with Microsoft Corporation as the wronged party. In one of these cases (17), the Delhi High Court granted reformatory and commendable harms against the transgressor who were engaged with robbery exercises by hard-circle stacking. With the developing idea of programming innovation parks and the significance of programming in each business, an ever-increasing number of organizations need security under the lawful system to hinder programming theft. The accessibility of injunctive alleviation and criminal cures are especially indispensable to the product business. Programming designers frequently depend on common ex parte injunctive systems to recognize infringers. Be that as it may, common systems in many creating countries are tedious, cost-restrictive, and to a great extent insufficient against proficient lawbreakers. In this way, programming engineers are regularly compelled to depend on criminal arraignments by open specialists to stop wild robbery of their items.

EQ. Citation: BNWJ-0920-099

4.

Legality of Put Option Under Securities Contract Regulation Act, 1956

By: Divyanshi Singhal

Pg. No.: 64-76

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Abstract

The put option is very important and commonly found in different types of transaction structures such as private equity, joint venture, venture capital, angel investors. Now it has become the most popular exit mechanism in India and Foreign countries. Even though Put Option has become acceptable worldwide way before but in India, till 2013 the legality of put option was in question. Various amendments and notifications have been brought but controversies and legal battles didn't end until SEBI issued a notification in 2013 to expand the scope of permissible contracts under the Securities and Contract Regulation Act, 1956 to include option contracts in its sphere.

This paper begins with a basic understanding of the put option and its relevance. It tells how put options are helpful to investors. Further, this paper discusses the obstacles in enforcing an option contract under SCRA, 1956, and the status of put option in India before it is made enforceable by SEBI. This paper throws light on the SEBI notification 2013 that reversed the position SEBI has maintained for a long and opened the door for options in India. This paper further discusses put option's legal position before 2013 and how it became enforceable after the landmark judgment passed by Bombay High Court in MCX Stock Market v. SEBI. This paper concludes that the 2013 notification is a welcome move and will bring great relief to the domestic investors along with RBI's perspective on permitting options.

Keywords: Put option, SEBI Notification, Legal position.

EQ. Citation: BNWJ-0920-099

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CHAPTER 1

Introduction

1.1. Meaning of Put Option

Options are very popular exit mechanisms in India and various other countries. They are often found in different types of transaction structures like angel investors, private equity, joint ventures, venture capital, etc. In India, the Securities Exchange Board of India, The Reserve Bank of India, The Ministry of Finance, The Ministry of Corporate Affairs take care of the rules and regulations for option trading.

According to Securities Contract Regulation Act, 1956 section 2(d) "option in securities" means a contract for the purchase or sale of a right to buy or sell, or a right to buy and sell, securities in future, and includes… a put, a call or a put and call in securities.

Options are the derivatives contracts. Option in securities is of two types- call option and put option. The call option is a right of buying the shares at a future date but a predetermined price. The put option is a right of selling the securities or shares at a future date but a predetermined price.

A put option is nothing but a contract for the sale or purchase of a right to obtain securities at a predetermined rate in the future. "Buying a put option is not an obligation but a right of selling an agreed amount of a financial instrument or particular commodity to the seller at a future date for a predetermined price called the exercise price."[75]

For better understanding let's consider an example, suppose an investor realized that at this point of time the stock market is bullish and the market rate of the share is high say Rs 1000, so he will buy a put option for one share by paying put option premium for 30 days. On the 29th day, the investor realized that the rate of the share fell and the market rate of the share became Rs 800. So, on that day investors will strike and buy a share for Rs 800 and exercise

[75] The Commissioner of Income Tax v. Bharat R Ruia, (Bombay HC, 2010).

his right to sell the same share at Rs 1000. Hence, the net profit of the investor will be Rs 200 on a share.

1.2. Relevance of Put Option

Put options have become famous in commercial practice and commonly feature in various agreements. These options are usually exercised by an investor when he wants to liquidate his investment, either to reduce the risk of loss of capital. Investors use put options in a risk-management strategy and this strategy is known as a protective put. The protective put strategy is adopted so that it can be ensured that losses in the underlying asset do not go beyond a certain amount called the exercise price or strike price and this strategy is used as a form of investment insurance.[76] Many Disagreements and conflicts are there while enforcing these options under various circumstances which we will discuss in detail.

CHAPTER 2

The Prohibition Years

The Securities and Contract Regulation Act (SCRA) regulates contracts in securities of any incorporated company or any other body corporate. SCRA's preamble states that it was enacted to avert undesirable transactions in securities. Initially, section 20 of the SCRA declared 'options in securities" as illegal.

A notification issued by the Central Government in 1961, in which it was stated that the rights which are contained in the promotion agreements or collaboration agreements or the Articles of Association of limited companies such as pre-emption contracts or any other rights similar to pre-emption contracts, would not come under the ambit of SCRA. Even though the option contracts are similar to pre-emption rights, but it was not clear whether this 1961 notification would hold good to option contracts or not. Section 20 of SCRA was in force when this

[76] Kuepper, J, (2020, August11). *Put Option definition*, Investopedia. https://www.investopedia.com/terms/p/putoption.asp.

notification was issued, and it was interpreted that this notification would not hold good to option contracts.[77]

2.1. 1969 Notification

In 1969 Central Government issued another notification under SCRA where under all contracts for the purchase or sale of securities were declared void except 'spot delivery contracts' or those contracts which settle through the stock exchange.[78]

According to SCRA, 1956 section 2 (i) spot delivery contract is a contract which provides for –

a) payment of price on the date on which contract is entered into or on the next day for actual delivery of securities;

b) or transfer of securities done by a depository.

Notification of 1969 expressly eliminated the options in contracts and considered them as non-spot delivery contracts. However, some amendments were made in 1995 in the provisions of SCRA. This amendment removed the words "by prohibiting options" from the Preamble of SCRA. Also, it eliminated section 20 of SCRA which considered options in securities as illegal.

2.2. 2000 Notification

This 2000 Notification repealed the 1969 notification. This notification introduced a new section 18-A to the SCRA which provides that, notwithstanding anything contained in any other law for the time being in force, derivatives contract will be treated as legal, if they are traded and settled through the stock exchange after complying with all the norms and bye-laws

[77] Law Associates, D. H. (2013, May), *Enforceability of options in Investment Agreements,* Manupatra. https://www.manupatrafast.in/NewsletterArchives/listing/Newslex%20DHLaw/2013/Resources_%20Newslex%20-%20May%202013%20-%20D.%20H.pdf.
[78] Ibid.

of such stock exchange in which options are traded. However, in March 2000 SEBI too issued a notification containing provisions similar to those in the 1969 notification.[79]

The reason behind introducing Section 18-A was to bring clarity among investors and authorities about the derivatives which being introduced by the said notification. Those derivatives do not form a wagering contract under section 30 of the Indian Contract Act, 1872. Hence, section 18-A was introduced to remove the confusion and to keep away from the chance of such derivatives being declared as void in the name of being wagers.

The use of options in the agreements was prohibited by SEBI in the case of the Cairn and Vedanta merger and Diageo and United Spirits merger.[80] In 2011 SEBI issued informal guidance to Vulcan Engineers Limited wherein it restated that only spot delivery contracts are valid and a call or a put option does not fall under the category of spot delivery contracts. Hence, options were considered as forward contracts or derivatives by SEBI and could not be enforced under SCRA.[81]

Even though Put Option has become acceptable worldwide way before but in India, till 2013 the legality of put option was in question. Various amendments and notifications have been brought but controversies and regulatory obstacles didn't end until SEBI issued a notification in 2013 to expand the scope of permissible contracts under the Securities and Contract Regulation Act, 1956 to include option contracts in its sphere.

CHAPTER 3

Inclusion of Option Contracts by SEBI Notification, 2013

SEBI issued a notification on October 3, 2013, which revoked the 2000 Notification issued by SEBI to expand the scope of permissible contracts under the SCRA to include option contracts in its sphere. This notification was issued after the landmark judgment passed by the Bombay

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[79] Supra note 3.
[80] Begur, R. (2016, May 5) *India: Option Contracts: Enforceability issues,* Mondaq. https://www.mondaq.com/india/securities/488800/option-contracts-enforceability-issues?type=mondaqai&score=74.
[81] Vinod, J., Chakarbarti, P., Agarwal, A., Basu, P (2019, November 4) *India: Put options- Enforcement and Claiming Damages & Indemnity*, Mondaq. https://www.mondaq.com/india/fund-management-reits/860054/put-options--enforcement-and-claiming-damages-indemnity.

High Court in favor of trading options in the securities market. This notification stated that the trading of option contracts would be valid in agreements of shareholders and the Articles of Association of various companies if it follows certain conditions. Conditions are:

1. The minimum period for the holding of ownership and title of the underlying securities by the seller should be one year from the date on which the contract is entered into.

2. the amount which is due on sale or purchase of derivatives under the exercise of any option contained therein should comply with all the laws.

3. The mode should be actual delivery to settle the contract of underlying securities. These contracts of underlying securities have to follow the provisions of the Foreign Exchange and Management Act,1999.

The SEBI explained in its 2013 notification that according to section 18-A of SCRA (which was introduced in 2000 notification of SEBI) if derivatives are traded as per the norms and bye-laws of a recognized stock exchange and settled by the recognized stock exchange on the clearinghouse then contracts in derivatives will be valid in the eyes of law and hence are enforceable.[82]

CHAPTER 4

Judicial Decisions on the Nature of Put Options

It is important to note that SEBI's notification in 2000, regulates only 'contract for the sale' or 'purchase of securities'. If we talk about the nature of the options, options are considered as a contingent contract that means they will become contract only on the event of actual sale or purchase. Hence, options belong to the category of contingent contracts that do not come under the category of the SCRA and notification passed in 2000 by SEBI. The nature of put options has been debated frequently. Let's understand what was the view of the Bombay High Court in regard to this matter.

[82] *THE GAZETTE OF INDIA EXTRAORDINARY PART -III -SECTION 4 PUBLISHED BY AUTHORITY NEW DELHI, OCTOBER 3, 2013 SECURITIES AND EXCHANGE BOARD OF INDIA NOTIFICATION Mumbai, the 3 SECURITIES AND EXCHANGE BOARD OF INDIA Notification under Section 16 and 28 of Securities Contracts (Regulation) Act, 1956*, 2013. https://www.sebi.gov.in/sebi_data/attachdocs/1380791858733.pdf.

4.1. Jethalal C Thakkar v. R. N. Kapur

In the Jethalal C Thakkar v. R. N. Kapur,[83] a question arose before a Bombay High Court that whether contingent contracts belong to the category of ready delivery contracts. Ready delivery contracts are considered valid or legal under the Bombay Securities Contracts Control Act, 1925. When the scope of the ready delivery contract is analyzed under the Bombay Securities Contracts Control Act, 1925 (which on similar lines with SCRA) it was held that ready delivery contracts should be performed within a reasonable period of time and no particular time is specified for the performance of such contracts. Hence, Bombay HC concluded that where there no present obligation exists in contracts for purchase or sale of shares, and if due to some condition obligation arises then the occurrence of any contingency would be valid and such contracts would fall within the scope of ready delivery contracts. Because of the similarity between the nature of ready delivery contracts and put options, it was interpreted in this case that put options would be enforceable in law.

4.2. Nishkalp Investments and Trading Company Limited v. Hinduja TMT Limited

The principle laid down in Jethalal C Thakkar v. R. N. Kapur was rejected by the Bombay High court in Nishkalp Investments and Trading Company Limited v. Hinduja TMT Limited.[84] In this case, Bombay High Court observed that a contingent contract is within the scope of SCRA, 1956, and is lawfully applicable under it. In this case, there was a repurchase of a certain number of shares and those shares were unlisted by a certain agreed date. The Bombay High Court interpreted that the provisions of a spot delivery contract under the SCRA, 1956 are not in the lines with the provisions of the ready delivery contract as provided under the Bombay Securities Contracts Control Act, 1925. Therefore, the Bombay High Court held that as a contingent contract for an arrangement of buyback of shares did not fall within the scope of a spot delivery contract (section 2 of SCRA) and it cannot be made enforceable.

[83] Jethalal C Thakkar v. R. N. Kapur, (Bom HC, 1956).
[84] Nishkalp Investments and Trading Company Limited v. Hinduja TMT Limited, (Bombay HC, 2008).

CHAPTER 5

Legal Position in the Light of MCX Stock Exchange Ltd. v. SEBI

The Bombay High Court in its judgment has provided clarity on the enforceability of option contracts under the SCRA, 1956, which has been the subject matter of constant controversies and debates amongst the investor community.

5.1. Facts and Background

MCX Stock exchange challenged the order of the Whole Time Member of the SEBI as SEBI rejected the application filed by MCX Stock exchange seeking SEBI's approval to undertake the business of stock exchange. After receiving SEBI's order MCX Stock exchange moved to the Bombay High Court, challenging the legality of the order passed by SEBI. On August 12, 2008, the MCX Stock exchange applied to the SEBI to work as a stock exchange. Later, on August 23, 2008, the SEBI allowed an in-principal approval to MCX Stock exchange for the same, subject to full compliance with the provisions of the MIMPS Regulations. Numerous measures have been undertaken by MCX Stock Exchange and its promoters to reduce shareholdings or ownership of the promoters of MCX Stock exchange such as share purchase agreements, making arrangements with the banks for preferential issue of shares, a scheme of reduction, and arrangement under section 391 to 393 of the Companies Act, 1956. Punjab National Bank was one of the banks to which shares were allotted on a preferential basis. An exit option was offered to Punjab National Bank in the form of a buyback arrangement exercisable against the MCX Stock Exchange or its promoters as a term of its investment. A similar kind of exit option was offered to IL&FS Financial Services Limited as a term of its investment (collectively mentioned as "Options"). Each option had a fixed exercise period and an IRR component was also included in the price at which the option could be exercised.[85]

[85] Sharma, S., Sharma, V., Reis, S., (2012, April 20), SEBI v. MCX – HAS THE VALIDITY OF 'OPTIONS' ATTAINED FINALITY? Nishith Desai Associates. http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/sebi-vs-mcx-has-the-validity-of-options-attained-finality.html?no_cache=1&cHash=0b96cccc6ef82856f7708435a364f18e.

On April 7, 2010, after complying with all the regulations of MIMPS, the MCX Stock exchange informed the SEBI. However, on September 23, 2010, the Whole Time Member of SEBI passed the order on behalf of SEBI and rejected the application of MCX Stock Exchange primarily because it has failed to abide the MIMPS regulations in complying with modes of reducing promoter shareholding, the concentration of economic interest of MCX Stock Exchange within the hands of its promoters, failing to seek the opinion of SEBI in compliance of the Scheme with the MIMPS Regulations, non-disclosure of the Option arrangements with IL&FS and PNB and the illegality thereof on the ground that they were like forward contracts not valid and legal under the SCRA. This is SEBI's mind leads to the conclusion that the MCX Stock Exchange failed to meet the 'fit and proper' criteria required of an entity desirous of operating a stock exchange. The Bombay High Court realized that there was a bona fide and a genuine attempt by the MCX Stock Exchange to reduce the shareholding under the MIMPS Regulations and hence set aside the SEBI's Order.[86]

5.2. Submissions by SEBI

SEBI made the following submissions:

- the Options which were to be exercised at a future date were like 'forward contract'. Hence, such Options do not fall under the scope of contracts for purchase or sale of securities under Section 16 of the SCRA,1956, and are not valid.
- SEBI also contended that the SCRA was enacted to avert undesirable securities transactions by regulating the dealings therein. Also, the provisions of SCRA deals with the contracts in securities which are like options, contracts in derivatives, spot delivery contracts, etc. To prevent undesirable speculation the Central Government can prohibit any person or state or area from entering into the contract related to the security. This power has been provided by SCRA to Central Government. By Notification on 1 March 2000, SEBI, issued directions under Section 16 of SCRA to state as under:

[86] Ibid.

1. If any person wants to enter into the contract related to the sale or purchase of securities other than a spot delivery contract can enter into a contract after getting the permission of SEBI.[87]

5.3. Observations Made by Bombay High Court

After analyzing the submissions of the SEBI, it was observed by the High Court that options constitute the privilege of the option holder, the exercise of which depends upon their unilateral volition. It depends on the discretion of the option holder whether he wants to exercise this privilege or not. The counterparty or opposite party cannot compel the option holder for the execution of the contract. Therefore, it was observed by the High court that if and only if options are exercised by the option holder a concluded contract for sale and purchase of shares would come into the picture. The High Court observed a significant difference between an option contract and a forward or futures contract and concluded that a forward contract involves a contract for the purchase and sale of securities at future date and a specified price.[88]

Spot delivery contract is a permissible mode of transacting under the SCRA. Further, the High Court observed that if the options were exercised by Punjab National Bank or IL&FS it would not come under the category of spot delivery contracts. The High Court also observed that if securities are dealt with by some depository and depository transferred the securities to the purchaser's account from the seller's account then it would come under the purview of spot delivery.

SEBI also contended before High Court that options are like derivatives and SCRA was enacted to prohibit the trading of such derivatives. It further argued that derivatives are prohibited under section 18-A of the SCRA which was recently introduced by the 2000 notification. In this context, the High court observed that if derivatives are traded on the floor of a recognized stock exchange after complying with all the norms and bye-laws of such stock exchange then such trading would be valid under section 18-A of the SCRA.[89]

The Special Leave Petition was filed by the SEBI in the Supreme court under Article 136 of the Constitution of India as it was not satisfied with the decision passed by the Bombay High Court. But Supreme Court disposed of the Special Leave Petition for the reasons stated above.

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[87] Supra at 11.
[88] Supra at 11.
[89] Supra at 11.

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CHAPTER 6

Conclusion

The question of the validity of put options has been raised frequently. Even though SEBI made the option contracts enforceable but if we talk about RBI, it has often been uncomfortable with such kind of contracts. RBI's perspective on put option was that these contracts are like debt if compared to equity, therefore such contracts defeat the spirit of foreign direct investment policy. It seems like SEBI consulted with the RBI before coming up with this notification. Later, on 9th January, 2014, RBI also issued a circular to permit options.

As discussed above, it can be said that the 2013 notification was a welcome move by the SEBI to make put options enforceable. Bombay High court cleared the doubts regarding the enforceability of options which was a very controversial topic until judgment in MCX Stock Exchange v. SEBI was not passed. If we talk about the recent decisions related to put options, the Bombay High Court in March 2019 passed a similar judgment as of MCX Stock Exchange v. SEBI in Edelweiss Financial Services Ltd v. Percept Finserve Pvt. Ltd.[90] and upheld the validity of put options under SCRA, 1956.

[90] Edelweiss Financial Services Ltd v. Percept Finserve Pvt. Ltd., (2019, Bombay High Court).

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5.

Emerging Trends in Digital Copyright Law

By: Sushmita Srivastava

Pg. No.: 77-91

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Abstract

In this digital world, our lives are incomplete without the use of multimedia, technology through phones, tablets, or computers. The advancement of digital technology is the finest creations by the human mind and with the increasing importance of electronic and digital media, there is easy access for everything that is provided on a digital platform which leads to copyright infringement. Thus, the importance of electronic and digital media needs laws to protect the owner of the copyright. Copyright is the main intellectual property rights that contains the rights possessed by the creators of literary or artistic work. The Copyright Act 1957 does not specify about the copyrighted work in the digital work but with the emergence of the use of technology in day to day lives the Copyright Amendment was done by the Copyright Amendment Act 2012 which gave attention to the copyright issues in the electronic and digital media, this protects different multimedia contents such as videos, photos, websites, memes, operating systems and many more.

Therefore, in the following paper we will be discussing about the laws that deal with copyright issues with special indication to digital exploitation in copyright, issues faced before the amendment of the Copyright Act in 2012, the digital Millennium Copyright Act, and issues of digital copyright laws, and how the copyright act has adopted new trends with the technological advancements and digital world.

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CHAPTER 1

Introduction

In general terms, Copyright is the type of intellectual property that protects creative work Such as songs, books, movies, sound-recording, sculptures and software, etc Copyright is the right to copy, it refers to the legal right of the Owner or creator of the intellectual property. Copyright laws Safeguards the rights of authors over their creation and protection of their creativity. The copyright protects the efforts of the Writers, musicians, designers, artists, and every other individual involved in the atmosphere of creativity. The symbol of copyright is © whereas for sound recording copyright symbol is p in circle. This symbol indicates that somebody legally owns the right to make and distribute copies of a particular work. Whereas in the legal world the intellectual rights are created

which are granted to a person for creative work, for any invention or discovery. The owners of Intellectual Property are granted exclusive legal rights to use their property without any violation and misuse of any kind. Intellectual property in India is governed under the Patents Act, 1970; Trademarks Act, 1999; Indian Copyright Act, 1957; Designs Act, 2001, etc. thus, copyright in legal terms though not defined in the Copyright Act 1957, generally means the "right to copy" which is available only to the author or the creator, or any other individual having the right to copy such. Thus, any other person who copies the original work of the author, creator, etc will amount to violate or infringement under the Indian Copyright Act, 1957. But under CHAPTER III, Section 13 of the Copyright Act, states some work in which copyright subsists:

1. Literary work including computer programs, including computer literary databases
2. Dramatic works
3. Musical works

4 Artistic work, sound recording, and Cinematograph films

The copyright law helps to regulate the creative artistic work and there use and exploitation of creative labor as well. It protects and promotes the authors, artists, composers, etc in the creation of original work a provision is made which provides the exclusive right to the original owner to do certain acts. The main principle of copyright law is that if anyone creates any

kind of original work by his skill, capital or labor shall for a limited period can enjoy an exclusive right to reproduce such work.

CHAPTER 2

Copyright and the Digital World

In the 20th century where technology is the utmost need in the lives of people and with the rapid growth in advancement in the digital world. Nowadays all the technological advancement is done for gaining economic benefit. And intellectual property rights have given a right over the property of the individual but the issue came up that whether the intellectual property gave the right to protect the digital work or not. The emergence of digital copyright came after the amendment in 2012 wherein the cinematographic work, lyricist of music, and many other digitalized works came into recognition. The adoption of digital copyright lead to piracy of digital work. Due to the Digitization, Now it easier to manipulate, reproduce, and distribute the protected works which means the content that is online on a digital platform can be altered, mixed and manipulated and combined easily as the internet is an open structure model and this technology enables the user to actively search and manipulated the information provided on the internet and by this users are becoming the authors. The item can be downloaded at any time and any place which eventually leads to the infringement of the real owner or the creator of the copyright as the contract made between the consumer and the owner are not able to restrain the infringement made under the digital world. At the time of the enactment of the Copyright Act,1957 there was not much advancement in the technology and thus the agreement for rights and exploitation was not made. Therefore, it becomes difficult for the copyright owners to protect their rights generally in multimedia. Thus, there was a need for Digital Right Management (DRM) which is used to reduce the level of risk and protect the copyright in a digital environment with the advancement of the technology. These DRM schemes are known as the control technologies, which enable authorized access to digital contents and restrict unauthorized duplication, modification of Copyrighted work such as software, music, videos, and movies[91].

[91] Editorial Staff. (2017, February 28). Copyright in the Digital World. Selvam & Selvam. https://selvams.com/blog/copyright-in-the-digital

Thus, the importance of electronic and digital media requires the laws which can protect the copyright owners and the creators, which was made after the amendment in 2012. Further, we will be discussing how these digital copyright laws came into effect broadly.

CHAPTER 3

Copyright Act, 1957 Amendments before 2012

The copyright Act,1957 is the oldest legislation in the IPR in India and it has been amended five times before the amendment in 2012, each in the year 1983,1984,1992,1994, and 1995 to meet the national as well as the international needs.

A few amendments were made in 1983 and 1984. However, keeping in view the latest developments in technology, especially in the field of computer and digital technologies, there was a new comprehensive Copyright Act. To bring in a new act the work commenced in 1987 and in 1990-91 a group was set up by the Ministry of Human Resource Development. The recommendations were given by the group were introduced in the Parliament and in august 1992, a motion for reference of the Bill to the Joint committee of both houses was adopted. On 24th August 1993, The Report of the Joint Committee and Bill along with the changes recommended by it were presented to the Parliament. The Joint committee had the views on various clauses of the Bill of a wide cross-section of members of public no-official organizations concerned with Copyright matters and experts. The Copyright Second Amendment Bill 1992 as amended and on 11th may 1994 it was passed by the House of parliament and on 13th May 1994[92].

The Copyright Amendment Act, 1994

Now, focusing on the current scenario which is digitalized and according to Peter S Menell, digital uprising is the third of the technological invention which heralded considerable effects

[92] Kumar, A. (1997). Problems of Copyright Enforcement in India (pp. 14–18). https://www.niscair.res.in/jinfo/JIPR/JIPR%202(1)%20(Copyright%20Enforcement%20in%20India).pdf

on copyright protection. he first was the printing press which brought in the methods of "mechanically storing and reproducing works of authorship, such as photography, motion pictures and sound recordings. Second was the advent of broadcasting, where it enabled to perform the work of an author at different locations. The "Digital Media is the new mode of expressing the creative work. This is made possible by computer programming and digital sampling. This has empowered anyone with a computer and an internet connection to flawlessly, inexpensively, and instantaneously copy or reproduce and distribute the work. This technological change is the greatest challenge to the copyright law.

CHAPTER 4

Gist of The Copyright Amendment Act, 2012

In May 2012, the Indian Parliament unanimously placed their seal on the Copyright Amendment Bill, 2012, and enacted the Indian copyright law into compliance with the World Intellectual Property Organization "Internet Treaties".

The 2012 amendments make Indian Copyright Law with the Internet Treaties – the WIPO Copyright Treaty and Performances and Phonograms Treaty WPPT[93].

1. **WIPO Copyright Treaty:** The WIPO Copyright Treaty is an agreement that is covered under the Berne Convention which deals with digital environment protection of works and their authors right in it. Any Contracting Party must adhere to the substantive provisions of the 1971 Act of Paris of the Berne Convention to protect the artistic and literary work.

   The WCT has two subject matters to be protected by copyright for the digital era

   (i) computer programs

   (ii) compilations of data or databases

   Treaty also grants:

[93] Panday, Abhay. (2013, January 22). Development In Indian IP Law: The Copyright (Amendment) Act 2012. https://www.ip-watch.org/2013/01/22/development-in-indian-ip-law-the-copyright-amendment-act-2012

(i) the distribution rights – is the right to give authority to the public by distributing the right of the original and copies of a work through sale;

(ii) the rental rights – it includes the right to ensure commercial rent to the public for the original and copies of the work of three kinds such as computer programs, cinematographic works;

(iii) broader communication rights to the public – to communicate to the public, through various means such as wired or wireless mode.

(i) **Treaty WPPT** - The Performances and Phonograms Treaty deals in the rights concerned with digital environment which are basically of two kinds performers such as actors, singers, musicians, etc; and

(ii) Producers of an individual or any legal entity that have the responsibility for the fixation of sounds.

Treaty grants performers economic rights in their performances such as:

(i) the right of reproduction - is the right to provide direct or indirect reproduction of the phonogram in any form.

(ii) the right of distribution- is the right to give authority to the public by distributing the right of the original and copies of a phonogram through sale.

(iii) the right of rental- it includes the right to ensure commercial rent to the public for the phonogram.

CHAPTER 5

The Copyright Amendment Act, 2012

The amendments introduced through the Copyright (Amendment) Act 2012 are:

1. **Amendments in rights in artistic works, cinematograph films, and sound recordings[94]:** These amendments were particularly made to address the technological issues particularly the issue of storing and challenges the digital era. 14th section of the

[94] Development In Indian IP Law: The Copyright (Amendment) Act 2012. (2013, January 22). Intellectual Property Watch. https://www.ip-watch.org/2013/01/22/development-in-indian-ip-law-the-copyright-amendment-act-2012/#:~:text=In%20May%202012%2C%20both%20houses

Act has been amended which provides the exclusive rights in respect of work and by this amendment is clarifies the rights in relation with the artistic work, sound recordings, and the cinematograph films which provides the right to reproduce or to make a copy of the artistic work and cinematograph films or to store a sound recording by any electronic medium. The definition section was also amended, **2(f)** the definition of cinematograph films has been amended and the amendment also introduces a new definition of visual recording in the **clause xxa**.

2. **WCT and WPPT related amendment to rights:** The amendment is made under section 14 which related to the meaning of copyright which provides the right of commercial rent to sound recordings and cinematograph films by amending the word hire by replacing it with commercial rent and further providing the right to sell or renting the copy of the sound recording of the film.

   The Amendment has also introduced the definition of 'commercial rental' which clarifies that the right does not apply to activities that are non-commercial, giving 'hire' which includes the activities of educational institutions such as libraries. These amendments also focus on the performers rights by amending section 38 which guaranteed negative rights and thus section 38A was introduced which provides an exclusive right to:

   a. Make sound recording or visual recording for performances
   b. Reproduce or store it in any electronic medium or form
   c. Issue copies to the public if not already circulated
   d. Sell or give as a commercial rent

   These rights enable the performer to earn royalty and thus by these amendments these negative rights have been changed into a positive one.

3. **Author-friendly mode of Assignment and Licenses:** The main focus in this part is given on the assignment of rights, in this amendment a second proviso is inserted under section 18(1) which states that no assignment shall apply to any mode of exploitation that was not in commercial use when it was made. Another proviso was also made **for the authors of literary or musical work that are incorporated in sound recordings or** cinematograph films shall not receive royalties in any other form apart from there

part of a film or recording. Thus, the main objective of this amendment is to strengthen the authors from any kind of exploitation from work that exists in any mode or form[95].

4. **Amendments related to Access to Works:** These amendments include Grant of Compulsory Licenses, Grant of Statutory Licenses, Administration of Copyright Societies, Fair Use Provisions, Access to copyrighted works by the Disabled Relinquishment of copyright. Under the compulsory licenses the amendment was made under section 31 and by this amendment amplifies applicability from the Indian work to any work and license can be granted to such person as the board may decide.
   Statutory licenses were included which provide a license to any person who desires to make a cover of a sound recording in respect of any literary, musical, or artistic work by inserting a new section 31C, but it also stated that the person making such cover version shall give prior notice to the owner in the prescribed manner.
   Administration of Copyright Societies, sections 33, 34, and 35 deals with such societies Which focused on their functioning. All these societies have registered themselves fresh for 5 years. Also, there are specific amendments made to protect and
   favor the authors under section 35. The amendment made under the provision of fair use will not lead to infringement of copyright under section 52 and with this amendment the provision of fair use has been extended to the sound recordings and the cinematograph films as well as it is extended to the digital environment and this provision ensures that the technological advancements will also be covered under this context.

5. **Strengthening enforcement and protecting against Internet piracy:** Under these three main concepts were focused namely Strengthening of Border Measures, Protection of Technological Measures, and Digital Rights Management Information
   The amendment under Strengthening of Border Measures includes section 53 which deals with the importation of infringing copies by restricting control over the imports by the custom department. Under the Protection of Technological Measure, a new section was introduced section 65A, this measure is used by the owner or the creator of

[95] Ghosh, J. (2018). Emerging Trends in "Digital Environment" Under The Indian Copyright Regime' Impact of Social Welfare Schemes among the PVTG's in West Bengal View project Rule of law Vis-a-vis Human Rights in India with Special Reference to child View project.

the copyright to protect the right in relation to the work. under Digital Rights Management Information, section 65B has been introduced to provide protection for RMI which is defined under section 2 clause (xa) these were introduced in WCT and WPPT as an effective measure to prevent infringement of copyright in the digital world. Sections 65A and B came into effect to help the music, film, and publishing industry to fight against piracy[96].

6. **Reform of Copyright Board and other minor amendments:** Section 11 was also Amended which relates to the board's constitution which earlier comprises members up to 14 which now consist of a chairman and two members also a provision was also introduced in the areas of payments and salaries too.
   Thus, all the amendments that were in 2012 were best possibly made for the digital environment and with this present amendments, India is among a few countries which have extended the fair use provision and rights to the digital era.

CHAPTER 6

Challenges faced by Copyright in the Digital World

The four main challenges that are faced in the digital world include copyright and internet, multimedia work, social media, and software.

1. **Copyright and internet:** The Internet is the major threats to copyright for a long time. Copyrighted works on the internet include many things such as news, stories, images, graphics, e-books, videos, and many more. The ocean of information available on the internet makes it difficult to determine whether the work is a duplication or copy of the protected work. It is a myth that the information extracted by the internet can be copied freely. But it is not so, unless the information is made available by the government, or the term for copyright has expired, or the holder of the copyright has surrendered his right.

[96] Meeta. (2012, May 23). Analysis of the Copyright (Amendment) Bill 2012 — The Centre for Internet and Society. Cis-India.Org. https://cis-india.org/a2k/blogs/analysis-copyright-amendment-bill-2012

2. **Multimedia Work:** The concept of multimedia is wide and within itself and consists of several categories which include text, sounds, audio, images, graphics, presentations, live videos and performances, and many more.

   The Copyright protection is available to multimedia under literary work under software program, artistic work that includes images, cinematographic films which means films or videos, dramatic plays, sound recording which includes musical works and photographs and thus the Protection of rights of the creators of the Copyright becomes difficult due to the variety of rights available to copyright owners under the ambit of multimedia.
3. **Social Media:** Social Media platforms have the prominent modes which connect people across the globe. This platform involves the sharing of work which may be copyrighted. The practice of sharing materials such as images, photographs on Social Media has resulted in infringements of copyrights. All the false material that is posted and available on social media is free, fed by an ignorance of the presence of copyright in such works is a major cause of such infringements. Copyright violations on Social media platforms can be in the form of: Re-posting, saving, or sharing of works protected under Copyright which is done without the owner's permission.
4. **Software:** The Software consists of a collection of computer programs, procedures, and documentation that help in performing the tasks for computer systems. Software piracy is the major reason for copyright infringement which involves the copying and distributing of copyrighted software that is unauthorized.

   Software Piracy involves Creating a copy and selling it, Renting the software, selling of computer hardware machines with pre-installed or pre-loaded pirated software, and Copying of software programs using CD-R technology.

CHAPTER 8

Remedies against Infringement in Digital Environment

The infringement under the Copyright in the digital domain has given a boost to preventive measures which ensure the rights and interests of the owner are protected in the digital domain.

Some of the remedies are:

1. ***Digital watermarks:*** it is the easiest way to protect the work of the creator of Copyright as it helps the owner to trace his work and prevent it from duplication. watermark technique is in the original work of the author in this way the unauthorized copying of the work can be detected.
2. ***Blockchain technology:*** in this technology, each transaction that occurs, the parties agree to details to encode it into the block of digital data which is uniquely signed or identified. due to its functioning, it is considered as an excellent technology to resolve the problem of copyright in the Digital Domain.
3. ***Access control and copy control:*** this software enables the user to check the creator or his illegal use of work.

There are also some international treaties and conventions that protect the copyright issues in the digital domain such as the world copyright treaty,1996, WIPO Performance of Phonogram treaty 1996.

CHAPTER 8

Complications in Relation with the Digital Environment

Numerous factors create complications in association with the digital environment. In our lifestyle, only time and economy are the main areas of concern these days and by the use of technology and the emergency of the digital world both are saved accordingly. Even though all the protection is taken into consideration by the original owner to avoid the infringement of copyright in the digital world but despite this precaution manipulators or the third party manage to infringe the original work. This manipulation leads to a huge amount of the loss over the control of data. This intervention by the third party causes a greater amount of loss in the online or digital media as compared to the offline medium as the internet can provide everything by the third party which can be shared by the people without knowing to the original owner which somehow infringes the real owner's rights.

The same problem is faced at the international levels too, the global copyright networking also faces the same issue, and to overcome these problems copyright, there is the urgency of some substantive laws concerning the copyright law for international jurisdictions.

The copyright laws were first established when it was difficult to make handwritten copies and after the technological advancements such as the printing press lead to infringement at large scale. Thus, the modern copyright law was first affected by the inventions of the photocopy machines and then the audio recording, visual recording, computer, internet came into flow with the digitalization that made the infringement much easier. And with this technological advancement, the infringement can take place even where even a large investment has not been made.

Therefore, the system of sharing files can be a new challenge in the future in copyright law, the legal remedies that are available to the copyright holders are straight forward which gives the owner the right to stop the control of copying the work. In the copyright law, it is said that the idea cannot be protected but only the reproductive work can be protected and this work comes with the involvement of skill, labor, and judgment.

CHAPTER 9

Conclusion

The digital world needs more attention in the copyright laws. The laws and the practical situation create different views in the minds of the creator and the author which is somehow divergent. The advancement in technology is rapidly growing that the infringement cannot be restrained by the laws made. The main contract of reproduction of work and the assignment of work are different. The open-access of the copyright called copyleft doctrine to face the alarming situation to some extent and in the same way the work for hire doctrine has not given the status of assigner and assignee of the work and this led to infringement of work.

The technological advancement leads to supplement the contract between the owner and the author, similarly the provision of fair use limits the scope of copyright work. Thus, the conflicting zone of technology and the legal system has created challenges in the digital era of

advancements and due to this, it can affect both the technology and the legal scenario in the near future.

Therefore, all the problems shall be taken into consideration which will give benefit to the public at large in the digital domain. The main idea is to protect the original work despite the technological advancement and the digitalization this will further help the researchers, students, teachers, authors, etc to ascertain the original work and to take permission from the owner of the copyright.

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6.

Contempt of Court

By: Apeksha Rawat

Pg. No.: 92-108

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Abstract

Contempt of court is an archaic legal doctrine inherited from the British Monarchical system that has little place within the functioning of a present-day democratic system, but is nevertheless often employed in India. Contempt allows a court to issue an order, Suo motu (or, "of its own accord"), to fine and imprison the thing of the order. This area of law is meant to take care of public order by deterring criticism which can shake people's faith in the capability of the courts and the "majesty" of the law. But in India often the law of contempt is used as a way of silencing critics and activists on the questionable ground that such criticism wounds the integrity and public respect of the court. It is ironical that in various contempt of court judgments the court exalt the virtues of judicial restraint and detachment, also because the importance of democracy and democratic rights, with the opposite, render an order fining and imprisoning an individual — proving unmistakably the court's lack of judicial restraint or detachment, and undermining the rights and democratic principles that it's sure to uphold.

This research paper through lights on the scope of the fundamental right to freedom of speech as against the power contempt of court. This paper focuses on contentious issues concerning the different legal cases where the excessive power of the judiciary of the Supreme Court of India in matters of contempt of court has been questioned. This article argues that there is a need for change in the laws regarding contempt of court and courts should exercise contempt powers judiciously and only in severe circumstances.

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CHAPTER 1

Introduction

Recently, laws regarding contempt of court were again in the controversy. Supreme court initiated *suo moto* procedure for criminal contempt of court against lawyer-activist Prashant Bhushan because of his tweets on the social media. The contempt charges were lodged in the perspective of the remark made on social media, aiming for the C.J.I. Justice S.A. Bobde. This is not the first time Prashant Bhushan was charged for contempt of court. Ten years ago, a contempt case was again charged against Prashant Bhushan for an interview in Tehelka magazine in September 2009.

Prashant Bhushan was proven guilty of contempt of court by the bench by exercising its inherent power under article 129 along with 142 of the constitution. Contempt of Court Act, 1971 was invoked for his punishment. Many people were disappointed with this judgment. This case has succeeded again in putting law regarding Contempt of Court on the trial.

Contempt of court is an offense in law of being disobedient to or discourteous towards the court order and court officers in behavior that opposes or disobeys the justice, authority, and dignity of the court, showing disrespect for the judge, interfering in the proceedings by behavior, or publication of material or non-disclosure of material, which is reckoned likely to threaten a fair trial. A court can issue an order from the perspective of a court trial or hearing that announces a person or organization to have contravened or been discourteous towards the court's authority. The judge may inflict sanctions such as a fine or jail for the alleged who is found guilty of contempt of court.[97]

Contempt of Court is meant to strengthen the foundation Judicial system, often yield counter and in several cases, adverse effects. The role of the judiciary has extremely risen in recent times. With the development of the numerous PIL's, the judiciary has appropriated the role of a colossal-administrator, often undertaking the garb of both the executive and the legislature. Thus, today the zeal of judicial activism is being dominated by judicial despotism.

[97] *WHAT IS CONTEMPT OF COURT*. (2020, April 14). Tripaksha Litigation. https://tripakshalitigation.com/what-is-contempt-of-court/.

Thus, the current issue legal of Prashant Bhushan has once more brought attention to the need for reassessing the law on Contempt of Courts.

CHAPTER 2

History of Contempt of Court

From centuries the phrase Contempt of Court (also known as Contemptus curiae) has been incorporated in the law. The genesis of the term could be traced in the prehistoric divine origin theory, social contract theory, and its various phases in the monarch legal system. In ancient times monarch primary function was to protect his subjects and administer justice. Justice was delivered by King himself or later on by his judicial offices. King power was absolute and it was the duty of his subjects (common people) to obey him and respect his judgments. Common people were not allowed to condemn or criticize him. People were punished if they do so.

The law of contempt of court in India is descended from British administration. After the acquisition of Indian territories by East India Company, the charter of 1726 provided the establishment of Presidency Towns. In these Presidency towns constituted a Mayor's Court and were made courts of record. Later on, the Supreme Court was established in Madras, Bombay, and Calcutta. The Supreme Courts and Recorder's Courts have similar powers in the issues of punishing for contempt was exerted by the higher courts in England.[98]

The privy council in Surendranath Banerjee's case of 1883[99], observed that the high court obtains its power to penalize for contempt from its being or creations. It is not a power, bestowed upon it by law.

In 1926, the Contempt of court Act was introduced to bring translucence in the conception of contempt of court and for the punishment of contempt of subordinate courts. This act was

[98] Sanyal, H. N. (Chairman), & Ministry of Education, G. of I. (1963). Report of the Committee on contempt of courts, February 1963. In dspace.gipe.ac.in. Government of India, Ministry of Education, Delhi. http://dspace.gipe.ac.in/xmlui/handle/10973/33748.
[99] Surendra Nath Banerjee v. The Secretary Of State For India, ILR 53 Cal 401

unsuccessful to provide provisions concerning the contempt of lower to Chief Courts and Judicial Commissioner's court. The Contempt of Court Act, 1952 replaced this act. [100]

Despite improvements, the 1952 act did not define the term 'contempt' and 'what constitutes' it. This created ambiguity and gave very extensive power to the judicial officers to interpret in their ways. It did not define contempt and lack clarity in the term. It did not have any provision regarding contempt of courts lower to Chief Courts and Judicial Commissioner's court. In 1961 on the recommendation of the H. N. Sanyal committee Contempt of Court Act, the 1952 act was replaced by the Contempt of Court Act 1972.

CHAPTER 3

Classification of Contempt of Court

According to The Contempt of Court Act, 1971 it is classified into two types:

3.1. Civil Contempt:

Under section 2(b) of The Contempt of Court of Act, 1971 'Civil Contempt' means wilful disobedience to any judgment, decree, direction, order, writ, or other process of a court, or wilful breach of an undertaking given to a court.

The Supreme Court scrutinized the term "Wilful" in the definition of civil contempt in the Act of 1971 and held that the term 'Wilful' under Section 2(b) as an act or omission which is acted voluntarily and intentionally and with the specific intent to do something the law prohibits or with the specific intention to fail to do something the law requires to be done, that is to say with harmful purpose either to disobey or to neglect the law. [101]

To punish a contemnor, it is necessary to establish that disobedience of the order is "willful". The word "wilful" introduces a mental element *(mens rea)* and hence, requires examining the mind of an individual/contemnor by evaluating his acts, which is a hint of one's state of mind.

[100] News. (2018, January 9). Contempt Of Court: An Analysis. Legal Desire. https://legaldesire.com/contempt-court-analysis/

[101] Ashok Paper Kamgar Union and Ors. v. Dharam Godha And Ors., AIR 2004 SC 105.

Even if there is a disobedience of an order, such disobedience is the result of some compelling situations under which it was not possible for the contemnor to obey the order, the contemnor cannot be punished. [102]

3.2. Criminal Contempt:

Under Section 2(c) of the Contempt of Court Act, 1971 criminal contempt means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which -

- Scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court, or
- Prejudices, or interferes or tends to interfere with the due course of any judicial proceeding, or
- Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

About criminal contempt, if the individual publishes an article in the public interest which is a critical analysis of a court's judgment can he be held guilty? He cannot be held guilty if no personal feelings are involved. But if instances indicate that the individual is guilty of criminal contempt of court despite having no intention to do so.

The difference between both 'civil' and 'criminal' contempt is no longer of much significance. Still, in present-day they draw attention to the difference between on the one hand contempt's such as 'scandalizing the court', physically interference with the course of justice, or publishing matters prospective to prejudice a fair trial. On the other hand, contempts which ascend from non-conformity with an order made, or undertaking required in legal proceedings.[103]

The court explained the distinction between both the types of contempt and their fundamental character. Criminal contempt offends the society and comprises of conduct that challenges the dignity of the court and offends the majesty of law. In Civil contempt, an individual fails to

[102] Ram Kishan v. Tarun Bajaj, (2014) 16 SCC 204.
[103] Home Office v. Harman, [1983] 1 AC 280.

follow the order, decree, direction, judgment, writ, or procedure delivered by courts for the benefit of the opposing party. [104]

Another difference was made in *Vijay Pratap Singh v. Ajit Prasad*,[105] where Allahabad Court observed that in a Civil Contempt the aim is to compel the contemnor to perform something for the benefits of the other party. But in Criminal Contempt, the proceeding is by way of punishment for a wrong not so much to a party or individual but the public at large by interfering with the judicial proceedings degrading the judgment or the reputation judge of the court.

CHAPTER 4

General Defences in Contempt of Court

1. **Innocent production and distribution of issue**

Section 3 of the Contempt of Court Act 1971 resolves the barrier under criminal contempt of court charges. If a criminal contempt commences against contemnor on the following ground that he is accountable for production or for the appropriation of distribution which becomes partial or intrudes with the pending procedures, the contemnor may take the following steps:

- ***Section 3(1) states that at the hour of distribution, he had no sensible ground for accepting that the procedure was pending.***
  "No man can be presumed to be aware of proceedings in court to which he is not a party." [106] Knowledge of the pendency is an indispensable criterion for holding a person guilty of contempt.
- ***Section 3(2) states that at the hour of production, no such continuing was pending.***
  In the cases of criminal contempt hearing proceedings will be reckoned to be pendant after the accused is brought into custody and even before he has been committed for trial or produced before a magistrate. Further, the offense of contempt may be committed even if no case is essentially pending provided that such a proceeding is

[104] Legal Remembrancer v. Matilal Ghose, ILR 41 Cal 173.
[105] Vijay Pratap Singh v. Ajit Prasad AIR 1966 All 305, 1966 CriLJ 632.
[106] Rama Swami v. Jawaharlal, AIR 1958 Mad. 558.

impending and the writer of the offending publication either knew it to be so or should have known that it was impending. [107]

- ***Section 3(3) states that at the hour of dissemination of production, he had no sensible ground for accepting that the issue (distributed or appropriated by him) contained or was probably going to contain any material which intervenes or impeded the pending continuing or organization of equity***.

  This defense unacceptable in contempt cases of distribution of any publication, printed or published else in compliance with the provisions of section 3 and section 5 of The Press and Registration of Book Act, 1867.

2. Fair and exact report of legal procedures

Section 4 of the Contempt of Court Act, 1971 gives that an individual should not be held liable of Contempt of Court for distributing a reasonable and precise report of any legal proceedings or any stage thereof. Section 7 of the Act gives an exception to the general rule that parity ought to be directed in broad daylight. Sub Sections (1) and (2) of Section 7 gives an individual unaccountable of Contempt of Court for distributing the content or for distributing reasonable and exact abridgment of the entire or any piece of the request made by the court in camera (in Chamber) except if the court has explicitly barred the production of the procedures on the grounds of *public policy*, *public order*, *security of the state and information recognizing with a furtive procedure, disclosure or novelty, or, in the exercise of the power conferred in it.*

3. Fair analysis of legal act

In Ambard v. Attorney-General for Trinidad and Tobago in 1936, Lord James Atkin as a judge of the United Kingdom Privy Council said -

"Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."[108]

Section 5 of the Contempt of Court Act, 1971 protects an individual from criminal contempt for delivering any judicious comment on the advantages of any case which has been at long last chosen. Protection can be taken that the proclamation whined of (in regards to the

[107] T. S. R. Subramanian & Ors. v. Union of India & Ors., (2013) 15 SCC 732.
[108] Ambard v. Attorney-General for Trinidad and Tobago (1936) 44 LW 15.

distribution of which criminal Contempt has been started) must be concerning a case that has been at long last chosen and not pertaining to pending procedures. Also, the statement should originate from the mouth of a competent individual in the field of law and not from a prosecuting party which has lost the case. To put it plainly, rational evaluation suggests that evaluation which while analyzing the presence of a Judge doesn't attribute any ulterior thought process to the offender.

In Re – Arundhati Roy case[109], the judge stated that there should be an occurrence like that of Arundhati Roy, the court held that legal analysis can't be fabricated under the attire of Freedom of Speech and Expression under Article 19(1)(a) of the Constitution.

Legal executive in general or the director of a judge unambiguously may not accountable to contempt of court if the legal analysis is done by some basic sincerity and out in the amendable intrigue. To determine the 'great confidence' and 'open intrigue' the Courts need to scrutinize all the comprising conditions integrating the individual's knowledge in the field of law, the anticipation behind the statement and the intention looked to be accomplished. A typical resident cannot be permissible to remark upon the Courts for the sake of scrutinization by looking for the assistance of Freedom of discussion and expression for the enlightenment that if it is not checked or controlled, it would crush the legal organization itself.

4. Bonafide Complaint against presiding officers of subordinate courts

Section 6 of the Contempt of Courts Act, 1971 states that a person shall not be guilty of contempt of court in respect of any report/ speech made by him in good faith concerning the presiding officer or any subordinate court to –

(a) any other subordinate court, or

(b) the High court to which it is subordinate.

If there is any cause of complaint against the presiding officers of the court, it is desirable that the higher authorities should know about it. Such complaint to higher authorities as provided in section 6 of the Act is not contempt of court, however, the complaint should be made in good faith and is bona fide, such cases are distinguishable from cases where complaints against the

[109] Arundhati Roy, In Re (2002) 3 SCC 343.

presiding officer of the subordinate courts are made to High Court in personal interest. Complaints, if made to bring pressure on the presiding officer to decide a matter in a particular manner or out of anger due to decision against the complainant, will not save the complainant from the penalties of the Contempt of Court Act.

5. Truth as a Defence in the Contempt of Court

Rarely truth is considered as a defense against the charge of contempt of court. But in 2006 Contempt of Court Act, 1971 was amended to which clauses (a) and (b) were added to section 13 in 2006. Clause (b) was in the reference with Section 49 of IPC, if it was in public interest and was invoked in a *bona fide* manner.

After defense of Truth establishment, public interest and bona fide could be questioned. These obligations cannot be scrubbed aside lightly. The party involved must be given a reasonable chance to establish the truthfulness of his act or words or publication or tweet whatever it maybe along with the public interest and bona fides concerned.

But the defense of Truth was short-lived. Mid-Day Case was a controversial case examined the defense of truth in the contempt of court. Mid-Day published a string of news reports and a cartoon claiming that during the tenure as a judge of the Supreme Court, retired Chief justice of India Y.K. Sabharwal's son had taken advantage of the sealing drive that was ordered in Delhi by their father. During the proceeding offender took the defense of truth and Y. K. Sabharwal was retired in January 2007 which means that he was a private citizen at the time the reports were published. He was no longer a judge. Delhi High Court did approve this defense in this judgment. Journalists was found guilty of contempt of court because their articles and cartoon had condemned the Supreme Court and lowered its image. The court said that the entire publication showcases that Supreme Court judges exercise their power to fulfill their motives and needs. The publication not only tarnish the image of the former Chief Justice of India but the entire judicial system.

In the case of Advocate General v. Seshagiri Rao,[110] the Court said that it was not tolerable for a defendant to establish the defense of truth in his allegations. Due to his actions, the damage was already done. The Court scrutinized that allegations against the Court *"incites in the minds*

[110] Advocate General v. Seshagiri Rao, AIR 1966 AP 167.

of the people a general dissatisfaction with all judicial determinations and disposes their mind to obey them". This was considered a dangerous obstacle for the working of the judiciary. However, such an explanation is a complete defense to an action for libel. The English Courts are strongly followed by the Indian courts in this respect nevertheless of the fact that the English have seldom taken resort to contempt proceedings in a long time. Indian courts have again repudiated the defense of truth in the laws of contempt.

CHAPTER 5

Abuse of Power of Contempt by the Court

In the words of Justice Marshal of the Supreme Court of The United States:

"Power of judiciary lies neither in deciding cases, nor in imposing sentences, nor in giving punishment for its contempt, but in the trust, confidence and faith of the general public."

India is a democratic country. After the independence Constitution of India concede Freedom of Speech and Expression. Judges are entrusted to maintain justice for the efficient functioning of the society. Judges should not boast about their hegemony or grandeur their authority. Their superiority depends upon their neutrality, demeanor, performance, integrity, and public confidence not derived out of fear of contempt of court law.

In the case *Attorney General v. British Broadcasting Council* [111]Lord Salmond commented that Contempt of Court law origin has a historical basis but it is still deceptive. It should only be used to protect the administration of justice.

Now people live in a democratic world. Everyone has freedom of speech and expression. Judges of the court should not use their authority to uphold their dignity. They cannot use their power to suppress those who speak against them. Often defense of freedom of speech and expression (under article 19(1) of the constitution) is being used by wrongdoers guilty of contempt of court. A similar line of reasoning was made in the contempt case against Arundhati Roy, the Court again gave the impression of freedom of speech and expression being misused by offenders to attack the courts' authority and dignity. This is a very inappropriate trend as far

[111] Attorney General v. British Broadcasting Council, [1980] 3 All ER 161.

as the right to freedom of speech and expression, which the Supreme Court has itself labeled as the 'lifeblood of democracy', is concerned and the attempt of the Court to vindicate itself from this particular angle needs an assessment. But this raises the quandary amid part of contempt law that criminalizes anything that "scandalizes or tends to scandalize" the judiciary and freedom of speech and expression (under article 19(1)), especially in the age of social media.

Every time a new judgment will be criticized by the people. Judges opinions of the judgment will be part of conversation and criticism. The judge should pay no attention to spurious criticism but should contemplate honest criticism. He should not feel unsettled or flustered by these criticisms.

In Madhu Trehan's case[112], a full bench of the Delhi High Court decided whether an article that evaluated judges under different heads amounted to contempt. The court held that *"faith of the people in the judiciary had been shaken"* and prosecuted the editor and publisher for contempt.

It has been forgotten that the law of contempt of court is not for the protection of judges for criticism, but it for the shield the foundation of the judiciary from slanderous and unsubstantiated remarks. Now a day's court courts consider personal remarks as a contempt of court. As the years passed the court has increased intolerance bigotry towards criticism has exercised its contempt powers in a regressive manner to suppress all voices of disagreement.

Former Union Law Minister Shiv Shankar case, the court pardoned perpetrating of unpleasant contempt when he acknowledged openly that the Supreme Court of India was entailed for the *"bride burners, diamond smugglers, corrupt and mafia".* His all-encompassing accusations against the Supreme Court reflected to be his personal feelings rather which the Congress leader spoke in the public interest. It is hard to settle these decisions of the Supreme Court in light of the true spirit of contempt powers. It can hardly be said that the edifice of the court is scandalized by the self-effacing words of common citizens, but not by the highest heights of power.

In the recent events, freedom of speech has been maligned. Is the judiciary defensible in crippling freedom speech for *"maintaining the dignity and status of the court or for the public*

[112] Shri Surya Prakash Khatri & Anr. v. Smt. Madhu Trehan And Others, 2001 (59) DRJ 298.

order"? Is it justiciable to scapegoat freedom of speech and expression guarantee by the constitution for judicial necessity?

It is pitiful that judges consider that silencing criticism will defend the image of the judiciary. But inverse it only aggravates the situation further. In the landmark U.S. judgment of Bridges v. California of 1941,[113] it was indicated that *"an enforced silence would probably engender resentment, suspicion, and contempt for the bench, not the respect it seeks".* Surely, this is not what the Court might yearn for.

CHAPTER 6

International Perspective on the Contempt of Court Law

Raison d'être behind the presence of such contempt of court power is the insufficient confidence of the Courts in their capacity to earn respect from the people. The authority of the court is enough for winning the respect and confidence of the people. The court should realize that there is no need for such power or imposing its authority with penalties.

In *Me Leod v St Aubyn* case of England, [114] it was observed in that *"Committals for contempt by scandalizing the court itself have become obsolete in this country. Courts are satisfied to leave to public opinion, attacks or comments derogatory or scandalous to them".*

USA has adopted a similar "*clear and present danger"* standard. It indicates that no action for contempt can be introduced until unless it shows *"substantive evil"* complained of is *"extremely high*". The recognition of criminal contempt by the Act in its present form has bolstered an indulgent and bigoted judiciary. Unless a more rigorous meaning of criminal contempt is adopted, the very objective for which powers of contempt have been discussed shall be disproved.

England inherit similar contempt of court law but the law evolved. After the delivery of Spycatcher judgment in the late 1980s by the House of Lords, the British tabloid, the Daily Mirror, published a reverse image of the Law Lords with the caption*, "You Old Fools"*. Lord

[113] Bridges v. California, 314 U.S. 252 (1941).
[114] Me Leod v. St Aubyn [1899] AC 549.

Templeton one of the judges of the bench said *"I cannot deny that I am Old; It's the truth. Whether I am a fool or not is a matter of perception of someone else. There is no need to invoke the powers of contempt."* They declined to initiate the contempt charges.

The Daily Mail published a photograph of the three judges who delivered the Brexit ruling with the caption "*Enemies of the People"* in 2016. It could in many ways be considered as an attempt to tarnish the image of the judiciary but the courts sensibly and prudently ignored the story and did not initiate contempt proceedings. This case was way worst than the Prashant Bhusan case. United Kingdom had obliterated the offense in its contempt laws. India judges should also consider the same. [115]

Courts are part of our constitutional democracy and must submit themselves to fair criticism even if there is marginal excess. Respect of the court must be earned through the quality of judgments and fairness and impartiality of the approach of the court and not through oppressive actions of contempt.

CHAPTER 7

Suggestions

In the end, it could be inferred that few changes are required in the Contempt of Court Act, 1971. The following are the suggestions for such changes:

- Only in the extreme and grave circumstances only the court should exercise the power of contempt of court guaranteed by the constitution to safeguard that civil liberties are not unfairly squashed upon.
- Removal of the offenses of "*scandalizing the court, lowering the authority of courts and prejudicing the course of justice"* as a ground of instigation of contempt proceedings. These words are vague leading to arbitrariness reliant on the fondness of judges.

[115] *Unpopular Opinion : The Supreme Court must remember: It is supreme because it's final not because it's infallible*. (2020, August 10). Unpopular Opinion. http://giffenman-miscellania.blogspot.com/2020/08/the-supreme-court-must-remember-it-is.html.

- During the proceeding of contempt of court case basic principle of natural justice, débet essejudex in propia causa should be applied. The Judicial Accountability Committee recommended that charges of contempt of court should be tried by a bench of five judges. Those judge or judges against whom criticism or imputation was made should not be part of the bench.
- The element of mens rea should be given importance during the proceedings of the case. If the offender had the intention to lower the image of the judiciary and cause chaos in the society should be held guilty of the contempt of court.
- In the era of social media tweets or status on social media cannot be considered as contempt of court. The court should not be over or easily offended and should not exercise this jurisdiction upon a mere question of propriety or an exaggerated notion of the dignity of the judges and must act with dispassionate dignity and propriety.
- The court should acknowledge the need and importance of free press and media in the modern age of information and take cognizance only of the most severe allegations made against it.
- The powers of contempt by the court should be exercised impartially. Contempt actions of public figures or ordinary individuals must be prosecuted even-handedly.
- Honest criticism and indictments cannot form an element of contempt. Judges should not misuse the contempt jurisdiction for maintaining their dignity and public image. Therefore, the public is open to austere comments and accusations as long as made with bonafide meticulousness and doesn't interfere in the process of delivering justice.

CHAPTER 8

Conclusion

The Indian contempt Act of 1971 has evolved to include amendments that demarcated what is not included in contempt and framed rules to standardize contempt proceedings, yet discrepancies remain. Amendment of 2006 included defense of Truth in the 1971 act to protect the freedom of speech and expression and personal liberty guaranteed by the constitution. Doctrine of Truth along with public interest keystones on which the law must be based. The

Legislature, Executive and Judiciary should ensure there are enough rules and regulations that safeguard against the arbitrary exercise of the power for contempt of court.

Contempt law is an anachronism. From divine origin theory to the modern era of social media we come a long way. It is heart-breaking to note that regardless of its doctrinal activism on human rights, the Supreme Court of India is way back in balancing freedom of speech and contempt of court law. There must be a stability between the right to speech and the court's power to punish its critics. Judiciary like other institutions should be open to criticism, imperiled that the criticism is fair enough and doesn't seed of suspicion in the minds of the public about the working of the judiciary as a whole.

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7.

Need for Legislations to counter Hate Crime in India

By: Pragya Gargee

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Abstract

Law and religion are an integral part of each other and religion is the very foundation for the formulation of law anywhere in the world from ancient to the modern world. However, the Indian subcontinent is witnessing a sudden increase in the incidents of religious hate crimes in contemporary times. Religious hate crimes are acts motivated by prejudice or bias towards a particular group of people based on religion or lack of one. It can include murder, assault, property damage, threats, or any other criminal offense committed with a bias motivation. This paper focuses on the need for legislative measures for religious hate crimes in India keeping in view the rise of communal violence.

Hold the Hate - Amnesty International has registered a total of 902 hate crimes in India from September 2015 to June 2019. In the first six months of 2019 alone, 181 incidents of alleged heinous crimes were recorded by the website being nearly double than the previous three years' half-yearly counts.[116] At present, communal violence attracts charges under provisions of the Indian Penal Code such as murder u/s 302 and rioting u/s 153A. These are very general and are too lethargically invoked in practice for them to serve as deterrents.

The paper also throws light on international organizations like the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) which require states to refrain from such discrimination and elaborates on a few relevant cases.

Lastly, the paper seeks to discuss reforms considering the urgent need for separate legislation and strict implementation procedures to curb biased hate crimes.

Keywords: hate crime, religion, legislation, communal violence, law, India.

[116]Hate Crimes in India | Lynching In India. (n.d.). Amnesty International India.

https://amnesty.org.in/news-update/hate-crime-reports-on-an-alarming-rise-reveals-amnesty-international-indias-halt-the-hate.

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CHAPTER 1

Introduction

Law and religion are considered essential elements of society since they set the stage for social equity and justice. Religion plays a role in shaping society whereas law has to conform to those religious principles to ensure better functioning and compliance with those laws. Religion is not just about following a belief but also a way of life since the followers of a particular religion follow its morality code and adhere to certain rules. When people enter the domain of law, they are expected to follow or not break the rules decided by a state. Thus, religion played a very vital role in maintaining law and order in ancient societies in different parts of the world. Laws were driven by religion and leaders were religious. In India, the authoritative legal guidance treatises have been the Arthashastra, dating from the 400 BC, and the Manusmriti from 100 AD. Historically, obedience in Hinduism is implanted not in mere formal rigid law but dharma[117] – that is, the need of every human being to live in a transposable sense of balance with his or her environment. Law was not controlled by dharma but, rather, was guided through it. Another source of influence has been Islamic law. The methodology of legal precedent and reasoning by analogy (Qiyas) used in early Islamic law has given direction to the later common law system.

The post-medieval period saw the partial divorce of law from religious dicta and its construction as an 'autonomous' professional field has framed law as a ruling setting. As a result, the notion of divine sovereignty as the sacred religious ruling authority of the earth was changed by building the sovereignty of the secular state.[118]

Around this time, India became part of the British Empire, supplementing Hindu and Islamic laws with the common law. Thus, the present judicature of the nation derives principally from the British system and has little association with the establishments of the pre-British era.

In recent times, religious nationalism has taken hold of India which rather than being supported by secular principles is created on the premise that Indian culture is coterminous with Hindu

[117] The Editors of Encyclopedia Britannica. (2015). Dharma | religious concept. In *Encyclopædia Britannica*. https://www.britannica.com/topic/dharma-religious-concept

[118] *Law and Religion*. (n.d.). https://law.haifa.ac.il/images/Publications/Law_and_Religion_intro.pdf

culture. The term 'Hindutva'[119] equates religion and national identity, it stresses that an Indian is a Hindu, leaving other important religious communities, such as Muslims and Christians, out of the equation. A rise in hate crimes started the spread of fear and anger throughout communities and impacted their perceptions of the justice system. Simply knowing someone who has been victimized is enough to impact individuals and create a tense atmosphere in general.

CHAPTER 2

Literature Review

Harshika A., Niranjana, K., (2019). A Study on Religious Laws and Religious Crimes[120] in India explains that in recent years, commonly, the reasons for religious clashes are political as opposed to ideological. Religious savagery in India incorporates demonstrations of viciousness by devotees of one religious gathering against adherents and organizations of another religious gathering, frequently as rioting. It also points out the abuse of web platforms to spread contempt towards other religions suggesting dire and extensive reaction.

Rajnish Hooda, (2018) Freedom of religion and criminal laws for religion, International Journal of Law[121] describes how religion and criminal law should or should not be involved with each other keeping in view the right to freedom of religion. It seeks to explain the term 'religious crime' by describing it as 'where religion is either the subject or the object of criminal behavior'(Rajnish Hooda, 2018). It delves into the past and highlights that historical religious conflicts like the Crusades, Spanish Inquisition, and the European wars of religion were political conflicts at the core. Hence, religion and politics were interconnected.

[119] *Hindutva | Definition of Hindutva by Oxford Dictionary on Lexico.com also meaning of Hindutva*. (n.d.). Lexico Dictionaries | English. Retrieved August 22, 2020, from https://www.lexico.com/definition/hindutva

[120] Durai, H., & Niranjana, K. (2019, August 26). *A Study on Religious Laws and Religious Crimes in India*. Papers.Ssrn.Com. https://ssrn.com/abstract=3442697

[121] Rajnish Hooda, (2018, March). *Freedom of religion and criminal laws for religion*, International Journal of Law ISSN: 2455-2194 www.lawjournals.org

Basu, D. (2019). Dominance of Majoritarian Politics and Hate Crimes Against Religious Minorities in India. Political Economy Research Institute, University of Massachusetts.[122] This paper assesses the role of Hindu nationalism in the political arena with the formation of the political party Bharatiya Jana Sangh in 1951 which later regrouped as the Bharatiya Janata Party in 1980. The BJP inherits its core political ideology of 'Hindutva' from its progenitor, right-wing organization, Rashtriya Swayamsevak Sangh (RSS). In 2014 the BJP won the Lok Sabha elections with a majority, dispensing with the need of allies to run the central government. The paper then goes on to demonstrate how hate crime records have seen a rise since 2015.

Sumter, M., Wood, F., Whitaker, I., & Berger-Hill, D. (2018). Religion and Crime Studies: Assessing What Has Been Learned, Religions[123] asks a potent question of whether the amount of religious knowledge matters more than the amount of religious participation. It interrogates if the amount of religious attendance suppresses crime more than the degree of knowledge or belief. Thus, suggesting an inverse relationship between religion and crime.

Bhat, M. M. A. (2020). Hate crimes in India. Jindal Global Law Review[124] highlights the issue of violence driven by sectarian hostility. It throws light on the trend of targeting individuals rather than mass violence which often serves a political ecosystem. Taking incidences of vigilantism and mob lynching as a reminder of the limitations in the criminal justice system. It takes into consideration the cost of such violence, for the victims and survivors, as well as for the social fabric. Lastly, it discusses that legal reforms must also integrate the systemic questions of prejudice, power, institutional bias, and democracy.

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[122] Basu, D. (2019). *Dominance of Majoritarian Politics and Hate Crimes Against Dominance of Majoritarian Politics and Hate Crimes Against Religious Minorities in India*. Political Economy Research Institute, University of Massachusetts.
https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1274&context=econ_workingpaper

[123] Sumter, M., Wood, F., Whitaker, I., & Berger-Hill, D. (2018). Religion and Crime Studies: Assessing What Has Been Learned. *Religions*, *9*(6), 193. https://doi.org/10.3390/rel9060193

[124] Bhat, M. M. A. (2020). Hate crimes in India. *Jindal Global Law Review*.https://doi.org/10.1007/s41020-020-00119-

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CHAPTER 3

Objective

A. This study aims to identify problems leading to the need for legislation in India to counter hate crime.
B. To assess existing laws, relevant cases, and international initiatives for the same.
C. To suggest reforms.

CHAPTER 4

Existing Laws

4.1. Section 153A

Section 153A of IPC states that whoever promotes enmity between different groups of religion and acts prejudicial to the maintenance of harmony will face punishment. Whoever,

1. Promotes religious disharmony or feelings of enmity, hatred, or ill-will between different religions using words, which are either spoken or written or by using signs, visible representations, or otherwise.
2. Commits any act which is prejudicial to the conservation of unity between different religions and which disturbs or is likely to disturb the public peace, is punishable by up to three years imprisonment or a fine or both.[125]

[125] Section 153(a) of Indian Penal Code, 1860.

4.2. Section 295A of IPC

Section 295A of IPC metes out punishment for intentional and malicious acts, by disrupting the religious sentiments of any class and insulting its religion or religious beliefs.

Anyone who deliberately insults the religious sentiments of any class citizen of India with words, signs, or visible representations and with spiteful intent to insult religions or imprison the religious beliefs of that class. Punishment for a period that can extend to 3 years or a fine or both depending on the interpretation of the same.[126]

4.3. Section 298 of IPC

Section 298 of IPC punishes anyone who deliberately incites hate towards other religions by speaking ill of them. Any person who deliberately utters words with the intent to offend any person's religious sentiments shall be punished under this section. Any object must be imprisoned with an explanation for a term which may be extended to one year or a fine or both. Whoever, with the pernicious motive of wounding the religious feelings of any person, utters any word or makes any sound in earshot of that person or makes any gesture in the sight of that person, shall be punished must be imprisoned with an explanation for a term which may be extended to one year or a fine or both.[127]

[126] Section 295(a) of Indian Penal Code, 1860.

[127] Section 298 of Indian Penal Code, 1860.

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CHAPTER 5

Burning Issues

5.1. Causes

Perpetrators of religious violence can be broadly classified into 4 types based on their core motivation to commit these hate crimes. They can be thrill-seekers (those motivated by excitement), defensive (who believe they need to protect their faith), retaliators (those who react to the perceived danger to their communities), and mission (perpetrators who make it their life mission the eradicate the 'difference')[128]. Reasons could stem from systematic oppression, inequality, and encouragement of snob ideology. Economic exploitation, discrimination, and unemployment stir feelings of dissatisfaction and resentment amongst the population, a fraction of which are trapped by religious fanatics. Psychological factors such as lack of empathy, prejudices, misinformation, and apathy against other communities add to the stew.

Communalism in politics is another ugly ingredient. Political parties play the communal card by providing concessions to minorities to appease them for votes while in retaliation other parties promote the religion in majority to eradicate the 'difference'. Hindu religious groups like Shiv Sena, Hindu Mahasabha, Viswa Hindu Parisad often compel the government to take steps conducive to the interest of Hindus promoting Hindu chauvinism.

Other countries' machinations to weaken India include funding to some orthodox organizations which uphold Islamic fundamentalism, demanding reservation facilities for Muslims. This creates a psychological divide between communities and the isolation of the sect.

[128] *Hate Crime: Cause and Effect*. (2018). https://www.equallyours.org.uk/wp-content/uploads/2018/10/Hate-crime-cause-and-effect.pdf

State governments of India have failed quite a few times in curbing communal violence in their respective states, the 2002 Gujarat riots[129] bearing a witness to their inefficiency. This makes the attackers feel emboldened, thinking that they can escape justice and evade punishment.

There are other deeper causes such a violent past (Partition of India), disputes arising from cow slaughter, desecration of religious places (temples, mosques), rumors (false information about rape of Hindu women by Muslim men lead to the damaging Godhra carnage[130]), and conversion activities which create a recurring pattern of the phenomenon of communal violence and hate crimes.

5.2. Incidents

On 12th August 2020, a Facebook post which was considered offensive to Islam ignited a deadly clash in the city of Bengaluru as police clashed with hundreds of Muslims who vandalized a police station and set fire to vehicles. At least 3 people were killed and a mob gathered around the house of the person responsible for the 'derogatory' post, eventually burning his house down.

On the night of 16th April 2020, two Hindu saints, 70-year-old Mahant Kalpavruksha Giri and 35- year-old Sushilgiri Maharaj, were confronted by a group of vigilantes and killed in Maharashtra's Palghar[131]. A few before this tragic lynching, rumors were rife in the area about bandits on the prowl. Reckless attackers dragged the two men out of their car and brutally beat them to death.

In an organized hate crime, Mohammed Akhlaqf and his son Danish were dragged out of their house and beaten with rods and bricks by a mob accusing them of stealing and slaughtering a

[129] *Home | Gujarat Riots: The True Story*. Retrieved August 22, 2020, from http://www.gujaratriots.com/index.php/home

[130] *Home | Gujarat Riots: The True Story*. Retrieved August 22, 2020, from http://www.gujaratriots.com/index.php/2016/10/the-godhra-carnage

[131] Palghar lynching: India police arrest more than 100 suspects. (2020, April 20). *BBC News*. https://www.bbc.com/news/world-asia-india-52350728

calf for Eid on September 28, 2015, near Dadri[132]. The mob broke into their fridge and leftover meat curry was seen as evidence that they had butchered a cow while Akhlaq's family insisted it was mutton. Unfortunately, Akhlaq died from the attack while Danish had to undergo brain surgery later to treat his severe injuries.

Arguably, the most infamous of riots in India is the Gujarat 2002[133] communal violence. It all started when the Sabarmati Express train carrying Karsevaks (Hindu pilgrims) returning from Ayodhya, Uttar Pradesh, was set on fire. There was a huge uproar that started a three-day massacre where thousands of people – including women, and children were killed. Many who had taken part in the carnage are yet to be brought to justice.

On 23rd January 1999, Christian missionary, Graham Stuart Staines[134] along with his two minor sons, Philip and Timothy, was set on fire by a gang of Hindu extremists while sleeping in his station wagon in Odisha. Dara Singh, a Bajrang Dal[135] activist, was convicted of leading the gang of attackers and was sentenced to life imprisonment.

5.3. Statistics

Since there are no specific laws to deal with hate crimes, the National Crime Records Bureau (NCRB), the federal organization that tracks crimes across the country, does not count such crimes. Halt the Hate - Amnesty International has recorded a total of 902 reported hate crimes in India from September 2015 to June 2019.[136] According to Statista, most hate crimes reported were targeted towards Dalits while Muslims followed as targets during this period with reasons

[132]INTERNET DESK. (2015, October 3). *The Dadri lynching: how events unfolded*. The Hindu; The Hindu. https://www.thehindu.com/specials/in-depth/the-dadri-lynching-how-events-unfolded/article7719414.ece

[133]*Home | Gujarat Riots: The True Story*. Retrieved August 22, 2020, from http://www.gujaratriots.com/index.php/home

[134]*MISSIONARY - DR. GRAHAM STUART STAINES*. (n.d.-b). Www.Missionariesbiography.Com. http://www.missionariesbiography.com/content/year/January/22.stainesfamily.html

[135]Inside a far-right Hindu "self defence" training camp. (2016, June 1). *BBC News*. https://www.bbc.com/news/world-asia-india-36415080

[136] *Hate Crimes in India | Lynching In India*. (n.d.-b). Amnesty International India. https://amnesty.org.in/news-update/hate-crime-reports-on-an-alarming-rise-reveals-amnesty-international-indias-halt-the-hate

varying from caste, religion to honor killing, and love jihad[137].181 incidents of alleged hate crimes that have been recorded by the website in the first six months of 2019 alone amount to almost double than the previous three years' half-yearly counts. Between January and June 2019, over two-thirds of the victims suffered harm on account of their Dalit identity followed by their Muslim (40), Adivasi (12), Christian (4), and their actual or perceived sexual orientation or gender identity (6)[138]. In 17 cases cow-vigilantism related hate crimes and honor killing were reported.

NHRC registered 2,008 cases where minorities/Dalits were harassed between 2016 and 2019 (till June 15).[139] Out of which, Uttar Pradesh alone accounted for 869 cases.

CHAPTER 6

Relevant Cases

Tehseen S. Poonawalla v. Union of India and Others [(2018) 9 SCC 501]

After a string of lynching incidents by cow protection groups, distressed activists, Tehseen Poonawalla and Tushar Gandhi filed writ petitions in the Apex Court. The petitions were heard together by a three-judge bench (Dipak Misra, D.Y. Chandrachud, Ajay Manikrao Khanwilkar). The former Chief Justice of the Supreme Court, Deepak Misra, famously warned against India turning into a 'mobocracy'. The judgment observed that every individual should "remain obeisant to the command of the law."[140] It laid down a series of preventive, remedial, and punitive measures including the appointment of Nodal officers and Highway patrolling. It

[137] *India - hate crime by identity of victims 2019*. (n.d.-b). Statista. https://www.statista.com/statistics/980033/identity-of-hate-crime-victims-india

[138] *Hate Crimes in India | Lynching In India*. (n.d.-b). Amnesty International India. https://amnesty.org.in/news-update/hate-crime-reports-on-an-alarming-rise-reveals-amnesty-international-indias-halt-the-hate

[139] DelhiJuly 19, M. R. N., July 20, 2019UPDATED:, & Ist, 2019 10:22. (n.d.). *With 43% share in hate crimes, UP still most unsafe for minorities, Dalits*. India Today. Retrieved August 22, 2020, from https://www.indiatoday.in/india/story/dalits-minorities-harassment-attack-cases-uttar-pradesh-india-1570980-2019-07-19

[140] *Tehseen S. Poonawalla v. Union of India and Others (2018) 9 SCC 501*

stated that lynching is in direct violation of the Constitution under Art 21.[141] The Court even recommended the Parliament to constitute a separate offense for lynching with appropriate punishment.

Zulfikar Nasir & Others v State of Uttar Pradesh & Others [2018 SCC Online Del 12153]

On 31 October 2018, Justice Dr. S Muralidhar (then) at the Delhi High Court convicted 16 members of the Provincial Armed Constabulary (PAC) for, the murder of 38 Muslim residents of Hashimpura, a neighborhood in Meerut, Uttar Pradesh in 1987[142]. He described the events that had unfolded as the 'targeted killing' of 'members of a particular minority community.'[143]

Ramji Lal Modi vs The State Of U.P [1957 SCR 860]

The Apex Court of India upheld a Ramji Lal's conviction for publishing a magazine article that maliciously insulted Muslims while upholding the constitutionality of Section 295A of the Indian Penal Code[144]. Ramji Lal Modi published an article in Guarakshak, a magazine focusing on cow protection, that was deemed to be intentionally outraging to Muslims and thus, in violation of the said section. The restraint to protect the public order from deliberately provoking speech was constitutionally acceptable by the Court.

[141] https://indiankanoon.org/doc/553290

[142] *Zulfikar Nasir & Others v State of Uttar Pradesh & Others 2018 SCC Online Del 12153.*

[143] Khanna, V. (2020). A tale of targeted violence in Hashimpura: the Delhi High Court on recognition, relations and responses. *Jindal Global Law Review*. https://doi.org/10.1007/s41020-020-00113-6

[144] https://indiankanoon.org/doc/553290

CHAPTER 7

International Initiatives

Organization for Security and Cooperation in Europe (OSCE) is an intergovernmental organization with 57 participating nations (India, not being a member) that addresses various security issues including hate crime. Under its organ, Office for Democratic Institutions and Human Rights, States taking interest have carried out themselves to pass enactment that accommodates punishments considering the gravity of hate crimes, to make a move to address under-reporting, and to present or further create limit building exercises for law enforcement, prosecution and legal authorities to avoid, examine and indict disdain violations.[145]

The Commission on Crime Prevention and Criminal Justice (CCPCJ) was established by the Economic and Social Council, United Nations. Its 28th Crime Commission held on 17 May 2019 in Vienna addressed crime motivated by intolerance or discrimination recognizing the need to combat hate crime and hate speech.[146]

The European Commission against Racism and Intolerance (ECRI) is a human rights monitoring body The European Commission against Bigotry and Narrow mindedness (ECRI) is a human rights observing body which underpins the battle against prejudice, segregation (on grounds of 'race', ethnic/national origin, color, citizenship, religion, language, sexual orientation, and gender identity), xenophobia, antisemitism, and intolerance in Europe.[147]

The European Convention on Human Rights rulings stated, where an attack is racially motivated, it is important to continue to re-emphasize the community, to condemn racism, and

[145] *What do we know | OSCE - ODIHR*. (n.d.). Hatecrime.Osce.Org. Retrieved August 22, 2020, from https://hatecrime.osce.org/what-do-we-know

[146]rrohrbac. (2019). *The Commission on Crime Prevention and Criminal Justice*. Unodc.Org. https://www.unodc.org/unodc/en/commissions/CCPCJ/index.html

[147]*ECRI European Commission against Racism and Intolerance*. (n.d.).

https://rm.coe.int/leaflet-ecri-2019/168094b10

to maintain the confidence of the minority in the authorities' ability to continue the investigation with vigor and impartiality. Protecting them from the threat of racial violence.[148]

CHAPTER 8

Reforms Needed

Hate crime laws should recognize that either people or property can be victims and should be implemented without discrimination. Courts should be required to consider evidence of motivation and that one single act can have multiple motivations. Hate crime laws should recognize the social and historical patterns of discrimination. It should use a combination of terms such as “race”, “ethnicity”, “religion”, “caste” so that a broader coverage is ensured even including cases where the offense was committed over mistaken identity. Further, the law must recognize solitary as well as group offenses.

The National Advisory Committee[149] had come out with the Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill - 2011[150] which intended to forestall demonstrations of brutality or instigation to viciousness coordinated at individuals based on their affiliation to any “group”. It provided for the establishment of the National Authority for Communal Harmony, Justice, and Reparation for monitoring the investigation of such cases and also for the establishment of special courts by state governments. However, it was heavily debated upon its definition of the term "group", which stands for only linguistic and religious minorities and did not include people of linguistic and religious majorities (i.e Hindus).

It is expected that Parliament wakes up to this pressing need in an expedited fashion, in the wake of the ongoing incidents of hate crimes. “For an offender to be subject to a hate crime

[148] *HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION*. (n.d.). Retrieved August 22, 2020, from https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-unmasking-bias-motives-paper_en.pdf

[149] *NAC (National Advisory Committee) | Green Rating for Integrated Habitat Assessment*. (n.d.). Www.Grihaindia.Org. Retrieved August 22, 2020, from https://www.grihaindia.org/nac

[150] *PREVENTION OF COMMUNAL AND TARGETED VIOLENCE (ACCESS TO JUSTICE AND REPARATIONS) BILL, 2011*. (n.d.). Retrieved August 22, 2020, from https://www.prsindia.org/uploads/media/draft/NAC%20Draft%20Communal%20Violence%20Bill%202011.pdf

law, a victim must be willing to report the crime, the law enforcement must record it earnestly and thoroughly investigate it, the prosecutors and courts shall expedite the rightful conviction as deemed fit under the prevalent legal construct. Any misstep in the sequence means a lost opportunity to combat hate crime."[151]

CHAPTER 9

Conclusion

"The purpose of religion is to control yourself, not critic others." – Dalai Lama

Hate motivation for selecting the victim, such as their "race', religion", "caste" should be explicitly recognized and punished when criminal cases are prosecuted. If this is omitted, the opportunity and potential for the perpetrator's punishment to discourage others are lost. The message sent to the victim and the perpetrator that the state does not view the hate motive which caused the crime seriously is dangerous. Certain state governments have made a few breakthroughs on the same, particularly with respect to the offense of lynching, however, the need for a comprehensive hate crime legislation applicable across the country is apparent. Drafting a penal statute recognizing crimes motivated by bias and thus providing for punishment requires scrutiny of a variety of factors.

Huffington Post gave an account of the worldwide rankings[152] where India ranked 4th across the globe in 2015–after Syria, Nigeria, and Iraq–for the most elevated social threats involving religion. These concerning statistics must jolt us awake from our deep slumber of blissful ignorance. It challenges the social fabric of India woven with intrinsic values of diversity, unity, and tolerance. Showing hatred towards someone's religion is unacceptable and violates the right provided by the Indian constitution, dire and extensive legislation is required for the same taking example from various countries like Malta. Section 222A of its Criminal Code provides for enhanced penalties for crimes against racial or religious groups and states that "religious

[151] OSCE Office for Democratic Institutions and Human Rights (ODIHR)

[152] *On Religious Hostilities, India Ranked Just Slightly Better Than Syria: Pew Study*. (2017, April 14). HuffPost India. http://www.huffingtonpost.in/2017/04/13/on-religious-hostilities-india-ranked-just-slightly-better-than_a_22037994

group means a group of persons defined by reference to religious belief or lack of religious belief."[153]

Hate crimes are violent manifestations of prejudices, if not countered properly with appropriate legislation, the victims will feel that their experience was not fully recognized and the perpetrators might go unpunished. Codifying social condemnation of these crimes can help build a greater sense of equality in our judicial process and fill the social gaps.

[153] (2020). Justiceservices.Gov.Mt. http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574&l=1

EQ. Citation: BNWJ-0920-099

8.

Uniform Civil Code: A Dream of Undivided India

By: Akshat Mittal

Pg. No.: 126-150

EQ. Citation: BNWJ-0920-099

Abstract

A matter of great spirituality, worship, devotion, belief, interest & faith in the one who is termed as divine, supernatural or God is what Religion is all about. The very existence of this world is believed to be by the way of spiritual development. Over thousands of years, Religion has become a whole socialistic & culturist system having its divisions, and each division is governed by a separate set of laws & practices. The idea which was anciently generated to promote purity & unity of souls has now become a virus that is eating the humanity alive. Modern society consists of diverse cultures & belief systems, keeping in mind which the word "Secularism" was incorporated into the Preamble to the Constitution of India. And to honor it further, "Right to Equality" & "Right to Freedom of Religion" were also added. Meaning thereby, each sect of Personal Laws which are based upon different sets of Religions respectively were given separate importance & freedom of practice which includes matters like marriage, divorce, custody, adoption, succession, inheritance, etc. unlike Criminal Law which has the same substantive & procedural provisions for every person irrespective of Religion. Uniform Civil Code is an umbrella, the intention of which is to cover these fragmented laws within a mutual realm. Article 44 of the Constitution imposes a duty upon the Government to secure a Uniform Civil Code for the State of India but to date, no center or state government has taken an initiative for the same, except Goa which has had its Civil Code's roots in Portuguese Culture. Uniform Civil Code is the only solution not only to curb various legal inequalities but also to promote the true spirit of Religion.

Keywords: Religious Freedom, Equality, Secularism, Uniform Civil Code, Equity, Justice.

EQ. Citation: BNWJ-0920-099

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CHAPTER 1

Introduction

From that very day when India was recognised as a Free Nation, she has emerged as the world's largest democracy which homes millions of communities, honouring each such community with a secular fabric. In order to guarantee this secularity, the Constituent Assembly have incorporated "Right to Freedom of Religion" as a fundamental right enshrined under **Article 25**[154] **(Part III)** of the Constitution with certain exceptions for the matters of public welfare. Further, **Article 26**[155] confers freedom upon the religious sects to manage their own institutions & property affairs. To strengthen the idea of secularism it was also made compulsory that no such knowledge or instruction shall be provided in educational institutions so as to influence the students[156], and no compulsion shall be there when it comes to payment of tax, if and so such payment is for the purpose to promote any religion.[157] The freedom of religious communities led to the formation of different personal laws which were based upon the ancient religious scriptures, beliefs & customs. As a result, fluctuated laws related to the matters of Marriage, Divorce, Custody, Adoption, Succession, Inheritance, Maintenance, etc. were formed based upon different religious opinions, cultural practices and application. Though, the Constitution of India is secular in nature but the epiphany of the recent times, points out the concocted nature of the constitution which brings about contradictions between the concept of secularism and personal laws of varied religions.[158] On one hand these various communities are co-existent parts of one Country but on the flip, family laws of each community differ.[159] These differences exist because India as a country is hearth to the entire wide spread practices of the varied religions and all the people born are swooned towards their customs with utmost admiration.[160] In modern India, questions have been raised regarding personal laws being discriminative in nature and inconsistent with fundamental rights guaranteed by the **Part III** of the Constitution.

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[154] INDIA CONST. art. 25, cl. 1.
[155] INDIA CONST. art. 26.
[156] INDIA CONST. art. 28.
[157] INDIA CONST. art. 27.
[158] Saksham Solanki & Shaivya Manaktala, *Uniform civil code and conflict of personal laws,* 03 I.J.L. 08, 08 (2017).
[159] *Ibid.*
[160] *Ibid.*

The Author through this study offers a detailed understanding of the concept of Uniform Civil Code. The topic of Uniform Civil Code is important as it has been one of the most heated, debated and trending topics since the British Rule. If brought into existence, it would be a life altering law for the citizens of the Country. The research work will benefit the readers to recognize the need for unified law to govern the personal matters irrespective of religion in the present time. The research will take into account various research studies, journals, online blogs and would analyse Judiciary's judgments & opinions, expert's opinions to present the detailed arguments benefiting the social & economic conditions of women, and highlighting Uniform Civil Code as a way to curb the religional inequalities. The Author has also provided various suggestions at the end which can form the basis for one possible Model Uniform Code in regard to promote Secularism in the Nation.

1.1. Background of UCC: Pre & Post Independence Scenario

The debate regarding Uniform Civil Code has always been in trend since the rule of East India Company. A Country like India where the culture is vastly diversified, the British fearing the massive opposition from religious leaders, abstained themselves from entering into the sphere of domestic law.[161]

1.1.1. The First Step

The idea of Uniform Civil Code found its origin even prior to British Rule. The first most step in this regard was taken by Lord William Bentinck, the then Governor-General of India when he passed the Bengal Sati Regulation Act, 1829 and suppressed the infamous practice of *Sati* (a practice where widow is compelled to death on the funeral of her husband). The said Act was later on made applicable to all English territories in India.[162]

[161] Anonymous, *Uniform Civil Code in India*, GK TODAY (Dec. 23, 2018), https://www.gktoday.in/gk/uniform-civil-code-in-india.
[162] Anonymous, *The abolished 'Sati Pratha': Lesser-known facts on the banned practice*, INDIA TODAY (Dec. 04, 2015, 11:23 AM), https://www.indiatoday.in/education-today/gk-current-affairs/story/sati-pratha. See also; *Infra Note 11.*

1.1.2. The Lex Loci Report

The British Government in 1840 for the first time recognised the need for codification of laws for India. The laws related to Crimes, Evidence & Contracts were framed with uniformity irrespective of religion, sex, caste, region, creed, race, etc. But as per the recommendations of the Report, Hindu & Muslim personal laws were not to be meddled with and were kept aside.[163] The British preferred to keep religious divisions alive and suggested that in case of disputes, local panchayats or courts should be formed consisting with people of the same religion or caste and the decisions delivered were to rely upon laws and religious scriptures of the ancient period.[164]

The British State acting upon the proclamation made by the Queen in the year 1858 promised not to interfere in religious matters of any sort[165], and if such interference is required it shall be only in exceptional circumstances. As history is the evidence, the British never intended to unite India. Rather, they used religion as a lethal weapon of their infamous practice of "Divide & Rule."[166]

1.1.3. A Conflicted Nation

India at one point or other has been home to almost all the religions and communities existing. This stands to be the reason that India has witnessed the richest history of culture & traditions throughout the world and also why India has always been tagged as a Nation at War. Difference in opinion and variance in preference exists even among the practices of one particular religion. One example would be, permitting remarriage of a widow in the Shudra caste, one among the Hindus, even though expressly forbidden by scriptural principles.[167]

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[163] *Supra Note 08.*
[164] Neha Maheshwari, *Should India have a Uniform Civil Code*, LAWORDO (Nov. 18, 2019), https://www.lawordo.com/uniform-civil-code/.
[165] Dr. V., *Landmark Judgements that Transformed India*, CIVILS DAILY (Jan. 24, 2016), https://www.civilsdaily.com/part-4-whose-law-is-it-anyway-landmark-judgements-that-transformed-india.
[166] Abhishek Verma, *Uniform Civil Code: Give it a serious thought*, DECCAN HERALD (Sep. 20, 2019, 07:40 AM), https://www.deccanherald.com/opinion/main-article/uniform-civil-code-give-it-a-serious-thought-762623.html.
[167] SUMIT SARKAR & TANIKA SARKAR, WOMEN AND SOCIAL REFORM IN MODERN INDIA, 93 (2008).

Even though such issues remain, the greatest religious war has always been between Hindus & Muslims of the Country. In British India, Hindu Law, due to fear of dominance & ease of operation were given more importance over Muslim Law by the British-Indian Judiciary.[168] The British Government not taking the pain of investigating the customary practice of each specific community, group or society, kept ignoring this issue for a long time. But towards the end of 19th Century recognising the local opinions & traditions became unavoidable.[169]

1.1.4. The Age of Reforms

Muslim Law in India is mostly based upon Sharia practices which in its true nature were discriminatory in favour of men in matters of property, inheritance, marriage & divorce. But even then due to pressure from Muslim leaders the Shariat Law of 1937 came into force, according to which each & every Indian Muslim is to be governed by the wallow of this law in matters of marriage, divorce, adoption, succession, inheritance and maintenance.[170] As regards to the Hindu Law, the earnest concerns have always been of gender inequality in the matters of remarriage, inheritance and divorce.

The first major call for the implementation for the Uniform Civil Code was put up by Lakshmi Menon in the All India Women's Conference (AIWC) in 1933 where the conference expressed the need for inclusion of women in legislature and to which Ms. Menon said, "If we are to seek divorce in court, we are to state that we are not Hindus, and are not guided by Hindu law. The members in the Legislative assembly who are men will not help us in bringing any drastic changes which will be of benefit to us." The Women Conference depended upon the resolution passed by the Indian National Congress in Karachi Session of 1931 wherein Gender Equality was one of the supreme concerns.[171]

The B.N. Rau Committee was specifically set up in 1937 to examine the need of unified Hindu Law. The Committee in its report concluded that keeping in mind the changing trends of society & equality of women, the need of the hour demands a common civil code. The committee

[168] *Ibid.*
[169] *Supra Note 14 at 263.*
[170] *Supra Note 11.*
[171] Satyam Singh & Shobhitabh Srivastav, *Uniform Civil Code: A Critical study of Individual Rights & the Role of the Secular State*, 03 J.C.I.L. 01, 06 (2017).

primarily focused on the aspects of Hindu law and suggested common laws to be made for marriage and succession. The committee's recommendations were sought again in 1947.[172]

1.1.5. Formation of Constitution of an Independent Country

"The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."[173] A provision for Uniform Civil Code was instituted as a Directive Principle under **Part IV** of the Constitution. After long debates on uniformity of personal laws, the Constituent Assembly came up with the solution to incorporate a duty upon the State to keep the principle of Uniform Civil Code in mind while making laws for the Country. The main concern in the Indian Parliament during the 1951-1954 sessions was regarding the codification of common code for Hindus.

Dr. B. R. Ambedkar was handed over the responsibility to present the Hindu Code Bill. He was of the view that majority of Hindu Laws had its basis in a specific school. He studied the religious Hindu *Shashtras* and attacked the dominance of Hindu upper caste saying that provisions like monogamy & widow's rights were available in orthodox Hindu laws. He also added that the Hindu structure was flawed and Uniform Civil Code was the only way to preserve it.[174] The then Prime Minister Pandit Jawaharlal Nehru even though supported Ambedkar's opinion on the necessity for Uniform Civil Code, opposed his opinions regarding Hindu Society.[175] Further the idea of Uniform Civil Code faced high criticism by Vallabhbhai Patel & Rajendra Prasad. The words of Dr. B.R. Ambedkar were, "I personally do not understand why religion should be given this vast, expansive jurisdiction, so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, discriminations and other things, which conflict with our fundamental rights."[176]

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[172] *Supra Note 13.*
[173] INDIA CONST. art. 44.
[174] *Supra Note 14 at 480-91.*
[175] *Ibid.*
[176] Christophe Jaffrelot, *Ambedkar and the Uniform Civil Code*, OUTLOOK (Aug. 14, 2003), https://www.outlookindia.com/website/story/ambedkar-and-the-uniform-civil-code/.

1.1.6. The Hindu Code Bill: A Replica for Uniform Civil Code

The closest attempt to implementing a Uniform Civil Code was witnessed by Indian History when the bill of Hindu Code was presented. The Bill codified the laws, laid out a common structure to be followed by all the Hindus including Buddhist, Jain & Sikhs throughout the Nation. The Bill faced high criticism in the Parliament. Issues like monogamy, divorce, inheritance rights of women/daughters which were subjected to be equal in terms of share, eradication of coparcenaries were targeted to bring out a solution but were opposed even by the women members of the parliament due to various political reasons.[177] The bill could have been termed as "Anti-Hindu" or "Anti-Indian." And later on, the solution to this debate resulted in passing of four different Acts namely; Hindu Marriage Act 1955, Succession Act 1956, Minority & Guardianship Act 1956, and Adoptions & Maintenance Act 1956.[178]

It was then, the Assembly decided to implement the Uniform Civil Code under **Article 44** of the Constitution. This move was addressed as "the failure of the Indian state to provide a uniform civil code, consistent with its democratic secular and socialist declarations, further illustrates the modern state's accommodation of the traditional interests of a patriarchal society" by Aparna Mahanta.[179] It is very much agreeable as it was a perfectly worked out step to shove the concept of Uniform Civil Code into oblivion. Directive Principles are not justiciable and are tame in comparison to the Fundamental Rights, even though they are to be claimed to be fundamental in nature.[180] It is only in the books & papers that harmony shall be construed between the two but in reality the extent of consonance has been always immeasurable.

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[177] *Supra Note 18.*
[178] Shikha Goyal, *What is Uniform Civil Code?*, JAGRAN JOSH (Aug. 05, 2020, 12:02 PM), https://www.jagranjosh.com/general-knowledge/why-uniform-civil-code-is-necessary-for-india-1477037384-1#:~:text=Uniform%20Civil%20Code%20(UCC)%20is,means%20one%20country%20one%20rule.
[179] C.K. Mathew, *Uniform Civil Code: The Importance of an Inclusive and Voluntary Approach*, THE HINDU CENTRE (Oct. 26, 2019, 03:19 PM), https://www.thehinducentre.com/publications/issue-brief/article29796731.ece
[180] M.P. Singh, *On Uniform Civil Code, Legal Pluralism and the Constitution of India*, 05 J.Ind.L.Soc. 05, 05 (2014)

1.1.7. Special Marriage Act, 1954

This Act was enacted as damage control of the failure of the Hindu Code Bill with regard to gender discrimination and to fill a few gaps of inter-religion inequalities. The said Act allows the marriage between two individuals irrespective of their religion, cast & communities. This Act only provides for Marriage, Divorce & Maintenance provisions. Matters pertaining to property or adoption shall be governed by the specific enactments.[181] This was only an attempt to cover few basic aspects like giving the option to the citizens to marry outside their religion. But the Act failed to address the effects of such marriage with regard to the reaction of society or individual's families which is why the only solution which can salvage the communities from the unseen consequences is the implementation of the Uniform Civil Code.

1.2. What does Uniform Civil Code propose?

Uniform Civil Code proposes to set out a common code which intends to synchronize the set of personal laws based upon various different religious scriptures. In other words, it is the one set of secular laws which will govern people belonging to different religion, caste or tribe. The Code aims to cover the common subjects like marriage, divorce, adoption, custody, inheritance, succession and maintenance. It can be seen as a bridge which gaps the inequalities created by the religious practices with respect to personal status, property rights, maintenance rights, adoption rights, etc.

Uniform Civil Code shall be not only be seen as a tool to ease out the legal operations but also to promote justice by putting an end to the long time running discriminatory practices by different religions. The Code specifically aims at promoting gender equality. The presumption is that the Common Code shall be based upon the modern day traditions and practices thereafter, respecting every religion and to delete those laws which have become backward & regressive. The Code not only proposes to bind the different religions together but also to bind the number of communities within a particular religion.

[181] *Supra Note 26.*

It shall be the purpose of Uniform Civil Code aims to protect and help vulnerable sections of the society to rise as high as the dominant & oppressive ones. UCC is a way to promote nationalism by uniting the citizens and instilling the sense of being an "Indian" first and then recognise the personal bifurcations into, Hindu, Muslim, Sikh, Jain, Christian, Buddhist and Parsi.

CHAPTER 2

Recognition of Need for Uniform Civil Code

There may be number of reasons which justify the implementation of "One Law, One Nation" but the most basic one would be the embarking revolutions marking its beginning in the 21st Century. Modern times, Modern practices, Modern youth who fail to understand the religious justifications for gender inequality, disparities between human dignities. The young population today is one of the major factor which screams for the implementation of Uniform Civil Code. The history is the evidence for the formation of a patriarchal society establishing dominance of men over women since ages. Even from the past few years the Nation has been striving for Women Empowerment which has positively resulted but till date the gap remains unfilled at certain junctures. Religiously these differences have been widened by the right wing ideologies existing in the communities itself, as Men have always been given preference in family matters such as being declared as the ruler of the family business, succession, inheritance, etc. With the implementation of UCC, hope to curb discrimination and achieve sense of true women empowerment and mark beginning of a new era seems a mile closer.

After the enforcement of Hindu Code throughout the Nation, the main conflict was left between two major communities i.e. the Hindus & the Muslim, whose laws were not subjected to any sort of reform by the Constituent Assembly and till date aim to abjectly prove their spiritual supremacy. But the conflicts between the two communities were at rest until the lighting of *Mohammad Ahmed Khan v. Shah Bano*,[182] case struck the nation and forced the topic of Uniform Civil Code once again to be left open for discussions.

[182] Mohammad Ahmed Khan v Shah Bano, (1985) 2 S.C.C. 556

2.1. Gender Discrimination under Personal Laws

2.1.1. The Shah Bano Judgement: A Gateway to Uniform Civil Code

Shah Bano was a 73 years old woman who has approached the local court through a petition seeking maintenance from her husband who had divorced her by way of Triple Talaq, by pronouncing the word "Talaq" three times after 40 years of their marriage. She was granted maintenance by the local court initially in the year 1980 but her husband took this matter to the Supreme Court of India and argued that his actions are justified under Muslim Personal Law as this form of unilateral divorce is permitted under Islam and he has successfully fulfilled all the obligations under Laws governing him.[183] But the Supreme Court observed that, "Section 125 of the Criminal Procedure Code applies to all citizens of the Country irrespective of Religion."[184] And while ruling in favour of Ms. Bano, the Court expressed regret noting that "Article 44 of our Constitution has remained a dead letter."[185] The then Chief Justice Y.V. Chandrachud specifically recommended that "Uniform Civil Code would help the cause of National Integration by removing disparate loyalties to law and by removing the contradictions based on ideologies."[186] The case was the first instance where the Indian Judiciary has strongly recommended the formation of Single Codified Law.

The Judgement faced nationwide criticism from Muslim Fundamentalists. The Muslim Communities felt threatened that they were being deprived of their cultural identity and that Judiciary is trying to impose UCC is the evidence as to supremacy of and dominance of Hindus over Muslims in the State. The Central Government under the rule of Rajiv Gandhi was forced to pass The Muslim Women's (Protection of Rights on Divorce) Act, 1986 which reversed & nullified the precedent of ***Shah Bano*** case.[187] This step of Government was widely opposed by the Muslim Women Activists and voicing their concerns they exclaimed that "this showed that Women's rights have a low priority even for the secular state of India which is why Autonomy of a religious establishment was made to prevail over women rights."[188]

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[183] *Ibid.*
[184] *Ibid.*
[185] *Ibid.*
[186] *Ibid.*
[187] Soumalya Ghosh, *Uniform Civil Code: An Ideal Vision of Modern India*, 09 Indian J.L. & Just. 207, 209 (2018).
[188] Atish Chakraborty, *Uniform Civil Code & the Indian Judiciary*, SSRN (Sep. 25, 2017), https://ssrn.com/abstract=3536262.

Later on, the constitutional validity of the said Act was challenged in the case *Danial Latifi v. Union of India*,[189] by the Advocate representing Shah Bano. The Court in this case went for a middle path and decided the Act to be in conformity with the provisions of **Article 14, 15 & 21** of the Constitution. Further it was concluded that, it is the duty of a Muslim husband to make "reasonable & fair provision" considering the future of the wife if divorced and such arrangements shall extend beyond Iddat period as by the interpretation of **Section 03(1)(a)** the Act in question. Also that a Muslim Woman who is unable to maintain herself and is not remarried can invoke **Section 04** of the Act and seek maintenance from her relatives and even the State Wakf Board if relatives are not able to maintain her.

2.1.2. The AWAG Judgement: Impoverishment of Indian Judiciary

The case of *Ahmadabad Women's Action Group v. Union of India*,[190] is considered to be a "classic example" of "judicial restraint."[191] A PIL was filed before the Supreme Court of India which challenged the provisions of Hindu, Muslim & Christian Personal Family Laws on the grounds of gender discrimination and to be violative of **Part III** of the Constitution. Specifically, the permissibility of Polygamy & Instant Triple Talaq under Islamic Law violates principle of "Right to Equality" as under **Article 14**. The Court reversing from its earlier stand held that the adjudication upon the matter of gender discrimination in personal laws is outside the jurisdiction of Court because it involves questions of meddling with the State policy which shall not be counted for duty of the Courts.

However the Courts in its previous judgements highlighted the importance of consistency of personal laws with the **Part III** of the Constitution. The Judgement faced opposition as Judiciary was alleged to be running away from its duty to safeguard the principles of Fundamental Rights.[192] Although, through this Judgement the Court tried to show its inability and conveyed that these issues can only be addressed by the Parliament. In its opinion highlighting the importance of legislative process, the Court deems fit that such reforms shall not be made by the Judiciary.[193] Further it can be concluded that such reforms when brought

[189] Danial Latifi v Union of India, A.I.R. 2001 S.C. 2181.
[190] Ahmadabad Women's Action Group v Union of India, A.I.R. 1997 S.C. 3614.
[191] *Supra Note 05 at 09.*
[192] *Supra Note 35.*
[193] *Supra Note 05 at 09.*

about by the parliament will be much valued and will truly achieve the purpose rather than boosting the sense of neglect amongst the minorities.

The Apex Court clearing out the same in *Lily Thomas v. Union of India*,[194] observed that the it is no doubt that Uniform Civil Code is the answer to a secured future but, "it can concretize only when social climate is properly built up by the society, Statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change for the betterment of the Nation at large."[195]

2.1.3. Section 10 of Indian Divorce Act, 1869: Discrimination against Christian Women

The 10th Law Commission Report (no. 90) in the year 1983 wherein the Law Commission in a *suo moto* action reviewed **Section 10** of the said Act. The said provision was said to be discriminatory against Christian women which can be figured out by the *prima facie* skim of the Section. In order to seek divorce, a Christian husband only had to produce relevant evidence raising reasonable doubt as to commission of adultery by the wife. But in case if a Christian wife had to prove the same, the evidence produced is required to prove one other aggregative factor for example adultery being accompanied by bigamy. The Report finds the said provision to be violative of **Article 14 & 15** of the Constitution of India.[196]

The same issue was raised before the High Courts of Calcutta, Kerala & Bombay in the cases of *Swapana Ghosh v. Sadananda Ghosh*,[197] wherein the Court expressly suggested that **Section 10** shall be adjudged as unconstitutional but still the judgement remained ignored till 1995. But then again in *Ammini E.J. v. Union of India*[198] & *Pragati Verghese v. Cyril George Verghese*,[199] the courts of Kerala & Bombay observed **Section 10** to be violating the principles of Gender equality and explicitly held it to be unconstitutional.

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[194] Lily Thomas v. Union of India, A.I.R. 2000 S.C. 1650.
[195] *Ibid.*
[196] Law Commission of India 90th Report, *The Grounds of Divorce Amongst Christians in India: Section 10 Indian Divorce Act 1869*, LATEST LAWS, URL: https://www.latestlaws.com/library/law-commission-of-india-reports/law-commission-report-no-90-ground-divorce-amongst-christians-india/.
[197] Swapana Ghosh v Sadananda Ghosh, A.I.R. 1989 Cal. 1.
[198] Ammini E.J. v Union of India, A.I.R. 1995 Ker. 252.
[199] Pragati Verghese v Cyril George Verghese, A.I.R. 1997 Bom. 349.

2.1.4. The Shayara Bano Judgement: A New Hope for Uniform Civil Code

The most recent and inspirational judgment of *Shayara Bano v. Union of India*,[200] has proved to be the "path breaking judgment" delivered by the Apex Court. The main issue raised before the Court of law was regarding the constitutional validity of Instant Triple Talaq. Further the practices of polygamy & *Nikah Halala* were also challenged by the petitioner. The Bench in the ratio of 3:2 observed that practice of *Talaq-e-biddat* (Instant Triple Talaq) to be contradictory with the principles of Islam and thereby, abolished the said practice. The Court was of opinion that such practice raises the issues of human dignity, gender quality, secularism & justice. J. Joseph specifically noted that, "There cannot be any Constitutional Protection to such a practice."[201] The Parliament was then directed to form a law to protect the rights of Muslim Women in marriage within 6 months. The result of which was the Muslim Women (Protection of Rights on Marriage) Bill, 2017 which was later on out-dated by the Muslim Women (Protection of Rights on Marriage) Act, 2019. The Act imposed criminal penalty on the practice of Instant Triple Talaq and made it a cognizable[202] & non-bailable offence.[203]

The desperate need for Uniform Civil Code can easily been seen starting from the episode of *Shah Bano* to the stunning case of *Shayara Bano*. It shall be observed that the Indian Judiciary on one balance has always respected religious practices but on the other balance has also prioritised the principles of gender quality & human dignity. With this step the judiciary has proved to be a reliever of encumbrance and a perfect center of balance, preserving traditions and eradicating ill practices. These landmark cases over the time have proved the aspirational character of women to challenge the orthodox practices of religious communities & to raise their voice against discrimination in matrimonial relations.[204] The distinction of Uniform Civil Code to that of personal laws which are driven by oppressive backward thinking and religious dominance has clearly made visible that the true spirit of Secularism lies in the implementation of the Uniform Civil Code.

Gender equality is the idea to provide as much liberty to women in such sense as to equate them with men in matters of economic & social policy.[205] It shall be construed as a duty that

[200] Shayara Bano v Union of India, (2017) 09 S.C.C. 01.
[201] *Ibid.*
[202] Section 04, Muslim Women (Protection of Rights on Marriage) Act, 2019, No. 20, Acts of Parliament, 2019.
[203] Section 07(c), Muslim Women (Protection of Rights on Marriage) Act, 2019, No. 20, Acts of Parliament, 2019.
[204] *Supra Note 34.*
[205] Medha Sarin, *Uniform Civil Code for Gender Justice*, 03 Inter. J.L. Manage. & Human. 665, 667 (2020).

lies upon every individual to respect & promote women's rights. This concept shall not be perceived as questioning the relationship of a man & woman, but instead balancing those relationships to such an extent where both men & women are valued equally rather than one in the terms of others. The Arbitrariness in social relations, subordination of women shall be changed to well-reasonable arrangements & fair social relationships.[206]

2.2. Inequalities among Communities: A Matter of Different Religious Benefits

The Constitution of India being a Secular Democratic Republic does not impose a State Religion upon its citizens and guarantees no interference in the religious practices. The "spine contention" against Uniform Civil Code is that it does not support the idea of "Secularism."[207] Having separate laws for each religious sect has created inequality among people on the basis of religion. Every religion is justified & reasonable as per own interests & orthodox thinking.

It is believed by many that implementation of UCC will contradict **Article 25** and restrict the communities from practicing their religion freely.[208] Uniform Civil Code focuses to bind the practices of every religion related to family matters under one shed and not to disrupt the religious beliefs of the people. The modern day youth is forced to assess the benefits and rights under every religion and then declare ones practice as the list contains a varied diversified range of inequalities. For example, A Hindu Man legally cannot have two wedded wives but such practice is no offence for a Muslim Man. Likewise, there are various differences in Adoption Laws, Succession Matters, family business matters, etc.

2.2.1. The Sarla Mudgal Judgement: Indication towards the Need for UCC

The question before the Court of law in *Sarla Mudgal v. Union of India*[209] was to adjudge the legal validity of the second marriage. In the present case, a Hindu husband without giving divorce to the first wife, in order to solemnise a second marriage converted himself into a

[206] *Ibid.*
[207] Shweta Mishra & Amit Kumar Pandey, *Necessity of Uniform Civil Code in India*, 02 J.C.L.J., 23, 25 (2019).
[208] *Ibid.*
[209] Sarla Mudgal v Union of India, A.I.R. 1995 S.C. 1531.

Muslim as it is legally valid for Muslims to have more than one wife. The Court whereas held that, "conversion to Islam and marrying again would not, by itself, dissolve the Hindu Marriage." The first wife is to be divorced first as by the Hindu Marriage Act, 1955 and then it shall be open to the Husband to marry again. Otherwise, the Husband shall be liable to criminal penalty under **Section 494** of the Indian Penal Code, 1860 for the offence of Bigamy.

Following the decision, J. Kuldeep Singh noted that, "Article 44 has to be retrieved from the cold storage where it is lying since 1949 reiterating that where more than 80% of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of citizens in the territory of India."[210] Once again recognising the need for Uniform Civil Code, the Supreme Court requested the Government to initiate the development of UCC.

2.2.2. The John Vallamattom Petition

Another indicating judgement was passed by the Supreme Court in the year 2003 trying to influence the need for Uniform Civil Code throughout the Nation. In the case of *John Vallamattom v. Union of India*,[211] the petitioner challenged the constitutional validity of **Section 118** of the Indian Succession Act, 1925. He argued that the provision is imposing unreasonable restriction upon Christian community and is therefore discriminatory in nature. The restriction was with regard to the "donation of property for religious & charitable purposes." The Apex Court found the provision to be violative of **Article 14 & 15** recognising that there shall not be any discrimination between religious communities and took down **Section 118** of the Act.

Further the then C.J.I. Khare took a note that, "we would like to state that Article 44 provides that the State shall endeavour to secure for all citizens a uniform civil code throughout the territory of India. It is a matter of great regrets that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country."[212]

[210] *Ibid.*
[211] John Vallamattom v Union of India, A.I.R. 1995 S.C. 1531.
[212] *Ibid.*

2.2.3. No Legal Recognition of Adoption Rights of Muslims

In the case of *Shabnam Hashmi v. Union of India*,[213] a Muslim activist had approached the Apex Court by way of Public Interest Litigation (PIL) requesting, "To lay down optional guidelines to enable and facilitate adoption of children by persons irrespective of their religion, caste, creed, etc." The petitioner sought legal recognition as a "parent" of her adopted daughter because in Islam, the system of *Kafala* is followed which only regards the petitioner as a "Guardian" and her daughter a "Ward." The petitioner has sought recognition as per the provisions of Juvenile Justice Act, 2000 (Amended in 2006) contending that the said Act is secular in nature and provides for every person to adopt a child, irrespective of religion.

The Court favoured the petitioner and held that, "The JJ Act, 2000 is a small step in reaching the goal enshrined by **Article 44** of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. An optional legislation that does not contain an unavoidable imperative cannot be stultified by the principles of Personal Law which, however would always continue to govern any person who chooses to so submit himself until such time that the vision of a Uniform Civil Code is achieved." The bench also observed that, "the same can only happen by the collective decision of the generations to come to sink conflicting faiths and beliefs that are still active as on date."[214]

2.2.4. The Sabarimala Incident: An Abomination to the Country

The historic case of *Indian Young Lawyers Association v. State of Kerala*[215] was the most recent dispute where the Sabarimala temple authorities argued that, "the presiding deity Lord Ayyapa is a celibate which is why women of 'menstruating' age shall not be allowed entry into the temple on account of purity." The Supreme Court observed such practices to be legally void & unconstitutional and struck down the ban on the entry women into places of worship. The Court in the original petition filed in the year with the ratio of 4:1 opined that, "We have no hesitation in saying that such an exclusionary practice violates the right of women to visit and enter a

[213] Shabnam Hashmi v Union of India, A.I.R. 2014 S.C. 1281.
[214] *Ibid.*
[215] Indian Young Lawyers Association v State of Kerala, (2019) 11 S.C.C. 01.

temple to freely practise Hindu religion and to exhibit her devotion towards Lord Ayyapa. The denial of this right to women significantly denudes them of their right to worship." Further it was observed that, "any exception placed on women because of biological differences violates the Constitution; that the ban violates the right to equality under **Article 14**, and freedom of religion under **Article 25**."

Even though the Judiciary has taken a positive step in favour of promoting the equality of women, this case particularly reflected that after all, even the modern India is not so modern. Biological processes in human body like Menstruation Cycle can also be one of the factors promoting discrimination between a man & a woman is a pity to witness. It is a shame to see that how all those Women Empowerment campaigns are encouraged, motivating daughters of the Country to be the one who can break all world records but still your menstrual process makes you inferior to men. Such cases make it more necessary to have a Uniform Code to put an end to such practices. India is a country of diverse religious beliefs and practices and it is an accepted fact that it is what makes it unique but such beliefs shall also evolve through time so as to conform to the modern day norms.

2.2.5. "We, the people of India……"

The Preamble to the Indian Constitution starts with the note "We, the People of India….."[216] which doesn't bifurcate further between men & women, Hindu & Muslim, or any other differentiation based on caste, color, class, region, religion, etc. The idea was to unite India to promote the feeling of "Justice," "Liberty," "Equality," & "Fraternity" among individuals.[217] But religion has become a way of competing, making a foe of each other and deciding upon the question of superiority. And this sense of accomplishing superiority is achieved by counting items and length of the list starting the grandeur and offerings of the said religion. In the present day scenario a daily dose of criticisms amongst the religious with regard to their practices and beliefs are a easy fetch. One can always see a Hindu criticising the practice of a Muslim or a Christian and vice-versa. These divisions in society have created war like situations in the Country, a classic example of which can be the *Ram Janma-bhoomi & Babri Masjid* land dispute; a fight between two communities to prove dominance & superiority of beliefs and

[216] INDIA CONST. preamble.
[217] INDIA CONST. preamble.

traditions. Religion shall be understood as a means to achieve mental peace & harmony and a sense of meditation between the supernatural and mere humans but not as a means to achieve sense of superiority by creating competitions and further rift amongst people.

Uniform Civil Code doesn't guarantee to end the differences amongst the religions, genders or communities as there always will be issues regarding the political, social and economic stands. But it surely would minimise the legal disputes between families, accumulate the thinking of the young generation, and bring National Integration. It shall be understood that the present society is driven by the trends of modernisation and their social attitudes understands the principles of universal & evergreen equality. A young aspirant would be an asset to the Nation only if he is free to choose his religion not by comparing the legal benefits but by recognising the best belief system to attain true prosperity.

CHAPTER 3

Uniform Civil Code: Way to Secularism?

The main argument against the implementation of Uniform Civil Code is that it would violate the doctrine of "Secularism." UCC is seen as a tool by which the State it is trying to interfere in the "freedom of religion & affairs of religious denominations" as guaranteed by the law of the land under **Article 25** & **26**. It shall be strongly recommended that **Article 44** does not aim to disrupt the connection between a man & God rather it aims to solve the disputes between humans themselves. As also rightfully opined by the Apex Court in the case of *S.R. Bommai v. Union of India*,[218] through J. Jeevan Reddy that, "religion is the matter of individual faith and cannot be mixed with secular activities, Secular activities can be regulated by the State by enacting a law."

The Uniform Civil Code is indeed a way to achieve Secularism. It intends to create a society where there is no discrimination between & among religions but equality in the personal & family matters of individuals. UCC will not in any case, force a Muslim to perform "*Saptapadi*" or a Hindu to perform "*Nikah*."[219] The religious practices and beliefs are secured, it is only the

[218] S.R. Bommai v Union of India, (1994) 3 S.C.C. 01.
[219] *Supra Note 54 at 26.*

matters which tend to create differences or discrimination among religious groups will be governed by the Code. But as everything in the world, Uniform Civil Code is also no perfect solution considering the present variances in thinking of the society.

It was the ratio of the bench in *Sarla Mudgal* case that, "Article 25 is very widely worded. Religion is any faith or belief. The Court has expanded religious liberty in its various phases guaranteed by the Constitution and extended it to practices and even external overt acts of the individual. Religion is more than mere matter of faith."[220] Interpreting this, it can be said that matters of marriage, divorce, inheritance, etc. shall be considered as much of religious belief & faith. But further it was also observed that, "Religious practices violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms are not autonomy but oppression. Therefore, a unified code is imperative both for protection of the oppressed and promotion of national unity and solidarity."[221]

The Uniform Civil Code in no way offends the principle of Secularism rather promotes it. As interpreting the Constitution of India and various precedents given by the Apex Courts, it is very much clear that the State can direct secular activities to be proper by enacting the necessary laws and that it is the duty of the State to secure National Integration if and so it involves interfering in the religious matters to eradicate the obstructions.[222] It is available by the law that if larger public interest is in question, freedom under **Article 25** & **26** can also be limited.[223] It is important to understand that Uniform Civil Code is no obstruction to religion but it is a way of sanitizing the orthodox practices as per modern societal beliefs & principles of equality.

3.1. Results/Implications of UCC, if enforced in India

3.1.1. Equality will be held in high esteem

A law commonly applicable to the population of the Nation will secure the ends of equality and demoralize discrimination on the basis of sex, caste, religion, etc. Prosperity in superior terms will abide by the principle of "Esprit-de-corps".

[220] *Supra Note 56.*
[221] *Ibid.*
[222] *Supra Note 34 at 211.*
[223] INDIA CONST. art. 25. cl. 2.

3.1.2. Promotion of National Integration

Implementation of the Uniform Civil Code will unify all the laws and weave all the nationals in one web. Utilization of tags like “special status” used to politicize thoughts and outcomes pursued by particular communities, will be discouraged.

3.1.3. Dominance clubbed to indistinguishable domain

Lives of minorities as well as public figures will be held aloof of contrast. Class difference will be eradicated and kept clear of discrimination which was in the past based on the norms believed and followed by the majority or upper-class groups. The aggrieved and victimized classes will now stand on a pedestal of equal length and density with those belonging to higher communities relying its weight on the Uniform Civil Code.

3.1.4. Outlook of the younger generations matched to a melody

The young population will be raised in a refined society where they can achieve their full potential and accomplish greater growth single minded. Without the influence of human made bifurcations, youth around the nation would steed the country towards amelioration of the general public, exploiting their flair on unbiased platforms.

3.1.5. Religious Freedom compromised and yielded

Implementation of the Uniform Civil Code can be widely considered as encroachment and interference of the State into personal and religious freedoms which have been followed by the communities over the years as traditions. The code can be deemed as a threat to conventions

that have been standing long enough to predict a consequence of wide spread danger to the humanity.

3.2. Suggestion/Recommendation

It is indeed a difficult task to ascertain the ingredients of such unified law because each sect of personal law is determined upon different belief, custom & practice which had its root in ancient biblical times. The core objective of this law shall be to strike a balance between religious sentiments and principles of human rights & dignity. As regards to application of such a law Dr. B.R. Ambedkar rightfully quoted, "It is perfectly possible that the future parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be purely voluntary."[224] The Application of the Uniform Code shall be parallel to the religious law or practice. Meaning thereby, UCC shall not in any case negate the option to an individual the availability of opting and practicing his religious law. In other words the religious law system shall not be wholly erased from existence, it shall exist parallel to the Civil law system and shall also be enforceable in the court of law if circumstances provide for such interference.

CHAPTER 4

Conclusion

“Desperate times call for desperate measures”. It is nothing short of appropriate to abjectly stress upon the despairing need to raise the concept of Uniform Civil Code beyond mere words and weights in paper, to match pace with the present day society and ensure continuing tranquillity. Commitment to the proposal of The Uniform Civil Code by all the citizens of India has to be deliberately woven with perspectives of liberalism and prosperity. Considering the depth and prospective outlook involved, codification of this idea should be amicably rejoiced. To achieve the desired results of acceptance, people of the nation should overlap their thoughts

[224] *Supra Note 26.*

with nationalism and aim to blend the code into the running system by adapting to changing times in the right frames of mind and reasonable time. A prominent hurdle for implementation of the Uniform Civil Code would be the diversified cultures, manifold religions and varying communities that reside in the nation. But, to safe guard the integrity of The Constitution of India, people need to expand their legion of outlook and adapt to the dynamic adjectives. The Uniform Civil Code owes its grandeur to the duty of the government to maintain peace and order but also strike a balance with fortifying the honour of The Constitution. Hence, its implementation demands immense efforts in the way of educating people and creating awareness with regard to the Socio-political issues and promote religious mobility. The Minorities who have since forever lived in the fear of being victimized to marginalization and loss of identity should be sufficiently addressed and comforted by building up unshakable faith in the government for proper treatment and providing solutions for increasing concerns. The Uniform Civil Code is a modern day initiative to match the need of the youth of a Nation which also demands modernised practise of law by the makers themselves. The true spirit of Secularism is recognised when the divergent religions harmonise and justify The Uniform Civil Code as the final destination to uphold solidarity. The initiative maybe an altruistic approach by the government but its existence and credibility purely depends on the much necessary adaption of the people.

"*Uniform Civil Code shall not only by the endeavour of the State but shall necessarily be by the Will of the people*." – Akshat Mittal.

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9.

Sedition under Indian Law

By: Gundala Praneeth

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Abstract

The term sedition refers to the actions which have a chance of making an individual revolt against the then prevailing authority or government. This is one of the criminal offences which are considered as betraying our own country. And who commits this offence is considered as anti-socials. The laws or provisions which govern these types of people are sedition laws. And the criminal law which defines this sedition law is section 124A of India Penal Code, 1860. First this law was drafted by Thomas Maculay in 1837 and was excluded in 1860, in a strange way, when Indian Penal Code came into force. Later in 1870 this was again included by an amendment by James Stephen when the nation showed the need of this law because of anti-socialism. The sedition law actually states that, any word or conducts of an individual which may or try to provoke or insist another individual to generate hatred or contempt or excites of attempts to excite disaffection against the government formed or established by the law of India, is said to be a criminal offence and the person who commits this shall be subjected to imprisonment which may extent for three years, and fine added to it. In light of this case one of the first cases in which this issue was raised is the trail of Jogendra Chandra Bose in 1891, where a journalist wrote an article criticizing the government and was held guilty of the offence of Sedition.

This research paper provides a detailed study on the offence of sedition along with discussing about the punishment for this offence and about the ongoing debate about this law.

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CHAPTER 1

Introduction

Now a days the law of sedition, that is, section 124A of Indian Penal Code, 1860 has acquired a controversial status and has been a regular topic in debates because its application slightly being visible as infringing the fundamental right of Speech and Expression which is mentioned in Article 19 (1) (a) of the Indian Constitution, 1950.

The term sedition refers to the actions which have a chance of making an individual revolt against the then prevailing authority or government. This is one of the criminal offences which are considered as betraying our own country. And who commits this offence is considered as anti-socials.[225]

The laws or provisions which govern these types of people are sedition laws. And the criminal law which defines this sedition law is section 124A of India Penal Code**,** 1860**.**

First this law was drafted by Thomas Maculay in 1837 and was excluded in 1860, in a strange way, when Indian Penal Code came into force[226]. Later in 1870 this was again included by an amendment by James Stephen when the nation showed the need of this law because of anti-socialism, in the IPC (amendment) Act of 1870[227]. This sedition law actually states that, according to "any person by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the government established by law in India"[228], which means, any word or conduct of an individual which may or try to provoke or insist another individual to generate contempt or hatred or attempts to excite or excites disaffection against the government formed or established by the law of India, is said to be the criminal offence sedition and the person who commits this shall be subjected to imprisonment which may extent

[225] India Today Web Desk New DelhiOctober 9, 2019UPDATED: October 9 & 2019 15:04, Use and misuse of Sedition law: Section 124A of IPC India Today (2019), https://www.indiatoday.in/education-today/gk-current-affairs/story/use-and-misuse-of-sedition-law-section-124a-of-ipc-divd-1607533-2019-10-09 (last visited Aug 20, 2020).
[226] Hrashavardhan, 'The Great Repression': The history of sedition in India National Herald (2020), https://www.nationalheraldindia.com/reviews-recommendations/the-great-repression-the-history-of-sedition-in-india (last visited Aug 22, 2020).
[227] Hrashavardhan, 'The Great Repression': The history of sedition in India National Herald (2020), https://www.nationalheraldindia.com/reviews-recommendations/the-great-repression-the-history-of-sedition-in-india (last visited Aug 22, 2020).
[228] Indian Penal Code, 1860, S. 124A

for three years, and fine added to it and here Disaffection indicates every feeling which can fill enmity and disloyalty in a person[229]. However, action or words which doesn't attempts to excite or excite hatred, disaffection or contempt, doesn't constitute to the offence mentioned under section 124A if Indian Penal Code, 1860, that is, Sedition[230].

Here the difference between the previous and the present law is that in the previous law, a person is said to be committed the crime of sedition only if he /she attempts excite or excites the feelings of any other person to bring "disaffection" towards the Government of India which is established by law. But in the present law a person is said to be committed an offence of sedition even if the offender "attempts to bring or bring the hatred or contempt towards the Government of India".

The crime, sedition was usually invoked on the freedom fighters by the British government in the times of the freedom fight. In light of this, one of the first cases in which this issue was raised is the trail of **Jogendra Chandra Bose** in 1891, where a journalist wrote an article criticizing the government and was held guilty of the crime called Sedition[231]. And apart from this, there are several more cases well known cases which took place in the times of freedom struggle, such as, the three trails of **Bal Gangadhar Tilak** and **Mahatma Gandhi**. Mahatma Gandhi and Shankerlal Banker were trailed for sedition for publishing three articles a week against British government[232].

[229] Sadaf Modak, Explained: Sedition law — what courts said The Indian Express (2020), https://indianexpress.com/article/explained/simply-put-sedition-law-what-courts-said-6254972/ (last visited Aug 20, 2020).

[230] Kedharnath v. State of Bihar, 1962 Supp 2 SCR 769.

[231] India Today Web Desk New DelhiOctober 9, 2019UPDATED: October 9 & 2019 15:04, Use and misuse of Sedition law: Section 124A of IPC India Today (2019), https://www.indiatoday.in/education-today/gk-current-affairs/story/use-and-misuse-of-sedition-law-section-124a-of-ipc-divd-1607533-2019-10-09 (last visited Aug 20, 2020).

[232] India Today Web Desk New DelhiOctober 9, 2019UPDATED: October 9 & 2019 15:04, Use and misuse of Sedition law: Section 124A of IPC India Today (2019), https://www.indiatoday.in/education-today/gk-current-affairs/story/use-and-misuse-of-sedition-law-section-124a-of-ipc-divd-1607533-2019-10-09 (last visited Aug 20, 2020).

CHAPTER 2

Sedition as an Offence in India

The present, prevailing sedition law has an everlasting effect of common law on it, from which it was derived. So, for the better understanding the researcher would like discuss about the evolution of sedition law in the common law and then in Indian criminal laws.

The common law's sedition law in the initial stages was very serious and had a vast scope[233]. And apart from this the evolution of "liberty of Speech and Expression" was very slow, particularly when it comes to criticizing the Government. And gradually the courts have begun to set some principles to decide whether a person has committed an offence Sedition in the cases like **R. v. Sullivan**[234] and **R. v. Burns**[235]. Justice Fitzerland in the above mentioned cases have observed that "Sedition in itself is a comprehensive term and it embraces all those practices 'whether by word, deed, or writing which are calculated to disturb the tranquility of the State, and lead ignorant persons to endeavor to subvert the Government and the laws of the Empire. Generally the objective of Sedition is to induce insurrection and discontent, and make people to turn their back on the Government and to cause insurrection or rebellion". Apart from this a similar decision was given by Justice Coleridge in the case of **R. v. Alfred**[236], it was held that the "word 'sedition' in its ordinary natural signification denotes a tumult, an insurrection, popular commotion or an uproar; it implies violence or lawlessness in some form".

Hence, now in English law, the crime, sedition is invoked on a person not only if he/she brings some other into hatred or disaffection or contempt against the government but also must attempts to generate or generate of excite the feelings to such an extent that the leads the another person to commit public disorder or a loud shouting against the government (loud slogans in India).

The now prevailing Indian law of sedition has been derived from the above mentioned Common Law by Sir James Fitz James Stephen[237]. As it is little severe and curtailing the

[233] Seven Bishop's Case, 1688, 12 St. T. 1
[234] R. v. Sullivan, 11 Cox. C.C. 44
[235] R. v. Burns, 16 Cox. C.C. 355, 361
[236] R. v. Alfred, 22 Cox. C.C. 1, 3
[237] Hrashavardhan, 'The Great Repression': The history of sedition in India National Herald (2020), https://www.nationalheraldindia.com/reviews-recommendations/the-great-repression-the-history-of-sedition-in-india (last visited Aug 22, 2020).

Fundamental Right which is mentioned in the Article 19(1) (a) of the Indian Constitution[238], this was challenged in many cases and came up with different views. In this aspect, one of the first cases to express its view on Law of Sedition in India was **Queen Empress v. B. G. Tilak**[239], in which, Justice Strachery had held that according to the sedition law every expression of bad feelings are punishable irrespective of whether it is the expression is of big scale or silent, in other words whether the feelings are express or implied[240]. These expressions on the scope of the sedition law given in the case of **Q.E v. B. G. Tilak**[241] were accepted by the Privy Council in the case of **K.E. v. Sadashiv Narayan**[242] and have been followed in the case, **Queen Empress v. Amba Prasad**[243] by the High Court. After this, in the case the **Q.E v. Ramachandra**[244], rejecting the literal and strict interpretation of the section 124A of Indian Penal Code, 1860 as it was done in English Law; Justice Ranade held that, "Disaffection is a negative emotion of disloyalty-like rejection, a stubborn insubordination to power, even when it is not rebellious. Makes people unable to follow or endorse the rules of the land, and foster confusion and public disorder". That is, the section 124A of Indian Penal Code is similar to the sedition law of Common Law but much more differently expressed and narrowed down.

Apart from this another landmark case that has rejected the literal and strict interpretation of the Common Law, is **Niharendu Majumdar v. K.E**[245], in which Chief Justice Gwyer rejected the a close or narrow reading and interpretation of the common law of law of the sedition and expressed the need of law of sedition as follows: The first and foremost duty of every government is the preserve of order, since order is the one obligation which in turns preserves all civilization and human happiness. It is no question that the task has often been done in such a manner as to make the remedy greater than the disease; but it should not fail to be a matter of responsibility as it has been carried out wrongly by those on whom the task depends. It is to this dimension of government activities that the crime of sedition is linked in our view. This is the State's reaction to those who try to disrupt its tranquility for the intent of disrupting or subverting this, to cause public disruption and spread chaos, or to provoke others to do so. Words, acts, or writings constitute sedition whether they have this purpose or inclination, so it

[238] Indian Constitution. Art. 19 (1) (a)
[239] I.L.R. (1897) 22 Bom. 11
[240] Queen Empress v. Ramachandra Narain, I.L.R. (1897) 22 Bom. 152 and Nibarendu Mujumdarv. K.E., 1942 F.C.R. 38, 43
[241] B.G. Tilak v. Queen Empress, I.L.R. (1897) 22 Bom. 528
[242]K.E v. Sadhashiv, L.R. 74 LA. 89.
[243] Queen Empress v. Amba Prasad, I.L.R. (1897) 20 All.
[244] Q.E v. Ramachandra, I.L.R. (1897) 22 Bom. 152
[245] Niharendu Majumdar v. K.E, 1942 F.C.R. 38

is plain to see that they may also constitute sedition whether they try, as the term is, to contempt government. It is not an insult to tend to the damaged vanity of nations, but because only disorder will occur when rule and legislation fail to be obeyed because people no longer have reverence for them. The substance of the offense is public disorder, or the fair expectation or likelihood of public disorder. The actions or phrases that have been spoken of must either cause chaos or be such that they convince fair people that such is their purpose or tendency." This case has given a liberal interpretation to the sedition law of India and has given a value to it. But this didn't last long. The view put forth by the Chief Justice Gwyer in **Niharendu Majumdar v. K.E** was nullified by the decision of Privy Council in **K.E v. Sadhashiv**[246]. As there is no any Supreme Court decisions supporting the decision of Niharendu's case, Sadhashiv's case decision continued prevail over the former according to Article 372 read along with Article 225 of the Constitution of India[247].

After all these views expressed by the different cases, finally in **Nazir Khan v. State of Delhi**[248], the honorable Supreme Court explained the content and meaning of the law of sedition. So, the honorable court in this case has observed:

"Sedition as a disloyal action and the law considers all the actions which have tendency to excite discontent or dissatisfaction, to lead to civil war, or to create public disturbance; to bring hatred or contempt towards the sovereign or the Government, the laws of that government or the constitution of the country itself, and generally all endeavors to promote public disorder". That is, the Sedition is a crime which is equal to betraying one's own country, because the act of betraying one's own country always starts with the offence of generating hatred towards the government formed by the law. The sedition is a term which covers all the actions, whether vocal, writing or deed which is capable of disturbing the peace in society of the state and excites people to revolt against the government and the laws of the country. The objective of the crime, sedition is to induce a person with dissatisfaction, make people revolt and turn people against the government and to disrespect administration of justice.

The conclusive ingredient for incorporating the crime, sedition under the section of 124A of Indian Penal Code, 1860 is that certain act would bring hatred or contempt against the government formed laws of India[249]. Raising slogans couple of times along with one or two

[246]K.E v. Sadhashiv, L.R. 74 LA. 89
[247] Punjabai v. Shamra, I.L.R. (1954) Nag. 805, 811
[248]Nazir Khan v. State of Delh, (2003) 8 SCC 461
[249] Bilal Ahmed Kaloo v. State ofA.P.,(1997) 7 SCC 43.

people which doesn't anybody around to react is not punishable under the section 124A of Indian Penal Code, 1860. To be punishable under the section 124A of Indian Penal Code, 1860, the act should be more overt, that is, the act must be more provocative for the people around to revolt against the government[250].

CHAPTER 3

Validity of the Law

Similar to the questions regarding the meaning and the scope of the Section 124A of the Indian Penal Code' 1860, there also arise the question regarding the constitutionality of the law of sedition. This arises because the Freedom of Speech and Expression has been guaranteed by the Indian Constitution to all the citizens of India and as the courts are the protectors of the Fundamental Rights of the people these questions were frequently raised before the court.

Article 19 of Indian Constitution talks about the Freedom of speech and expression, in which clause (1) especially guarantees the above mentioned Fundamental Right and clause (2) talks about certain limitations on the Freedom of Speech that has been guaranteed to the pupil of India by the clause (1). The limitations set on the Freedom of Speech and expression by the clause (2), were actually considered by the Supreme Court in various cases[251] and also held that the limits set out on the freedom of speech and expression to be narrower and stringent[252]. Even though the limits were declared to be narrower and stringent, the cases questions questioning the validity of the law have not stopped showing up before the court of law.

One of the first case in which the validity of this law questioned was, in **Tara Singh v. state**[253], in this case it was held that the Section 124A of India penal Code, 1860 was void as it is curtailing the Fundamental Right of Freedom of Speech in a manner not suggested by the Constitution of India. As a result of which through the Constitution (First Ament Act), 1951,

[250] Balwant Singh v. State of Punjab, (1995) 3 SCC 21.
[251] Romesh Thappar v. State, [1950] S.C.R. 594; Brij Bhushan v. State, AIR 1950 S.C. 129; Dharam Dutt v. Union of India, AIR 2004 SC 1295. See also Surjan Singh v. State of Rajasthan, AIR 1965SC 845; Supdt. Central Prison v. Dr. Lohia, AIR 1960 SC 633; Madhu Limaye v. S.D.M. Monghyar,l970 (3) SC
[252] Romesh Thappar v. State, [1950] S.C.R.
[253] Tara Singh Gopichand v. State, AIR 1951 E.P.27.

two amends were made to the Article 19 which deals with the Freedom of Speech and Expression. They are:

- Increased the scope for legislative restrictions on free speech
- Made clear that the restriction imposed must be reasonable.

Now, it should be checked whether the section 124A of Indian Penal Code, 1860 is infringing the amended Fundamental Right. In response to this several views were put for by the honorable courts of India. They are:

- In **Ram Nandan v. State**[254], it was held that the Section 124A of Indian Penal code, 1860 is acting beyond its legal authority by infringing the Fundamental Right of Speech and Expression and its actions are not justified by the expression "in the interest of public order".
- In **Dobi soren v. state**[255] it was held that "Section 124-A is not void because the expression "in the interestscof public order" has a wider connotation and should not be confined to only one aspect of public order viz. to violence. It has a much wider content, and embraces such action as undermines the authority of Government by bringing it into hatred or contempt or by creating disaffection towards it, from this point of view S. 124A of Indian Penal Code, 1860 is saved under clause (2) of Article 19".
- In the case of **Indramani v. State of Manipur**[256] it was held that, the section 124A of Indian Penal Code is half void and half valid, this is because the law is void in infringing the Fundamental Right to Freedom of Speech and expression by imposing restriction and in the same time is valid as the restrictions imposed on the Freedom of speech for making people punishable who commits the crime, sedition, are made by the provisions of Article 19 clause (2).

Here the Supreme Court have failed to declare whether the section 124A of IPC can infringe the Fundamental Right in the interest of public order but made a thing clear that the restriction must have a rational and reasonable relation with the public order in order to make the restriction valid[257]. Here the courts seem to having difference in their opinions and could not decide whether the Section 124A of Indian Penal Code, 1860 is constitutionally valid or not.

[254] Ram Nandan v. State, AIR 1959 All. 101
[255] Debi Soren v. State, AIR 1954 Pat. 254.
[256] AIR 1955 Manipur 9
[257] V.K. Javali v. State of Mysore, AIR 1966 SC 138

Finally after deciding all these cases and could not acquire the answer for about the constitutionality of S.124A of Indian Penal Code, 1860[258], the constitutional bench in 1962, in the case of **Kedarnath vs. State of Bihar**[259] have said that, the utmost importance of the state is the maintenance of law and order and disturbance of formed would be the criteria for legislation to punish people who does a wrongful act against the state. And similarly, the legislation also has the duty to protect the Fundamental rights of people and guard them. But it also has to limit the freedom from misused as an approval for condemnation of the government. So, from this, it can be said that, a person speak anything or write anything about the Government or its policies, in a criticizing or commenting manner provided this criticism or comments should not provoke the people revolt or commit violent actions against the government or should not be done intending to disturb the public disorder.

In addition this the court also shared its view upon imposing a reasonable restriction of freedom of speech in the following cases:

- The court in the case of State of **Kamataka v. Dr. Praven Bhai Thogad**[260] has valued the Fundamental Rights the most and tried its best to protect them. And it also held that, sometimes, for the maintenance of peace, preservation of rule of law and public order this freedom of speech can be subjected to restrictions.
- The apex court in the case of **Nazir Khan v. State of Delhi**[261], have accepted for the section 124A of Indian Penal Code, 1860, to impose restriction on by hearing to the line "inciting disaffection in the people's mind against the government or legal political policies is a crime".

[258] Indian Penal Code, 1860, S.124A
[259] Kedharnath v. State of Bihar, 1962 Supp 2 SCR 769.
[260] State ofKamataka v. Dr. Praven Bhai Thogadia, AIR 2004 SC 20.
[261] NazirKban v. State of Delhi, (2003) 8 SCC 461.

CHAPTER 4

Punishment for the offence of Sedition Law

- The sedition law is an offence which is non-bailable in nature. The person who is accused of crime of sedition is subjected to imprisonment for three years and which may be extended for life and fine may be added to it.
- The person who is accused of sedition is barred from government jobs, had to live without passport and have to appear in the court whenever it may be required.

CHAPTER 5

Should the Sedition Law be scrapped?

Before discussing whether the Sedition Law in India should be scrapped or not, first we have to know about the basic objective of the Sedition Law in India. The basic objective of the sedition law in India is to preserve peace, public order and prevent anti nationals to brain wash peoples mind and make them revolt against the government established by the law. That is, anyone who disturbs the peace in the state or disturbs the public order or excites or attempts to excite other people to revolt on the people on the government by filling their minds with hatred towards the government is punishable under S. 124A if Indian Penal Code, 1860. But now-a-days this section has become a mere tool of politics, precisely the party which forms the government. In simple words the political parties are using it as a tool to shut the mouth of common people who are protesting against their laws and policies. For an instance let's consider the protests which have taken place in the December month of year 2019, a large number of sedition cases were filed against the people who were on protest against the Citizenship (Amendment) Act, 2019[262]. According to the data from National Crimes Bureau, the filing of no. of cases increased, in past three years, after the CAA was passed and about

[262] Jayant Sriram, Should the sedition law be scrapped?, The Hindu, March 6, 2020, https://www.thehindu.com/opinion/op-ed/should-the-sedition-law-be-scrapped/article30993146.ece (last visited Aug 22, 2020).

194 cases were filed after the CAA was passed on December 11, 2019[263]. Here the people were just fighting for their rights, neither revolting against the government nor provoking other to revolt. Here the other view is that, the people might be wrong in interpreting the act, so, the government should try to control the public and try to explain them in detail, instead of invoking a crime which nearly equal to treason on them.

And just by looking at we can simply scrap the law sedition, because this may lead to provocation of people again the government by the opposition parties. So, the nation need the Law of Sedition provided there should be certain guidelines to invoke the offence on the people as mentioned in the case of **Chudwala v. State of Maharastra**, which was decided with the help of the case **Kedharnath v. State of Bihar**[264].

CHAPTER 6

Research Questions

- What is the brief History of Section 124A of Indian Penal Code, 1860?
- What is the offence of sedition?
- What is the punishment for this offence?
- What is the status Constitutional validity of the Law of Sedition and Should the Sedition Law be scrapped?

CHAPTER 7

Research Objectives

- To know about the brief history of the Section 124A of Indian Penal Code, 1860.
- To know about the Sedition as an offence in India.

[263] Jayant Sriram, Should the sedition law be scrapped?, The Hindu, March 6, 2020, https://www.thehindu.com/opinion/op-ed/should-the-sedition-law-be-scrapped/article30993146.ece (last visited Aug 22, 2020).
[264] Kedharnath v. State of Bihar, 1962 Supp 2 SCR 769.

- To know about the punishment for the offence of Sedition.
- To know about the Constitutional validity of S.124A of Indian Penal Code, 1860 and whether the law should be scrapped.

CHAPTER 8

Conclusion

After analyzing and studying extensively the Concept of Law of Sedition, the researcher would like to conclude that the researcher is successful gathering the information required to answer the question that the researcher has set up for this research paper. The researcher also wants to conclude that the researcher would agree with the Mahatma Gandhi's statement of calling the law of sedition as the "prince among all the political sections of the Indian Penal Code designed to suppress the liberty of the citizen" because this is one section or provision which has the scope of completely suppressing the Fundamental Rights of the Speech and Expression and take a common into control even when it is the time when that common man should react to has happened to him. But at the same time this provision is very important to be included in criminal law, because still, as told in the case of **Kedharnath v. State of Bihar**[265], government established by law is the body which protects the each and every right of a citizen and absence of any such law would result in provocation of people to turn them against the government established by the law, by the opposition parties or anti-social elements. So, it can be said that this law is a provision which can be used both legally and illegally depending upon the discretion of part which forms government.

[265] Kedharnath v. State of Bihar, 1962 Supp 2 SCR 769.

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10.

Critical Analysis of Interface between Competition Law and Intellectual Property Rights with Special Reference to Copyrights in India

By: Drishti Jain and Molshree Totla

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Abstarct

The research paper focuses on the interface between Copyright (Intellectual Property Rights) and Competition Law in India. Both these aspects of law have occupied distinct positions in law and generally contradict each other. Competition Law regulates practices which have anti-competitive effect on the market and also which affect negatively on the fair functioning of the market; whereas IPR promotes exclusive rights of the author (creator) over the content and also promotes monopoly over the content; in this sense the two concepts of law contradict each other fundamentally.

The foundation of case laws and jurisprudence regarding the interface of Competition Law and IPR are still developing and need to be concrete, thus there is a need to refer and analyse the jurisprudence in the US and the European Union.

The first part of the paper shall deal with definitions, interpretation and overview of competition law and IPR in India. The following chapters shall compare the provisions of the EU Regulations, laws in USA and laws in India. The paper shall conclude with suggestions and guidelines which can be adopted from other jurisdictions.

Key Words: Intellectual Property Rights, Competition Law, European Union Regulations

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CHAPTER 1

Introduction

There are two sets of law which have recently expanded and developed in 21st century, which are Competition Law & Intellectual Property Rights [hereinafter referred to as IPR]. These fields of law work dynamically in their own spheres. But when they intersect, they have its own principles which at some instances create conflict between the interest of the concerned parties.

Competition Law is a set of rules seeking to maintain the market competition by synchronizing anti-competitive conduct of companies in the market. The competition law approaches matters relating to anti-competitive conduct of the enterprises' by a combination of punitive, remedial and preventive measures.[266] Competition law plays a vital role in conduction of a fair market. It has assumed great importance in regulating markets both national and internationally. It is a law which protects consumers' interests and ensures freedom of trade and practices worldwide. Internationally new forums have been constituted which governs competition law apart from United Nations Conference on Trade and Development (UNCTAD). The principle objective of the law is to protect and maintain fair market competition.

The Competition Commission of India (herein referred to as CCI) was constituted under the Competition Act, 2002. The main aim of the commission is to prohibit malpractices adversely affecting market competition. Moreover, it was inactive with the purpose to sustain a fair market competition as well as to protect consumers' interests. The Hon'ble Supreme Court in the writ petition case of *Brahm Dutt V. Union of India*[267], stated the qualification of the members and the chairman of the Commission. It comprises of a Chairperson and minimum two and not more than six other members to be appointed by the Central Government[268]. It is established under Section 7(1) of Competition Act, 2002.

Intellectual properties are the properties created out of human mind. Rules and regulations governing such properties are called Intellectual Property Rights. It is a right provided to the owner of the property in respect of it's ownership, protection and security. The term intellectual property connotes a specific legal meaning itself but nowadays it's abbreviations such as IP or

[266] Competition Commission of India, Annual Report 2015/16.
[267] AIR 2005 SC 730; (2005)2 HC 431.
[268] The Competition Act, 2002 No. 12, Act of Parliament, 2003 (section 8)

IPR has become modern names for the same. Random House Webster's Unabridged Dictionary defines the term "intellectual property", thus: Property that results from original creative thought, as patents, copyright material and trademarks.[269] IP is divided into two branches: 1] Industrial Property, and 2] Copyrights and neighbouring rights.

Industrial properties includes Industrial designs, Patents, Layout designs, Trademarks, geographical indications etc. Whereas Writings, Dramatic works, Musical Works, Painting and Drawings, Audio – Visual Works, Architectural works, Photographic works, Sound Recording, Sculptures, Actors and Singers, performance of musicians, broadcasts etc are included under Copyrights and neighbouring rights.

In simple terms, copyright means a right acquired by an individual over his work as a result of a person's intellectual labour. The main objective of this law is to provide protection to individual's skills, labour over a work. "According to Oxford dictionary the word copyright was derived from the expression 'copier of words." The word copyright has been explained in Oxford English dictionary as an exclusive right given by law for a certain term of years to an author, composer etc. (or his assignee) to print, publish or sell copies of his original work. According to Black's Law Dictionary copyright is the right in literary property as recognised by positive law. An intangible incorporeal right granted to the author or originator of certain literary or artistic production whereby he is invested for a specific period with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.

The copyright law in India has been revised several times to suit the needs of the creators over several decades, often based on changes in the international conventions. The important question which has been at dispute for several years is regarding the subject matter of protection under the scope of copyright law. The extent of safeguarding shall extend to the following amongst many others such as, literary works (either original or translation), dramatic works, musical works, artistic work, films, sound recording, computer programs (including software), compilation of books. The fundamental principal behind the section 14 [270] of the present Act was to promote creation of original and authentic content either in the context of texts, translations, audio-visual creation, art work or even digital like software codes etc. The

[269] Random House Webster's Unabridged Dictionary.
[270] The Copyright Act, section 14, 1957

provision promotes originality and protects the creator. In a way this provision also promotes and protects the creator's economic rights.

In India, copyright comes into existence automatically that means as soon as the work is created, the right comes into existence. According to Section 45 of Copyright Act, 1957 registration is optional and not mandatory. Works published before the inception of the present Act can also be registered provided the work still enjoys copyright. Copyright is negative in nature as it imposes duty on others to prohibit exploitation of others work for their benefit. The general principle on which the copyright law works is that "protected works cannot be availed without the consent of the owner of the rights"[271]. The Berne Convention is an international agreement that governs copyright. It was enacted in 1886 in Berne, Switzerland. India became it's member in 1928.

CHAPTER 2

Overview of Laws

The decade of 80's and 90's has been a crucial one for India, especially due to enactment of new economic policies and opening of Indian market to the world. It was a period of transaction, where the government has to promote Indian industries in the world. The new economic policies of 1991 which brought about Liberalisation, Privatisation and Globalisation which is abbreviated as LPG. It was observed that as the competitiveness of the market has increased a competition law was the need of the hour. In 1959, the first competition law was enacted and is known as Monopolies and Restrictive Trade Practices Act (herein referred to as MRTP). The Act enforced on 1st June, 1970. But with the changes in the market structure, nature of business, economy etc., there was a need to replace the existing Act and hence the Competition Act of 2002 was enacted. Consequentially the Government of India formed a committee under the chairpersonship of Mr. SVS Raghavan (known as "Raghavan Committee") to draft a competition law in accordance with international conventions. In keeping with the report, a draft of Competition Law was formulated and introduced to the Government in the year 2000 and the Bill was presented in the Parliament which was passed

[271] Alka Chawla, Law of Copyright: Comparative Perspective (1st Edition, Lexis Nexis, 2013).

in 2002 and the act was called as Competition Act of 2002 and was enforced from September 1, 2009 and thus repealed MRTP Act.

As per Section 7(1) of Competition Act, 2002, a commission was established which is to be known as Competition Commission of India. The constitutional validity of the commission was questioned in *Brahm Dutt V. U.O.I*[272], and wherein Section 8 of the aforementioned act was put under the scanner. The Apex Court refrained from delivering any judgement on the issue and further observed that one should look at the amendments and then question the issue of constitutionality. Under Competition (Amendment) Bill, Competition Appellate Tribunal was established which is a three member quasi-judicial body and it was enacted in the light of the *Brahm Dutt* [273]case.

Section 3 of the Act deals with the anti-competitive agreement. Section states that "agreement between enterprise or associations or enterprises or person or association or persons in relation to production, supply, storage, distribution, acquisition or provision of services or control of goods which causes or is likely to cause an appreciable adverse effect of competition are known as anticompetitive agreement."[274] *Such agreements are prohibited by law. This agreement is of two types: vertical agreement and horizontal agreement.*

"*The abuse of Dominant Position"* is contrary to the objectives of the Competition Act and thus prohibited by section 4of the act and it is defined under section 4[275] of the Act. As per the definition in the act, any enterprise holding a position of power in any relevant market, which allows it to function as independent of the factors in the market such as competition and consumer interests, and which affect the competition is known to hold "*Dominant Position*" in the said relevant market. For instance, if an enterprise by the name XYZ holds a dominant position in a relevant market, it has the power to control the dynamics of the market and thus cause imbalance to competition in the said relevant market.

The concept of IPR is borrowed from West. The very first law passes in relation to IPR was the Indian Trade and Merchandise Marks Act which was enacted in 1884. It was followed by Indian Patent law in 1856. It was some of the first Indian laws to be enacted and was followed by a series of related to IPR. These include Indian patents and Designs Act, 1911, Indian

[272]AIR 2005 SC 730; (2005)2 HC 431.
[273] Brahm Dutt v. Union of India, AIR 2005 SC 730; (2005)2 HC 431 (India)
[274] The Competition Act, section 3, 2002.
[275] The Competition Act, section 4, 2002.

Copyright Act, 1914. The Trade and Merchandise Marks Act of 1958 and the Indian Copyright Act of 1957 replaced the Indian Merchandise Marks Act and Indian Copyright Act respectively. The then government formed a committee under the chairpersonship of Justice Rajagopala Ayyangar. The committee was called as Justice Rajagopala Ayyangar Committee (RAC). The committee was constituted to revise the existing patents and designs laws. In 1959 a report was submitted by the committee which stated fine balance between the ideals of the constitution. It also provided for patenting of drugs. It mainly outlined the policy behind the Indian patent System. India has ratified both World Intellectual Property Organization (WIPO) and World Trade Organisation (WTO).

The law governing copyright in India is the Copyright Act, 1957. The said Act was amended in 2012. Section 16 of the Act specifies that any person shall not be entitled to copyright or any right similar to the latter in the areas of any artistic work, literary, dramatic, musical, irrespective of the status of the publication , otherwise than under and in accordance with the provision of this statute.[276]

CHAPTER 3

Inter-Relation between Copyright and Competition

The most common concern in the area of competition law is the possible violation of the law due to the existence of intellectual rights such as copyright, trademarks, patents, geographical indications (GI). IPR provides an owner with the right to protect and sell his property which in turn provides monopoly to the owner whereas competition law aims to establish a fair competition and restricts monopoly of any particular enterprise in the market. Such right holders mere rely on this law as it encourages more innovation and competition in the market.

The Competition Act 2002 has broadly taken into consideration the principles of IPR at the time of formulation of the provisions of the act and it does not exclude the dominance achieved by a person due to such IP rights.[277]

[276] Gramophone Company of India Ltd. V. D.B. Pandey (1984) 2 SCC 534 (India)
[277] Best IT World India Private Limited V. M/s Telefonaktiebolaget L M Ericsson (Publ) (CCI)(India), (2016) 124 CC 0519

Some of the notable judgements of Indian courts on interface between IPR and Competition Laws are following:

Aamir Khan Productions Private Limited V. Union of India[278], the High Court of Bombay has held that all the matters pertaining to Competition Law and IPR falls within the jurisdiction of CCI [279]. In another case, the Commission has held that IPR is a statutory right guaranteed by the law and does not have a sovereign status.[280] In *Union of India V. Cyanamide India Limited & Anr*.[281], the Supreme Court has held that charging huge amount on life saving drugs falls within the scope of price control and the Competition Commission exercises jurisdiction over such matters.[282] In the landmark case, the Apex Court reiterated its previous judgements and observed that though the copyright holder enjoys full monopoly but it is not absolute in the sense that if such monopoly hampers the functioning or competition of the market it will be regarded as in violation of the competition law and a reason for cancellation of the license. [283]

Section 3(5) of the Competition Act

Act, 2002 provides the reasonable conditions that are necessary to protect the IPR conferred by the following statutes, would not constitute anti-competitive agreements. It states that:

"5. Nothing contained in this section shall restrict—

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under:

(a) the Copyright Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

[278](2010) 112 Bom L R 3778
[279] Ibid
[280] Kingfisher V. Competition Commission of India, Writ petitions no. 1785 of 2009(India)
[281] AIR 1987 SC 1802
[282] Ibid
[283] Entertainment Network (India) Limited v. Super Cassette Industries Ltd., 2008 (5) OK 719

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) the Designs Act, 2000 (16 of 2000);

(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export."[284]

The term 'reasonable conditions' in clause (i) of Section 3(5) has not been defined or explained in the present Act. In simple terms it means that if any unreasonable conditions are attached to IPR then the Section 3 will be applicable that means if the licensing arrangements affect the prices, varieties and quantities of any commodities and services then it will fall under Competition Law. As per the reports published by the commission, the CCI is authorized to question and investigate into the conditions which obstructive in the IPR agreements. [285] The Commission is empowered to impose penalty upon parties to such agreements under Section 27 and 28 of Competition Act, 2002.

In the case of *FICCI Multiplex Association of India V. United Producers/Distributors Forum*[286], it was contended in this case that the alleged anti competitive agreement was for the purpose of protecting the rights of producers/distributors and is covered under Section 3(5) of the Competition Act, 2002. It was observed by the commission that right guaranteed under the Copyright Act, 1957 is not an absolute right. It further observed that Section 14 of Copyright Act, 1957 has to be read in line with provisions of Competition Act. It is commonly understood that copyright in works such as cinematography, film and sound recordings are limited in nature as compared to rights in primary works like literary, dramatic or musicals. [287]For the purpose of the present case the Competition Commission has relied on the observation made by the Delhi High Court in the case of *Gramophone Co of India Ltd V. Super Cassette Industries Ltd*[288]., where the commission held the copyright as a statutory right.

[284] The Competition Act, section 3(5), 2002
[285] Intellectual Property Rights under the Competition Act, 2002, A Quick Guide published by Competition Commission of India, New Delhi, pp. 3-8.
[286] 2011 Comp LR 79 (CCI).
[287] Ibid
[288] ILR (2010) Supp (5) Delhi 656.

The Delhi High Court in the case of *Microfibres Inc. V. Girdhar & Co*[289]., has held that the legislative intent was to grant a higher protection to pure original artistic work such as paintings, sculptures etc., and lesser protections to design activity which is commercial in nature.[290]

In the landmark case of *Shamsher Kataria V. Honda Siel Cars India Ltd*[291]., observed that though the registration of IPR is compulsory, same registration does not automatically empowers a company to seek exemption provided u/s 3(5) of the Act, 2002. The Commission further stated that an important criteria for the determination of availability of the exemption u/s 3(5)(i) is to examine if the conditions were enforced by the holder of such rights can be termed as an "*imposition of a reasonable condition*, as maybe required for safeguarding any of his rights."[292]

CHAPTER 4

Other Jurisdictions

EUROPEAN UNION

The interface between IPR and Competition Law in the European Union (herein referred as EU) is outlined in the preamble of the Technology Transfer Guidelines issued by the European Commission (herein referred as EC). Notably the Article 101 of the Treaty on the Functioning of European Union(herein referred as TFEU) provides for the applicability of the EU Competition Law to agreements aimed at restricting market competition. Article 102 of the same treaty sanctions violation of a dominant position and also the merger regulation. [293] There

[289] 128 (2006) DLT 238
[290] Ibid, Nandu Ahuja vs. Competition Commission of India & Anr. (17.01.2014 - COMPAT) : MANU/TA/0003/2014 (India)
[291] 2014 Comp LR 1 (CCI).
[292] Ibid.
[293] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (The "Merger Regulation Act"), OJL 24, 29.01.2004, p.1-22.

is a move to the intervening approach from a liberal approach in the area of IP law in relation to licensing agreements in the European Courts.[294]

UNITED STATES

The development of competition in the states started before any other jurisdictions. In nineteenth century, America enacted anti- trust laws in response to unfair business practices by the corporate enterprises, to control such market competition and inflation. Since then the laws has been evolved to prohibit engaging in huge range of anti competitive conduct of corporate including anticompetitive mergers and joint ventures. The Sherman Act regulated the market competition as it is applicable to both US companies and Non- US companies operating business outside. With the change in market circumstances and increasing competition he Department of Justice has created zones known as safety zones which provides no imposition of the restrictions on Licensing agreements unless and until it adversely affects the market.

In America, copyright law primarily falls in the domain of federal law; however, the states (individual) have their own state laws concerning copyright. The State Copyright legislations are limited in nature as it exists within a confine space, i.e., within the state constrained by other factors such as the federal law, international law, the pre-emption doctrine and etc. Though the state laws are not that important in state policy, but do form an important component of such policies.

CHAPTER 5

Conclusion and Suggestions

To confer upon exclusive rights of the owner to behave in a particular way is an exclusive characteristic of IPR. On contrary, the aim of the Competition Law is to keep the market open

[294] A.Jonas and B.Suffrin, EC Competition Law: Text, cases and materials, 2008, p.777.

and fair. However, it is generally believed that it is simply incorrect to suppose that there is a tension inherently between the area of law and policy. The European Commission Guidelines on the application of Article 101 of the TFEU to technology transfer agreements says:-

"*Indeed, both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources. Innovation constitutes an essential and dynamic component of an open and competitive, market economy".* [295]

The US Department of Justice and Federal Trade Commission have similarly recognised that "*Intellectual property and Anti- trust Laws work in tandem to bring new and better technologies, products, and services to consumers at low prices."* [296]

The jurisprudence of interface between copyright and competition law is similar to the provisions under the European Union because of socialist economy followed in both the countries. For instance, under Indian law the provision of dominant position is not expressly defined whereas under European Law fix percentage is provided for the determination of dominant position of an enterprise in the market.

The interface between IPR and Competition law in India meets with several loopholes. The jurisdiction to decide cases involving copyright and competition is still undiscovered and is considered by several scholars, jurists as one of the main loopholes. Another loophole in this area is the lack of fair representation as the members do not have expertise in Copyright Law. The jurisprudential aspect of this area is also lacking.

[295] OJ [2014] C 89/3
[296] Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition