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Editorial Note

Volume II Issue II

The Editorial Board of the International Journal of Law & Management Studies is pleased to bring forth the second issue of the second volume of the journal attempting to cover a wide ambit of areas within its fold ranging from Alternative Dispute Resolution, an evolving answer to the constant endeavour of the business community to find an efficacious alternative to litigation to understanding the essence of giving back to society by the corporates, the Corporate Social Responsibility initiative and laws surrounding the same. The journal has strived to contribute to the academic research improving around critical legal issues through articles contributed by students, practicing scholars and academicians.

Contemporary issues have arisen in the recent past in the legal framework in India. Ranging from the proposed amendments to the Finance Bill, 2016 to merge tribunals paving way to a changing scenario of tribunals in India to the Goods and Services Tax and many more reforms in these areas of law. As regards one of the fundamental reforms to merge the Competition Appellate Tribunal (COMPAT) with the National Company Law Appellate Tribunal (NCLAT) among other tribunals seems one of the reforms which goes against the fundamental reason for establishment of tribunals as specialized quasi-judicial bodies dealing with specific matters by people with expertise in such matters with an aim of speedy disposal and the idea of clubbing these tribunals seems to isolate the 'specialized quasi-judicial bodies' objective entirely. Further, the issue includes articles which revolve around various issues relating to contracts, Anti-Defection Law, extradition laws and the ever-green issue of scope of non-compete agreements under the Indian Law. Further articles on Right of Healthy Indoor Air, an evolving concept and Cross-Border M&A are expanding and vitalizing the importance of innovation in research.

The journal seeks to focus, in the upcoming issues, on certain growing areas of law including Intellectual Property Rights, Competition Law, moving towards tribunalisation of all commercial areas of law. The journal seeks to study on few of the topics discussed above in the next edition.

Sameer Avasarala

Publishing Editor

We seek to place our gratitude on record to all contributors for their valuable research papers, articles through which the journal seeks to promote active academic research in the areas.

ALTERNATIVE DISPUTE RESOLUTION AND JUDICIAL REFLECTIONS IN INDIA

Dr.(Smt).Manjula .S.R¹

INTRODUCTION

The resolution of dispute through a middle man is not a new concept, but it has been practiced from time immemorial. The Arbitration Act of 1940 was purely made applicable to domestic arbitration between parties and it also the replica of the New York Convention of 1958. The Government of India to give consideration of the UNCITRAL Model Law on International Commercial Arbitration enacted the new law of Arbitration and Conciliation Act of 1996 which was made applicable to Domestic Arbitration, International Arbitration and Conciliation procedures in India. Part-I of the Act is applicable to all types of Arbitrations in India between Indian Nationals, Companies, and foreign Nationals. Part-II of the Act is made applicable to Arbitration outside India as governed by the New York Convention.

JUDICIAL REFLECTION ON ADR SYSTEM IN INDIA

A. In *ONGC V. Saw Pipes Co Ltd*², the main question before the court was whether the judicial review of an award should extend to the examination of errors of law. The Supreme Court held that, award can be set aside on ground of erroneous in law. The court referred Section 69 of the English Arbitration Act of 1996 which provides for a provision to an appeal on point of law.³ Section 28 of the Indian Arbitration and Conciliation Act of 1996 also contains the similar provisions.

B. *Venture Global Engineering v. Satyam Computer Services Ltd*⁴The question of setting up of an award on ground of public policy under section 34 of the Act was considered by the Supreme Court of India. The Satyam and Venture Global Engineering Co entered into an agreement to form a joint venture. In an agreement they agreed to be governed by the law of Michigan, it also said that all times the shareholders would act in accordance with the Indian Companies Act and other

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² AIR 2003 sc 2629

³ Section 69 provides for appeal on the grounds of question of general public, if the decision of Arbitration is obviously wrong, and if it just and proper to decide.

⁴ AIR 2008 SC 1061

applicable Indian Laws. Then Satyam alleged that the VGE co had defaulted and sought to exercise its contractual right to call the shares of the joint venture. The parties arbitrated the dispute in London under London Court of International Arbitration Rules. Arbitrator ordered the VGE Co to transfer its shares in the joint Venture to Satyam. The VGE Co contended that the share transfer ordered by the Arbitrator would violate the substantive law of India. The VGE Co filed suit in India to set aside the award and Satyam filed suit in Michigan to enforce the award under the New York Convention. The section 34 of Indian law could be used to set aside the foreign award if the award is in contravention of the provisions of the Indian Arbitration and Conciliation Act of 1996. The Supreme Court of India opined that, Indian courts could review whether the award violated Indian law, and it chastised Satyam for seeking to enforce the award in United States and to avoid review by the Indian Courts.

*C. Shri Lal Mahal Ltd v Progetto Granpo Spa*⁵ (Lal Mahal Case) has overruled the Supreme Court's earlier judgment in *Phulchand Exports Limited v OOO Patriot*⁶ (Phulchand Case), to hold that the expression "*public policy of India*", when used in context of Section 48(2)(b) of the Arbitration and Conciliation Act, 1996, which sets out the ground on which the enforcement of foreign awards may be refused, cannot be given a wider meaning to include patent illegality in an award, as is done in context of the same expression used in Section 34 of the Act, relating to enforcement of domestic awards. This judgement re-emphasises the recent arbitration friendly inclination of Indian courts to adopt an approach of minimal interference in implementation of arbitration awards.

The case at hand involved an agreement for sale of durum wheat between an Indian seller and an Italian buyer. Disputes arose between the parties when the buyer alleged that the wheat supplied by the seller did not meet the specifications under the agreement and was infact soft common wheat. Further, disputes also arose as to whether the inspection was to be conducted by the inspection agency based in Geneva or in India and which agency's report was to be considered as determinative. The buyer invoked arbitration under Grain and Feed Trade Association, London (GAFTA) and the award was rendered in favour of the buyer. A further award was also rendered in favour of the buyer for the seller's alleged breach of the arbitration agreement in bringing legal

⁵ *Civil Appeal No. 5085 of 2013 dated 3 July 2013.*

⁶ 2011 10 SCC 300

proceedings in India concerning the first dispute, before the same was determined under the GAFTA rules. The sellers in turn filed two appeals before the Board of Appeals of GAFTA (Board of Appeals), both of which were dismissed in favour of the buyer. Subsequently, the seller also failed in its challenge to one of the orders of the Board of Appeals before the High Court of Justice at London. Accordingly, both the awards of the Board of Appeals became final.

Thereafter, the buyer instituted a suit in the Delhi High Court for enforcement of the awards and the seller raised various objections to the enforcement of the above awards including, inter alia, that the awards in question are contrary to the public policy of India inasmuch as they are contrary to the express provisions of the contract entered into between the parties. The seller submitted before the Delhi High Court that there had been an error in accepting the inspection/ test report by the investigation agency based in Geneva whereas under the contract, it was the inspection/test report of the investigation agency based in India that was material. On the other hand, it was submitted on behalf of the buyer that such ground taken by the seller was in fact a matter of appreciation of evidence and determination of question of fact which was beyond the scope of the proceedings under Section 48 of the Act. The buyer submitted that the seller could not be permitted to reopen questions of fact. Seeking enforcement of the awards, the buyer submitted that there was nothing in the awards which could be said to be against the public policy of India.

The Supreme Court in deciding the said issue, made a distinction between the ambit of the expression “public policy” when used in context of enforcement of a domestic award and a foreign award, holding that in case of the latter a restricted meaning must be applied.

D. *Renusagar Power Plant Co. Ltd v General Electric Co*⁷ (Renusagar Case), the Supreme Court while construing the term “*public policy*” in Section 7(1)(b)(ii) of Foreign Awards (Recognition and Enforcement) Act, 1961 (Foreign Awards Act), applied the principles of private international law and held that an award would be contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality and cannot be set aside on merits. However, the expression “public policy” became a cause of concern when it was interpreted by the Supreme Court in the case of *ONGC v. SAW Pipes Ltd*⁸ (SAW Pipes Case). The Supreme Court in this judgment expanded the concept of public

⁷ AIR 1994 SC 860

⁸ AIR 2003 SC 2629

policy, to add that the award would be contrary to public policy if it was “patently illegal”. The Supreme Court distinguished SAW Pipes Case from the Renuagar Case on the ground that the judgement pronounced by the Supreme Court in the Renuagar Case was in context of a foreign award, while the ratio of the SAW Pipes Case would be confined to domestic awards only. However, in the Phulchand Case, the Supreme Court had held that the meaning given to the expression "public policy of India" in Section 34 of the Act in the SAW Pipes Case must be applied to the same expression occurring in Section 48(2)(b) of the Act. Thus, if the award was patently illegal, it would be deemed to be against public policy and therefore serve as a ground on which an Indian court could refuse to enforce a foreign award.

Accordingly, the court held that "enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to-

- fundamental policy of Indian law; or
- the interests of India; or
- justice or morality.

The wider meaning given to the expression "public policy of India" occurring in Section 34(2)(b)(ii) in Saw Pipes (ONGC) is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b)."

Venture Global Engineering vs Satyam Computer Services Ltd & Anr on 11 August, 2010. The appellant, Venture Global Engineering, having its principal office in Michigan, USA, entered into a Shareholders Agreement and a Joint Venture Agreement on 20th October, 1999 with the first respondent, for establishing a company called Satyam Venture Engineering Services (hereinafter, "the second respondent"). As per the terms of the agreement, the appellant and the first respondent each held 50 per cent shareholding in the second respondent.

Article VIII of the Shareholders Agreement contemplates certain 'events of default', and in the event of default, non-defaulting shareholder has the option to purchase the defaulter's shares at book value or cause immediate dissolution and liquidation of the second respondent.

In the year 2000, the second respondent entered into an agreement with TRW, a manufacturer and supplier of automotive equipment, to provide engineering and IT services. They agreed to sub-

contract the automotive engineering works to the second respondent. The first respondent levied US \$3 an hour towards administrative charges. According to first respondent, they retained US \$859,899 from the TRW receipts. The appellant disputed the same and alleged that Satyam retained a total of US \$2,188,000, and also alleged concealment and dereliction of duty as a joint venture partner. Thus, disputes cropped-up and were referred to arbitration.

The sole arbitrator gave his award on 3rd April, 2006 whereby the appellant is to transfer its entire shareholding in the second respondent to the first respondent. The first respondent filed a petition for the recognition and enforcement of the award before the U.S. District Court, Eastern District Court of Michigan.

On 28th April, 2006, the appellant filed a suit (O.S. No. 80/2006) seeking a declaration to set aside the award and also prayed for a permanent injunction against the transfer of shares under the arbitral award, in the Court of Ist Additional Chief Judge, City Civil Court, Secundrabad. The Trial Court dismissed the suit of the appellant on the ground that a foreign award could not be challenged under Section 34 of the Arbitration & Conciliation Act, 1996 (herein after, ABC, 1996).

The appellant appealed against the order of the Trial Court before the High Court of Andhra Pradesh at Hyderabad, and the said appeal was also dismissed on 27th February, 2007. Thereafter, the appellant filed a special leave petition before this Court and this Court, vide its order dated 15th May, 2007, issued notice to the respondents and passed an interim order restraining the transfer of shares pending the disposal of the special leave petition.

This Court then finally heard the matter and allowed the special leave petition vide its Judgment and Order in *Venture Global Engineering vs. Satyam Computer Services Ltd. and another* (2008) 4 SCC 190 and held that a foreign award could be challenged under Section 34 of ABC, 1996. In the light of this finding, this Court remanded the case to the trial court and directed that the parties were to maintain status quo with respect to transfer of shares. Thus, the case of the appellant was transferred to the IInd Additional Chief Judge, City Civil Court, Hyderabad.

Meanwhile, on 7th January, 2009, Mr. Ramalinga Raju, Chairman and founder of the first respondent confessed that the balance sheets of the first respondent had been fraudulently inflated to the tune of Rs.7,080/- crores. As a result, Price Waterhouse Cooper (PWC), auditors of the first respondent, declared that the financial statements could no longer be considered accurate or

reliable. In the light of these developments regarding the first respondent, the appellant filed an interim application before the Trial Court (I.A. No. 1331/2009 dated 12th June, 2009) to bring certain facts on record and also filed additional pleadings in respect of the same under Order VIII Rule 9 of the Civil Procedure Code, 1908.

The Trial Court, vide its Order dated 3rd November, 2009, allowed the application of the appellant. The first respondent challenged the said order of the Trial Court by filing a civil revision before the High Court.

The High Court, vide its order dated 19th February, 2010, allowed the revision petition of the first respondent. The High Court, inter alia, held that a reading of Section 34(1) and (3) of the ABC, 1996 indicates that a party could only set aside the arbitral award if an application for the same is made within a period of 3 months (extendable by another 30 days) from the date of making the award; whereas in the present case the new grounds of challenge are sought to be brought after the limitation period.

Further, the High Court also held that an application under Order VIII Rule 9 of the Civil Procedure Code, 1908 for bringing additional pleadings on record would not lie. The High Court held, relying on Rule 12(1) of the Andhra Pradesh Arbitration Rules, 2000, that Rule VIII of Civil Procedure Code is not applicable, so a petition for additional pleading is not maintainable under Order VIII of Civil Procedure Code. Therefore, the High Court did not allow the appellant to file additional pleadings on record.

Aggrieved by the impugned judgment and order of the High Court, the appellant has approached this Court by way of filing a special leave petition. The court considered the case in *State of Maharashtra Vs. M/s Hindustan Construction Company Ltd.*⁹ This Court In *M/s. Hindustan Construction (supra)* made it clear that it cannot be the intention of the Legislature to shut out amendments, as a result of which incorporation of relevant materials in a pending setting aside proceeding is prevented.

In *M/s. Hindustan Construction (supra)* this Court considered the provision in Section 34(2)(b) of ABC, 1996 and while considering the ambit of the expression "the Court finds that" in Section

⁹ AIR 2010 SC 1299.

34(2)(b), this Court opined that where application under Section 34 has been made within the prescribed time, leave to amend grounds, in such an application, if the peculiar circumstances of the case and the interest of justice so warrant, can be granted.

In saying so, this Court in paragraph 25 of the report, relied on the decisions of this Court in the case of *L.J. Leach and Company Ltd. and another Vs. Jardine Skinner and Co*¹⁰. and *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and ors*¹¹, and held where it is required in the interest of justice, the Court always has the power to grant leave to amend and this power to grant an amendment is not affected under Section 34.

The approach of the High Court in this case, in rejecting the appellant's prayer for amendment, inter alia, on the ground that a wrong provision has been quoted in the amendment petition, is obviously a very hyper technical one.

Mr. Salve, learned senior counsel argued on a different line. The learned counsel submitted that the grounds which are sought to be incorporated by way of amendment are not relevant and do not come within the concept of public policy which has been explained in the Explanation to Section 34 of ABC, 9 1996. Mr. K.K. Venugopal, learned senior counsel appearing for the appellant and contradicting the aforesaid contentions submitted that facts which are sought to be incorporated by amendment are only those which have been disclosed by the first respondent on its own. Prior to such disclosure, they were not in public domain and naturally could not be included in the original petition to set aside the award. Without disclosure of those facts by the first respondent, the appellant could not have known them. It is submitted that in any event those facts are relevant for the purpose of being put on record by amendment.

On 7.1.2009, it was reported that the Securities and Exchange Board of India (SEBI) directed an investigation in the entire matter. Along with the additional pleadings were annexed extracts from press clippings about the said investigation by SEBI.

On 8.1.2009, Government of India directed an inspection of the financial statements and books of 8 subsidiaries of first respondent. Such inspection was to be conducted in accordance with section

¹⁰ AIR 1957 SC 357

¹¹ AIR 1957 SC 363

209A of the Companies Act, and the second respondent is one of those subsidiaries in respect of which inspection was thus ordered.

On 13.1.2009, Price Waterhouse Coopers (PWC), which acted as the statutory auditor of the first respondent, wrote to the Board of the first respondent that in the light of statements made by Mr. Raju, the financial statements for the period from June 2000 to 30th September, 2008 could no longer be considered reliable. Extracts from the said opinion of PwC are also enclosed with the additional pleading. On 13.1.2009, the Government of India directed the Serious Fraud Investigation Office (SFIO) to investigate the matter. SFIO is a multi-functional investigating agency representing the Ministry of Home Affairs, Enforcement Directorate and the Intelligence Department. Such order by Government of India came on the basis of a report from the Registrar of Companies, Hyderabad.

On 21.1.2009, Mr. Raju reportedly admitted diversion of funds from the first respondent, which was widely published in newspapers across India. Mr. Raju confessed diversion of funds of the first respondent to two real estate firms held by his family and others. On being questioned by criminal investigation department of the Andhra Pradesh police, Mr. Raju reportedly admitted to using Satyam (respondent no.1) money for buying prime land in and around Hyderabad and Mr. Raju admitted in answer to interrogation that funds of the first respondent were being diverted for the last 4-5 years. i) It was reported on 25.1.2009, that partners of PWC (statutory auditors of the first and second respondent) were arrested for their alleged role in the misstatement of the accounts of the first respondent.

On 27.1.2009, the Income Tax department reportedly directed an investigation in the operations of the first respondent. In this matter the Income Tax department was making an independent probe about the alleged fraud of about Rs. 7800 crores in the first respondent. On 8.2.2009, it was reported that a confession was made by PWC before the police that Mr. Raju employed an elaborate scheme to exaggerate the accounts of the first respondent.

Mr. Talluri Srinivas and S. Gopalakrishnan, two persons associated with PWC, and arrested in connection with the Satyam scam, admitted to the police that meetings were arranged at the instance of the first respondent with the motive of falsifying accounts, and such meetings were chaired by Mr. Raju himself.

On 17.2.2009, Central Bureau of Investigation (CBI) was asked to probe the Satyam scam. n) On 22.3.2009, it was reported that the extent of fraud relating to the first respondent could be over Rs. 9600 crores. On 5.4.2009, it was reported that the Enforcement Directorate also directed an investigation in the matter for alleged money laundering. On 7.4.2009, CBI filed its charge sheet against several persons, including Mr. Raju, Mr. Gopalakrishnan and Mr. Talluri.

Mr. Gopalakrishnan is alleged to be a partner of the firm PWC Bangalore. On 13.4.2009, SFIO submitted its report to the Government of India. On 17.4.2009, it was reported in the press that PwC is guilty of wrong doing in the multi-crore Satyam scam. On 20.4.2009, SFIO alleged to have found evidence that the first respondent diverted foreign earnings even before they reached India. Such diversion was made to tax havens like Mauritius before routing it back to Maytas Infrastructure and other entities owned by Mr. Raju and his relations.

In the decision of the House of Lords in *Frank Reddaway and Co. Ltd. vs. George Banham*, 1896 Appeal Cases 199, Lord Macnaghten explained the multifarious aspects of fraud very lucidly, and which we quote: "But fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the Court." The aforesaid elucidation by the learned Law Lord has also been accepted in celebrated treaties on fraud (see Kerr on Fraud and Mistake, 7th Edition, pg. 1). Kerr has also referred to Story's Equity Jurisprudence and defined fraud as: "Fraud, in the contemplation of a civil court of justice, may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another."

In Indian law, namely the Indian Contract Act, the said common law doctrine of fraud has been assimilated in Section 17 of the said Act. A very wide definition of fraud has been given, which is as under: Therefore, this Court is unable to accept the contention of the learned counsel for the respondent that the expression 'fraud in the making of the award' has to be narrowly construed. This Court cannot do so primarily because fraud being of 'infinite variety' may take many forms, and secondly, the expression 'the making of the award' will have to be read in conjunction with whether the award 'was induced or affected by fraud'.

This Court also holds that the facts concealed must have a causative link. And if the concealed facts, disclosed after the passing of the award, have a causative link with the facts constituting or inducing the award, such facts are relevant in a setting aside proceeding and award may be set aside as affected or induced by fraud. The question in this case, is therefore one of relevance of the materials which the appellant wants to bring on record by way of amendment in its plea for setting aside the award. Whether the award will be set aside or not is a different question and that has to be decided by the appropriate Court. In this appeal, this Court is concerned only with the question whether by allowing the amendment, as prayed for by the appellant, the Court will allow material facts to be brought on record in the pending setting aside proceeding.

Judging the case from this angle, this Court is of the opinion that in the interest of justice and considering the fairness of procedure, the Court should allow the appellant to bring those materials on record as those materials are not wholly irrelevant or they may have a bearing on the appellant's plea for setting aside the award.

Nothing said in this judgment will be construed as even remotely expressing any opinion on the legality of the award. That question will be decided by the Court where setting aside proceeding is pending. The proceeding for setting aside the award may be disposed of as early as possible, preferably within 4 months.

CONCLUSION

Thus, the Indian courts have jurisdiction to enforce the foreign award passed by the international courts in dealing with the Arbitration agreement entered between the Indian nationals with the nationals of other countries.

ANTI- DEFECTION LAW: ANALYSIS OF THE PROVISIONS FROM A CONSTITUTIONAL PERSPECTIVE

Prof. D.Ganesh Kumar¹², Akshay Douglas Gudioho¹³

ABSTRACT

In a country like India where there is a congregation of both democratic and republic form of government, the political parties and their members play a significant role in the governance and in the formation of a decisive country. The most commended Anti-defection law was passed by the Parliament by bringing the 52nd Constitutional Amendment Act, 1985 by adding 10th schedule to the Constitution, to curb the crouch of legislative members from one political party to another, after the elections. However, the law brought with it certain maladies leaving the electorates in a baffled indecisive state as to whether the law culminated to be a bane rather than a boon. The scorch of unethical defections showed its impact on the administration rather mal-administration. The authors in this article attempt to discuss the mode of electing the members of the political parties and implications and repercussions of floor crossing after the elections are concluded in a constitutional perspective. The impacts of the law on the privileges enjoyed by the members of the legislature are also discussed. The authors have also made their own recommendations with respect to the law on Anti-defection, in pursuance of an effective administration and governance.

Keywords: defections, privileges, disqualification, party whip, judicial review

India represents an admixture of a Republican and Democratic form of Government. The electorates elect their leaders and these leaders, in turn, elect the executive head of the State. Democracy in India, being the largest in the world, still continues to be based upon a basic principle of governance. But this journey has been rather perplexing. For instance, the introduction of

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Universal Adult Franchise posed a great challenge to Indian Democracy because majority of the population was illiterate. The Constitution of India was introduced as a champion of unity in diversity as it took into account a large number of communities, religions, faiths, castes, and creeds irrespective of their limitations. It sought to secure to all the citizens individual dignity imbibed in the unity and integrity of the nation.¹⁴ This highlights the primary vision behind the framers of our Constitution while adopting a Parliamentary form of government wherein the eligible citizens of the country could elect their representatives to the State Legislature and the Parliament too. The same has been enunciated in our Constitution and the Representation of the People Act 1951.

Article 326 of the India Constitution provides that every citizen, who has not been disqualified, is entitled to be registered as a voter to elect the representatives of the House of the People and the Legislative Assemblies of the State on the basis of adult suffrage.¹⁵ Section 62¹⁶ of the Representation of the People Act 1951 provides every citizen the right to vote in their respective constituencies who have not been disqualified. Article 81(1) (a)¹⁷ of the Constitution of India envisions a direct election to the House of the People or the *Lok Sabha*. Article 80 (2)¹⁸ describes

¹⁴ The Preamble of the Constitution of India acts as an assurance to such unity as it inscribes “EQUALITY of status and opportunity” and promotes “FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation”.

¹⁵ Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage. The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; but is to say, every person who is a citizen of India and who is not less than twenty one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election

¹⁶ (1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of by any constituency shall be entitled to vote in that constituency. (2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950 (43 of 1950). (3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void. (4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for that constituency more than once, and if he does so vote, all his votes in that constituency shall be void. (5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police. Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force. (6) Nothing contained in sub-sections (3) and (4) shall apply to a person who has been authorized to vote as proxy for an elector under this Act in so far as he votes as a proxy for such elector.

¹⁷ (1) Subject to the provisions of Article 331 the House of the People shall consist of
(a) not more than five hundred and thirty members chosen by direct election from territorial constituencies in the States

¹⁸ The allocation of seats in the Council of States to be filled by representatives of the States and of the Union territories shall be in accordance with the provisions in that behalf contained in the fourth Schedule

the Constitution of the Council of States or the *Rajya Sabha* to be filled by the representatives of the states. The representatives of the state represent either the Legislative Councils or the Legislative Assemblies depending on the population of the state.¹⁹ The election of the executive head i.e. the President is elected by an electoral college consisting of the elected members of both the Houses of the Parliament and that of the Legislative Assemblies of the State.²⁰

Thus, the indirectly elected representatives of the *Rajya Sabha*²¹ and the directly elected members of the *Lok Sabha* are both responsible for electing the President who in turn represents the Executive power of the Union.²² Hence, it is safe to state that India has adopted a Democratic-Republican form of Government, wherein, the will of the people takes precedence, and the Government so formed, functions according to the will and aspirations of the people. However, it should be noted that the aforementioned stand is not in ignorance to the incorporation of the terms “Socialist” and “Secular” into the Preamble of the Indian Constitution.²³ The stands taken attempt to embody the establishment of the government and its nexus with the people. The terms “Sovereign”, “Socialist” and “Secular” determine the nature of the state over the procedural mechanisms of setting up the Governmental machinery.

In a parliamentary democracy like India, the mandate of the electorate is articulated in the political party’s manifestos and ideals, which are espoused by their leaders. Inspired and influenced by the electoral promises which paint a utopian picture of democratic euphoria, the electorates vote them to power. Hence, the political leaders in order to secure the mandate of the electorates contest elections in correspondence with the pulse of the electorates or the *volksgeist* of the people.

In exercise of the same, the parliamentarians are given certain privileges or immunities to deliberate the voice of the people without the fear of arbitrary repercussions or judicial scrutiny. Privileges are conferred on each House so that it may vindicate its authority, prestige and power and protect its members from any obstruction in the performance of their parliamentary

¹⁹ Article 168(2) inscribes the Constitution of the Legislative Councils and the Legislative Assemblies.

²⁰ Article 54.

²¹ Article 80 (4) holds that the representatives of each state in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of a single transferable vote.

²² Article 53(1) -The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution

²³ Included by the 42nd Amendment Act 1976

functions.²⁴ It is the essence of parliamentary democracy that people's representatives should be free to express themselves without fear of legal consequences.²⁵ However, on attaining the confidence of the *populi*, our democratically elected leaders have resorted to unethical floor crossing or political defections, thereby attempting to transform a majority government into a minority one.

CRUCIAL QUERIES REGARDING THE TENTH SCHEDULE OF THE CONSTITUTION

Prior to passing of the commendable law relating to Anti-Defection passed by the 52nd Amendment Act, 1985, the political party on whose ticket such a candidate contested the elections was left in a vulnerable state. In order to curb the scorching of political defections, the Parliament enacted the law of Anti-Defection²⁶ as a quintessential measure. The Act amended certain provisions²⁷ of the Constitution in order to curb the evils of defections which had endangered the edifice of democracy thereby causing immense mischief in the political fraternity. The amended provisions with respect to 102(2)²⁸ and 191(2)²⁹ provide that disqualification shall accrue to those who defect to another political party in the House of the Parliament and the State Legislature respectively.

The Supreme Court has defined defection as a situation wherein an elected member changes his loyalty from his original political party to some other political party after elections, only allured by the lust of power, money or any other form of wrongful augmentation, ensuing in one of the nastiest facade of corruption in the political institutions³⁰. Thus, defection refers to elected members only and not those that are to be elected.

²⁴ *P. Sudhir Kumar v. Speaker, A.P. Legislative Assembly* (2003) 10 SCC 256.

²⁵ *Tej Kiran Reddy v. Sanjiva Reddy* AIR 1970 SC 1573.

²⁶ The Anti-Defection law is a concise legislation consisting of 8 paragraphs and was passed by the Parliament under Sec 6 of the 52nd Constitutional Amendment Act, 1985 and incorporated the 10th Schedule to the Constitution. It amended the provisions – Art. 101, 102, 190, 191 of the Constitution, relating to vacation of seats and disqualification of membership of Parliament and the State Legislature. It added Article 101 (3)(a), 102(2), 190 (3)(a) and 191 (2).

²⁷ Articles 101, 102, 190, 191 of the Constitution relating to vacation of seats and disqualification of members of Parliament and the State Legislature.

²⁸ A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule.

²⁹ A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule

³⁰ *P.V. Narashimha Rao v. State(CBI/SPF)* , AIR 1998 SC 2021

In this regard, there lies an element of betrayal, not only to the political party on whose ticket the candidate has contested the elections, but also to the electorates who reposed their trust and confidence in their candidate via their vote. Further, there is a sheer implication of nepotism whereby the party with the least number of seats may defect to another party only to acquire ministerial positions.³¹

The supporters of the said amendment argue that it provides stability to the government by preventing swings in party allegiances and loyalty among the elected members of party. However, the amendment has brought certain pitfalls permitting the members of the political party to defect to another political party in the Legislature without attracting the provisions of the impugned Act.

This was especially seen under Para 3³² of Schedule 10 which provided for defection of the members of one political party to another via a split. The said Paragraph exempted disqualification of the member for the remaining unexpired term of the Legislature even if he joined a faction or decided to split from the original party that did not constitute 1/3rd of the membership of the original party. With the objective to do away with bulk defections amongst political parties, Para 3 now stands omitted by Sec 5(c) of the 91st (Constitutional) Amendment, 2003.

This amendment, by eliminating defections adopting the facade of factions, attempted to prevent Indian parliamentary democracy from further deterioration and upheld the dignity of the Parliamentary institution. Though the above amendment brought about a radical change, the defects in the law still persist. In this regard, the law has permitted “mergers” but is still silent in certain aspects and does not effectively define some of the relevant expressions such as an ‘Unattached Member’ or an ‘Expelled Member’. Further, there are cardinal questions with regards

³¹ See, *Mayawati v. Markendeya Chand* AIR 1998 SC 3340.

³²Prior to the 91st Constitutional Amendment Act, 2003, Para 3 read as : 3. Disqualification on ground of defection not to apply in case of split – Where a member of a House makes a claim that he and any other members of his legislature party constitute the group representing a faction which has arisen as a result of a split in his original political party and such group consists of not less than one-third of the members of such legislature party,-

a) he shall not be disqualified under sub-paragraph (1) of paragraph 2 on the ground –

i. that he has voluntarily given up his membership of his original political party; or

ii. that he has voted or abstained from voting in such House contrary to any direction issued by such party or by any person or authority authorized by it in that behalf without obtaining the prior permission of such party, person or authority and such voting or abstention has not been condoned by such party, person or authority within fifteen days from the date of such voting or abstention; and

b) from the time of such split, such fraction shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this paragraph.

to the jurisdiction of the Speaker/Chairman in matters of disqualification under the Tenth Schedule and the Freedom of speech and expression of the Parliamentarians with respect to the said Schedule. In effect, certain provisions under the Tenth Schedule are fraught with challenges and must undergo scrutiny.

Evaluating Mergers under the Tenth Schedule

Under the Tenth Schedule, Mergers are exempted from disqualifications. Here, the members of the original political party can merge with another and become members of the new political party with not less than two third of the consent of the members of the old political party in the House. Alternatively, the other political party members can refuse to accept the merger and opt to function as a separate group.³³

In *Jagjit Singh v. State of Haryana and Ors*,³⁴ the court held that the test to determine whether an independent member has joined a political party is whether he has given up his independent character on which he has been elected by the electorate or if he does not fulfill the formalities to join the political party. The court held that when a sole member of a political party in an Assembly joins another political party, he cannot attract the protection of paragraph 2 of the Tenth Schedule³⁵ and will be disqualified from being a member. However, the quintessential enquiry in this regard is if a political party has filed its candidates in almost all the constituencies and only one candidate has won. Here, deliberation with regards to the stand taken by the law is imperative.

For instance, the Supremo of the *Lok Satta* Party on contesting the elections has won from the constituencies of *Kukatpally, Hyderabad* of the erstwhile state of Andhra Pradesh in the year 2004. Further, presuming that all the other candidates of the said party who were defeated, intend to merge their political party with the opposition party. In the instant case, out of say 294 constituency

³³ Para 4 of the Tenth Schedule. Disqualification on ground of defection not to apply in case of merger.—(1) A member of a House shall not be disqualified under subparagraph (1) of paragraph 2 where his original political party merges with another political party and he claims that he and any other members of his original political party— (a) have become members of such other political party or, as the case may be, of a new political party formed by such merger; or (b) have not accepted the merger and opted to function as a separate group, and from the time of such merger, such other political party or new political party or group, as the case may be, shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this sub-paragraph. (2) For the purposes of sub-paragraph (1) of this paragraph, the merger of the original political party of a member of a House shall be deemed to have taken place if, and only if, not less than two-thirds of the members of the legislature party concerned have agreed to such merger.

³⁴ *Jagjit Singh v. State of Haryana* (MANU/SC/5473/2006)

³⁵ *Infra*, Note 61.

seats of the erstwhile Andhra Pradesh State, *Lok Satta* Party has won only one seat acquired by the Party Supremo. Now, if the single member wants to merge with another political party, is it equivalent to contesting elections as an independent candidate though he had won on a party ticket? In the instant case, in case the member merges, it would amount to a 100% merger by the original political party the candidate belonged to. In effect, the law has pardoned defection by a single member but not of political parties.

The prevalence of Para 4³⁶ highlights the attention of the parties shifting from splits to mergers. The aim now would be to acquire the support of two-third of the members. Once this is reached, the candidate would split the party and merge the newly found party which provides his party the greatest advantage. So presently, the members who stage a split would not be protected under the law even if their numbers are one-third of the total party. But a loop hole still persists in the form of Para 4. This means that even if member cannot stage a split they can still merge with another party provided that two thirds of the members support the merger.

SCRUTINIZING THE EXPULSION OF ELECTED MEMBERS

A pertinent issue with regards to Article 105 and 194 is the expulsion of an elected member by their respective political parties. In *G. Vishwanathan v. Speaker, Tamil Nadu Legislative Assembly*³⁷, the issue was whether a member can be said to have voluntarily given up his membership when he joins another political party after being expelled by his old party. The dictum of the Court was that once a member is expelled, he is treated an ‘unattached member’ of the House. However, he continues to be the member of the old party as per the Tenth Schedule.

Here, the issue arises as to whether such a candidate is to be considered as an independent candidate or not? The Supreme Court has held that there is no hard and fast rule to determine the independent character of a candidate and it must be ascertained on appreciation of the material on record and conduct of the member by the Speaker.³⁸ However, as this is left to the speaker’s discretion, it is to his satisfaction to consider a member as an independent candidate or not. Further, the Speaker or the Chairman does not have the jurisdiction to disqualify a member under the Tenth

³⁶ *Supra*, Note. 20

³⁷ (1996) 2 SCC 353

³⁸ *Jagjit Singh v. State of Haryana* (MANU/SC/5473/2006)

Schedule unless a petition which is in consonance with the procedural requirements of the Civil Procedure Code (CPC) is provided to the same.³⁹

Thus, till the provision of a petition to the Speaker/Chairman determining the independent character of a member, an expelled member continues to be a member of the old political party, and would be liable to be disqualified if he goes against the party whip⁴⁰. In the current case, should not such a candidate be treated as synonymous with a lame duck member who fills the seat only for the purpose of parliamentary presence? Here, the candidate can neither vote against the directions of the party whip nor voice his own opinion or vote against the same. The freedom of speech and expression of such a candidate is extremely limited as he will always be under the vengeful direction of the party whip.

In *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha*⁴¹, the court has held that in matters of expulsion in either House of the Parliament and the State Legislature, the power of judicial review shall apply. However, the question here was not with reference to expulsion under the Tenth Schedule. But, if the judiciary applies the power of judicial review even to the expulsions under the Tenth Schedule, the maladies highlighted above may be redressed. In the said case, the court made a distinction between disqualification and expulsion. While the former refers to a candidate's inability to occupy a Member's seat, the latter refers to a candidate who is otherwise qualified but not worthy in the eyes of the Parliament or the State Legislature. The Supreme Court has held that disqualification under Para 6⁴² of the Tenth Schedule is subject to judicial review.⁴³ However, the question on whether expulsion under the Tenth Schedule is to be subject to judicial review is still to be a matter of judicial deliberation.

PARLIAMENTARY SUPERINTENDENCE

The law makes the Speaker or the Chairman the final authority and sole judge in any dispute arising under the Tenth Schedule⁴⁴. All the proceedings in relation to any question on disqualification of

³⁹ *Mahachandra prasad Singh v. Chairman, Bihar Legislative Council* (2004) 8 SCC 747

⁴⁰ *Infra*, Note. 48.

⁴¹ (2007) 3 SCC 184.

⁴² Para 6 of the Tenth Schedule- Decision on questions as to disqualification on ground of defection.—(1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final

⁴³ *Infra*, Note. 37.

⁴⁴ *Ibid.*

a member of a House under the Tenth Schedule are deemed to be proceedings in Parliament or State Legislature within the meaning of Art 122⁴⁵ and 212⁴⁶. No court has any jurisdiction in matters relating to disqualification.⁴⁷

The power to take a decision and disqualify any member, who defects from one political party to another, is vested with the Chairman or the Speaker of the Legislative House on receipt of a petition from the shackles of Whip of the political party on whose party ticket such member has contested the elections. If a complaint in the form of a petition is received with respect to the defection of the Chairman or Speaker, a member of House elected by that House shall take a decision.⁴⁸

However, it does not necessarily mean that the member so expelled by the party loses his seat in the House. They continue to be member of the House as long as the Chairman or the Speaker of a House gives a final decision on their disqualification from the House after holding a proper enquiry on the basis of the petition filed by the party whip. The member so disqualified can contest the election again from any other political party for a seat of the same House. However, it is questionable whether he would get a ticket from the former political party which expelled him.

In this regard, should the decision on defection or floor crossing be judged by the Speaker who is usually a member of a ruling political party or a collision? In pursuance of a non-partisan authority, the question that pegs attention is whether an external neutral body such as the Election commission or would the Constitution of a body (established by the inclusion of a separate provision into the Constitution) suffice as a judicious mechanism of evaluating the malicious

⁴⁵Courts not to inquire into proceedings of Parliament:

- (1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure
- (2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers

⁴⁶ Courts not to inquire into proceedings of the Legislature:

- (1) The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure
- (2) No officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers

⁴⁷Para 6(2) of Tenth Schedule.

⁴⁸ Para 6 (1) of the Tenth Schedule.

shadows of Anti-Defection. Further, does it not violate the basic structure of the Constitution with regards to judicial review?⁴⁹

The above legal enquiries were dealt with in the *Kihota Hollohan v. Zachillhu and Ors*⁵⁰. The five Judge Bench of the Supreme Court by a majority of 3:2 unanimously struck down Para 7⁵¹, in so far as it affected the jurisdiction of the Courts under Article 136⁵², 226⁵³, and 227⁵⁴, and was not ratified from at least half of the State Legislatures as required by proviso (b) of 368 (2)⁵⁵. Here, the majority bench held that Para 7 satisfied the doctrine of severability as it did not vitiate any other Paragraphs of the Tenth Schedule by its absence.

To the extent that Para. 6⁵⁶ of the Tenth Schedule granting finality to the orders of the Speaker, the provision was held to be valid. However, the bench held that the higher courts i.e., Supreme Court

⁴⁹ Added as part of the Basic Structure Doctrine of the Constitution in the *Kesavananda Bharti v. State of Kerala* (1973) 4 SCC 225

⁵⁰ 1992 Supp(2) SCC 651

⁵¹ Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule.

⁵² Special leave to appeal by the Supreme Court

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces

⁵³ Power of High Courts to issue certain writs

(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose

⁵⁴ Power of superintendence over all courts by the High Court

(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories interrelation to which it exercises jurisdiction

⁵⁵ (2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in

(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent

⁵⁶ *Supra*, Note. 29.

and the High Courts, could exercise judicial review under the Constitution. But, the court held that judicial review should not cover any stage prior to the making of a decision by the Speaker/Chairman. This has been reiterated in *Jagdish Gandhi v. Legislative Council*⁵⁷, wherein, the court refused to give any relief at the inquiry stage in a privilege matter by the Privileges Committee of the House.

With regards to Article 122⁵⁸ and 212⁵⁹, the majority bench held that the Speaker's duties while disqualifying a member under the Tenth schedule is that of an administrative tribunal which does not fall under "be deemed to be proceedings in the Parliament" under Article 122 and "be deemed to be proceedings in the Legislature of a State" under Article 212. Thus, the same could be subject to judicial review. This appears as legally sound as the Supreme Court can pass any decree and order for doing complete justice subject to its jurisdiction.⁶⁰

This has been reiterated by the Supreme Court whereby the order of the Speaker disqualifying legislator(s) on the ground of defection was construed as a quasi-judicial order subject to judicial review under Art 32, 226, and 136.⁶¹ In *Ravi S.Naik v. Union of India*⁶², it was held that a Speaker while passing an order under the Tenth Schedule functions as a Tribunal which is subject to judicial review. In *Dr. Kashinath G. Jhalmi v. Speaker, Goa Legislative Assembly*,⁶³ the Court held that a Speaker cannot review his own decisions to disqualify a candidate.

The Speaker being an authority within the House and his tenure being dependent on the will of the majority therein, the likelihood of suspicion of bias cannot be ignored. Rule of law has firmly entrenched the governance of natural justice of which rule against bias is a necessary concomitant. Here, a basic postulate of the rule against bias is *nemo jux in causa sua* (No man can be a judge in his own case). In other words, a judge is disqualified from determining any case in which he may be, or may fairly be suspected to be biased, and it is of fundamental importance that justice should not only be done, but manifestly and undoubtedly seen to be done.

⁵⁷ AIR 1966 All. 291.

⁵⁸ *Supra*, Note.32

⁵⁹ *Supra*, Note.33

⁶⁰ Article 142.

⁶¹ *D Sudhakar (2) v. D.N.Jeevaraju* (2012) 2 SCC 708

⁶² *Ravi S. Naik v. Union of India* AIR 1994 SC 1558

⁶³ (1993) 2 SCC 703.

The Speaker being a party man and his tenure dependent on the will of the majority in the House, there is always a likelihood of suspicion of bias in the form of nepotism, favoritism or a partisan attitude, how so ever impeccable he may claim. Hence it can be said that the Speaker's office in India is a gift in the hands of the ruling party. Even in case of the Speaker in the *Kihota judgment*⁶⁴, the Supreme Court held:

“The Speaker's office is undoubtedly high and has considerable aura with the attribute of impartiality. This aura of the office was even greater when the Constitution was framed and yet the framers of the Constitution did not choose to vest the authority of adjudicating disputes as to disqualification of members to the speaker; and provision was made in Art 103 and 192 for decision of such disputes by the president/ governor in accordance with the opinion of the Election Commission. The reason is not far to seek.”

Even in case of a Privilege Issue, the argument for the House is that the Privilege Committee comprises of a variety of members from various political parties who submit their report to the Speaker. However, the Committee of Privileges comprises of 15 members who are nominated by the Speaker itself. The question again arises whether such a committee can be treated as an absolute non-partisan body.

As asserted by *Erskine May* in his classic *Parliamentary Practice*⁶⁵, ‘*Confidence in the impartiality of the speaker is an indispensable condition for the successful working of the procedure, and many conventions exist which have as their object not only to ensure the impartiality of the speaker but also to ensure that his impartiality is generally recognized*’. In India, the existence of this ‘indispensable condition’ is rather questionable.

In fact a reform in this regard was suggested by *Madhu Limaye* in a letter written on 13th of March 1967, to the then Prime Minister Smt. *Indira Gandhi* putting forward a proposal for securing the office of the Speaker from partisan attitude towards his party men. The contents of the letter held that the Speaker must, upon election, resign from his party, declare his impartiality and non-partisan attitude in the House. While in office, he should abstain from participating in controversies and should contest elections only as a non-party candidate.

⁶⁴ 1992 Supp(2) SCC 651

⁶⁵ Erskine May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 20th Edn., (London: Butterworths, 1983), p. 235.

Further, while comparing the Parliamentary form of Government of England, *Limaye* held that the conventional practice followed in England was that the other political parties would not field their candidate for contesting against the Speaker and the election of the Speaker was unanimous. Lastly, *Limaye* held that after retirement, the Speaker should be provided with pension for life and should be barred from holding any public office, save the office of the President.

Thought the aforementioned recommendations are commendable certain fallacies must be brought to light. It is still a contested issue whether the electorates vote for a political party or an individual candidate. However, arguing on the presumption that either House of the Parliament is occupied by majority of elected political parties over individual candidates, the Speaker's election as an individual candidate is highly doubtful with regards to it representing the voice of the electorate as the same vote based on party manifestos. Further, even if he is elected as an individual candidate devoid of any party affiliation, it is highly ambitious to expect his attitude to be free from bias. Thus, an independent body to adjudicate on disqualifications under the Tenth Schedule must be a subject of deliberation.

EVALUATING ALTERNATIVES TO ADJUDICATING AUTHORITIES UNDER THE TENTH SCHEDULE.

The minority view in the *Kihota judgment*⁶⁶ held that the tenure of the Speaker is dependent on the continuous support and will of the majority in the House. Thus, the likelihood of suspicion of bias could not be ruled out. Hence the Speaker does not satisfy the requirement of an independent adjudicatory authority and the Speaker's choice as the sole arbiter in the matter violates an essential attribute of the basic feature of the Constitution. They further held that, democracy is a part of the basic structure of the Constitution and free and fair election with provision for resolution of disputes relating to the same as also for adjudication of those relating to subsequent disqualification by an independent body outside the House are essential features of the democratic system.

⁶⁶ 1992 Supp(2) SCC 651

All questions with regards to disqualifications under Article 102 (1)⁶⁷ and 191 (1)⁶⁸ are to be referred to the President or the Governor, as the case may be, who shall further obtain the opinion of the Election Commission and act according to such opinion.⁶⁹ Here, the question that arises is why the Speaking/Chairman was given the sole adjudicating powers in case of disqualifications under the Tenth Schedule, when the President/Governor had the discretion otherwise.

The Supreme Court has held that the Election Commission is in a quasi-adjudicating capacity while deciding the disqualification of a sitting member of the Parliament or the State Legislature.⁷⁰ Further, the court has held that though the final decision on disqualification is passed in the name of the President in case of the Parliament and the Governor in case of the State Legislature, both are bound by the opinion of the Election Commission.⁷¹

In the *Kihoto judgment*⁷², Para 6 of the Tenth Schedule was made subject to judicial review. In case of disqualifications under Article 102 (1) and 191 (1), the decision of the Election Commission is final which, in this regard, acts as a quasi-judicial body. However, in case of the former, the Speaker acts as a middle man whereby only on his decision shall the subject matter be

⁶⁷ (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament

- (a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;
- (b) if he is of unsound mind and stands so declared by a competent court;
- (c) if he is an undischarged insolvent;
- (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;
- (e) if he is so disqualified by or under any law made by Parliament Explanation For the purposes of this clause a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State

⁶⁸ (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State

- (a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;
- (b) if he is of unsound mind and stands so declared by a competent court;
- (c) if he is an undischarged insolvent;
- (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;
- (e) if he is so disqualified by or under any law made by Parliament Explanation For the purposes of this clause, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State

⁶⁹ Article 103, 103 (2), 192, 192 (2).

⁷⁰ *Election Commission v. Subramaniam Swamy* AIR 1996 SC 1810.

⁷¹ *Brundaban Nyak v. Election Commission* AIR 1965 SC 1892.

⁷² 1992 Supp(2) SCC 651.

subject to judicial review. While in case of the latter, an application can directly lie to the President from an elected member or a citizen of India devoid of the Speaker's role.

However, there are certain fallacies which arise in case of the former. A disqualification under the Tenth Schedule can only be initiated by a petition of an elected member to the Speaker, thus eliminating the role of the electorate in this regard. The disqualification under Article 102 (1) and 191 (1) takes effect after the President has given his decision. However, in case of the Tenth Schedule, Para 6 makes the decision of the Speaker final. Judicial Review is on receipt by the court of a petition challenging the Speaker's order. Thus, in this regard, the member shall be deemed to be disqualified till the Speaker's order is subject to judicial review and decided thereof. This, in effect, allows the Speaker to exercise a bias, whether there may be one or not, till the matter is under judicial consideration.

Under Article 324⁷³, all appointments to the Election Commission are on made by the President or Governor as the case may be. Here, the Election commission is given complete Superintendence with regards to the conduct of the election to the Parliament and the State Legislature. As the body

⁷³ Superintendence, direction and control of elections to be vested in an Election Commission

(1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission)

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission

(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1)

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine; Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment: Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner

(6) The President, or the Governor of a State, shall, when so requested by th Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1)

is necessarily appointed by the President, the element of bias is limited or may even be absent, as there is no direct involvement in the functioning of the Parliament or the State Legislature. Thus, the authors hold the application of the Election Commission to disqualifications under the Tenth Schedule as an imperative initiative to delimit Parliamentary partisanship.

ANTI-DEFECTION AND THE PARLIAMENTARY FREEDOM OF SPEECH AND EXPRESSION

The members of the political party cannot go against the ideals and policies of the political party. They are constitutionally restricted from voting or abstaining from voting against the directions given by the political party⁷⁴. However, the members have a right to the freedom of speech through which they are permitted to express their views under Article 105 (1)⁷⁵ or Article 194 (1)⁷⁶, even

⁷⁴ Para (2) of the Anti-Defection Act speaks about, Disqualification on ground of defection.—(1) Subject to the provisions of paragraphs 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House— (a) if he has voluntarily given up his membership of such political party; or (b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorized by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.

⁷⁵ Art 105 (1) holds “subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament”. (2) declares that “no member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any Committee thereof and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings”. (3), which has undergone an amendment by the 44th Constitutional Amendment Act, 1978, prior to the amendment it read as: “in other respects the powers, privileges and immunities of each House of Parliament, and of the Members and the Committees of each House, shall be such as may from time to time be defined by Parliament by law, and until so defined shall be those of the House of Commons of Parliament of the United Kingdom and of its Members and Committees at the commencement of this Constitution”. After the aforesaid amendment, clause (3) now reads as follows: “(3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty-fourth Amendment) Act, 1978.” (4) reads thus: “The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliament or any committee thereof as they apply in relation to members of Parliament.”

⁷⁶Article 194 holds “(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State. (2) No member of the Legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings. (3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of Section 26 of the Constitution forty fourth Amendment Act, 1978. (4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take

if the political party issues a direction in the form of a whip. Here, the question that merits attention is whether the law, while deterring defections, leads to suppression of healthy inter-party debate and dissent? Additionally, are the elected representatives restricted from raising issues and voices concerning their electorates in opposition to the official political position?

Section 2(f) of the Representation of the People Act, 1951 reads, “*political party*” means an association or a body of individual citizens of India registered with the Election Commission as a political party under section 29A⁷⁷. An elected member of a House is deemed to belong to the political party if he was set up as a candidate for election as such a member or before the expiry of 6 months he belongs to a political party from the date of taking his seat after complying with the requirements of Article 99⁷⁸ or 188^{79/80}.

In this regard, a pertinent question and a legally perplexed point is whether an independent candidate should be disqualified if he joins a political party post-election. Para 2(1) of the Tenth Schedule disqualifies such an independent member if he joins a political party after the election.⁸¹ The same applies to a nominated member of the House who joins a political party after the expiry of six months from the date on which he takes his seat after complying with the requirements of Article 99 or 188.⁸² Here, the point of consideration is whether an independent candidate or a nominated member has any parliamentary support to his right to freedom of speech and expression under Article 105 and 194 in the absence of the backing of a majority or minority political party. Further, with reference to a nominated member, he is permitted to join a political party before the expiry of 6 months of taking his seat, which again, leaves an ambit of opportunity for the ruling party to allure him into the clout of the party majority.

part in the proceedings of a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature”.

⁷⁷ Registration with the Election Commission of associations and bodies as political parties

⁷⁸ Oath or affirmation by members Every member of either House of Parliament shall, before taking his seat, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule

⁷⁹ Oath or affirmation by members Every member of the Legislative Assembly or the Legislative Council of a State shall, before taking his seat, make and subscribe before the Governor, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

⁸⁰ Para 2 Explanation (a) of the Tenth Schedule.

⁸¹ An elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election.

⁸² Para 2(3) of the Tenth Schedule.

With regards to Para 2 (1) (b)⁸³, the Supreme Court has laid down that the provisions of the Tenth Schedule do not subvert the democratic rights of elected members in the Parliament and State Legislatures.⁸⁴ It does not violate their conscience. The Majority held that the provisions relating to whips do not violate or affect any right or freedom under Art 105 and 194 of the Constitution. The bench adjudged that the freedom of speech of a parliamentary of State Legislative member is not an absolute freedom. The court held:

The expression 'any direction' occurring in Para 2(1)(b) of the Tenth Schedule requires to be construed harmoniously with the other provisions and appropriately confined to the objects and purposes of the Tenth Schedule.⁸⁵

To elucidate on the point of the restricted freedom of speech and expression within the Parliamentary chambers, the Constitution supports the same under Article 118⁸⁶ and 208⁸⁷. The discretion given to the Speaker/Chairman with regards to the rules of procedure and the standing orders under the said Articles extend even to the freedom of speech under Article 105(1)⁸⁸ and

⁸³ *Supra*, Note. 61.

⁸⁴ *Kihota Hollohon v. Zachilhu and Others* 1992 Supp(2) SCC 651

⁸⁵ http://shodhganga.inflibnet.ac.in/bitstream/10603/129471/1/11/11_chapter%202.pdf. p.65. Accessed on 17:00, 23rd March 2017

⁸⁶ Rules of procedure

(1) Each House of Parliament may make rules for regulations, subject to the provisions of this Constitution, its procedure and the conduct of its business

(2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature of the Dominion of India shall have effect in relation to Parliament subject to such modifications and adaptations as may be made therein by the Chairman of the Council of States or the Speaker of the House of the People, as the case may be

(3) The President, after consultation with the Chairman of the Council of States and the Speaker of the House of the People, may make rules as to the procedure with respect to joint sittings of, and communications between, the two Houses

(4) At a joint sitting of the two Houses the Speaker of the House of the People, or in his absence such person as may be determined by rules of procedure made under clause (3), shall preside

⁸⁷ Rules of procedure

(1) A House of the Legislature of a State may make rules for regulating subject to the provisions of this Constitution, its procedure and the conduct of its business

(2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature for the corresponding Province shall have effect in relation to the Legislature of the State subject to such modifications and adaptations as may be made therein by the Speaker of the Legislative Assembly, or the Chairman of the Legislative Council, as the case may be

(3) In a State having a Legislative Council the Governor, after consultation with the Speaker of the Legislative Assembly and the Chairman of the legislative Council, may make rules as to the procedure with respect to communications between the two Houses

⁸⁸ *Supra*, Note. 62

194(1)⁸⁹. The Supreme Court has also held that the freedom of speech and expression under Article 105 (1) is of wider amplitude than that of Article 19 (1)(a) as the former is not subject to Article 19 (2).⁹⁰ Thus, parliamentary privileges are not subject to Article 19 (1) (a).⁹¹ However, apart from the “*provision of the Constitution*” and the “*rules and standing orders regulating the procedure of the Parliament*”, Article 105 and 194 is rather absolute. In this regard, the Supreme Court has held that the “*provisions of the Constitution*” which place a restriction on the freedom of speech and expression under Article 105 (1) and 194 (1) are only those relating to regulating the procedure of the Parliament i.e. Article 118 and 211.⁹²

Further, the speaker or the presiding officer of the House has a right to regulate and conduct the internal proceedings of the House, and any irregularity in the proceedings does not in any way vitiate or invalidate the proceedings of the House and the proceedings are held to be valid. A candidate that violates the aforementioned freedoms can only be dealt with by the Speaker or the House itself. The candidate has no remedy before the courts.⁹³ Further, the freedom of speech under Article 105 (1) can only be subject to the discipline of the rules of the Parliament, the good sense of the members and the control of the proceedings by the speaker, devoid of any judicial intervention.⁹⁴ Lastly, the courts are not to interfere with the functioning of the Speaker inside the House in the matter of regulating the conduct of business therein by virtue of powers vested in him.⁹⁵

At the outset, the argument of the Speaker's decision being subject to judicial review with regards to disqualifications under Para 2 (1)(b) of the Tenth Schedule has been affirmed by the Supreme Court.⁹⁶ However, the question arises whether the Speaker's/ Chairman's right to regulate the

⁸⁹ *Supra*, Note. 63

⁹⁰ *M.S.M Sharma v. Shri Krishna Sinha* AIR 1959 SC 395 (*Searchlight I*). Reaffirmed later in *M.S.M Sharma v. Shri Krishna Sinha II* AIR 1960 SC 1186 (*Searchlight II*)

⁹¹ Emphatically held in the *Gunupati Keshavram Reddy v. Nafisul Hasan*, AIR 1954 SC 636. This case was a source of influence for the *ratio* laid down in *Searchlight I and Searchlight II*.

⁹² *Ibid.*.

⁹³ *Jagdish Gandhi v. Leg. Council, Lucknow*, AIR 1966 All. 291.

⁹⁴ 1992 Supp(2) SCC 651.

⁹⁵ *Surendra v. Nabakrishna* AIR 1958 Ori. 168.

⁹⁶ *Kihota Hollohon v. Zachilhu and Others* 1992 Supp(2) SCC 651

proceedings of the House under Article 118 or 208 and thereby reasonably curtail the Freedom of speech and expression under Article 105 and 194 is subject to judicial review?

Under Article 105 (3)⁹⁷ and 194 (3)⁹⁸, provides the Parliament and the State Legislature respectively, the jurisdiction to define the powers, privileges and immunities of the House. There are certain exceptions to the said Articles wherein the courts may intervene. In this regard, the Supreme Court has held that when an established privilege has been breached the Parliament has the jurisdiction to decide the matter on merits in cooperation with the Committee of Privileges except in the rare cases of *mala fides*. However, the courts have the jurisdiction to adjudge whether the privilege exists or not, as the same is established by Constitutional provision.⁹⁹ Further, parliamentary privileges are also subject to the satisfaction of ‘*personal liberty*’ inscribed under Article 21¹⁰⁰ of the Constitution.¹⁰¹ Thus, in this regard, a candidate can file a *habeas corpus* petition to the High Court or the Supreme Court.

The *Kihota judgment*¹⁰², with regards Para 2 (1) (b) of the Tenth Schedule not violating the freedom of speech and expression under Article 105(1) and 194(1) may be reconsidered on the following stands. The question on whether the elected member has the right to speak or vote even against the party whip may be considered as a new parliamentary privilege itself. However, the absence of such a privilege is primarily due to the precedence given to elected member’s loyalty to his party over that of the electorates. Thus, even if the party whip goes against the electorate, the elected member who may dissent with the same is bound to affirm with the whip or face disqualification. In effect, the elected member is given the freedom of speech and expression under Article 105 and 194, subject not only to Article 118 and 208 but also Para 2 (1)(b).

⁹⁷ In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined shall be those of that House and of its members and committees immediately before the coming into force of Section 15 of the Constitution (Forty fourth Amendment) Act 1978

⁹⁸ In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of Section 26 of the Constitution forty fourth Amendment Act, 1978

⁹⁹ *Keshav Singh v. Speaker, Legislative Assembly* AIR 1965 All.349

¹⁰⁰ No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹⁰¹ *Ibid.*

¹⁰² 1992 Supp(2) SCC 651

However, as highlighted above, Article 118 and 208 is restricted to only provisions regulating the procedures of the Parliament.¹⁰³ But, Para 2 (1) (b) is a provision specifically relating to the procedures of a political party. If an infraction or dereliction of ‘*any direction*’ of a political party an elected member belongs to amounts to a disqualification under Para 2 (1) (b), should not such a disqualification be considered as a contempt of the party rather than that of the House? This is evident from the fact that the date of disqualification under Para 2 is the date the candidate goes against the party whip and not the date the Speaker decides the matter.¹⁰⁴ Thus, in effect, Para 2 (1) (b) is in direct contradiction to the restrictions applied to the parliamentary privilege granted under Article 105 (1) and 194 (1).

Further, the court’s jurisdiction in the above matters is restricted to extreme cases of *mala fides*, *habeas corpus* petitions or with respect to establishing the existence of a privilege. With regards to *mala fides* and rare *habeas corpus* petitions, the court is extremely confined by jurisdiction.¹⁰⁵ In case of establishing a new privilege the courts hands are tied because; (i) the law prefers party loyalty over electorate loyalty due to the larger ethos of democratic consonance, (ii) the party is assumed to more effectively represent the people over its individual candidates, and (iii) the court’s jurisdiction is barred in this regard as Article 105 and 194 already exists.

However, in this regard, there may arise two courses of action, (i) The Parliament may pass an amendment with respect to Para 2 (1) (b) of the Tenth Schedule, or (ii) the court may enunciate the formation of a new privilege arising out of Article 105 and 194 which can only be subject to limited exceptions under Para 2 (1) (b). If the new privilege is announced by the court, any disqualification under Para 2 (1) (b), whether it be exceptional or not, would be subject to judicial review in light of the *Kihota judgment*.¹⁰⁶ This, on one hand, ensures a parliamentary privilege of freedom of speech and expression even against the party whip and, on the other hand, subjects all disqualification especially under Para 2 (1) (b) to judicial review.

¹⁰³ *Supra*, Note. 77.

¹⁰⁴ *Rajendra Singh Rana v. Swami Prasad Maurya*, (2007) 4 SCC 270.

¹⁰⁵ See, *Jagdish Gandhi v. Legislative Council*, AIR 1966 All.29 and *C. Subramaniam v. Speaker, Madras Legislative Assembly* AIR 1969 Mad. 10.

¹⁰⁶ 1992 Supp(2) SCC 651

CONCLUDING RECOMMENDATIONS AND REMARKS

In light of the argument brought forth, the authors recommend the Parliament to amend or omit the following paragraphs of the Tenth Schedule in accordance with Article 368 (2)¹⁰⁷. Firstly, any amendment to the Tenth Schedule shall attract a special majority as the Schedule does satisfy the requirements under Article 368 (2). This is essential as the *Kihota judgment*¹⁰⁸ clearly states that the Tenth Schedule was introduced in violation to Article 368 (2).

Secondly, it is recommended that the Election Committee on reference by President or the Governor should be made the final decision making body even in cases of disqualification under the Tenth Schedule as has been prescribed under Article 103(2) and 193 (2). The authors do not concur with the minority judgment in the *Kihota case*¹⁰⁹ of setting up an independent body as the same has been provided under Article 103(2) and 193(2). This is imperative in order to delimit any possibility of partisan treatment towards disqualification and to omit the arbitrary exception to the said Articles made by Para 6 even though it has now been made subject to judicial review.

Thirdly, it is recommended that Para 2 (1) (b) be made applicable only in extreme cases of either no confidence motions against the Government or the like. Merely restoring public confidence under Para 2 (1) (b) should not be treated as an overriding feature that can limit parliamentary freedom of speech and expression under Article 105 (1) or 194(1). It is recommended that the Legislature take note that Para 2 (1) (b) of the Tenth Schedule is essentially a provision in favor of the political party than the Parliament. In this regard, it is recommended to the judiciary to make *suo moto* cognizance and declare Article 105 and 194 as a privilege even in case of Para 2 (1) (b) which can be restricted only in reasonable exceptional cases.

Fourthly, it is recommended that ‘voluntary giving up of membership’ or an expelled member should be able to act as an independent candidate devoid of the restrictions of the party whip under Para 2 (1) (b) of the Tenth Schedule. Fifthly, in light of the maladies of coalition faced in the country, it is recommended to consider pre-electoral fronts to be treated as ‘Political Parties’ subject to the Tenth Schedule. Here, pre-electoral mergers should be under strict vigilance of the

¹⁰⁷ *Supra*, Note. 42.

¹⁰⁸ 1992 Supp (2) SCC 651.

¹⁰⁹ *Ibid.*

Election Commission under Section 29A of the Representation of the People Act 1951. This is essential so that the electorates are assured of the party or candidate they are voting for are true representatives of their electoral promises. Defection should not be a matter restricted only to elected parties or candidates.

Sixthly, it is recommended to the Legislature to make it mandatory for political parties to formulate basic ideals, plans of action and declarations to the effect that defectors would not be allowed to be members of the party. Such declaration should be made binding on the party members and evaluated by the Election Commission. In this regard, if disqualifications under the Tenth Schedule are made subject to the Election Commission, party vigilance against defection would increase, as their declarations would act as a pre-electoral evidence of electoral responsibility. However, a party member should not be restricted to voluntarily give up his membership and function as an independent candidate. This is to ensure that his parliamentary privilege under Article 105 or 194 is still upheld after giving up his membership or in case of his expulsion. This could go a long way in curbing defections.

Lastly, it is recommended to the Legislature to make unprincipled defections punishable with imprisonment which could act as a deterrent to party hoppers. In this regard, it is imperative to omit Para 4 of the Tenth Schedule as it amounts to nothing but a malicious disguise of defection.

CROSS BORDER M&A: ISSUES AND CHALLENGES

Archishman Chakraborty¹¹⁰

ABSTRACT

India is internationally renowned as a developing yet extremely spirited economy with massive potential. The Government's pledge and its initiatives towards liberalization of FDI guidelines, expansion of service sector, easing of regulatory structure, capital market improvements together with business prospects and improved standard of living serve as chief factors contributing to the fast growing and vibrant Indian economy. However, a protectionist sentiment across the globe and lack of a stable regulatory environment in India has caused mass capital outflow from India, and has discouraged or delayed cross-border transactions in a major way. This together with a handful of homegrown issues impedes cross-border mergers in India in a critical way even as it struggles to update its laws and build, a stable and business-friendly regulatory atmosphere. Identification and assessment of the risks of an M&A transaction at an early stage is critical to successfully executing transactions and India is no different. For this, issues including the prevalent legal and regulatory environment should be kept in mind while undertaking M&A deals. The essay tries to identify and examine pressing challenges to cross-border mergers and acquisitions under the present regulatory framework and provide appropriate solutions for the same.

Keywords: Acquisition, Challenges, Cross-border, Merger, Regulatory

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INTRODUCTION

“Protectionism, populism and de-globalization are on the rise. It’s not good for closer economic cooperation globally.”

President Xi Jinping¹¹¹

The advent of globalization had played a quintessential role in bringing the people of the world together, striving to knit a truly globalized social fabric, building a global identity and upholding the spirit of an ancient Indian saying :*Vasudhaivakutumbakkam*. For the majority of 20th century, we lived in a world that advocated free trade between countries and free movement of people across continents, where businesses were encouraged to invest in another country driven by various benefits that their home country could no longer offer as the domestic markets matured. Some of the key factors that led an entity to invest in a foreign country, could be expansion of their market (read consumer base), cheaper labor costs, access to natural resources or new technology. For this, the foreign entity would often search for a partner entity, incorporated in the foreign country, who were likely to have certain specific expertise like their knowledge of the regulatory structure for the investment-specific sector in that country, established brand name etc. In others, and most cases, the foreign country simply made it mandatory for the entity to search for a local partner, established within their jurisdiction. This practice called for some necessary restructuring of the entities and establishment of new subsidiary entities, and other times merging their subsidiary entity with a local entity i.e a merger or simply acquiring controlling stake in the local entity – an acquisition. The phrase Mergers and Acquisitions (‘M&A’) ascribes to that facet of corporate strategy, corporate finance and management which concerns with the buying, selling and combining of different corporatess which can finance and aid a growing company in an industry to grow rapidly without necessarily creating another business entity.¹¹²

Since the global economic meltdown of 2008, and faced with worsening economic conditions at home, the world has seen an increasingly protectionist and conservative drive in Europe and

¹¹¹Reuters, “*China’s Xi says Chinese economy to keep growing steadily*”(Speech at World Economic Forum in Davos, Switzerland) January 17,2017 <http://www.freemalaysiatoday.com/category/business/2017/01/17/chinas-xi-says-chinese-economy-to-keep-growing-steadily/> accessed January 25, 2017

¹¹² ARA Law, “White Paper – Mergers and Acquisitions”, available at <http://www.aralaw.com/wp-content/uploads/2016/08/MA-White-Paper.pdf>

America. According to the IMF, global trade volumes fell 17.5 percent amid September 2008 and January 2009, in an event currently known as “Great Trade Collapse”¹¹³. This together with a handful of homegrown issues impedes cross-border mergers in India in a critical way even as it struggles to update its laws and build, a stable and business-friendly regulatory atmosphere.

Fig. 1 below depicts the fall in US imports in the aftermath of the Economic meltdown of 2008.

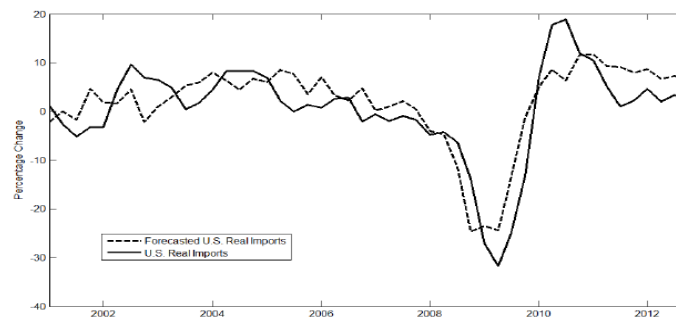


Fig. 1

For India, the economic meltdown of 2008 and the consequent sentiment of protectionism as displayed by major economies of the world has thrown up new challenges to cross-border mergers, a sector already suffering from lack of clarity in taxation policy in the domestic law, antitrust issues, complex legal frameworks, unstable regulatory/political environment, etc. Through this article, the author has tried to identify and scrutinize the regulatory roadblocks that pose a challenge to cross border mergers in India and suggest prudent solutions to deal with the same.

REGULATORY HURDLES TO CROSS-BORDER MERGERS IN INDIA

Over the last few years, the M&A market in India has seen some uneasy fluctuations. However, with the election of the Narendra Modi Government has been met with a tremendous surge in investor confidence, a fact that has been reflected in the securities market in recent years. After a slump in M&A activity, many experts are of the opinion that the M&A market is expected to

¹¹³ Rob Gregory, Christian Henn, Brad McDonald, and Mika Saito, “*Trade and the Crisis: Protect or Recover*” (INTERNATIONAL MONETARY FUND – Strategy, Policy, and Review Department) April 16, 2010 <http://www.imf.org/external/pubs/ft/spn/2010/spn1007.pdf> accessed January 25, 2017

resurge with new vigor due to a number of investor-friendly steps that have been taken by the current Govt. The new bankruptcy law, the rapid pace of approvals introduced by the government as a part of its ease of doing business in India drive, the easing in Foreign Direct Investment norms along with a decline in the crude prices and low inflation locally are a few factors expected to stimulate the M&A market in India. However several regulatory barriers and grey areas of law make cross border transactions in India still a tedious affair. Some of those hurdles have been identified and discussed as under.

1. Regulatory and procedural hurdles under Company law :

Mergers and Acquisitions are modes by which distinct business entities combine to work together and reap the benefits of growth as a single entity. The Companies Act, 2013 (hereinafter referred to as “CA13”) does not specifically define the term ‘merger and amalgamation’, however section 230(1) defines the term ‘arrangement’ as re-organization of the company’s share capital by way of consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods. The Act can be said to describe a merger fleetingly as a combination of two or more entities into one, the desired effect being not just the accumulation of assets and liabilities of the distinct entities, but organization of such entity into one business.¹¹⁴The Income Tax Act of 1961 “hereinafter referred to as “ITA”) however defines an equivalent term, ‘*amalgamation*’ as the merger of one or more companies with another company or the merger of two or more companies to form one company¹¹⁵. Legal frameworks in India predicts various forms of mergers, subject to the needs of the merging entities, and often encompasses every type of corporate restructuring that an entity might undertake, thereby receiving indifferent treatment from a corporate law perspective.

Cross-border mergers are essentially arrangements between companies hailing from different nations in the target nation.¹¹⁶CA13 makes a departure from the earlier position of law with regard to cross-border mergers under the 1956 Act¹¹⁷, which limited cross-border mergers to the Indian transferee companies only. Section 234, CA13 makes the provisions of Chapter XV

¹¹⁴Section 232, Companies Act, 2013

¹¹⁵Section 2(1B) Income Tax Act, 1961

¹¹⁶Anshritha Rai, “*Cross-Border Mergers*”, Corporate Law Reporter available at <http://corporatelawreporter.com/2016/12/07/cross-border-mergers/> accessed January 31, 2017

¹¹⁷ Section 394, Companies Act, 1956

applicable mutatis mutandis to mergers and amalgamations between Indian companies and companies incorporated in jurisdictions notified by the central government, and additionally presents that a foreign company may, with prior approval of the RBI, merge into an Indian company and vice-versa.¹¹⁸ The introduction of S. 234 has largely been a welcomed advance among various stakeholders; however, a degenerating restriction of allowing such cross-border mergers only with the foreign companies incorporated in the Central Government notified jurisdictions invalidates the development which was perceptible in Section 234. The procedural compliance for listed companies become more onerous when analyzed against the requirements posed under S. 234(5) which obligates companies to send notice of meeting for the approval of a merger to a number of government authorities including the Income Tax Department, the RBI, the Registrar of Companies, the official liquidator and the Competition Commission of India ('CCI'), as well as the Securities and Exchange Board of India ('SEBI') and respective stock exchanges.

Thus, while allowing cross-border mergers to take place in India, the CA13 introduces a set of unwieldy regulatory approvals which has proved to be a major roadblock for timely completion of Cross-border merger deals. Also, by restricting M&A activity to notified jurisdictions, CA13 limits the reach of Indian companies to find foreign investors and stops the M&A market from reaching its full potential.

2. *Regulatory and procedural hurdles under the competition law :*

The Competition Act ,2002 attempts to make a shift from curbing monopolies to curbing practices that have adverse effects on competition both within and outside India, popularly addressed as the 'Effects Doctrine', wherein the conduct of the transaction procedure cast an effect inside the domestic territory¹¹⁹. Sections 5 and 6 of the Competition Act, 2002 deal with Merger regulation. S. 5 lays down asset and turnover thresholds for parties to a combination, foreign and Indian which if flouted may treat the combination to review. S. 6(1) of the Act bars a 'combination', 'which causes or is likely to cause an appreciable adverse effect on competition within the *relevant market*

¹¹⁸Kalpataru Tripathy, PromodeMurugavelu, Medha Kumar, "Cross-border mergers and the Companies Act, 2013", Indian Business Law Journal, available at <https://www.vantageasia.com/cross-border-mergers-and-the-companies-act-2013/> accessed January 31, 2017

¹¹⁹T. Ramappa, "Competition Law in India: Policy, Issues and developments", (New Delhi: Oxford University Press) Edi. 2nd, 2009, pg. 275

in India'¹²⁰Section 6 (2) (b) of the Act states '*the execution of any agreement or other document for acquisition*' as one of the actions that will set off the necessity of notification.

The 2007 amendment to the Competition Act makes a compulsory obligation upon the merging entity to notify a planned transaction to the Competition Commission of India ("herein referred to as "CCI") as it surpasses the prearranged limits. The investigative powers of the CCI with regard to combinations have been provided under sections 20, 29, 30 and 31 of the Act. Under the 2007 Amendment, the CCI has been directed to build a *prima facie* opinion on whether a combination has sourced or is likely to source an appreciable adverse effect on competition in India, within 30 days of filing.¹²¹The amendment further prescribes that no combination shall come into force until two hundred and ten days have passed from the day on which the notice was given to the CCI¹²²; or the Commission has passed orders under section 31 approving, rejecting or modifying the terms of the proposed combination. Section 32 of the Competition Act overtly permits the Competition Commission to study a combination already in effect outside India¹²³ and pass orders against the same given that it casts an 'appreciable adverse effect' on competition in India,¹²⁴ thus bringing Cross-border mergers within the regulatory and investigative ambit of the CCI.¹²⁵

The Competition Act, by providing to bring cross-border mergers within the ambit of the CCI and making it necessary for the merging entities to seek approval of the CCI in the cases cited above, consequently creates yet another bottleneck for cross-border mergers, discouraging mergers of high valued entities.

3. Ambiguity in the India-Mauritius DTAA and its long-term effect:

Ambiguities with regard to Taxation policies in cross border merger deals emerge when two separate jurisdictions intend to tax the exact amount of money or income or the same legal entity thereby ensuing in double-taxation which serves as a big disincentive for parties otherwise willing

¹²⁰S. 2 (r), Competition Act

¹²¹ S. 5(b) Competition (Amendment) Act, 2007

¹²² S. 5(c) Competition (Amendment) Act, 2007

¹²³Shalin, "*Cross Border Mergers: Implications under the Competition Act, 2002* ", available at <http://www.legalservicesindia.com/article/article/cross-border-mergers-implications-under-the-competition-act-2002-968-1.html> accessed January 31, 2017

¹²⁴RavPratap Singh, "*Implications Of Cross Border Mergers Under Indian Competition Law – A Comparative Analysis With US & EC Jurisdictions*", available at <http://cci.gov.in/images/media/ResearchReports/RavPratapSingh.pdf>, accessed January 31, 2017

¹²⁵ Supra Note 2

to engage in cross-border trading activity. In some occasions countries enter into what is known as a Double Taxation Avoidance Agreement (hereinafter referred to as “DTAA”), with a view to encourage bilateral trade, co-operation and investment by restricting their taxing jurisdiction voluntarily.¹²⁶ It has been observed that such agreements are especially significant in the Indian frame work where the taxation policies are perceived to be aggressive and the laws as vague, some protection in the form of a treaty jurisdiction becomes essential.

The election of the Narendra Modi Govt. has seen India take rapid strides in the path of economic reformation and has significantly improved the overall investment climate. India has lately brought changes to the India-Mauritius DTAA and has further stated its plan to bring the ones with Singapore, Cyprus and Netherlands in consonance with the improved India-Mauritius DTAA,¹²⁷ which shall come into effect from April 1, 2017¹²⁸. The agreement amends the existing residence based tax system under the Mauritius DTAA and gives India a source based right to tax capital gains that arise from parting of shares of an Indian resident company bought by a Mauritian tax resident. It seeks to bring under its ambit all existing investments up to March 31, 2017, with the revised position being applicable only to investments made on or after April 1, 2017.¹²⁹ Though this is a welcome improvement doubts have been raised upon the new tax protocol. A working group set up by the Finance Ministry has found ambiguities regarding some of the provisions of the DTAA¹³⁰ The panel conceded that the tax ambiguity lies in relation to quasi-debt instruments such as a compulsorily convertible security acquired before April 1, 2017 bar converted and sold beyond the date. It is also ambiguous as to what will be the tax implication on an investor who acquires securities of a business concern A before April 2017, and obtain shares of business concern B to which A is merged after April 2017, and then earns capital gains by selling the shares

¹²⁶Nishith Desai Associates, “*Tax issues in M&A Transactions*”, August, 2016 pg 10 available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Tax_Issues_in_M_A.pdf accessed February 1, 2017

¹²⁷ Ibid

¹²⁸MoF Press Release dated August 29, 2016 available at <http://incometaxindia.gov.in/Lists/Press%20Releases/Attachments/511/PRESS-RELEASE-Indo-Maritius-Protocol-29-08-2016.pdf> accessed February 1, 2017

¹²⁹ Supra Note 2

¹³⁰Dilasha Seth, “FinMin sets up Working Group to examine India-Mauritius DTAA concerns”, Business Standard, June 14, 2016, available at http://www.business-standard.com/article/economy-policy/finmin-sets-up-working-group-to-examine-india-mauritius-dtaa-concerns-116061301048_1.html accessed February 1, 2017

of B, in 2018.¹³¹ While capital gains arising out of sale/transfer of shares of an Indian company which have been bought before April 1, 2017 shall not be concerned by the amended agreement, it would seem that convertible instruments (including preference shares and debentures) acquired by a Mauritius resident prior to April 1, 2017 may need to be converted into equity/ordinary shares before April 1, 2017 in order to benefit from the capital gains tax exemptions under the new regime. However, this understanding may not be true and needs further clarification from the Government.

The Govt. while going about its reform agenda must promptly resolve all outstanding disputes with regard to the India-Mauritius DTAA, as it is likely that all future DTAAs will be modeled upon this, thereby posing greater risks to the health of the economy and further hindering cross border transactions.

4. Restrictions on cross-border mergers on NBFCs by the RBI:

On July 9, 2015, the RBI came up with a notification requiring obtaining of prior approval of the RBI in cases of acquisition/ transfer of control of Non-Banking Financial Companies.¹³²The said notification was issued in furtherance of an earlier notification dated May 26, 2014 on the same subject. In the said notification, the RBI mandates any concerned person to take prior written permission of the Financial Regulator in the following cases :

- a. **any takeover or acquisition of control of an NBFC, which may or may not lead to alteration of management;**
- b. **any alteration in the shareholding pattern of an NBFC, that includes progressive increases over time, which might lead to acquisition/ transfer of shareholding of 26 per cent or more of the paid up equity capital of the NBFC. An early**

¹³¹Sachin Dave, Sugata Ghosh, “Panel on DTAA with Mauritius spots tax ambiguity”, The Economic Times, July 25, 2016 available at <http://economictimes.indiatimes.com/news/economy/finance/panel-on-dtaa-with-mauritius-spots-tax-ambiguity/articleshow/53370712.cms> accessed February 1, 2017

¹³²Reserve Bank of India, Notification No.DNBR (PD) CC.No. 065/03.10.001/2015-16, Issued July 09, 2015, titled “Requirement for obtaining prior approval of RBI in cases of acquisition/ transfer of control of Non-Banking Financial Companies (NBFCs)” available at <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=9934&Mode=0> accessed February 1, 2017

consent would, however, not be needed in case of any shareholding amounting over 26% due to buyback of shares/ reduction in capital where it has sanction of a competent Court. The same is nevertheless obligatory to be reported to the Reserve Bank not later than one month from its incidence;

- c. any change in the management of the NBFC which would lead to alteration in more than 30 per cent of the directors, excluding independent directors. An early approval would not be needed for the directors who get re-elected post retirement by rotation.¹³³

However, Para 2(ii) of the Notification clarified that NBFCs shall continue to inform the Reserve Bank regarding any change in their directors/ management as required. The said document further states that a public notice of at least 30 days has to be given before effecting the sale of, or transfer of the ownership by sale of shares, or transfer of control, whether with or without sale of shares and that such public notice shall be given by the NBFCs and also by the other party or jointly by the parties concerned, after obtaining the prior permission of the Reserve Bank.¹³⁴ While para 6 of the notification states warns that any infringement of the aforementioned directions would result in unfavorable regulatory action together with cancellation of CoR.

By this Notification the RBI has sought for greater intervention in cases of any merger/acquisition or change of control of NBFCs by a foreign entity and is consequently applicable to cross-border merger transactions as well. The reasoning behind this rigorous regulatory intervention is to make sure that the acquirer / resultant enterprise subsequent to the Merger is a “fit and proper person” which possesses the required qualifications to continue the business of the NBFCs, and that the Merger is not detrimental to public or depositor’s interest.¹³⁵ This however has brought yet another complexity, specific to cross-border mergers with regard to NBFCs and adds on to the list of

¹³³ Para 2(i), *Ibid*

¹³⁴ Para 4(i), *Ibid*

¹³⁵ [Umakanth Varottil](http://indiacorplaw.blogspot.in/2014/05/regulatory-domain-over-m-for-nbfc.html), “Regulatory Domain over M&A for NBFCs” IndiaCorpLaw Blog. May 27, 2014 available at <http://indiacorplaw.blogspot.in/2014/05/regulatory-domain-over-m-for-nbfc.html> accessed February 2, 2017

hurdles, therefore deserving a relook by the Govt. if it earnestly wants to encourage cross-border mergers in India.

5. SEBI observations on ‘Control change’ and impact on Cross-border mergers:

The definition of ‘control’ under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 2011 (hereinafter referred to as “**Takeover Guidelines**”) has for long been subjected to lengthy debates in India and abroad. Traditionally, the test of ‘control’ was left as a subjective case, to be decided by SEBI on a case to case basis, whether there has been any change in control in that particular case. The very nature of the term and the fluid manner in which it could be interpreted made it difficult to designate a specific standard definition to the term ‘control’.¹³⁶ With the gradual decrease in public participation in listed companies over the past years, private investments have turned out to be the best bet for listed companies to generate funds for growth. In acknowledgement of this situation, SEBI had issued a Discussion Paper requesting public opinion upon certain brightline tests to define ‘control’ with regard to the Takeover Guidelines.¹³⁷ The issue of control has been surrounded with indistinctness for along time, demanding greater clarity. The Hon’ble Supreme Court in *Subhkam Ventures Pvt. Ltd.*¹³⁸ had left the question control open to further interpretation, the SEBI had stated that affirmative rights resulted in acquisition of control by the investor. However, in a ensuing case of *Jet-Etihad*¹³⁹, SEBI had changed its stance and stated that investor protection rights or affirmative rights not in the nature of day-to-day supervision or policy formulation of a business concern would not amount to acquisition of control.¹⁴⁰

¹³⁶Prarthana Baranwal, “SEBI’s Bright Line Tests for Control - An Analysis” News & Publications, Lakshmikumaran & Sridharan attorneys, available at <http://www.lakshmisri.com/News-and-Publications/Publications/Articles/Corporate/sebi-bright-line-tests-for-control-an-analysis> accessed February 2, 2017

¹³⁷ Discussion Paper on “Brightline Tests for Acquisition of ‘Control’ under SEBI Takeover Regulations” available at http://www.sebi.gov.in/cms/sebi_data/attachdocs/1457945258522.pdf accessed February 2, 2017

¹³⁸ MANU/SC/1587/2011, the Supreme Court in its order had acceded to the out of court settlement between the parties and specifically stated that the question of law i.e. whether negative control will amount to control, remained open and that the previous decision by SAT which held negative control as not amounting to control would not be treated as a precedent.

¹³⁹Order in the matter of acquisition of shares of Jet Airways (India) Limited (hereinafter referred as "Jet") by Etihad Airways PJSC (hereinafter referred as "Etihad") available at http://www.sebi.gov.in/cms/sebi_data/attachdocs/1399545948533.pdf accessed February 2, 2017

¹⁴⁰MukeshButani, “SEBI clears the air on ‘control’ in M&A”, The HinduBusinessLine, April 24, 2016 available at <http://www.thehindubusinessline.com/portfolio/macro-view/sebi-clears-the-air-on-control-in-ma/article8516595.ece> accessed February 2, 2017

The change in SEBI's original position had led to much uncertainty and had considerably affected the investor sentiment. The said Discussion Paper has largely been an effort on SEBI's part to restore the investor confidence by proposing a system which differentiates between downward protection rights and control rights by stating an expounded list of protective rights that would not trigger acquisition of control over a business concern.¹⁴¹

Through the discussion paper, the regulator has also expressed its intention to distinguish between control and significant influence. The discussion paper further proposes that the threshold for assuming 'control' be laid down at 25 % of voting rights, irrespective of whether such holdings result in de facto control. While this move shall build a transparent and predictable in consonance with the current legal position¹⁴², certain shortcomings have been noticed in the proposal. Some are of the opinion that the document merely suggests half measures, like doing away all rights in unlisted companies while listing. Also, the paper recommends that any downside protection rights to investors will have to be approved by a majority of the minority (public) shareholders in a meeting. Half measures like these are neither rational nor acceptable if an incentive has to be offered to private supporting of listed entities.¹⁴³

It is recommended that the regulator presents some concrete ideas so as to objectively define acquisition of control as under the Takeover Guidelines. A subjective analysis of the same, on a case to case basis, can only create more uncertainty in the regulatory atmosphere and is bound to keep Foreign investors away, which in turn will affect business transactions like cross-border mergers and acquisitions and will prevent growth.

6. Lack of uniformity of Stamp Laws:

One of the major issues to be noted while structuring Cross-border merger transactions, besides the Tax and regulatory implications is its stamp duty aspects. Stamp duty is a tax levied on an instrument which limits, transfers, extinguishes, extends or records any right or liability. The power to impose a stamp duty has been vested both with the Centre and the state, while the Centre

¹⁴¹*Ibid*

¹⁴²It must be stated that acquiring 25% shares or voting rights presently leads to a takeover trigger, irrespective of the fact that such acquisition of shares or voting rights is resulting in an acquisition of 'control'. Hence, this improvement can only bring objectivity without extending the scope of the present legislation, further resulting in a cleaner test in cases of indirect acquisitions of control.

¹⁴³*Supra note 28*

has direct rights to tax certain instruments, the power to prescribe, reduce or remit rates of stamp duty on other instruments lie with the States. Assessing the stamp duty implications of a transaction becomes more complex when faced with the fact that the stamp duty differs vastly from one state to another. When considering transactions of cross border mergers, a major challenge that the merging entities faces is with respect to the duty to be levied upon Schemes of Arrangement approved by the Court under provisions of CA13, where the stamp duties levied by different states show tremendous diversity.¹⁴⁴

For a considerable period of time, one of the most pertinent questions surrounding Merger Transactions were whether the court order approving a scheme of arrangement is an instrument that must invite a stamp duty. The matter was finally put to end by the Supreme Court in the case of *Hindustan Lever & Anr.*¹⁴⁵ wherein the Hon'ble Court definitively illustrated that the order of the High Court would be treated as an 'instrument' and hence liable to stamp duty. Thereafter, a number of states have brought changes to their respective laws including a levy of stamp duty (within the ambit of 'conveyance') on a Scheme. Recently the Calcutta High Court in *Emami Biotech Ltd and others*¹⁴⁶ reaffirmed that held that a Court order sanctioning a scheme of amalgamation or demerger under section 391 to 394 of the Companies Act, 1956 (the Companies Act) is an 'instrument' within the meaning of the Stamp Act applicable to the state of West Bengal and is subject to stamp duty.¹⁴⁷

However, certain uncertainties remained on whether stamp duty is payable in a particular state that does not have specific entry for stamp duty on a Scheme. The Delhi High Court in the case of *Delhi Towers Ltd v. G.N.C.T. of Delhi*¹⁴⁸ expounded that stamp duty is payable on a court order approving the scheme of arrangement irrespective of a specific entry in the State's stamp duty

¹⁴⁴Falguni Shah, JayeshSanghvi, "Stamp duty laws for M&A – an overhaul required", Moneycontrol, Dec 09, 2016 available at http://www.moneycontrol.com/news/tax/stamp-duty-laws-for-ma-%E2%80%93overhaul-required_8092441.html accessed February 3, 2017

¹⁴⁵*Hindustan Lever & Anr. v. State of Maharashtra* (2004) 9 SCC 438 (SC)

¹⁴⁶*Emami Biotech Ltd. and others v. State of West Bengal* [Company Application No. 777 of 2011]

¹⁴⁷ PWC, "Sharing insights", News Alert, 27 February, 2012 available at https://www.pwc.in/services/tax/news_alert/2012/pdf/pwc_news_alert_27_february_2012_emami_biotech_ltd_and_others.pdf accessed February 3, 2017

¹⁴⁸*Delhi Towers Ltd v. G.N.C.T. of Delhi* [2009] 159 Comp Cas 129 (Delhi)

schedule for such orders.¹⁴⁹If the uncertainties with regard to the position of law were not enough, cross-border transactions have run into a new storm, being subject to a plethora of different stamp duties on court orders, unique class of assets enclosed in the stamp duty net and disparity in concessions available.

While in Gujarat, the stamp duty levied on a court order approving a Scheme stands at 1% of value of immovable properties or 1% on higher of market value (for listed company) or face value (for unlisted company) of shares issued in pursuance of the Scheme, whichever is higher,¹⁵⁰ in Goa, stamp duty is payable on both movable and immovable properties based on the rate applicable to conveyance being 7% (plus surcharge of 1%) on immovable properties and 6% on movable properties. In Maharashtra, the stamp duty stands at 5% on value of immovable properties or 0.7% on value of shares issued in pursuance of the Scheme, whichever is higher, subject to a maximum of 10% on the value of shares issued.¹⁵¹Yet, if the paid up share capital of the transferee company is less than Rs. 5 crores and the directors of the entities involved in the scheme are common, then there is a remission of 80%. Karnataka imposes 2% stamp duty on market value of all properties or 1% on value of shares issued and cancelled pursuant to the Scheme whichever is higher.¹⁵²¹⁵³

Another confusion that has arisen currently is whether a set off of stamp duty payable in one state can be maintained in the other state in case two states are involved in a Scheme due to orders of two courts or the sites of properties in a state dissimilar from the state in which the court order is passed, as highlighted in the recent Bombay HC judgment in the case of Reliance Industries Limited and Reliance Petroleum Limited¹⁵⁴. Hon'ble High Court, on its explanation of the requirements of the Bombay Stamp Act, refuted the advantage of rebate of stamp duty already compensated on Gujarat order against the stamp duty to be paid in Mumbai. The High Court in conclusion stated that the orders passed by separate courts are separate instruments that need to be stamped differently. This has increased the hassles for companies twice over, as the orders

¹⁴⁹Payel Jain, Vinod Kothari & Co., “*Incidence of stamp duty on mergers-demerger – ruling of the Delhi High Court in Delhi Towers Ltd v. G.N.C.T. of Delhi*” available at <https://www.indiafinancing.com/Delhi%20High%20Court%20ruling%20on%20Stamp%20Duty.pdf> accessed February 3, 2017

¹⁵⁰ Art. 20 (d) Gujarat Stamp Act

¹⁵¹ Art. 25(da), Bombay Stamp Act

¹⁵² Art. 20(4)(ii), Karnataka Stamp Act

¹⁵³Supra note 32

¹⁵⁴*Reliance Industries Ltd. and Reliance Petroleum Ltd v. The Chief Controlling Revenue Authority* LSI-1021-HC-2016-(BOM)

basically provide that the same matter involving transfer of the same assets and liabilities be made through separate applications filed in different courts in different states.

With regard to conversion of a partnership firm into a company, the earlier view as illustrated by the Andhra Pradesh HC¹⁵⁵ that there should not be any stamp duty, has been put into question by a recent amendment in the Rajasthan Stamp Act, to include a duty of 2% on the market value of immovable property consigned in an LLP on alteration of a private / public unlisted company into an LLP.

Such irregularities on the position of law and divergent rates of stamp duties has presented a much complicated view of the Indian legal system, and increased the possibility of multiple litigation. This in turn has discouraged and delayed cross-border merging activity to a great extent. In order to build a conducive atmosphere for such transactions, the stamp duty laws in the country must be overhauled and unified.

7. Ambiguities brought in by the Insolvency and Bankruptcy Code, 2016 :

The Insolvency and Bankruptcy Code of 2016 (hereinafter referred to as “**IBC**”) unifies and amends the laws concerning reorganization and insolvency resolution of corporate bodies, partnership firms and individuals in a time bound approach so as to maximize the value of assets of these entities, to encourage entrepreneurship, availability of credit and seeks to strike a balance of interests of all the stakeholders.¹⁵⁶ Although the IBC has been hailed by the investor community at large and promises to boost cross-border M&A activity by a great extent, questions have been raised on the creditor-controlled processes proposed by the IBC for executing sale of distressed companies.

The IBC empowers a creditor to initiate the insolvency resolution process against the corporate debtor, once a demand notice has been served on him, and he has not received any payment, or any notice of an existing dispute under Section 9 (1) of the Code by making an application to the adjudicating authority. The adjudicating authority in case of a Corporate entity will be the NCLT while that for individuals and partnership firms will be Debt Recovery Tribunal. The admission of

¹⁵⁵Valli Pattabhirama Rao and Anr v. Sri Ramanuja Gin. & Rice Factory P Ltd & others 1986 60 CompCas 568 AP

¹⁵⁶ CMA JK Budhiraja, “*Insolvency Resolution Process, Liquidation and Opportunities for CMAs under IBC, 2016*”, IBC, 2016, available at <http://www.ipaicmai.in/IPA/Upload/Article-IRP.pdf>, accessed March 7, 2017

such an application to the Adjudicating Authority under will mark the commencement of the asset sale procedure under the IBC.¹⁵⁷ Such an application has to be made along with the name of a Resolution Professional to be nominated by the creditors who upon appointment, essentially performs the duties of the corporate borrower, overriding existing management.¹⁵⁸

The Resolution Professional being a nominee of the creditors puts the creditors in a commanding position in the entire process. This process of placing the creditor in power may cause the management to lose interest in the sale process or even turning unreceptive, leading to uncomfortable roadblocks in the flow of information on the corporate debtor and the factual level of its assets and liabilities. This may hinder the price ascertaining process as well as potentially put off bidders from presenting acquisition proposals.

The IBC also proposes a freeze on M&A activity during the moratorium period beginning after the insolvency commencement date. Section 14 of the IBC mandates the adjudicating authority to declare a moratorium period of 180 days (extendable by 90 days) which shall *inter-alia* prohibit transferring, encumbering alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein¹⁵⁹, a restriction that will extend till the completion of the insolvency resolution process. Such a large moratorium period could result in decline of the value of the assets of the borrower and may negatively impact the business of the corporate debtor. To avoid this situation, a pre-package arrangement has been suggested, which permits the sale of at least some part of a entity's business or assets to an recognized purchaser for a pre-negotiated amount or negotiated simultaneously with the initiation of the bankruptcy process by the Adjudicating authority.¹⁶⁰ Such pre-package provisions have been popular in international jurisdictions¹⁶¹, but have not been provided for under the IBC.

The nonexistence of pre-package provisions may also deter genuine acquirers who have a legitimate revival plan for the insolvent company, but do not wish to get entangled in an auction

¹⁵⁷ Section 9 (6) Insolvency and Bankruptcy Code, 2016

¹⁵⁸ Sections 17, 18, 19, 20 Insolvency and Bankruptcy Code, 2016

¹⁵⁹ Section 14 (1)(b), Insolvency and Bankruptcy Code, 2016

¹⁶⁰ Kartick Maheshwari, Aashutosh Sampat, "*Mergers and acquisitions under Bankruptcy Code: some concerns*", Livemint e-paper, April 7, 2017, available :

<http://www.livemint.com/Opinion/XhU7eXX6xGATjdpRSUyRIN/Mergers-and-acquisitions-under-Bankruptcy-Code-some-concern.html>, accessed April 8, 2017

¹⁶¹ The Enterprise Act, 2002 in UK has popularized pre-packaged sale by a great deal.

process under the IBC, as the resolution professional will be statutorily obligated to seek out additional bidders.

Further, the IBC do not provide any immunity from payment of stamp duty and other statutory costs with regard to acquisition of assets. Acquirers will, hence, need to suitably factor this cost into their financial model, and where conducive, adjust their transaction structure for greater effectiveness.

Also, the IBC mandates that for sale of an insolvent company, 75% of the creditors need to give their approval.¹⁶² The threshold of 75 % is a significantly high one especially when compared to the threshold of 60% approval by secured creditors under the SARFAESI Act. As a consequence, unless acquirers are convinced of synchronization and agreement among creditors, they may be cautious of devoting time and effort in such situations.

¹⁶² Section 21 (8) , Insolvency and Bankruptcy Code, 2016

NON-REGULATORY HURDLES TO CROSS-BORDER M&A: CULTURAL DIFFERENCE

Merging or acquiring the resources of another entity can fetch a number of concrete benefits to the newly created business. Yet successful M&A transactions are sieged a few softer and non-regulatory challenges. These challenges are frequently created around differences between two different cultures – both business and national. It has been often observed that at the core of these alarmingly high failure rates is the failure to address the cultural barriers between the two international organizations and creation of a new (and unique) culture that accommodates and embraces the culture of both the parties to the transaction.

According to a statistics presented by *Communicaid*¹⁶³, there is a 30-50% chance of an unsuccessful venture in cross-border mergers attributable to variations in cultural practices and business environment. The article advices the corporates to carefully evolve a new workplace culture and while forming a new entity, taking into consideration the practices established in either corporate and make good study of the employer-employee relationship already prevalent in the foreign country so as to better the chances of success for cross-border M&A transactions. The article with that objective, the author recommends a series of steps to insulate the merging entities from cultural differences including a better understanding of each other's culture and embedding culture in change management.

The issue with regard to adaptation to a new culture can be considered as a softer challenge compared to the regulatory requirements which are considered as hard challenges. The Government can bring out guidelines and recommendations for foreign companies considering entering into M&A transactions with Indian companies. Workshops and training centers may be established to provide foreign investors an overview of the practical challenges faced by foreign companies in adapting to the domestic culture. A better understanding of the challenges faced by cultural differences will enable the corporate to take greater precautions while entering into transactions and prevent their failures to a large extent.

¹⁶³ Declan Mulkeen, "How culture impacts a Cross-Border M&A", *Communicaid*, Dec 21, 2015, <https://www.communicaid.com/cross-cultural-training/blog/how-culture-impacts-a-cross-border-ma/> accessed February 4, 2017

CONCLUSION:

India's quest to better its rank in the Ease of doing business index has paved the way for drastic liberalizations in FDI policy, Tax structure and licensing requirements. However, as pointed out in this article, business transactions in the country continue to be held to ransom by a few unnecessary restrictions and grey areas of legislation. In order to usher in a new era of industrial activity in true spirit, it is imperative that the Government effectively address each of the regulatory and procedural hurdles pointed out in the essay and thereby develop a healthy environment for cross-border mergers. In my opinion, a single window approval system under the Companies Act, 2013 and the Antitrust regime, in a stricter time bound manner may decrease the hassles of a foreign investor to a large extent and increase investor confidence in the Indian economy. Similarly uniformity of stamp laws throughout the country and clarity in taxation policy will facilitate and encourage businesses to invest in India, and help them reap early benefits. Also, a stable regulatory position with regard to the scope of 'control' and diluting the role of Creditors under the Insolvency and Bankruptcy Code will make going easier for acquirers with a genuine plan for reviving an insolvent company, who otherwise may feel hesitant to be in a situation which would put their investment hostage to the whims of the Regulators

On their part, to avoid regulatory hassles, the acquirers or the merging entities can formally approach the regulators before executing a transaction to dispel their doubts and associated risks. The acquirers can also make an in-depth assessment of the corporate governance standards of the target company and undertake a much more comprehensive Due Diligence, involving even an investigative and HR due diligence.

With regard to the anti-trust laws, parties must at an early stage itself inspect the anti-trust implication of the deal including the need and timing of the filing and actions that need to commence previous to taking CCI's approval, and if the acquirer or merging entities anticipate an anti-trust implication, then they must assign the anti-trust risk by either carrying out modifications in the deal documentation to take in clauses which necessitate the buyer to undertake all actions to comply with anti-trust requirement or approving a set of divestures as a condition precedent so as to alleviate any anti-trust apprehension.

With regard to tax risks, it might be possible to moderate some of the risks, should parties first bargain tax specific indemnities in their transaction documents and must approach the concerned

authority for Advance Ruling to find out about their tax responsibility and obtain tax insurance to immune themselves from potential tax risk

While going about M&A deals, the parties must also have deeper understanding of where operational assessment making in the target lies, whether at promoter level or management level, develop strong communication with the target entity, their workforce and their culture, and last, but not the least develop flexible organizational formation, which might be necessary to make sure the capacity of the merged or acquired entity to accept cultural, social and other factors that contrast across markets.

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GOVERNMENT CONTRACTS UNDER INDIAN CONSTITUTION:**AN OVERVIEW OF ARTICLE 299**

*Pooja Rao Putrevu*¹⁶⁴

ABSTRACT:

Day in day out many individuals enter into contracts, like wise government also enters into contracts with private individuals. Therefore it is necessary to form an agreement between the parties in order to call it a valid contract. Article 299 of the Indian Constitution provides for the procedure to enter into a contract when government is one of the parties. With the change in time there have been many changes in the procedure, as it went on to become difficult for the government as well as the private party to fulfill the legal formalities for each and every contract. The main aspect of this paper lies in the study of the judicial attitude towards this Article with relation to Section 70 of the Indian Contract Act.

This paper will analyze Article 299 very closely and provide with an insight regarding the loop holes as well as the other contradictions that the article faces. This paper will also present the contradictions laid down by Article 14, which highlights the power win the hands of the government while choosing the contracting party. The paper will also study the principles laid down in the landmark case of R.D. Shetty V. International Airport Authority, and analyze the reasonableness and non- arbitrariness present in these principles. The data shall be substantiated using the judicial review and case laws.

Keywords: Article 299, Government Contracts, Judicial attitude.

INTRODUCTION:

A contract to which the Central Government or a State Government is a party is called a 'Government Contract'. Section 2(h) of the Indian Contract Act, 1872 defines a contract as "An agreement enforceable by law". The word 'agreement' has been defined in Section 2(e) of the Act as 'every promise and every set of promises, forming consideration for each other'. The Indian

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Contract Act, 1872 does not prescribe any form for entering into contracts. A contract may be oral or in writing. It may be expressed or be implied from the circumstances of the case and the conduct of the parties. But the position is different in respect of Government Contracts. A contract entered into by or with the Central or State Government has to fulfill certain formalities as prescribed by Article 299 of the Indian Constitution.

The subject of government contract has assumed great importance in the modern times. As the modern era is mostly focused on welfare state, the government is now a days' is dispensing a large number of benefits through its expansion in economic activities. More and more wealth of an individual today includes property. Most of the individuals enjoy largess¹⁶⁵ in the form of government contracts, licenses, quotas, mineral rights, etc. most of these forms of wealth are in the nature of privileges, though some may be regarded as legal rights.¹⁶⁶

As our constitution is adopted from various constitutions, there is a very close relation of many provisions with the English Law.

POSITION IN BRITIAN:

Before 1947, that is during the applicability of the common law the crown could not be sued for contractual obligations. This was the situation during the feudalism period, where the lords could not be sued in his courts. And also the maxim which was believed and pressed into service that king can do no wrong. And if any subject has a problem, against the crown, they could file a petition of right in which if the royal fate was granted then the action could be tried in the court. The grant was just given as a matter of course but not as a matter of right.

But later on such practices were abolished and permitted to file suits against the crown in ordinary courts to enforce contractual liability, a few types of contracts however being expected.¹⁶⁷

POSITION IN INDIA:

¹⁶⁵ Largess: willingness to give money, Cambridge dictionary, [www.http://dictionary.cambridge.org/dictionary/english/largesse](http://dictionary.cambridge.org/dictionary/english/largesse)

¹⁶⁶ Charles A. Reich, The New Property, 73 Yale LJ, individual rights and social welfare: the emerging legal issues, 74 Yale LJ 1245 (1965)

¹⁶⁷ WADE AND PHILIPS, CONST. LAW, 623 et. Seq (1977)

Article 299 of the Indian constitution talks about the contracts between the government and the individual, the article read as follows.

ARTICLE 299: Contracts-

(1). All contracts made in the exercise of the executive power of the union or of the state shall be expressed to be made by the president or by the governor of the state, as the case may be, and all such contracts and all assurances of the property made in the exercise of that power shall be executed on behalf of the president or of the governor by such persons and in such manners as he may direct or authorize.

(2). Neither the President nor the Governor shall be personally liable of any contract or assurance made or executed for the purpose of this constitution, or for the purpose of any enactment relating to the government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

FORMATION OF CONTRACT:

There are three conditions which Article 299(1) specifies regarding the contracts made in the exercise of the executive power of the centre or the state must be fulfilled to be valid. These conditions are:

- a) Such contracts to be expressed to be made by the president/governor as the case may be.
- b) Such contracts in the exercise of the executive power are to be executed on behalf of the president/governor as the case may be. And,
- c) The contracts are to be executed by the persons and in such manner as the president/governor may direct or authorize.

(The word “executed” in Article 299(1) here means that the contract between the government and any person must be in writing. Mere oral contract is not sufficient for Article 299(1).)¹⁶⁸

The first aspect in question is whether a contract not fulfilling the above mentioned requisites, then is that contract valid?

¹⁶⁸ JAIN & JAIN, Principles of Administrative Law, Ch. XXII(1986); Jain, a Treatise on Adm. Law, II (2002)

The reason for inserting any provision in the constitution is with a pre determined objective, in the same way the reason for including this Article 299 is not for mere form, but to safeguard the government from being saddled with liability for unauthorized contracts. It is in fact to protect the public from being destroyed when the government is representing them. Article 299 is a mandatory and not a directory.

Therefore the answer for the issue raised is found, that if the contract entered into does not fulfill the stipulated requisites which the Article 299 specifies then it is not a contract in the context of this Article. And if the contract is not stipulated according to this article, then neither the government can be sued and held liable for breach of such a contract, nor can the government enforce such a contract against the other contracting party.¹⁶⁹

For example: the contract for the supply of the goods would not cease to attract sec 7 (d) of the peoples representation act merely because it does not comply with article 299(1) and as such is not enforceable against the government.¹⁷⁰

K. P. Chaudhury v. State of Madhya Pradesh: *it was held that*

In view of article 299(1) there can be no implied contract between the government and another person. Article 299 being a mandatory term no implied contract can be spelled out between the government and the appellant. In this case it was also held that if the implied contracts were allowed between the government and the other party then this article would just be a dead letter. Then for the benefit of the person sued he would argue saying that implied contract be inferred from the facts and circumstances of the case.

Mulamchand v. State of Madhya Pradesh¹⁷¹- *Here the court gave a slightly different view with regard to implied contracts-*

It said that day in and day out government contractors enter into agreements orally, then it would be really inconvenient from an administrative point of view if it were insisted that each and every contract must be affected by a ponderous legal document couched in a particular form.

¹⁶⁹ *Chatturbhuj v. Moreshwar*, AIR 1954 SC 236

¹⁷⁰ *Abdul Rahiman Khan v. Sadasiva Tripathi*, AIR 1969 SC 302

¹⁷¹ *Mulamchand v. State of Madhya Pradesh*, AIR 1986 SC 1218

JUDICIAL ATTITUDE TOWARDS ARTICLE 299- Here keeping in view certain points the judiciary has made such provisions in this article. They are:

- To protect the government from unauthorized contracts
- To safeguard the interests of unsuspecting and unwary parties who enter into contracts with government officials without fulfilling all the formalities laid down in the constitution.

As it is very difficult for the private parties to strictly comply with the procedure laid down in the constitution, therefore the courts while addressing any case of this kind do not strictly follow the provisions of article 299 but they just look if it is substantiating with the procedure under article 299(1).

*Union of India v. Rallia Ram*¹⁷²- upon the invitation of tenders by the government, the letter of acceptance was signed by the director and contained an arbitrary clause. In this case it was held that the correspondence between the parties ultimately resulting in the acceptance note was held to amount to a contract. This means that a binding contract by tender and acceptance can come into existence if by a person is duly authorized in this behalf by the president.

RATIFICATION:

Previously the government could not be sued for informal contracts, but it could take responsibility for any kind of dispute by ratifying them.¹⁷³

In *Mulamchand v. State of Madhya Pradesh*- the Apex Court adopted a rigid view of Art. 299(1) held that there was no question of ratification or estoppels by or against the government in case of a contract not conforming to article 299(1). The court reiterated the view that this article has not been enacted for the sake of mere form and, therefore, the formalities prescribed by it cannot be dispensed with. If the plea of the government regarding estoppels or ratification is admitted, that would mean repeal of an important constitutional provision intended for the protection of the general public.

STATUTORY CONTRACTS:

¹⁷² *Union of India v. Rallia Ram*, AIR 1963 SC 1685

¹⁷³ *N. Purkayastha v. Union of India*, AIR 1955 Ass 33

Article 299 does not apply to statutory contracts, i.e; a contract made in existence of statutory powers and not general executive powers. There is a distinction between contracts executed in exercise of the executive powers and those executed in exercise of ordinary statutory power. And Article 299 applies to the former type of contracts and not latter.

*State of Haryana v. Lal Chand*¹⁷⁴- the Supreme Court considered a contract granting exclusive privilege of liquor vending, executed in exercise of the statutory powers referable to the Punjab excise act, and the rule made there under. The court held that the grant of exclusive privilege gave rise to a contract of a statutory nature, distinguished from the one executed under Article 299(1) and, therefore, compliance with Art. 299(1) was not required in each case.

The Supreme Court has clarified that only because one of the parties to the agreement in the statutory or public body, the contract cannot be characterized as a statutory contract.¹⁷⁵ In furtherance of that in the instance case, the Supreme Court has also quoted as under;

“Every act of a statutory body need not necessarily involve an exercise of statutory power, statutory bodies, like private parties have the power to contract or deal with property. Such activities may not raise any issue of public law.”

CONTRACTUAL LIABILITY:

This part talks about who has the liability if so any dispute arises between the parties, if it is the fault of the other party then it is simple to define as to whom to catch hold of the liability, but if there is any default from the side of the government the actual problem arises as to who will be held responsible for the acts as the contract has been entered into on behalf of the president or the governor. Therefore Article 299(2) specifically talks about whom how the immunity power works for the president and governor.

The major question that arises here is that are the parties on whose behalf the contract entered be personally liable?

Article 299(2) immunizes the president, or the governor, or the person executing any contract from on his behalf, from any personal liability in respect of any contract executed for the purpose of the

¹⁷⁴ *State of Haryana v. Lal Chand*, AIR 1985 SC 1326

¹⁷⁵ *Kerela State Electricity Board v. Kurian E. Kalathil*, AIR 2000 SC 2573

constitution, or for the purpose of any enactment relating to the government of India heretofore in force. Here it only removes the personal liability of behalf of whom the contract has been entered into. But this does not mean that the government is immune from any kind of contractual liability out of any contracts which have been entered into by the procedure laid down under Article 299(1).

RESTITUTION:

There have been many changes which took place in the history of our constitution, in the same way there have been many changes in the view as to how this article was taken into consideration. Earlier, the view which was taken into consideration was that when a contract has been entered which is not in a proper form, the exception laid down in Article 299(2) would not apply to the officer executing the contract and he would be personally held liable under Section 230(3) of the Indian Contract Act.¹⁷⁶

With the upcoming of the case of *State of Uttar Pradesh v. Murari Lal*¹⁷⁷ the view has been totally changed and nay contract which is entered not in compliance with Article 299(1) shall be void in nature. So, section 230(3) of Indian Contract Act stands inapplicable. In this case it is to be inferred that there will not be any change in the liability of the government when compared to that of a private party, but it is just subject to the statutory provisions. Many a times it is that the private parties enter into petty contracts orally without corresponding to the procedure in article 299, and if any problem arises from the government side, they are immune with the availability of article 299(1). Therefore the courts have adopted a view on practical terms, by saying that the government is a vast organization. In this case for the benefit of the government for its use and enjoyment, section 70¹⁷⁸ of the Indian Contract Act comes in to picture to support the claim for compensation made by the contracting parties not withstanding anything that is mentioned in article 299.

State of West Bengal v. B.K. Mondal¹⁷⁹

¹⁷⁶ *Chattur bhuj v. Moreshwar*, AIR 1954 SC 236

¹⁷⁷ *State of Uttar Pradesh v. Murari Lal*, AIR 1971SC 2210

¹⁷⁸ Section 70, Indian Contract Act- Obligation of person enjoying benefit of non-gratuitous act.—Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.1 —Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered

¹⁷⁹*State of West Bengal v. B.K. Mondal*, AIR 1962 SC 779

On the acceptance of the tender put up by the government, the contractor constructed the building for which the government has accepted, but consequently the contractor was not paid. The government went on to argue that the construction was unauthorized so there is no privity to contract between the contractor and the government. They also said that the requisites of article 299(1) were not fulfilled. The Supreme Court held that though the contract was unenforceable as it did not fulfill the requisites of article 299(1), yet the state will be held liable under section 70 of the Indian Contract Act for the work done by the contractor and acceptance by the government. In this case the below mentioned three elements have been satisfied, so the government was held liable.

Section 70 lays down three conditions, namely,

1. A person shall lawfully do something for another person or deliver something to him.
2. In doing so, he must not intend to act gratuitously.
3. The person for whom something is done or for whom something is delivered must enjoy the benefit thereof.

Here it is to be observed that these principles are not only for the government officials but also for the private individuals. If any party has obtained any benefits out of the contract then he can be sued for the same under Section 70 of the Indian Contract Act, even though the contract did not fulfill the requisites of Article 299.¹⁸⁰ And if so the government has made any kind of payments to the contractor in a void contract they can be recovered the same under Section 65¹⁸¹ of the Indian Contract Act.

EFFECT OF SECTION 70 OF INDIAN CONTRACT ACT ON ARTICLE 299-

The understanding of section 70 of the contract act can be brought about from foot note 13. This section does not deal with the rights and liabilities of the parties accruing from the contract. Here it emphasizes and deals with the relation which is created from the contract so formed and the

¹⁸⁰ *State of Orissa v. Rajballav*, AIR 1976 Ori 79

¹⁸¹ Section 65, Indian Contract Act- Obligation of person who has received advantage under void agreement, or contract that becomes void.—When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it. —When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

rights and liabilities which arise out of it. Therefore section 70 does not apply to those situations where someone has done something for somebody and cannot sue for specific performance and neither can seek for damages by saying that the contract entered into is in compliance with the requisites of article 299.

Section 70 of the act is applicable for those where the goods so delivered are accepted, and the work done voluntarily is enjoyed, the liability to pay compensation arises. To be specific and clear it deals with those where the act done by a person not intending to act gratuitously and the other enjoys it.

This section in no sense deviates from the main point of Article 299(1). The claims which the respondent makes are not of the type that the liability is always of the government. Here section 70 is just an assumption that the contract in pursuance of which the respondent has supplied the goods or anything that was in question is ineffective and as such, amounts to no contract at all. Thus section 70 does not nullify Article 299(1). The only thing which section 70 prevents is unjust enrichment and it applies as much to individuals as to corporations and government.

The question that arises is whether the state is bound by any norms in dispensing its largess?

Here in order to understand this question and answer it, the meaning of the word “largess” is to be understood. The literal dictionary meaning of this is “generosity in bestowing money or gifts upon others”. These days that is in the modern days what has been observed is in form for the enormous amount of wealth which the government has, many and many individuals are enjoying this government largess in the form of licenses, jobs, contracts, etc. in this way it is helping the government to dispose of the largess in an arbitrary manner.

INCOMPLETENESS OF ARTICLE 299:

Another main thing that is to be looked into is that the scope of article 299 is very narrow, that is there are many questions left unanswered by this article. Like it does not answer questions like till what extent can the executive power can be exercised? And also like how the concept of judicial review applies to the government contracts under article 226?

FREEDOM OF THE GOVERNMENT TO CHOOSE ITS' CONTRACTING PARTY:

Back in the year 1979, the contracting capacity of the government is that they are very free to enter into the contract with whomsoever they want to. Here it is to be noted that the contractual freedom of the government is as same as that of the private party. But it is upon the government to decide as to whom to take as a contractor in order to complete the work. If the government rejects one person over the other it does not mean that the aggrieved party is being violative of this Article 14 that is right to equality. In the case of *C.K. Achutan v. State of Kerela*¹⁸²- the Supreme Court held that *when one person is chosen rather than another, the aggrieved party cannot claim the protection of Article 14 because the choice of the person to fulfill a particular contract must be left to the government, and also that a contract which is held from government stands on no different footing from a contract from a private party.*

CHANGES IN ARTICLE 299 WITH TIME:

As there have been changes in all fields of life and also with time it is necessary for the law to change, so, there have been changes in law also especially for government contracts. Now the attitude of the government with regards to the government contract is different, it has laid down a rule that now the government has no choice to choose the contracting party, as a government and is always a government subject to rule of law in all its activities. It has been realized that government is a welfare state and for the common good of the larger number of people and not for the good of favored few.

***Euranian Equipment & Chemicals Ltd. V. State of West Bengal*¹⁸³-**

The Supreme Court stated that the government is not and should not be as free as an individual in the matter of entering into contracts and that whatever its activity, the government is still the government.

Now after all the recent developments it is a well established norm that while dispensing the largess the government has to act like a private individual but also should act according to the standards and norms. There are many cases related to his aspect of constitution but the major or the landmark case is- **R. D. Shetty v. International Airport Authority**¹⁸⁴

¹⁸² *C.K. Achutan v. State of Kerela*, AIR 1959 SC 490

¹⁸³ *Euranian Equipment & Chemicals Ltd. V. State of West Bengal*, AIR 1975 SC 226

¹⁸⁴ *R. D. Shetty v. International Airport Authority*, AIR 1979 SC 1628

Here in this case the Supreme Court has laid down few principals for awarding contracts by the government and its agencies. As already stated above, the government while awarding contracts must be with subject to Article 14 of the constitution no government authority should award the contracts in the non arbitrary and non discriminatory manner. It has no authority to hold the largess in its arbitrary and discretionary manner or on its own will. The standards that the government lays down it should abide by them. Here it is to be very keenly noted that the government cannot relax these norms in favor of few individuals when compared to another who are in the same situation. The norms for the qualification of the contractor have also been laid

Down. They say that while choosing the contractor the basis should be reasonable, objective and non-discriminatory. **The court quoted the following lines:**

“It must therefore follow as a necessary corollary from the principle of equality enshrined in Art. 14 that though the state is entitled to refuse to enter into relationship with anyone, yet if it does so it cannot arbitrarily choose any person it likes for entering into such relationships and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground.”

The following principles emerge from R. D. Shetty case:

- a. The government does not have an open and unrestricted choice in the matter of awarding contracts to whomsoever it likes.
- b. The government is to exercise its discretion in conformity with some reasonable non-discriminatory standards or principles.
- c. The government is bound by the standards laid down by it.
- d. The government can depart from these standards only when it is not arbitrary to do so and the departure is based on some valid principle which in itself is not irrational, un-reasonable or discriminatory.

Since the time of the R D Shetty, in order to check if the government exercises its power in awarding the contract in a rightful manner it has laid down the following propositions:

- a) The government must lay down certain fixed norms or standards. These should be non-discriminatory or non-rational.
- b) The government must adhere to, and must not deviate from the standards laid down by it.¹⁸⁵
- c) The government should award the contract only to those who have fulfilled the pre-laid requisites and according to the eligibility criteria. If it does so then it becomes discriminatory as it will start giving priority to few than others who are in the similar situation. This rule follows Art. 14 as well as from Administrative Law.¹⁸⁶
- d) The terms and conditions mentioned in the advertisements published for the invitation must not favor a certain class because they will participate in that tender.¹⁸⁷
- e) There can be difference in the expression of views and opinions in exercise of contractual powers. That difference must be based on specific terms. They can be legal or accounting terms. As long as they are clear and specific they can be applied, and there will not be any breach of rule of law.¹⁸⁸
- f) For the execution of any work tenders must be invited. It must be awarded to those with the lowest tender except for in specific cases.

INSTRUMENTALITY OF THE STATE: (CONTRARY TO ARTICLE 14)-

The instrumentality of the state is contrary to the public good and public interest, in its contractual constitutional or statutory obligation and is totally contrary to the provisions of Article 14. But once the instrumentality of the state is the party to the government it should act fairly, justly and reasonably with article 14. This article prohibits the government from choosing its contractor on its will. But however no person can claim a Fundamental Right to carry on business with the government, all that they can claim is that any contract entered into must be treated fairly and reasonably.

***Reliance Energy Limited v. Maharashtra State Road Development Corporation Limited*¹⁸⁹**

¹⁸⁵ *West Bengal Electricity Board V. Patel Engineers*, AIR 2001 SC 682

¹⁸⁶ *Premium Granites v. State of Tamil Nadu*, (1994) 2 SCC 691

¹⁸⁷ *G. J. Fernandez V. State of Karnataka*, AIR 1990 SC 958

¹⁸⁸ *Reliance Energy Limited v. Maharashtra State Road Development corpn Ltd*, (2007) 8 SCC 1

¹⁸⁹ *Supra*, Footnote 23

In this case the Supreme Court has co-related the right conferred by Article 14 with those under Article 21. It also said that the norms laid by the administration must be clear and must be well understood by the administration. The norms must be certain or else they would lead to breach of rule of law. It was observed that the legal certainty was an important aspect and if any unjust or unreasonable practices are done then it would lead to violation of “doctrine of level playing field”. The court in this case observed that when such norms are travelled then it would be subject to judicial review.

After referring to the three heads of judicial review namely illegality, irrationality and procedural impropriety, has held that all errors of law are jurisdictional errors.¹⁹⁰

CONCLUSION:

Irrespective of the flaws in Article 299 it fulfills the present needs. It is now a well known fact that any contract entered by the government must follow the procedure and the requisites which are laid down in this article. There is no difference between the contracts entered by the government or by any other person; the rights and liabilities remain the same for both of them. This scenario has been only been there since the 1900. But previously the government had all the rights to accept or reject the contractor on its basis. Now the scenario is of the type that government shall stay government and no discrimination shall be made on the basis of choosing the contractor as it would violate the rule of law. But when there is specific norm about the choosing of the contractor then Article 14 shall not come into effect. In the case of *R. D. Shetty v. International Airport Authority* there were few principles issued which were to be followed which were based on the unreasonable and non-discriminatory practices which are to be followed while entering into the contract. The liability of the contract is also made clear in the above discussed matters. Day in day out individuals enters into contracts with the government, and this protects the interest of the parties. Therefore Article 299 is a very important part of the constitution as it constitutes the major part of our working.

¹⁹⁰ *Supra*, Footnote 23

SUSTAINABILITY OF INDIAN HANDLOOM INDUSTRY- A STUDY OF WEAVERS OF BAJARDIHA IN VARANASI DISTRICT

Pooja Singh¹⁹¹

ABSTRACT

India has a distinctive place in the world of handloom products since time immemorial. The handloom Industry is basically unorganized, decentralized and labour intensive. Located in rural and semi urban areas, the industry provides employment to the craft persons besides generating substantial foreign exchange for the country. There is a huge demand for Handloom products in India and this demand is growing at an escalating rate (NSDC, 2013). Availability of cheap labour, use of local resources and low capital investment are the major strengths of this industry. Despite these strengths the sector faces various challenges such as lack of capital, poor exposure to modern technological skills, illiteracy, obsolete designs, increased price of yarn, inadequate wages, lack of awareness about the government initiatives etc. They also face threat from power loom and synthetic fabrics. These challenges pose a big question on the sustainability of this industry. Therefore the responsibility lies with the government to work upon these issues and preserve this rich and unique cultural heritage of India.

In light of this, the present study is an endeavour to make an insight into the challenges faced by handloom weavers and to look into the prospects for the upliftment as well as sustainability of handloom weavers of Bajardiha in Varanasi district. The study is primarily empirical in nature, though secondary information was also used to support the result. Socio-economic variables were taken for the study and descriptive statistics was used for analysis. The study revealed that a sincere effort is required on the part of government to look into the matter else the sustenance of weavers and the sustainability of handloom industry will be at stake. Few major findings includes: easy availability of quality yarns at affordable prices, proper training to work with the aid of modern technology, adequate wages, provision of direct marketing outlets , promoting handloom products

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with E-commerce, collaboration with the fashion institutions so that they can get an idea of new designs etc.

Keywords: Handloom, Weavers, Unorganized, Sustainability.

INTRODUCTION

The sustainable development system does not only mean to generate higher incomes and achieve better economic growth. The sustainable development is complete only when the monetary benefits can convert directly into human development; in the form of higher literacy rate and health care and result in poverty reduction and eliminating other evils from the society. Such sustainable development system, with close integration between incremental income and capacity-building, is the key to achieving happy and prosperous societies (Kalam and Pal, 2014).

In India after agriculture, handloom sector become one of the largest unorganized economic activities. It constitutes an integral part of the rural and semi rural livelihood. Handloom weaving reflects the richest and most vibrant aspects of the Indian cultural heritage. The sector requires less capital investment, minimal use of power, eco-friendly, and flexibility of small production, openness to innovations and adaptability to market requirements. The basic reason behind the sustainability and growth of this industry depends on transfer of skill from one generation to other (Government of India, Ministry of Textile, 2015).

The Indian handloom products are exported across geographies, the major destinations includes US, UK, UAE, Germany, France, Latin American countries (LAC), Italy, Netherlands, Canada and Australia (Irani, 2016). Apart from international markets, the leading international players which facilitate importing Indian handloom products are IKEA, Wal-Mart, Target Corporation, Habitat, and Town and Country Linen. The Indian handloom products are basically known for their unique design and finesse.

In order to upgrade the handloom industry government facilitate mix the old designs with new techniques and create original products. The Export Promotion Council for Handloom, 2016 revealed that industry has strong infrastructure, with about 2.4 million looms of varied designs and construction. The industry has also a high employment rate, and employs more than 4.3 millions handloom weavers across India. It is no doubt to say that the handlooms industry represents

the continuity of the age-old Indian heritage of hand weaving and at the same time reflects the socio-cultural tradition of weaving communities. The sector enjoy with availability of abundant and cheap labour, use of local resources, low capital investment and unique craftsmanship which have received global appreciation. Despite these strengths, the sector faces several challenges likes low literacy and education levels among weavers, poor exposure to modern technological skills, and lack of adequate finance to invest in raw material and poor institutional framework (Irani, 2016).

In light of this, the present study is an effort to make an insight into the challenges faced by handloom weavers and to look into the prospects for the upliftment as well as sustainability of handloom weavers of Bajardiha in Varanasi district.

1) SWOT Analysis of Handloom Sector

Strength

- Huge availability of local raw material like cotton, jute, silk, wool etc.
- High competitiveness in the cotton sector.
- Easily availability of trained manpower in management and technical spheres at a competitive rate.
- Strong presence in the textile value chain from raw material to finished goods.
- Diverse design.
- Leverage ability of the rural population to produce products using locally available resources.

Opportunities

Weaknesses

- Large fragmentation.
- Technological constraints (especially in weaving, processing and garmenting segments).
- Huge unskilled labour.
- In compared to global competitors Indian weavers used outdated technology, poor design.
- Unawareness among weavers regarding government initiatives.
- Lack of interest among youth artisan to carry on their traditional family handloom business
- Inadequate raw materials, production and marketing techniques.

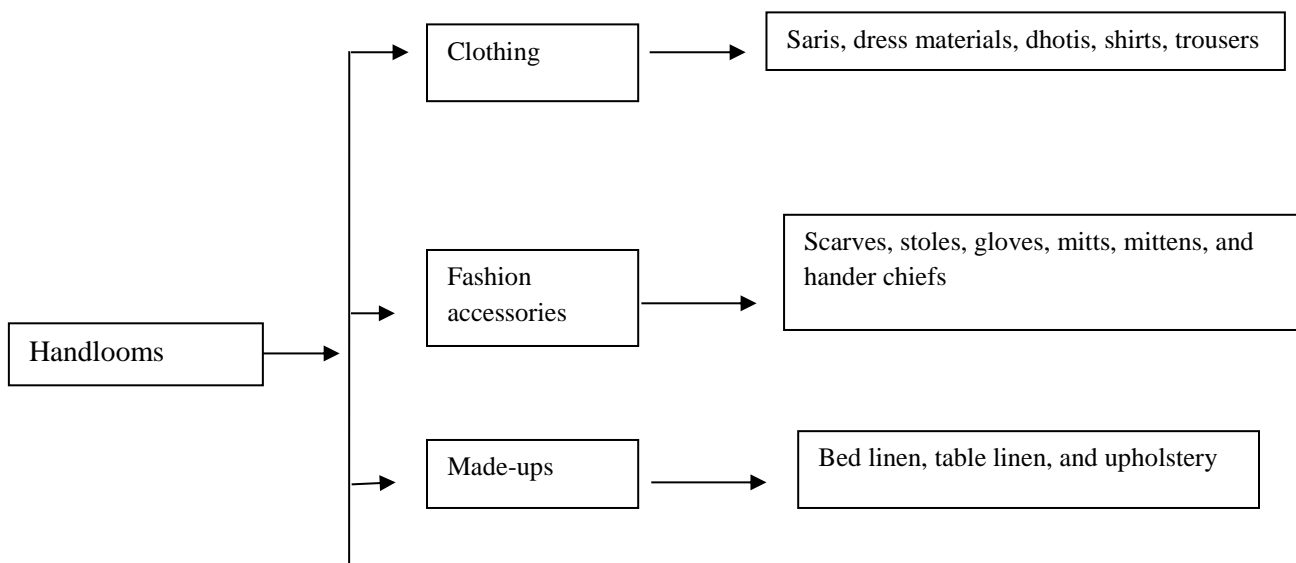
Threats

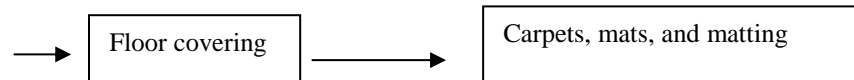
- Shortage of skilled workers.

- Several initiatives taken by the government to provide impetus to the Handlooms sub- sector.
- Inadequate infrastructure facilities and shortage of electricity.
- Several programmes introduced by the government in order to encourage export. These programmes are common facility centers (CFC), Handlooms export promotion council.
- Strict international Norms or/ standards (abolition of child labour).
- Increase in the disposable income and purchasing power of Indian customers
- Stiff competition from neighbor countries.
- Large potential of domestic and international markets
- Deterioration in financial health of cooperatives.
- Domestic market of India that seems sufficient to accommodate the future increase in production due to the increase in disposable income of the middle-class

Source: KPMG in India analysis, 2013

2) Classification of Handlooms on the basis of products





Sources: Export Promotion Councils of Handlooms as on March 2014

OVERVIEW OF HANDLOOM WEAVERS IN BAJARDIHA

Varanasi city and its surrounding villages have a high concentration of weaving centers, and all of these collectively known as the Benaras handloom cluster. Bajardiha is a place located in Varanasi Tehsil/Block/Mandal, in Varanasi district of Uttar Pradesh state, India. The approximately population of the area is about two laks. A number of families engaged in handloom weaving belong to minority community and facing evils like malnutrition, hunger, poverty and unemployment. Ironically, the Centre and state governments claim to be the benefactors of minorities, but these poor weavers are still in dire need of help. The main product of Banaras Handloom Cluster is saree. It estimated in the total value of output varies from 90% to 95%. Apart from saree the other products are Dress material Furnishing fabric and Fashion accessories includes stole, scarves. The saree segment typically consists of Satin-based work (largely Karnataka yarn) and Organza type work (largely Chinese yarn) (EDI, 2007).

The Bajardiha craft cluster mainly done work related with Jangla, Kaduwa. In Jangla work, the weft threads are allowed to hang at the back of the fabric and are cut away by hand later. This type of brocade is much faster to weave, than the Kaduwa designs, where the extra weft is inserted into the field where it is not seen in the design. In Kaduwa as also in Jamdani weaving, where each motif is hand inlaid, the weft threads are put on the smaller bobbin or *sirki*, more amenable to fine maneuvering (indianartisansonline.com)

Behind the sheen of Banarasi Sarees that have abundant takers from the affluent class of the country and abroad, there are thousands of invisible women who work round-the-clock to support the men in their houses to work on the loom to make a sarees. They lead a miserable life that goes unrecognized in many ways, even by their own families in most cases (Indiatimes.com).



LITERATURE REVIEW

Tanusree, (2015) identified that there are four types of weaver found in Varanasi. These are Independent weaver, contact weaver, loom less weaver and cooperative weavers. The complexity of the design and weaver's bargaining capacity determines the wages. **Singh and Naik (2008)** revealed that shortage of power, inadequate government, lack of modernization, unawareness about market, and low literacy of weavers lead to decline the handloom work in Varanasi. Further **Faisal (2016)** extended the work and found that direct link between artisans and exporters, increase in the price of raw materials, interference of power-loom, lack of space for display and storage, lack of proper workplace were also responsible for deterioration of handloom sector in Varanasi region. **Shaw and Das (2013)** identified that economic differentiation create class gap among the weavers. Bani or monopoly system and Non-bani system these are two types of production process involved in handloom. The handloom work required a lot of activities such as buying yarn, making design, patta cutting, bleaching, dyeing the yarn, rolling the threads in pirns and bobbins through charka, warping the threads in drum and beam, denting and drafting, weaving, cutting the threads, polishing and carrying the finished product to the market. And all these 12 operations are not executed by any single individual. A lot of people require for this job. These operations are categorized into three group i.e. preparatory works, weaving and post weaving work. **Shazli and Munir (2014)** mentioned that vocational education is required for the awareness of weavers towards girl's education as well as weavers can diversify their traditional handloom product through innovative ideas. **Bajpai, et al. (2015)** revealed that the combine efforts of master weavers, independent weavers and designers execute the newer design for Varanasi handloom. **Varghese and Salim (2015)** the loom-lessness and loom idleness these are two major factors which caused displacement and marginalization of handloom weavers. Apart from this, the

increase prices of cotton hank yarn and dyes lead to handlooms vulnerable. All these factors mostly affect the independent weavers and small master-weavers-cum-traders owning few looms and employing wage labourers. **Ahmad and Nengroo (2013)** pointed that handloom is labour intensive sector, does not rely on scarce resources, does not cause pollution and is environment friendly. Therefore, the social cost benefit ratio, of all investment in this sector is very high. **Bari, Munir, and Khan (2015)** suggested that in order to encourage handloom work government should provide interest free loan to the weavers.

OBJECTIVE OF THE STUDY

It is a well-known fact that the basic human amenities such as health care, education, sanitation and access to goods and services are the fundamental building blocks for achieving sustainable development of the economy. In Indian economy, handloom sector occupies a distinct and unique place. In the present economic climate where dependency on Foreign Direct Investment (FDI) and high-tech system all round, the handloom industry presents a sustainable model of economic activity which requires low capita investment, minimum electricity and extensive skill. For its survival and growth objective it is very necessary to understood in a proper perspective. Thus, it is the need of the hour to make appraisal of handloom industry and weavers of the industry. Therefore, researcher has targeted two objectives of the paper which are given below:

1. To make an insight about the challenges faced by handloom workers in Varanasi.
2. To suggest measures for the upliftment of both handloom workers and handloom industry in Varanasi.

METHODOLOGY OF THE STUDY

1) Collection of Data

The primary data have been collected with the help of self structured questionnaire from 50 respondents through direct interview and discussion. Secondary data have been collected from internet, various published and unpublished journals and reports given by handloom promoted institutions.

2) Sampling Technique

The study had been conducted on handloom weavers of Bajardiha in Varanasi district. Simple random sampling has been used in the study. Socio-economic conditions of Handloom Weavers in Bajardiha where the sampling unit and people of Bajardiha were the sample population. Questionnaire has been collected randomly from weaver. The sample consists of 50 weavers which include 32 males and 18 females. The age of the weavers ranged between 15 to above 40 years. The details of demographic of sample are given below in the table 5.2 (a):

3) (a) Demographic of Sample

Variable	Group	N	Percentage
Gender	1. Male	32	64
	2. Female	18	36
Age	1. 15-18 years	11	22
	2. 19-29 years	18	36
	3. 30-40 years	16	32
	4. Above 40 years	5	10
Religion	1. Hindu	0	-
	2. Muslim	50	50
Nature of loom possession	1. Handloom	50	100
	2. Powerloom	-	-
Type of weaver	1. mahajan/gaddidar	-	-
	2. Independent weaver	50	100
	3. co-operatve society weavers	-	-

The above table 5.2(a) depicts that muslim community performed the work of handloom weaving. The weavers used the shuttle pit looms for saree weaving. The looms required lots of energy as well as intricate designs. Both male and female weavers are involved in weaving work of the sarees. It is found that weavers belong to 19- 40 years more involved in weaving in compared to weavers age group of above 40 years. It is because of deterioration in physical health, strength and visual problems. The weavers are independent weavers.

a. Area of the Study

This study was confined to Handloom Weavers of Bajardiha alone in Varanasi district, Uttar Pradesh.

4) Statistical Tools

Descriptive statistics was used for analysis of the socio-economic condition of the handloom weavers. The socio-economic condition includes nature of weaver, their education, family background, housing facilities, working condition, recreation facilities, weaver's health issues, and purpose of their work.

FINDINGS AND DISCUSSION

1) Family Profile

Variables	N	Percentage
1. Nature of Family		
a. Nuclear family	17	34
b. Joint family	33	66
<hr/>		
2. Males in Family		
a. Less than 2 or 2 males	13	26
b. 3 to 5 males	28	56
c. Above 5 males	9	18
<hr/>		

3. Females in family

a. Less than 2 or 2 females	16	32
b. 3 to 5 females		
c. Above 5 females	31	62
	3	6

4. Siblings of the Weavers

a. Less than 2 or 2 sibling	6	12
b. 3 to 5 siblings		
c. More than 5 siblings	40	80
	4	8

5. Children of the Weavers

a. Less than 2 or 2 children	29	58
b. 3 to 5 children		
	21	42

6. Literacy of the Weaver's parent

a. Illiterate	35	70
b. Literate		
	15	30

7. Occupation of the Head of Weaver**Family**

a. Handloom work		
b. Government servant	50	100
c. Factory worker	-	-
d. Casual worker		
	-	-
	-	-

8. Number of person involved in handloom work

a. Less than 2 or 2 people		
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b. 3 to 5 people	17	34
c. More than 5 people	29	58
	4	8
9. Monthly family Income		
a. Below Rs. 5, 000	3	6
b. Rs. 5, 001 to Rs. 10, 000	27	54
c. Rs. 10, 001 to Rs. 15, 000	20	40

The above table 6. 1 shows the family profile of handloom weavers. It is no doubt to say that the size (big or small) and nature (nuclear or joint) of family contribute a major role in generating income for the family. The study revealed that the joint family (33) still prevails in the weavers' community with 3 to 5 males and females members. The weaving is a very complex work and it involves engagement of all family members from children to elderly, who contribute their valuable service in pre-loom, loom and post-loom processes. The weavers are mostly illiterate (35) and handloom weaving is their traditional work. They earn monthly of Rs. 5,000 to Rs. 15, 000. In Bajardiha, weavers are Independent weaver. They worked for master weavers. Therefore the annual income of the family is very low.

2) Educational Determinants

Variables	N	Percentage
1. Status of Weaver's Schooling		
a. Currently attended school	-	-
b. Had attended school	18	36
c. Never attended school	32	64
2. Level of Weaver's Education		
a. Not educated/Illiterate		

b. Up to 5 th standard	32	64
c. Up to 8 th standard	16	32
	2	4
3. Type of Weaver's Schooling		
a. Government school	-	-
b. Private convent school	-	-
c. Madarsa	-	-
	50	100
4. Reason behind illiteracy		
1. Self not interested in study	1	2
2. Parents are not interested in providing education		
3. Both	-	-
	49	98

Education is one of the principal means of breaking the vicious cycle of poverty (Sreenivas and Suman, 2016). The above table 6.2 provides information about education profile of the weavers. Most of the weavers (32) even does not going to school in their life. Out of total 50 weavers sample, only 16 weavers complete their study up to 5th standard. The main reason behind their illiteracy is weaver's self and also their parents. They only take their education relating to religion and going to madarsa. After making discussion with weaver's community, researcher found that poverty and lack of government facilities are the main reason behind their illiteracy.

a. Health Issues

Variables	N	Percentage
1. Kind of Aliment suffer by the weavers		
a. Stress on eyes and watery eyes		

b. Bachaches & Joint pains	12	24
c. Headache and Pulmonary	11	22
d. All the above	7	14
	20	40
2. Treatment taken by the Weavers		
a. Yes	50	100
b. No	-	-
3. Sources of treatment		
a. From Government hospital	7	14
b. From Private hospital		
c. From Quacks treatment	-	-
	43	86
4. Vaccines and Immunity protection taken by the Weavers		
a. Yes		
b. No	11	22
	39	78

The above table 6.3 revealed the information relating to health issues of the weavers. There are several health relating problems such as weak eye sight or watery eyes, joint pains, headache and pulmonary pain are suffered by weavers. They have taken treatment mostly (43) from quackers. Mostly weavers (39) have not taken vaccines and immunity protection because they can afford their price.

b. Nutrition and Dietary Determinants

Variables	N	Percentage
1. State of diet taken by the weavers		
a. Getting enough to diet	-	-
b. Quality food to eat	-	-
c. Enable to eat	-	-
	50	100
2. Types of food taken by the weavers		
a. Fresh cooked	50	100
b. Leftover food	-	-
c. Brought from the market	-	-

The above table 6.4 shows the nutrition and dietary variables of the weavers. The weavers earned that much money which enables them to eat fresh cooked food. They are not able to take nutrition like milk, eggs, or meat/chicken, and fruits in their daily/weekly diet plan.

c. Working Condition

Variables	N	Percentage
1. Training aspect of Weaver		
a. Trained	-	-
b. Untrained	-	-
	50	100
2. Enrolment of weaver in government registered		
a. Yes	50	100
b. No	-	-
3. Economic factor behind their work		
a. Poverty	-	-
b. To clear debt	-	-

c. Desire to earn money	-	-
d. Both Poverty and to clear debt	-	-
	50	100
4. Socio factor behind their work		
a. Continue tradition	50	100
b. To learn work		
c. Big size of family	-	-
	-	-
5. Motivational factor for their work		
a. Parent	2	4
b. self		
c. both	6	12
d. friend	42	84
	-	-
6. Number of hours work done by the weavers		
a. Less than 6 hours or 6 hours	-	-
b. 7 to 12 hours	50	100
c. More than 12 hours	-	-
7. From how many years weavers are worked		
a. 0-5 years	5	10
b. 6-11 years	18	36
c. 12-17 years	18	36
d. More than 17 years	9	18
8. Working place of the weavers		
a. At home	41	82
b. At factory	5	10
c. At neighbor	4	8

d. At any other place	-	-
9. Whether Working condition contains necessary amenities like cleanliness, ventilation, lighting or enough space		
a. Yes	38	76
b. No	12	24
10. Nature of employment		
a. Regular paid wage weavers	32	64
b. Unpaid family weavers	18	36
c. Regular part time weaver	-	-
11. Nature of work		
a. Handloom woven fabric	50	100
b. Hand painted fabric	-	-
c. Hand printed and dyed fabric	-	-
d. Hand embroidered fabric	-	-
12. Type of machine used by the weavers		
a. Personal machine	50	100
b. Machine provided by the government	-	-
13. Whether weavers have participated in workshops or camping organized by government institutions for the purpose of developing awareness among the weavers		
a. Yes	-	-
b. No	50	100
14. Sources of procurement of raw materials		
a. From master weavers	50	100
b. From local dealers	-	-
c. From co-operative societies	-	-

The above table 6.5 revealed the information about working condition of the weavers. The weavers are mostly (50) untrained worked and also not registered under ministry of textile. They work for 7-12 hours in a day. Poverty and debts clearance is the major economic factor and to continue their traditional work is a basic social factor that motivated weavers to work. Most of the weavers work from 6 to 17 years. The most of weavers (41) are worked at their home and they have necessary working condition amenities like cleanliness, ventilation, lighting and enough space. Out of total respondents' weavers, 32 are regular paid and 18 are unpaid family weavers. The study further revealed that total 50 weavers used their personal machine for handloom woven work. They never benefited from government facilities and never participated in workshops or camping organized by government institutions for awareness purpose. The most important thing noticed by researcher is that they work for master weavers and the raw material used in their work are also taken from master weaver.

5) Economic Determinants

Variables	N	Percentage
1. Whether weaver have received wages or not		
a. Yes	50	100
b. No	-	-
2. Mode of wage payment		
a. Cash-in-hand	50	100
b. Wages deposit in bank account	-	-
3. Nature of wage payment		
a. Installment basis	41	82
b. All amount paid in one lump sum	9	18
4. Amount of monthly wages		
a. Less than Rs. 1,500 or up to Rs. 1,500		

b. Rs. 1,500- Rs.3, 000	11	22
c. Rs. 3,001- Rs. 4,500	6	12
d. Rs. 4, 500- Rs. 6,000	26	52
	7	14
5. Advantage of Government Grants and incentives		
a. Yes	16	32
b. No	34	68
6. Whether weavers have Bank Account or not		
a. Yes	18	36
b. No	32	64

The above table 6.6 shows the economic capacity of the weavers. Master weavers paid wages in the mode of cash in hand to independent weavers for the work they have done. Unfortunately all wages amount are not paid by master weavers in one lump sum they paid in installment basis. The most important thing is that most of weavers have no bank account. The weavers said that they are only able to meet their eating need and not able to save money for their future. Most of the weavers earn monthly income only of Rs. 3,000-4,500. Ironically, weavers do not taken the benefits of any government facilities.

6) Living Environment Determinants

Variables	N	Percentage
1. Type of housing facility enjoyed by the weavers		
a. Pucca house	23	46
b. Semi-pucca house		
c. Katcha house	20	40

	7	14
2. Whether weaver's house contain necessary facilities like electricity, water, kitchen		
a. Yes		
b. No	41	82
	9	18

One of the basic requirements for human well-being is to have a roof over one's head, either owned or rented (Sreenivas and Suman, 2016). In management, the Maslow motivation theory also revealed that physiological needs (the need for sleep, food, air, and reproduction) are the basic human need for their survival. The above table 6.7 shows the type of dwelling facilities enjoy by weavers. Most of the handloom weavers live their life in pucca (23) and semi-pucca (20) house and most of the weaver's (41) house contains necessary facilities like electricity, water, and kitchen.

7) Recreational determinants

Variables	N	Percentage
1. Recreational facilities enjoyed by the weavers		
a. Listening songs	-	-
b. Watching movies	-	-
c. Listening radio	-	-
d. All the above	-	-
	50	100
2. Leisure hours of the weaver		
a. Half an hour	-	-
b. One to two hours		
c. More than two hours	35	70

American Council on Exercise (2000) contends that creating some leisure time in the course of the day allows employees to recharge themselves psychologically and emotionally and this can lead to improved job performance.

Recreation was perceived as a form of intrinsic reward that provides a means of pleasure, and enjoyment. Recreation and work-life balance as an aspect of job satisfaction had a positive relation. The weaving work demand a lot of mental exercise thus, recreation is very essential for the weavers. The weavers re-energetic themselves with the help of listening song, radio, and watching movies. The weavers taken break mostly for 2-3 hours.

CONCLUSION AND SUGGESTIONS

Benaras weaves are synonymous with rich, heavily patterned fabrics. Mostly silks, they often incorporate zari - gold or silver threads. The range of Benaras weaves, and the skills of the Benaras weavers, are not found in any other single weaving center in the country (indianartisansonline.com). But unfortunately, this sector is suffering from the high competition of power looms due to its very nature of being unorganized and dispersed. Also there is lack of education, adequate working capital, proper infrastructure; poor exposure to new technologies, lack of market intelligence, stiff competition and poor institutional framework (Planning Commission; Crafts Council of India; Primary interviews; KPMG in India analysis). The study revealed that weavers in Bajardiha, Varanasi district who have inherited weaving occupation, are in pitiable condition owing to the poor socioeconomic conditions. Majority of them are wage weavers who earn minimal wages in spite of working for 7-12 hours a day. The literacy rate of weavers is very low.

The researcher discusses some of the measures which are beneficial in the upliftment of handloom weavers of Bajardiha in Varanasi district. These are as follow:

- (a) **Recognition of handloom work on area basis-** First of all, ministry of textile divide the handloom works on area basis. It helps in easily recognition of weavers and their contribution.
- (b) **Registration of weavers-** Under the ministry of textile, government should make compulsory provision that it is the duty of area in-charge of handloom sector to register the weavers in their books of account and record. And also ensure free registration.
- (c) **Medical facilities-** At the central level, it shall be the duty of ministry of textile to provide all necessary medical and health facilities like vaccines, free health card for timely check up etc. to weavers free of cost or at a minimum price.
- (d) **Education facilities-** Ironically, in Bajardiha, only one government school is there and which have only three room. In first room, combined classes of first standard to third standard are conducted, in second room, combined classes of fourth and fifth standard are conducted and third room is allotted for mid-day meal purpose. The government shall also make provision to provide a well furnished government school with proper class rooms, teachers and other facilities like washroom. And also ensure education to all age group of weaver whether they are child, adolescent, adult, young or old.
- (e) **Training facilities-** The government should open many training centres in each area in Varanasi district where handloom activities performed. And training centres must provide technical and design information to weavers.
- (f) **Awareness programmes relating to government plans and benefits-** The government shall aware the handloom weavers about programmes, policies or aids which are launched only for weaver's community. The awareness can be done by using DD national, radio channels or with the help of nukkda drama.
- (g) **Government itself purchase final product of the weavers-** The government shall make practice to establish a direct link with each individual independent weavers or group of weavers for purchase of their final product. In this way weaver can earn sufficient amount to live their life in a better way.
- (h) **Abolished middle men from purchase of raw material to sell of final product-** The government shall make provision to remove middle men or bichauliya from the chain of handloom work.

- (i) **Provision of Minimum wage-** The government is decided minimum wage for workers which are worked in factory, mine, construction and several other places similarly, government shall make provision to provide or fix minimum wages for handloom weavers for their better life.
- (j) **Provision of pension-** The government shall also make provision of pension for handloom weaver for their secure future.

LIMITATIONS AND DIRECTION FOR FUTURE WORK

The present study has certain limitations; the sample consists of handloom weavers of Bajardiha having homogeneous sample. The findings of the study cannot be applied indiscriminately to preloom activities like dyeing & warping, sizing, attaching the warp, weft winding. Further studies may be conducted by taking wider groups of weavers of Varanasi. Future the research may investigate the impact of FDI on Indian textile industry. Or, forecast the result if handloom industry is governed or regulated by proper act of parliament.

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HEALTHY INDOOR AIR: A RIGHT FOR ALL

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ABSTRACT

People are spending most of their time indoors. All have the right to healthy indoor air. Therefore, indoor air quality is an essential determinant of healthy life and people's well-being. Hence, clean air is a basic requirement of life. Indoor exposure to air pollutants causes very significant damage to health globally – especially in developing countries. WHO has prepared indoor air quality guidelines. It is important for Nation States to develop policies to combat indoor air pollution and work on ambient indoor air quality. This initiative will help States to reduce burden of diseases and lower the spending on medical interventions. This is particularly true in developing countries. Women in rural India spend maximum of their time indoors thereby being exposed to indoor air pollution. Young children, the old and the infirm tend not to spend too much time outdoors, thereby being susceptible to the consequences of pollution indoors. Breathing this microscopic particulate matter causes many serious diseases such as lung cancer, heart stroke, tuberculosis etc. Rural women cook using wood and mud stoves that kill them. The Planning Commission of India came out with a report which stated that indoor air pollution was the second largest killer in India, after blood pressure. The only way for India to solve the problem of indoor air pollution is by adopting WHO guidelines for indoor air quality of 2006 and saving millions of lives.

Keywords: indoor air pollution, diseases, rural India, health hazards, fossil fuels, alternate fuel, microscopic particulate matter. WHO guidelines.

INTRODUCTION

In today's modern world people are spending most of their time indoors, be it inside their houses, offices, cars, airports, hospitals, schools or daycare centers. Spending time indoors has a sense of protection from heat and pollution. Staying indoors is the best possible way to stay safe. Good quality air is a fundamental right. It is a known fact that outdoors exposes us to life threatening pollution, it could be air, noise, water or soil pollution. All of us have a right to healthy indoor air. But, most of us do not even know that pollution is not only outdoors but it is also indoors. And mostly the pollution we experience indoors is indoor air

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pollution which is equally harmful. Experts have demonstrated by research that indoor air pollution is lethal. We believe that air quality inside the home or other closed places is clean and safe. Therefore, indoor air quality is an essential determinant of healthy life and people's well-being. Hence, clean air is a basic requirement of life. But this basic requirement is hard to come by. In modern day's construction industry the materials that are being used emit hazardous substances and also the household equipment and other commodities used by humans are dangerous to health. Indoor air is also polluted due to human activities such as combustion of fuels for cooking or heating which lead to a broad range of health problems and which may even be fatal.

Indoor exposure to air pollutants causes very significant damage to health globally – especially in developing countries. Despite this, public health awareness on indoor air pollution is minimal. Therefore, to reduce the adverse effects of these pollutants on health it is imperative to have an understanding of the impact these pollutants would have on human health and thereafter to take necessary actions to avoid them.

The growing concern of indoor air pollution has only recently started to receive attention. While the problem has plagued humanity for generations, it was never discerned. Neither was the presence of the phenomenon noted, nor the pervasive harm it caused was ever paid attention to. Even today society remains largely unaware of the ravaging effect of indoor air pollution.

INDOOR AIR POLLUTION- MEANING

Indoor air pollution can be understood as a resultant of three main pollutants. The first are those pollutants which are created inside the house. Examples of this category are pollutants from cooking, smoking, emissions from substances like paints, air fresheners and personal care products. The second category is of pollutants which travel into the house from outside like traffic emissions and factory emissions. The third category of pollutants is natural radon which seeps into the building from the ground and through water.

Problems of indoor air quality are recognized as important risk factors for human health in both low- and middle- and high-income countries. Indoor air pollution affects population groups that are particularly vulnerable owing to their health status or age.

The world's atmosphere has undergone a series of changes through the ages in terms of its chemical composition. The earth's natural atmosphere – the carbon-free atmosphere that existed before the beginning of the Industrial Revolution has been subjected to extreme changes in terms of its physical, chemical and biological characteristics. Due to the mass release of several pollutants, the natural chemical balance of the earth's atmosphere has been severely and irreversibly damaged. The EPA¹⁹³ has categorized the most

¹⁹³ Environment Protection Agency

common pollutants of the earth's atmosphere into 6 main groups – Ozone, particulate matter, carbon monoxide, nitrogen oxides, sulphur dioxide and lead; and has further established certain National Ambient Air Quality Standards which are essentially permissible pollution levels allotted to different countries and sectors for the purpose of controlling the discharge of these pollutants into the atmosphere.¹⁹⁴

While various measures have been adopted by national as well as international agencies all over the world to curb the release of pollutants into the atmosphere and protect the natural atmospheric balance, there is hardly any awareness on the concept of indoor air pollution and its equally harmful ramifications. Indoor air pollution is still a fairly rudimentary notion; countries and inter-governmental organizations have traditionally paid greater attention towards protecting the atmosphere from general air pollution and tend not to focus on indoor-air pollution which is a silent-killer that is responsible for over seven-million deaths every year.¹⁹⁵ The WHO¹⁹⁶ has carried forth various case studies to highlight the importance of reducing pollution indoors as well and maintaining the indoor air quality and has found that the most common source of indoor air pollution are the fuels that are used for the purpose of heating and cooking such as charcoal, kerosene, oil, gas, wood, crop wastes, dung. Scientific studies show that the burning of these fuels indoors or inside closed quarters with no proper ventilation or exhaust-facilities can cause various short-term and long-term health issues such as asthma, breathing difficulties, cancer, heart and respiratory conditions, strokes and hypersensitivity. In some instances, toxic chemical substances that are released from the usage of even simple household materials such as air fresheners, paints, personal-care products, anti-insect sprays/ pesticides etc are also harmful in the long-run.¹⁹⁷

Globally, almost 3 billion people are heavily dependent on bio mass such as charcoal, wood, coal, dung, crop by products and fuels as their only source of domestic energy. In the developing countries particularly South-east Asian countries, India, Pakistan, Bhutan and Burma, there is a general lack of awareness, technology and infrastructure with respect to reducing pollution indoors, thereby resulting in the construction of homes with little or no ventilation and poorly built kitchens without any exhaust facilities thereby exposing the residents to the combustion of solid fuels which have terrible health ramifications in the long-term.¹⁹⁸ Women in impoverished nations spend over 85% of their time indoors thereby being

¹⁹⁴ <http://www.epa.gov/airquality/urbanair/>

¹⁹⁵ <http://news.nationalgeographic.com/news/2014/03/140325-world-health-organization-indoor-fuel-pollution-death/>

¹⁹⁶ World Health Organization.

¹⁹⁷ Accessed online at: http://ec.europa.eu/health/scientific_committees/opinions_layman/en/indoor-air-pollution/index.htm

¹⁹⁸ Bradford O. Brooks, William F. Davis, "Understanding Indoor Air Quality", Telford Press, 1992. Accessed online at: <http://books.google.co.in/books?id=7bDt4B7ScHkC&printsec=frontcover&dq=indoor+air+pollution&hl=en&sa=X&ei=GioUVOTUNTWMuATVyYLYAQ&ved=0CDkQ6AEwBA#v=onepage&q=indoor%20air%20pollution&f=false>

exposed to indoor air pollution. It is also asserted that some other groups of people – such as young children, the old and the infirm tend not to spend too much time outdoors, thereby being susceptible to the consequences of pollution indoors.

The contamination of air indoors by biological or physical agents is known as indoor air pollution. It is responsible for seven million deaths across globe every year.¹⁹⁹ With one in every eight people dying from it, it is the largest environmental cause of health related deaths.²⁰⁰ Breathing this microscopic particulate matter causes more than lung cancer, which is accountable for only 6 percent of the seven million premature deaths. The large bulk of deaths—69 percent—is due to heart disease or stroke. A recent report of the World Health Organization introduces the rule of thousand, which means that a pollutant that is present indoors is one thousand times more likely to reach peoples' lungs than a pollutant released outdoors.²⁰¹

Indoor air pollution is a significant reason for likely health hazards to vulnerable populations, particularly in developing countries. Around half the people in developing countries depend upon coal and biomass such as wood, dung, crop residues etc. for their domestic energy needs. These materials are characteristically burnt in simple stoves with partial combustion. This releases large amounts of toxic gases well as microscopic particles, known as particulate matter, which is very harmful if inhaled. As a result, women and young children are exposed to high levels of indoor air pollution every day. People in developing countries are commonly exposed to very high levels of pollution for 3–7 hours daily over many years. During winter in cold and mountainous areas, exposure may happen over a significant portion of each day.

In developing countries, almost 2 million excessive deaths occur due to indoor air pollution. This alone accounts for almost 4% of the global burden of disease.²⁰² There exists reliable confirmation that indoor air pollution adds to morbidity and mortality from respiratory tract illnesses or infections. The respiratory illnesses include bronchitis, asthma and pneumonia. In developing countries, even though cleaner and more refined fuels are accessible, households tend to continue to use plain biomass fuels, due to the larger marginal costs of using cleaner fuels. As a result, poverty is one of the chief obstructions to the implementation of cleaner fuels within households and remains the most challenging factor to combat. The

¹⁹⁹ WHO News Release, 25th March, 2014. Available at: <http://www.who.int/mediacentre/news/releases/2014/air-pollution/en/>. Last accessed: 19th October, 2014.

²⁰⁰ WHO: Air pollution caused one in eight deaths; By Arshiya Khullar, for CNN Available at: <http://edition.cnn.com/2014/03/25/health/who-air-pollution-deaths/>. Last accessed: 19th October, 2014.

²⁰¹ World Health Organization (1999) Air Management Information System (AMIS) (World Health Organization, Geneva)

²⁰² Gall, E.; Carter, E.; Earnest, M.; Stephens, B. Indoor air pollution in developing countries: Research and implementation needs for improvement in global public health. *Am. J. Public Health* 2013, 103, e67–e72.

sluggish pace of development in many countries means that the poor will be forced to utilize biomass fuels for many decades²⁰³.

Indoor air pollution exposure is a function of the compound interaction between household fuel patterns, appliances, housing design and human behaviour.²⁰⁴ Adding to that are risk factors like nutrition, crowding, family history of infection, poor vaccination history and exposure to environmental tobacco smoke. Further, there are no regulatory authorities in developing countries and there is no conventional or tested methodology for Health Impact Assessment of pollution from indoor sources.²⁰⁵

Classical air pollutants include by-products of incomplete combustion such carbon monoxide, nitrogen oxides, sulphur dioxide and particulate matter, which have usually been linked with diverse negative environmental health impacts. The most dangerous are both colourless and odourless gases carbon monoxide and nitrogen dioxide. CO obstructs the delivery of oxygen to the body. It can create fatigue, headache, confusion, nausea, and dizziness. Very high levels can even result in death. NO₂ aggravates the mucous membranes in the eye, nose and throat and can cause shortness of breath and promote infections. The contribution of SO₂ and NO_x from the combustion of wood and other biomass fuels is much less than the emissions from fossil fuels used in traffic, industry, and energy production. However, residential wood combustion is often considered a major source of ambient local air pollutants, especially for hydrocarbons and PM.²⁰⁶ Apart from traditional contaminants, other contaminants such as the following exist and contribute to the problem as well, they are environmental tobacco smoke which includes not just the smoke inhaled by the smoker but also the more dangerous and potentially fatal second hand smoke which is absorbed by indoor furniture and decorations such as carpets and curtains. Biological contaminants such as bacteria, mould, mildew, viruses, animal dander, dust mites, cockroaches and pollen. These grow in damp, warm environments or are brought in from outside. Household products like paints, varnishes, hobby products and cleaning products which all hold organic chemicals that are released during use or storage. 80 percent of a large majority of peoples' exposure to pesticides occurs indoors and measurable levels of toxic pesticides have been detected in indoor air pollution.²⁰⁷

²⁰³ Holgate, S. T., Samet, J. M., Koren, H. S. & Maynard, R. L., eds. (1999) Air Pollution and Health.

²⁰⁴ Bruce, N., Perez-Padilla, R. and Albalak, R. (2000) Indoor air pollution in developing countries: a major environmental and public health challenge. Bulletin of the World Health Organization 78, 1078-92.

²⁰⁵ World Health Organization (1997) Health and Environment in Sustainable Development (World Health Organization, Geneva).

²⁰⁶ Brandon, C. & Hommann, K. (1995) The cost of inaction: Valuing the economy-wide cost of environmental degradation in India in Conf. on the Sustainable Future of the Global System (United Nations Univ., Tokyo).

²⁰⁷ Smith KR. National burden of disease in India from indoor air pollution. Proc Natl Acad Sci U S A. 2000 Nov 21;97(24):13286-13293.

SOURCES OF INDOOR AIR POLLUTIONS

Research has established that poor indoor air quality poses a considerable environment, economic as well as health/ well-being problem. Despite the fact that studies on indoor air pollution started less than a decade ago, researchers and scientists have already come to the firm conclusion that indoor air quality has to be maintained for well being. Jerome Wesolowski, being one of the early researchers of air quality and indoor pollution emphasized the importance of conducting high quality scientific research and the use of such research to develop sound public policies to protect human health. He defined indoor air pollutants as “the totality of attributes of indoor air that affect a person’s health and well-being”.²⁰⁸ He therefore asserted that scientific research must be effectively used to determine the quality of indoor air and established the three important parameters that indoor air quality must reflect a) it has to satisfy thermal and respiratory requirements, b) it has to inhibit the unhealthy accretion of pollutants and c) it has to allow for a sense of well-being.²⁰⁹

A variety of building-related diseases and illnesses have been found to exist due to poor indoor air quality. The most common pollutants found inside buildings and closed spaces include mold, pollen, dust-mites, smoke from the usage of tobacco, chemicals released from the utilization of household products and pesticides, fungi and parasites, bacteria, gases such as radon, nitrogen oxides, sulphur dioxides and carbon monoxide, formaldehydes, asbestos, lead and other respirable suspended particles.²¹⁰ The result of the existence of such pollutants inside houses can be very severe. Each pollutant has a different set of impacts on human health and well being ranging from mild irritation to severe allergies and in the long run, even more harmful medical conditions such as asthma and cancer.²¹¹

Many chemicals and their compounds are present in indoor air which make life difficult. These chemicals are present in both outdoor and indoor air. Air is rendered toxic when smoking, cooking, heating, cleaning or when using building materials. Therefore, we need to reduce or eliminate human activities that release air pollutants. Otherwise due to pollutants many health hazards are reported such as presence of benzene causes acute myeloid leukaemia and genotoxicity, carbon monoxide causes acute exposure-related

²⁰⁸ Jerome J. Wesolowski, "Relationships between Residential Indoor Pollution and Housing Characteristics in Krakow".

²⁰⁹ S.K. Brown, "Indoor Air Quality: State of the Environment", Department of Environment, Queensland University, 1997.

²¹⁰ Hereinafter referred to as 'RSP' – these are the particles that are small enough to inhale and that come in a variety of sizes, shapes and levels of toxicity.

²¹¹ "Common Indoor Air Pollutants: Sources and Health Impacts", University of Kentucky – College of Agriculture, Accessed online at: <http://www2.ca.uky.edu/hes/fcs/factshts/HF-LRA.161.PDF>

reduction of exercise tolerance and increase in symptoms of ischaemic heart disease, formaldehyde causes Sensory irritation , naphthalene causes respiratory tract lesions leading to inflammation and malignancy in animal studies , nitrogen dioxide leads to respiratory disorder, bronchoconstriction, increased bronchial reactivity, airway inflammation and decreases in immune defence, leading to increased susceptibility to respiratory infection, polycyclic aromatic hydrocarbons causes lung cancer and radon causes lung cancer , some also cause kidney problems and renal failure to name a few.²¹²

SITUATION IN INDIA

It is now clear that large parts of the urban population living in Indian cities are exposed to some of the maximum recorded pollutant levels in the world. Annual concentrations reported at urban monitors in India for PM10 (particles less than 10 microns in diameter) is around 200 gm³ on average, whereas in the United States, it is about 60 gm³. The safe limit set by the WHO is around 50gm³. Even the most contaminated urban area in the United States in the 1990s had annual concentrations considerably lower than the cleanest Indian city reported.

The 1991 National Census incorporated for the first time, a question about the principal household fuel used and showed that about 95% of the rural population still relied primarily on biomass fuels. Reported levels of almost 3000 gm³ were found in homes using biomass fuels. A small fraction uses coal, which means about 97% of households relied principally on these unprocessed solid fuels. Nationwide, some 81% of all households used on these fuels; 3% used coal and 78% used biomass.²¹³

As a result, the national burden due to disease is showing principally in children and women. Acute Respiratory Infections in children under 5 years accounts for almost 24% of child deaths under 5 years of age. Similarly, respiratory infections such as TB account for 5.5% for women's deaths across the board.

Indoor air pollution is a pressing problem in most developing and underdeveloped countries not only because of a lack of awareness/ knowledge and technical know-hows to invent devices and implement measures/ policies but also because traditionally and culturally they are accustomed to certain practices which they are not willing to give up in order to adopt the new fuel-efficient practices. Statistics prove that in India, over a million people die every year because of indoor air pollution, majority of which are

²¹² Air quality guidelines. Global update 2005. Particulate matter, ozone, nitrogen dioxide and sulfur dioxide. Copenhagen, WHO Regional Office for Europe, 2006 (http://www.euro.who.int/__data/assets/pdf_file/0005/78638/E90038.pdf, accessed 4 August 2010).

²¹³ Hong, C. (1995) Global Burden of Disease from Air Pollution (World Health Organization, Geneva)

women.²¹⁴ The Planning Commission of India came out with a report which stated that indoor air pollution was the second largest killer in India, after blood pressure.²¹⁵ In India, the ones who are most exposed to indoor air pollution are the women because India is inherently a patriarchal society – where the male members of the family typically are the bread-winners and workers while their female counterparts stay at home, cook and attend to the children. Women in rural India bear the brunt of the consequences of indoor air pollution as their everyday activities occur only inside the house and mainly inside the kitchen.

Being a developing country, India still battles greater problems such as illiteracy, poverty, unemployment and due to the persistence of these social issues, India has been unable to adopt technology and scientific research and use it constructively to achieve development. In rural India, cooking practices are extremely traditional, conventional and lack scientific basis. Traditionally in India, biomass fuels, coal and wood are burnt for domestic energy as these are cheap sources of energy that are abundantly available. Moreover, these cooking practices have been used for generations and therefore, the mentality of the people in rural India is so backward that in a lot of situations, they have refused to embrace technological innovations and give up their old fuel-inefficient ways. In India, women have to take up the responsibility for managing household resources – including collecting fuel sources, cooking on the stove, disposing off waste material etc and therefore they are the ones who interact with environment and the forces of nature every day, and are consequently the worst affected by its deterioration.²¹⁶

In rural India, women do most of the household work – they collect fuel (such as wood, coal) in the morning, and they burn the fuel they collected for domestic energy on traditional cooking stoves that release unfiltered smoke and gaseous particles into the air. In most rural homes, cookstoves are located inside the house – and these homes are often extremely small and are constructed with very poor quality bricks and other materials. These homes also lack ventilation and proper exhaust devices. Apart from these problems, rural homes are also faced with other issues such as – easy collection of dust, poor sense of hygiene, infestation with insects/ germs/ bacterial and fungal growth such as mold (because the homes are often not constructed to resist rain/ storms and other forces of nature). The worst aspect about homes in rural India is the fact that they have very little access to electricity – and are often faced with power cuts as well, and therefore, the only source of energy they have is the burning of fuel.

Since women, young children, the old and the infirm are the ones who stay indoors the whole time, they are the ones who are severely affected by the poor indoor quality. Rural homes in India are also infamous

²¹⁴ Chetan Chauhan, Hindustan Times, “Indoor Air Pollution Kills A Million People Every Year in India”, February 22nd, 2013. Accessed online at: <http://www.hindustantimes.com/india-news/newdelhi/indoor-air-pollution-kills-a-million-people-every-year-in-india/article1-1015749.aspx>

²¹⁵ Ibid.

²¹⁶ Aruna B. Venkat, “Indoor Air Pollution and Women’s Health”, IJSSIR, Vol. 3, 2014.

for being extremely small and yet being home to large families. A typical rural home consists of one room, one kitchen and one bathroom and yet it is common for a family of 7 to survive in it. Women end up doing most of the cooking and are exposed to cookstove smoke – which is said to be the most harmful smoke known to mankind. Cook stove smoke can cause low birth weight, asthma and acute pneumonia in children under 5 and can cause lung cancer and cardiovascular disease in adults along with several other health issues.²¹⁷ Apart from the consequences of exposure to poor indoor air quality, women in rural homes are also faced with various other unfortunate situations – many of them get burnt/ injured from the open flames of traditional cook stoves.²¹⁸

India while having a set of comprehensive environmental laws has not focused any attention on indoor air pollution at all. Therefore, the legal system currently is absolutely unresponsive towards the phenomenon.

SUGGESTIONS AND CONCLUSIONS

WHO has prepared air quality guidelines which define conditions for healthy air.²¹⁹ It is important for Nation States to develop policies to combat indoor air pollution and work on ambient indoor air quality. This initiative will help States to reduce burden of diseases and lower the spending on medical interventions. This is particularly true in developing countries. Therefore, indoors should be such that they are well lit and ventilated. Households should use chimneys and alternative sources of energy. The outdoor pollutants also penetrate indoors and pollute indoor environment. It is said that the high concentration of particulates and gases found indoors in houses might be responsible for nearly 1.6 million excess deaths annually and about 3% of the global.

It is time to also have policy development in indoor air pollution, have applicable standards to indoor concentrations of air pollutants; make monitoring of concentrations of indoor air a reality. It is a definite challenge to give answers to questions such as how could air quality standards be enforced indoors? Management of indoor air quality requires different approaches from those used for outdoor air. The impact of biosphere on humans varies considerable. Also, individuals vary widely in their response to exposure to pollutants and chemicals.

²¹⁷ National Institute of Environmental Health Sciences, “Cookstoves and Indoor Air”, Accessed online at: <http://www.niehs.nih.gov/research/programs/geh/cookstoves/>

²¹⁸ Accessed online at: <http://chijnayafoundation.org/health-and-environment/indoor-air-pollution-and-women%E2%80%99s-health>

²¹⁹ Air quality guidelines for Europe. Copenhagen, WHO Regional Office for Europe, 1987 (WHO Regional Publications, European Series, No. 23).

The WHO recommended and guidelines on indoor air quality must be adopted as legally enforceable standards.

Routine monitoring in people's homes is unlikely to be widespread, and the application of measures to enforce standards is often not feasible or, at least, difficult. But what is possible is application of low-emission materials and products; proper selection of the devices and fuels used for combustion indoors; the venting of products to the outdoor air; and ventilation control. In many countries, these means of control are encapsulated in product standards and building standards or regulations.²²⁰ WHO guidelines present useful option for reducing the adverse effects of indoor air pollution on health.

India as a country does not have any legal framework regarding the issue of indoor air pollution. Western countries have introduced clear norms for indoor air pollution that regulates emission levels indoors with regular periods of checking and inspection. Certain countries have been more proactive in tackling issues of unclean cooking methods by banning unclean stoves and levying heavy fines in cases of breach. Certain other countries have also implemented schemes that involve the installation of smoke alarms in every household; exhaust fans in kitchens, clean stoves/ electric stoves as well as carbon monoxide measuring devices/ moisture-identifying devices etc. so as to reduce incidence of indoor air pollution.

The main goal of the Indian lawmakers should be to create a framework that focuses on prevention instead of rectification. The law must focus on regulating the use of toxic materials that cause indoor pollution. India must attempt to adopt new technologies and resources that can be used for construction and commercial purposes so as to avoid the harmful effects of using materials like lead and asbestos.²²¹ The Indian government should offer subsidies and should invest in electric cookers/ stoves and heaters that will not only save fuel while heating efficiently, but will also funnel the smoke and particulate matter out of enclosed areas and reduce emissions and indoor air pollution. Electricity-operated cooking devices can further more also reduce risk of women burning themselves on open flames.

²²⁰ Development of WHO guidelines for indoor air quality. Report on a working group meeting, Bonn, Germany, 23–24 October 2006. Copenhagen, WHO Regional Office for Europe, 2006 (http://www.euro.who.int/__data/assets/pdf_file/0007/78613/AIQIAQ_mtgrep_Bonn_Oct06.pdf, accessed 4 August 2010).

²²¹ Thad Godish, "Indoor Air Pollution Control", 1989, CRC Press, Pg 156

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DOMESTIC WORKERS – THE LIFELINE OF A METROPOLIS

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ABSTRACT

The 21st Century is an age of innovation, aspiration and progress. We have only just entered this promising century and already it has shown us a great deal of advancement. Our country has also cashed in on all the development and has become a global hub for business and outsourcing. Amidst the progression, we have seen our villages turn into towns and towns into cities. As cities grew larger they came to be known as Metropolitan cities. A more apt definition for a metropolis today would be to call it “a city that never sleeps”. It is kept running day and night, by millions of people working in different sectors like Information Technology, E-Commerce, Medicine, Mass Media and a lot more. As the IITian, IIM and educated folks from different fields rush in a race against time, a lesser educated sector contributes equally. They are neglected, overshadowed and often ignored. They are the Domestic Workers. From cooking to feeding, washing to cleaning they do it all. They don’t undergo a 3 month training regimen or a formal education in their department, but they do their job well and earn a meagre sum at the end of a gruelling month. This paper is an attempt to study and draw attention upon the social condition of domestic workers especially with regard to those working in Metropolitan cities. It will focus on the hardships faced by them and try to find the reasons for the same while also exploring legal remedies if any. The society is indifferent to them, but their need to the society is indispensable.

Keywords: Domestic workers, metropolitan cities, minimum wages, social security.

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INTRODUCTION:

Domestic workers may seem to form a small element of our societal structure today but it is quite glaring there are more than 2.62 million of them in our country²²⁵. Other reports put the figure at a staggering 4.75 million workers²²⁶. These numbers speak of their inevitable need to our world today. This is why they cannot be ignored any further. But first, it is important to understand the working conditions of domestic workers. Unlike other forms of labour market activity, domestic work takes place in an unconventional place of work, i.e. the household. Gaining public acceptance of a household as a place of work is a challenge. Implementations of labour laws such as minimum wages and regularized work hours, which are essential elements of any kind of work, also remain a challenge. Such regulation is complex because the nature of domestic work is unique compared to other forms of work. The sector lacks effective means to regulate working conditions, for example, through streamlined job descriptions which could be offered through standard contracts. Furthermore, unlike work in a formal setting, domestic work is not guided by clear and agreed production or output goals. Enforcing labour laws remains a significant bottleneck. This is because privacy norms do not bode well with the idea of labour inspectors entering private households and ensuring regulations.

Policymakers, legislative bodies and people need to recognize the existence of an employment relationship in domestic work. Such a view would see domestic workers as not just “helpers” who are “part of the family” but as employed workers entitled to the rights and dignity that employment brings with it. In August 2015, the Labour Minister declared that a ‘National Policy for Domestic Workers’ will be brought into force soon and it would cater to the needs of the domestic workers. The highlight of the policy is that it promises a minimum wage of Rs.9000/- per month to a full time domestic worker. However, the policy has not come into force yet. It is very important to note that domestic workers in India work in a different way compared to the rest of the world. They work in multiple homes and offices throughout the day. Such domestic workers are called ‘part-time domestic workers’. They do not confine themselves to one home or establishment. Though this maximizes their earnings, it also leads to a very hectic work schedule. In some metropolitan

²²⁵ According to a survey conducted by National Sample Survey Organization (2009-2010)

²²⁶ According to a survey conducted by the NSS (2004-05)

cities, domestic workers are known to work for more than 17 hours a day. Despite putting in such exhausting effort, the living condition of domestic workers fails to see any sort of improvement.

DEFINITION:

The International Labour Organization has defined domestic work as “work performed in or for a household or households”²²⁷. Thus, a domestic worker is defined as “any person engaged in domestic work within an employment relationship”²²⁸. In India, there is no formal definition for ‘domestic workers’. However, the Draft National Policy on Domestic Workers as recommended by the Taskforce on Domestic Workers provides a definition of a domestic worker as: “For the purpose of this policy, the “domestic worker” means, a person who is employed for remuneration whether in cash or kind, in any household through any agency or directly, either on a temporary or permanent, part time or full time basis to do the household work, but does not include any member of the family of an employer.”²²⁹

Types of domestic workers, based on the hours of work and nature of employment relationship:

The domestic workers can be:

- a) Part-time worker i.e. worker who works for one or more employers for a specified number of hours per day or performs specific tasks for each of the multiple employers every day.
- b) Full-time worker i.e. worker who works for a single employer every day for a specified number of hours (normal full day work) and who returns back to her/his home every day after work.
- c) Live-in worker i.e. worker who works full time for a single employer and also stays on the premises of the employer or in a dwelling provided by the employer (which is close or next to the house of the employer) and does not return back to her/his home every day after work.”

This definition is only a proposal and is yet to be implemented.

²²⁷ Art. 1(a) of Convention No. 189 of the ILO.

²²⁸ Art. 1(b) of Convention No. 189 of the ILO.

²²⁹ A Project Report On Domestic Workers -A Modern Form of Slavery As a Part of Project Work of Labour Law by Bharat Poonia.

HISTORICAL BACKGROUND OF DOMESTIC WORKERS:

During ancient times, domestic workers were treated as slaves all over the world. In countries such as Rome, Greece, Egypt and Babylonia these 'slaves' were either prisoners of war or kidnapped or purchased persons. Their labour was generally utilized in the plantations or on the fields or for domestic purposes, but the conduct of masters towards them was more or less in-human and barbaric²³⁰. The masters made them toil for hours together and their work was limited only by physical exhaustion. There were so many of them that it became unnecessary to conserve them. If one died due to fatigue the master would just go to the market to buy another one.

With regard to the scenario in India, it is a well-known fact that domestic workers did exist, and they too were treated as slaves. But, whether their conditions were as bad as that of those in Rome, Egypt, Greece and Babylonia is quite doubtful. In ancient India, slaves were called 'dasas'. In the Rig Veda, we find the word 'dasa' used several times. These "Dasa" or "Dasyu" who were either captives of war or people of low mentality were regarded 'untouchables' and were treated as enemies by the people of the upper castes. That was the reason for their being kept in servitude. In the Rig Vedic days, ownership of slaves could even be transferred from one master to another.

There was also a classified distinction between slaves. Ancient Indian jurists distinguished between different kinds of slaves; for example, we find four types of slaves being enumerated in the *Vidura-panditaJatakaviz*. (1) children of slaves; (2) slaves for food and protection; (3) purchased slaves and (4) voluntary slaves. In Manusmriti, however, a distinction is drawn between seven kinds of slaves: captives of war; those serving for their maintenance; children of slaves (born in the house of the master); purchased slaves; presented slaves; inherited slaves and those enslaved by way of punishment. Similarly, it has been stated in Naradsmriti that "any person born of a female slave in the house of her master, purchased, received as a gift or inherited, pledged by a person with another person in return of a loan, was a slave".

However, on-going through various ancient texts we find scenarios where the masters treat their slaves as more or less family members²³¹. The condition of slaves in India improved to such an

²³⁰ Available at http://www.pbs.org/empires/romans/empire/slaves_freemen.html

²³¹ Stories found in Nanda Jataka, Nanacchanda Jataka and Asampadan Jataka give a detailed description of how slaves were treated benevolently by their masters.

extent during 320 B.C. that foreign visitors could not even visualize the existence of slavery in India. Such was the position of domestic workers in ancient India.

During the medieval times in India, the affluent had servants; mostly men with loyalty obligation and patronage bring the salient aspects of this relationship. Caste defined the hierarchy – lower castes performed the dirty work of cleaning while higher caste men cooked. Even today, caste continues to decide the kind of work that individuals may do. Though domestic work is not a new phenomenon in India, it cannot simply be viewed as an extension of historical feudal culture where the affluent employed ‘servants’. Both in the urban and rural contexts, the nature of work and workers have been rapidly changing. The sector now consists of millions of workers of which majority are women. Their effort put in by these workers is not given any value and also not regarded as work. It is also undervalued because it is often performed by poor, migrant workers from lower castes. All these contribute to the inferior status of their work, both in their own minds and in society²³².

RESEARCH CONTEXT:

Domestic labour is a vast and expansive area of research. There are an estimated 53 million domestic workers all over the world and it is baffling that 83% of them are women²³³. India is a country which houses more than 2.62 million domestic workers²³⁴. However, some NGOs calculate this number to be more than 7 million. While Indian diplomat Devyani Khobragade’s arrest and the alleged ill-treatment of her house help brought the focus on Indian paid domestic workers, it also brought with it a checklist, which showed how the country has failed in protecting them despite repeated push from unions, NGOs and citizens. This paper mainly focuses on the social and economic conditions of domestic workers in metropolitan cities and methods in which their conditions can be uplifted. The domestic workers’ belongs to the unorganized sector and has no established body which can look into their grievances²³⁵.

²³²http://shodhganga.inflibnet.ac.in/bitstream/10603/30220/8/08_chapter%202.pdf.

²³³ According to a survey conducted by the International Labour Organization

²³⁴ *Supra note: 1*

²³⁵ Indian Diplomat’s Arrest in New York Sparks Row with U.S.- Indian officials call the arrest and treatment of their deputy consul in New York City "barbaric" and have meted out retaliatory measures on U.S. diplomats based in India, by Nate Rawlings @naterawlings Dec. 17, 2013, published in world.time.com.

In June 2011, the International Labour Conference of the International Labour Organization (ILO) adopted the Domestic Workers Convention, 2011 (No. 189) and its supplementing Recommendation (No.201). This convention established the international standards with regard to the protection of domestic workers that are to be followed by the countries world over. However, India has not yet adopted a policy on the lines of the above mentioned convention. The feasibility of adopting the principles of the convention will also form a part of the context of this research²³⁶.

SOCIAL AND ECONOMIC CONDITION OF DOMESTIC WORKERS:

In modern India, we see that in some places the caste system still exists and determines the occupation of an individual. Children of domestic workers are made to skip education and help their parents in doing different kinds of domestic work. They learn to cook, clean, wash and do other household chores at a very young age and as they grow up they take up the positions which their parents once held. But the situation is somewhat better in metropolitan cities. With the help of government bodies, NGOs and unions, young children are made to undergo primary and secondary education which equips them to break free from the realm of domestic work²³⁷. Though such efforts are on an increase, majority of domestic workers in metros still face various difficulties. It can arguably be said that almost all domestic workers in metropolitan cities are migrants. Domestic workers often work excessively long hours, without breaks, days off or holidays. Those who live with their employers are often considered 'on call' to undertake work for their employer 24 hours per day. Poverty tops the list of problems faced by the domestic workers today. The pay is often very low, with wage payments frequently delayed. Some domestic workers may not be paid at all or only receive 'payment in kind' such as food or accommodation. Poverty is followed by social isolation, physical and sexual abuse and the resulting mental torture²³⁸. Many domestic workers face verbal abuse such as insults and threats, alongside physical and even sexual abuse. Some domestic workers experience a lack of food and poor living conditions such as having to sleep on the floor in a utility room. Various organizations try to reach out to such exploited domestic workers but they succeed only to a small extent. This is because of yet another problem

²³⁶Domestic work is work. Domestic workers are, like other workers, entitled to decent work. On 16 June 2011, the International Labour Conference of the International Labour Organization adopted the Convention concerning decent work for domestic workers, which is also referred to as the Domestic Workers Convention, 2011 (No. 189) by ILO, Geneva.

²³⁷Source: Division of Labor International Encyclopedia of Marriage and Family, The Gale Group Inc.2003.

²³⁸Source: Walls at Every Turn Abuse of Migrant Domestic Workers through Kuwait's Sponsorship System, 2010

faced by these workers i.e., illiteracy. All these problems culminate to form a complex barrier for domestic workers which prevent them from achieving social recognition and upliftment.

RESEARCH QUESTIONS:

As stated above, the area of domestic labour is broad and boundless. But with regard to the context of this research, the questions raised are as follows:

1. What are the reasons behind the various problems faced by domestic workers in metropolitan cities?

As discussed above, domestic workers are vulnerable to a host of problems especially in metro cities. Domestic workers work endlessly to sustain themselves and their families and even after putting together hours of painstaking work, they barely find any improvement in their living conditions. It is true to a certain extent that all problems have solutions but in order to find out the solution is it important to understand the cause of such problems. An analysis of the problems faced by domestic workers is required in order to find out the reasons behind them.

Poverty is the single biggest economic problem faced by domestic workers. On an average, a metro part-time domestic help earns only Rs.1,500/- per month. A metro full-time domestic worker receives Rs.7,500/- per month²³⁹. This is a beggarly amount when compared to the lakhs of rupees earned by residents in a metropolitan city. Millions of homes would grind to a halt or descend into chaos in the absence of the domestic workers but yet, their work is undervalued. The main reason for this is the social stigma of the Indian society which forces the employers and even the domestic workers to think cheaply about domestic work. Another reason for such neglect is the migrant nature of the domestic workers. Migrant workers often come from distant villages where a small sum of money carries great value. Also, the fact that a person from a village is working in a metropolitan city, regardless of the nature of his work, becomes a matter of pride for the domestic worker. The fact that they are looked down upon and paid a paltry sum of money at the end of the month by the city dwellers becomes irrelevant to the domestic workers. It is as if they have gotten used to their living conditions. Apart from this, the government has also not framed a proper minimum wages policy for domestic workers. One thing that is most distressing is the fact that the government has not included 'domestic workers' under the purview of the Minimum Wages Act,

²³⁹According to a survey conducted by Nirmukta, an NGO in January, 2014.

1948. The Minimum Wages Act, 1948 recognizes workers who work in different sectors and ensures that they are not paid less than a certain sum which is notified by the government from time to time. Despite domestic workers being indispensable in modern times, their needs are not being identified by the government. Though policies are in force in various States like Karnataka, Kerala, Bihar, Andhra Pradesh and Rajasthan, various organizations in these States complain that the minimum wages are not enough. Authorities complain that it becomes difficult to set up minimum wages for domestic workers since their nature of work is unpredictable²⁴⁰. Some may work part-time while others work full-time. Some may only wash and clean while other cook and clean the dishes. Though this reason is a valid one, it still does not let the government escape its responsibility of ensuring the welfare of domestic workers.

Social problems such as insults, threats, physical and sexual abuse and social isolation are very serious in nature and often overlooked. These problems are capable of causing emotional hardships and mental agony especially to female domestic workers. The cause for these problems is once again the fact that most domestic workers are migrants. They stay away from their families which form the basis of emotional and moral support. Domestic workers also lack social bonding because of the mentality of the society which they live in. Metropolitan residents only consider educated and literate people as their counterparts and completely avoid any sort of social contact with domestic workers. This puts the workers in a situation where they do not receive basic care and affection which leads to the degradation of their mental health. *Pankaj Sain v. State*²⁴¹ gives us a clear picture of the reality of living conditions of domestic workers in India. In this case, the domestic worker was a minor girl who was abused and beaten and not paid her dues. The Delhi District Court dismissed the appeal filed by the accused and held him liable to pay adequate compensation to the victim. In cases of sexual assault by employers, female workers often refrain from lodging protests or complaints against the offenders for the fear of losing their 'coveted' jobs or facing social stigma. The resulting mental torture can be quite dangerous and can also lead to lunacy.

²⁴⁰ Statement made by Anita Kapoor of the Shahri Mahila Kamgar Union in Delhi to Times of India.

²⁴¹ Criminal Appeal No. 08/2013, Delhi

Illiteracy is yet another problem faced by domestic workers today. Metropolitan cities are famed for having some of the best educational institutions in the country. Students pay millions of rupees to get educated in such institutions. On the other hand, children of the domestic workers are not even provided with basic necessities. It is true that metro cities also have numerous government schools which offer free education but the effort to bring in the children to such schools is lacking. In the year 2014, 534 government schools in the State of Karnataka alone had to shut their doors because of zero admissions²⁴². In such cases, the authorities wash their hands clean by stating that educational facilities are provided but not made use of by the people. One of the main reasons for illiteracy amongst the domestic workers is, as we discussed above, poverty. Hence, it is like a vicious cycle where because of poverty, children are made to work. Because of children being made to work, they end up without basic education. Because of lack of basic education, they are forced to continue to work as domestic workers. Because of being employed as domestic workers, they continue to live in poverty.

2. Is it possible for India to adopt a policy which will be on par with the Domestic Workers Convention, 2011 established by the ILO?

The Domestic Workers Convention, 2011²⁴³(DWC) adopted by the ILO speaks in great volumes about the oppression and neglect of domestic workers. It defines 'domestic work' and 'domestic workers' and also recognizes the relationship between the employer and domestic worker. It says that the member nations shall set up the minimum age and minimum wage for domestic workers and that the State shall protect domestic workers from any form of abuse or harassment. The Convention was brought into force in September 2013. Uruguay was the first to ratify the Convention²⁴⁴ and so far 22 nations have ratified the same²⁴⁵. Shockingly, India has not yet ratified the Convention. However, as stated earlier, the Indian Government plans on bringing into force a policy for domestic workers which according to it will meet international standards. When asked about the same in Rajya Sabha, the Labour Minister of India Sri Bandaru Dattatreya replied that

²⁴² As reported by Times of India On June 11, 2015.

²⁴³Convention No. 189 of the ILO.

²⁴⁴ "Uruguay First Country to Ratify C189" published by International Domestic Workers' Network. 3 May 2012. Retrieved 11 May 2012.

²⁴⁵ Ratification by Countries of Domestic Workers' Convention (C189) published by 'Women in Informal Employment: Globalizing and Organizing'

India will ratify a Convention only when the national laws and practices are brought in conformity with the Convention in question²⁴⁶.

Though the Policy for Domestic Workers has not yet been brought into force, whether it will be in conformity with the DWC or not becomes a very important question. There are certain key provisions in the DWC which may be difficult for India to interpret and implement. For example, Art. 1(a) of the Convention defines 'domestic work' as "work performed in or for household or households". In India, however, domestic workers also engage in working for corporations and other offices apart from households. The DWC also speaks about the employer and worker entering into a contract and receipt of job offer letters²⁴⁷. Though it sounds easy on paper, it is practically impossible in the Indian scenario. This is because most domestic workers are illiterate and thus it becomes difficult for them to enter into written agreements. It also mentions that every domestic worker shall be given 24 consecutive hours of rest in a week²⁴⁸. Whether a particular worker is given 24 consecutive hours of rest every week or not cannot practically be assessed by the government. Also, according to Art.6 of the Convention, every domestic worker shall be provided decent living conditions that respect their privacy. Once again, it becomes unrealistic for the government to conduct inspections of every household since there are more than 2 billion domestic workers in India. The other provisions of the Convention such as setting up minimum wages²⁴⁹, protection against abuse and harassment²⁵⁰, setting minimum age for domestic workers²⁵¹ are somewhat suitable to the Indian situation.

In India, the Director General Labour Welfare (DGLW) has submitted the 'National Policy for Domestic Workers' to the Labour Minister in August and the same is under consideration by the Labour Ministry. As mentioned earlier, this policy plans on setting the minimum wage as Rs.9,000/- per month for the 'skilled full-time household helps'. It also provides for social security of domestic workers and contains a provision for 15 days paid leave to every domestic worker in a year. However, the Policy so far does not mention anything about part-time workers. Whether

²⁴⁶Rajya Sabha session conducted on March 17, 2015.

²⁴⁷ Art. 8 of the Domestic Workers Convention, 2011.

²⁴⁸ Art. 10 of the Domestic Workers Convention, 2011.

²⁴⁹ Art. 11 of the Domestic Workers Convention, 2011.

²⁵⁰ Art. 5 of the Domestic Workers Convention, 2011.

²⁵¹ Art. 4 of the Domestic Workers Convention, 2011.

part-time workers will come under the purview of the Policy or not will be known only when the Policy is brought into force.

FINDINGS:

From the data gathered so far, it is found that the living conditions of domestic workers in India, especially women are quite pitiable. The social and economic hardships faced by them are unimaginable. One of the most important facts of this area is that the work done by the domestic workers is highly disregarded and undervalued. This is one of the main reasons for the degradation of this sector. It is high-time that the government and relevant NGOs took up initiatives in order to strengthen the workers in this area. The first step in this direction would be to pass appropriate laws or frame thorough policies that recognize domestic workers and their rights. It is also found that, presently, domestic workers are covered only under the Unorganized Workers Social Security Act, 2008. The Act defines domestic workers under the head 'wage worker'²⁵². Under this Act, a National Social Security Board and various State Social Security Boards have been set up in the country. Yet, the Act does not specifically relate to domestic workers. It is a statute which deals with the unorganised sector generally.

It is also found that framing a policy for domestic workers on the lines of the DWC, 2011 is going to be an up-hill task for the government of India. The impracticalities are high in number and pose a challenge to the Labour Ministry. There are also certain shortcomings in the provisions of the DWC, 2011 such as incomplete description of 'domestic workers', vague description of 'domestic work' and so on. Yet another cause for concern is that the DWC, 2011 has only been ratified by 22 nations, most of which are small in size and dominance. Super powers such as USA, Russia, France, China and UK have not yet ratified the Convention. In fact, UK voted against the Convention when its provisions were first mooted²⁵³. When all of this is taken into consideration, it can be stated that there may be certain provisions in the Convention which raise doubts amongst the member nations. India's position with regard to the Convention now does not look as bad it used to.

²⁵² Section 2 (n) defines 'wage worker'.

²⁵³ Rights for Domestic Workers- United Nations in India. available at <http://in.one.un.org/page/rights-for-domestic-workers>.

SUGGESTIONS:

The domestic work sector is a growing area of unorganized labour. It is an area which is only going to keep expanding since domestic workers are indispensable in our world. It is safe to say that domestic work is one such area of labour which has never come to a complete halt. It has been in existence since time immemorial and continues to exist even today. Hence, improvement of living condition of domestic workers is a predominant issue and needs to be addressed at the earliest.

One of the first steps that can be taken in this direction by the government is to include domestic workers under the Minimum Wages Act. Ever since the Act was brought into force in 1948, the labour sector of the country has seen quite an improvement. Implementation of this Act was a huge success and its provisions are in force even today. At present, only contract workers, casual workers and permanent employees are covered under this Act. An amendment to the Act is of utmost importance and inclusion of domestic workers under its purview will ensure that they receive a decent minimum sum of money at the end of every month. The same can be done by State governments as well since the domestic work sector comes under the ambit of the States. If each State passes a law which sets out the minimum wages to be paid to domestic workers, it will go a long way in improving their economic conditions. As mentioned earlier, some States have already taken this initiative and the others are expected to follow at the earliest.

Another step which can be taken by the government is to adopt the National Policy on Domestic Workers as soon as possible. This Policy speaks about protection and improvement of the socio-economic conditions of domestic workers. If it is brought into force, the policy will make it binding to enter into a tripartite agreement between the employer, the worker and the intermediary agency that connects the two. The draft policy recommends minimum monthly wage for unskilled, semi-skilled, skilled and highly-skilled categories of the domestic workers. The policy for domestic workers was underway since 2007. It went to the Cabinet twice; first in 2013 and then in 2014. But, it was later on referred to the Group of Ministers as Right to Collective Bargaining and Freedom of Association, which are integral parts of ILO convention, were missing in the draft proposed at that time. Now both these points i.e., Right to Collective Bargaining and Freedom of Association have been included in the revised draft policy²⁵⁴.

²⁵⁴ According to an official report by Economic Times titled 'New policy for domestic helps: Government proposes Rs 9,000 minimum pay, social security cover, mandatory leaves' dated 16 August 2015.

Creating awareness amongst the general public can also serve the cause of improving the living standards of domestic workers. Employers can be a significant part of the solution if they educate themselves about workers' rights and hold themselves accountable to fair labour standards. Employers should be prepared to provide domestic workers with a contractual agreement, fair wages including overtime pay and regular pay raises, access to affordable medical care, secure retirement income, paid leave, and a safe and healthy work environment. Practicing respectful communications and keeping accurate records of hours worked can go a long way toward improving the quality of the employment relationship.

In this way, many other options may also be explored by the government. Already, plenty of suggestions and recommendations have been made to the government with regard to the issue but the process of framing a suitable statute and implementing the same is a rather time-consuming one.

CONCLUSION:

Domestic workers are an essential part of our world today. Domestic work, though conducted in private homes, contributes substantially to the public good. Household labour is a lynchpin connecting the economics of the home and the economics of the workplace. By committing to improving domestic workers' conditions of work, policy makers and employers, and indeed society as a whole, commit to building an economy based on dignity and care. We have the opportunity to improve, materially and substantially, the conditions of a critical and especially vulnerable sector of our labour force. Both in India and globally, a domestic workers' movement for rights and respect has been steadily gaining strength. Domestic workers, through their organizing, are pointing the way forward. It is past time for both employers and policy makers to take heed.

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NON-COMPETE AGREEMENTS

WHAT IS THE SCOPE AND LIMITATION OF NON-COMPETE AGREEMENTS UNDER INDIAN CONTRACTS ACT, 1872 & HOW IS IT DIFFERENT FROM PRACTICAL PRACTICE OF CORPORATIONS IN OTHER JURISDICTIONS?

*Ayush Shrivastava*²⁵⁵

ABSTRACT

This paper examines non-competition clauses and discusses the limitations within the Indian Contracts Act, 1872. The main purpose of non-competition clauses is to protect the interest and reduce the amount of competition faced by the corporations.

The paper will also differentiate between the post-termination and pre-termination non-compete clauses. The degree of enforceability of non-compete clauses will be explored and compared in India, USA, UK, Australia, Hong Kong and others. This paper analyzes cases regarding noncompetition agreements that pertain under Indian Jurisdiction. Finally, the critique will be given on the present scenario for trade restraints under Indian Law and sectors that need improvement will be pointed out.

INTRODUCTION

The relationship between an employer and an employee has evolved over time. Such evolution and changes in the relationship, causes the change in the nature of disputes that arise due to diverging interests of both the parties seek to protect. Several laws and legislations exist in order to deal with such issues with and to reasonably balance the interests of both: the employers and employees. Such employment laws cover all areas of the employer-employee relationship including the contractual issues and workplace discrimination.

This paper seeks to provide an overview of the Non-Compete Agreements within Indian Law and where such disputes may arise between employers and employees, and remedies/provisions to settle such disputes. Further, this paper also assesses the validity of this restrictive covenant that is

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being incorporated in employment contracts under different jurisdictions comparing it to the Indian Contracts Act, 1882. This research primarily paper focuses on the analysis of the scope and ambit of the Non-Compete Agreements of employment contracts and its limitations with respect to the Indian Contracts Act in furtherance to a comparative study by referring to the laws in USA, UK, Australia, Hong Kong, etc.

A non-compete clause is very popular and common under the Contractual Laws as the clause being made out into any agreement between two parties namely, the employer and the employee. By virtue of this non-compete clause, the employee is made to undertake and give his acceptance to the condition that *during* the course of the employment or even *after* the termination from the services/job of the employer, he will not compete with the employer in the nature of the employment or business of the employer²⁵⁶. The Non-Compete is a common practice in the corporations established throughout the globe. But, generally under the Indian legal scenario the non-compete clause is prohibited under the Indian Contracts Act, 1882 (ICA). It is covered under Section 27 of the Indian Contracts Act which prohibits the imposition on the restraints on trade.

Section 27: "Every agreement by which anyone is restrained from exercising a lawful profession or trade or business of any kind, is to that extent void".

Exception: One who sells goodwill of a business with a buyer to refrain from carrying on a similar business within specified local limits so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein provided that such limits appear to the court reasonable, regard being had to the nature of business.

Various clauses that put a Restraint on Trade are:-

- i. Non-Disclosure Clause: The employee is required mandatorily to take measures for keeping all the confidential information in confidence except and to the extent when disclosure is mandatory under any law in force. The employee further agrees that no confidential information of the company shall be discussed or disclosed to any person or business unrelated to the company or even employee/consultant of the company.

²⁵⁶ <http://www.lexology.com/library/detail.aspx?g=31ca32d5-6c37-4f0e-a647-869666352b17>

- ii. Non-Compete Clause: This clause mandates a party to agree with any other party to restrict his liberty in the future to carry on trade with other persons who are not parties to the contract in such a manner as he chooses. As an exception to this general rule, agreements under which one party sells his goodwill to another, while agreeing not to carry on a similar business within specified local limits, specific time period, nature of work or competing rival companies are valid provided such agreements appear to be reasonable to the court.
- iii. Non-Solicitation Clause: This clause prevents an employee or a former employee for a specific period of time, from indulging in business with the company's employees or customers against the interest of the company. For example, an employee agrees not to solicit the employees or clients of the company for his own benefit during or after his employment.

This paper only focuses on the Non-Compete Clause and the other two clauses will not be discussed in any greater details.

DISTINCTION BETWEEN POST-TERMINATION OF EMPLOYMENT CLAUSES & IN TERM OF EMPLOYMENT CLAUSES OF NON-COMPETE:-

In cases where the employee quits / resigns voluntarily is generally not the cause of any dispute. But contrary is the case when the employee's termination is by demand of the employer and may cause various disputes. There exists a difference in the non-compete clause and the ingredients between the clause during the course of employment (in-term) and after the term of the employment (post-termination). This difference is taken into account from a legal perspective while drafting the contract. The terms of the contracts differ for in-term and post-termination periods.

In-term clause generally mandates the employee to restrict his ability to carry trade/business or to practice service of the same nature as employer's interest with any competing rival firm, or company within the local geographical limit or create a competition to the employer the business of same nature. While the post-termination clause mandates such restrictions only after the course of employment is over.

Also, the periods are treated differently under law. During the term of employment, violating non-compete clause causes breach of contract and is compensated accordingly as per contractual breach remedies or damages as the case maybe. But after the termination of employment, there exists no contract between the two parties. In such a case, the violation of the clause will result in remedies such as specific performance with damages or damages only.

The intensity and strictness to abide by the clause also differs in both the cases. In-term non-compete clause is permitted under Indian Law and is not considered as a restraint on trade. This causes the obligation of the parties to be binding and enforceable. Whereas, the Indian Court does not permit post-termination non-compete clause to be enforced unless they are reasonable to the court. In general, post-termination clauses are not permitted under Indian Law and are regarded as a restraint on trade in pursuance to Sec. 27 of the ICA.

TYPES OF CONTRACTS CONTAINING NON-COMPETE CLAUSES:-

The origin of non-compete clauses in contracts dates back to early 1900s. Examples of such clause can be found in many early reports that include long term supply contracts, requirement contracts, lease contracts, service provision contracts, consultancy agreements, outsourcing contracts, marketing agreements, licensing contracts, asset sale contracts, share purchase agreements (“SPA”), sale of a division, sale of a business (*fonds de commerce*), agreements between shareholders, contracts of formation of a European Interest Grouping (“EEIG”), agency contracts, distributorship contracts, franchising contracts, management contracts including hotel management, confidentiality agreements, assistance agreements, cooperation agreements, consortium agreements, joint venture agreements, ICT contracts (information, communication, telecommunication), research and development contracts.²⁵⁷

Industry sectors and commerce have wide use of these clauses used by all size of the enterprises namely large, medium and small. But the sectors related to banking, insurance and constructions do not practice this clause so commonly.

Non-compete clauses are also included at the negotiating stage of a contract and evident in pre-contractual documents like letters of intent, memoranda of understanding or pre-contractual protocols. Generally, non-compete clause does not create any contractual rights or obligations. It

²⁵⁷ International Business Law Journal, 2006 [Non-compete clauses in international contracts], Filip De Ly, pp:12

is merely a draft that is to be repeated in the contract. Such draft clauses are inserted in a pre-contractual document, MoU or letter of intent, to establish an agreement exists already about the non-compete that is effective subjective to the contract performance. Such clauses are different from other clauses in MoU or letters of intent and stand alone non-compete clauses (rare cases).

Contracts with a non-compete clause require appropriate drafting primarily because non-compete clauses deal with identical issues such as geography and the business activities contemplated by the clause and also the effect it has on third parties. Examples of such are:-

- i. Non-compete clauses can include geographical restraints such as not practicing same profession within certain distance from a particular city or in a particular state.
- ii. Non-compete clauses can introduce a Protected Party that specifies the employee not to work for/with a particular rival or competing company of the employer (protected party).
- iii. Non-compete clauses can specify the time period for bounding a restriction on the employee over geographical or protected party restrictions.

NEED FOR NON-COMPETE CLAUSE:-

Section 27 of the Indian Contracts Acts says any agreement restraining the exercise of trade is void agreement and cannot be imposed. As per this rule, the clause of non-compete should be void completely. But the exception mentioned in the section also allows such restraints and specifies the words ‘...unless reasonable to the court...’, and it has been observed in various cases where the court has allowed the clause of non-compete on the basis of reasonability.

Reasonability of such clause will be explained further with the help of hypothetical examples of different professions that require the clause to be added in employment contracts.

Examples:

- i. A is a person working as a senior lawyer for B’s law firm. Due to some feud between A & B, A decides to resign and plans on joining a competitive rival law firm in the same city. B wants to protect his interest and tries to impose a non-compete clause on A over termination of his employment. In such case, if the non-compete clause is not imposed on A, then the client secrets and the inside information of B’s law firm will be carried with A

to a competitor and might affect B's business. This is why it is important and reasonable for B's interest to impose a non-compete clause on A.

- ii. Similar case might occur in a stock trading firm where an analyst or a trader might have trade secrets and confidential information of the clients of the firm. Also, they might be aware of the financial position of the company and future plans of investments or business models.

In the absence of non-compete clause, it would be very difficult to prove the guilt in court due to lack of circumstantial evidence in most of the cases. To protect such interests and to avoid misuse of the confidential information about the employer's business, it is needed to introduce this negative covenant in the contract to safeguard employer's interest. This reasonability is the reason why Indian courts have permitted non-compete clause for various cases as an exception to restraint on trade.

REMEDIES FOR BREACH OF NON-COMPETE CLAUSE:-

This section of the paper will cover the possible remedies that can be awarded under the breach of non-compete clause. Although Indian Laws do not provide any provision under any section, but the possible remedies will be discussed that might be awarded by the court with reference to the provisions under other jurisdictions.

Remedies possible can be an injunction from the court against the party which violates clause. A penalty might also be granted from the court under the jurisdictions of France, Netherlands and Belgium.

Under common law jurisdictions, specific performance is only available against the violation of non-compete clauses in cases where the court finds that monetary compensation would not be enough. In UK & USA, specific performance is the remedy under no other alternate.

Other possible remedies could be repayment of share price or termination(s) with damages.

CASES RELATED TO NON-COMPETE CLAUSE IN INDIA:-

Under this section of the paper, some important judgments of cases in Indian jurisdiction relating to Non-Compete clause will be discussed.

- **Niranjan Shankar Golikari v. Century Spg & Mfg Co. Ltd**²⁵⁸

In this case, there was an agreement between a producer and the manufacturing company of tyre cord yarn. A NDA was signed between the parties agreeing to maintain confidentiality in terms of technical information related to their product. The SC observed: “...considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract than those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and therefore do not fall under section 27 of the Contract Act. A negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one sided...”

In pursuance to the judgment, the agreement was valid and the appellant was restrained from working anywhere else for till the exhaustion period and the SC held it to be implied contractual obligation to not reveal trade secrets of the previous corporation after termination of employment. Subject to this, an injunction was granted was not unreasonable as it was restricted as to time, nature of employment and area.

- **Superintendence Co. of India Pvt. Ltd. v. Krishan Murgai**²⁵⁹

The Apex Court said “the doctrine of restraint of trade does not apply during the continuance of the contract for employment and it can be applied only when contract terminates. While during period of contract of employment, court would not grant any specific performance as it is a restraint in furtherance of trade and not trade itself.”

- **Percept D’Mark (India) Pvt. Ltd. v. Zaheer Khan & Anr**²⁶⁰

²⁵⁸ Niranjan Shankar Golikari v. Century Spg & Mfg Co. Ltd, 1967 AIR 1098

²⁵⁹ Superintendence Co. of India Pvt. Ltd. v. Krishan Murgai, AIR 1980 SC 1717

²⁶⁰ Percept D’Mark (India) Pvt. Ltd. v. Zaheer Khan & Anr, AIR 2006 SC 3426

The Court held: “The doctrine of restraint of trade does not apply during the continuance of a contract of employment and it applies only when the contract comes to an end. A restrictive covenant will be applied after the period of contract and will be void under Sec.27 of ICA.”

- **Gujarat Bottling Company Ltd. v. Coca Cola Company**²⁶¹

The court held, “A restrictive covenant must be reasonable in accordance to the public policy and necessary for protection of the interest of covenantee. Contracts in restraint of trade are void and burden of proof is on party supporting contract to show that restraint is reasonable and for showing injury against public is on the party is on party challenging the contract. Test will be of two steps, 1) whether contract is in restraint of trade and 2) whether, if in restraint of trade, it is reasonable.”

- **American Express bank Ltd. V. Ms. Priya Puri**²⁶²

The court held that the post-employment contracts restraining the employee to explore further job opportunities are unenforceable and void.

- **Pepsi Foods Ltd. & Ors. v. Bharat Coca-Cola Holdings Pvt. Ltd**²⁶³

In this case, the court held, “Post employment restrictions are invalid and violate Art. 19(1)(g) of the Indian Constitution. Negative covenant in contract restraining employee from engaging or undertaking employment for a specific period after leaving the services are contrary and in violation of Sec.27 of ICA on the basis of which injunction was denied.”

²⁶¹ Gujarat Bottling Company Ltd. v. Coca Cola Company, AIR 1995 SC 2372

²⁶² American Express bank Ltd. V. Ms. Priya Puri, (2006) III LLJ 540 (Del)

²⁶³ Pepsi Foods Ltd. & Ors v. Bharat Coca-Cola Holdings Pvt. Ltd, 1999(50) DRJ 656

- **Sanmar Speciality Chemicals Ltd v. Dr Biswajit Roy**²⁶⁴

Non-compete clause under service contract restraining employee from taking up employment in similar field of activity and not disclosing confidential information was held to be in violation of Sec.27 and hence injunction was denied.

SUMMARY OF NON-COMPETE CLAUSE IN ACCORDANCE TO THE LEGAL POSITION IN INDIA :-

The position under Indian Law with reference to the judgment of cases mentioned above and various other cases is clear that the restraints on trade by the non-compete clause during the course of employments are permitted as they are considered to be contractual obligations on the parties to the contract. But the non-compete clauses that restrain the trade post termination of employment are strictly held null and void with subject to Section 27 of the Indian Contracts Act. Indian law does not differentiate between restraints on trade being partial or absolute. These covenants are equal under Indian jurisdiction which is in contrast to the American and British Laws which allow partial restraints on trade. The term Partial or Absolute restraints are not mentioned neither discussed in the Indian Contracts Act, 1872.

While this aspect on restraints is clear, the scope regarding the confidential information of the firm to be carried along with the ex-employee remains wide loose. The confidential information can be carried forward but not shared. The aspect needs to be looked upon by the legislature and the law-makers to bring more clarity into the subject.

Also, the argument against Fundamental Rights as emerged in various cases in pursuance to Art. 19(1)(g) is right against the state and can be imposed only on government employees. The argument does not hold true in cases of private organizations and thus neglected in most cases.

SCOPE OF NON-COMPETE UNDER DIFFERENT JURISDICTIONS:-

- USA

²⁶⁴ Sanmar Speciality Chemicals Ltd v. Dr Biswajit Roy, AIR 2007 MAD 237

Most of the states in the USA take into consideration the factor of reasonability and consider non-compete restraints with a factor of geographical nature, time period restriction or nature of work. Geographical restraints should be within reasonable limits and same for the time period. Time cannot be too long, for eg. 8-10 years, etc. The restraints have to be justified and the reasons should be found acceptable in the eyes of court in order to be imposed.

- **United Kingdom**

Non-Compete clauses are in common practice in UK for contracts of senior employees who hold valuable and confidential information. The two key requirements for imposing such clauses are legit interest in business and reasonable restriction limit. The clauses restraining the trade should be reasonable and based upon position/nature of work, duration of such restraint and geographical ambit. These factors are dependent on the severity of the interest.

Also under the British law, no compensation is required to be paid to the employee for imposing a non-compete clause post-employment period.

- **Australia**

Post-employment non-compete clauses are a common practice in Australia to safeguard and protect the business interests in cases of senior position holders. The most common clauses impose a restraint on working for a competitor firm for a specified duration after termination of employment. The key ingredient in order to impose such a restraint should be towards the goodwill of business and it cannot be against the employee's right to exchange his labor. The restrictions should be reasonable with regard to the geographical and time bindings.

Non-compete clauses cannot be unilaterally imposed under Australian law but can be imposed on any new offer to the existing employee. Non-compete clauses will be held void if failed to prove the purpose to safeguard business interest.

- **Hong Kong**

Hong Kong jurisdiction allows common practice of non-compete clause in corporate firms in the employment contract of senior position holders who are in particular with valuable and confidential information. Such restraints are allowed in order to protect trade connections of clients, trade secrets and to maintain stability in the workforce.

The basis of imposing and validity of such restraints is mainly reasonability factor.

Although the jurisdiction allows imposing non-compete clauses, but it is easier to impose non-solicitor and non-dealing clauses as compared to the non-compete. The main issue with non-compete clause is the geographical restraint and each case the clause has to be considered on the circumstances and the interest that is to be protected.

- **New Zealand**

Under New Zealand, commonly non-compete clauses are unenforceable as they are considered to be anti-contrary and opposing to the public interest. Under rarest of the rare circumstances, these can be imposable with a couple of points to be proved. These include the legit interest in business, geographical and time bounding, scope and nature of business, seniority of employee, compensation for imposing such a restraint and effect on the employee.

Non-solicitation clauses are much easy to be imposed as compared to non-compete which require meeting of all the factors mentioned.

- **Germany**

German Laws in general do not allow restraints from employer's part on the employee after the termination of employment. These laws imply securing the confidential and valuable information and contain no specific provision in support for non-compete agreements.

In exceptional circumstances, non-compete may be imposed provided the employer is able to prove the following: legit business interest, no unfair restriction upon employee for further advancement, term not exceeding 2 years, agreement is in writing and the sufferer has to receive a minimum compensation of 50% of the previous year's remuneration.

- **Netherlands**

The Dutch laws contain the provision for the restrictive covenants such as non-compete clauses and permits them under contracts to safeguard the business interests and maintain confidentiality.

For a non-compete agreement to be imposed, it is necessary to establish a legit interest. The party should be above 18 years and the agreement should be in writing. The Dutch Laws also require the employer to compensate for the period of the restraint.

CONCLUSION

Under Indian Law, the non-compete clause is permitted only during the course of employment as a contractual obligation. But it is void after the course of employment as there exists no contractual obligation on the parties. Section 27 and the judgments of various cases clearly suggest that such a clause is a restraint on trade. The laws also do not provide a specific relief or provision to safeguard the business interest or confidential information that flows with the employee after the termination of employment. It is considered to be implied under contract to not disclose such confidential information.

In contrast to this, non-compete clauses are permitted in most of the jurisdictions around the world which allow partial restraints on trade being imposed. Most of the jurisdictions have set provision for such clause and provide a suitable remedy in case of breach of such obligation.

Free trade practice and changing circumstances demand a change in law and a need to introduce a dedicated section under Indian law for restrictive clauses on trade practices. Legislature under present scenario also needs to focus and bring in a better law for the safeguard of the confidential information and trade.

Indian law can draw inspirations from different jurisdictions and come up with a new section with wider ambit of trade restraints like non-compete.

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EXTRADITION LAW: CHALLENGES

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ABSTRACT

Vijay Mallya case is a long debated and most awaited cases of extradition which has surfaced up in the last one year. The case is important because India has had many extradition treaties with many countries, U.K being one of them. Yet, it is uncertain whether the extradition shall take place or not.

The paper tries to bring to light the concept of extradition under international law. It focuses the entire attention on how India has adapted to this global concept of extradition. The aim of the paper is to bring to light the actual essential for a successful extradition to take place. The paper also discusses the essentials of extradition under international law.

Keywords: Extradition, India, International Law

MEANING OF EXTRADITION

Extradition is more of a mutual agreement between two states. It is the small arrangement to which two countries mutually agree to abide by, by respecting the territorial integrity of other's penal system. To extradite means to make someone return for trial to another country or state where they have been accused of committing an offence.²⁶⁷

Extradition had never gained acceptance by international community, with almost no space in customary international law, and so, much of it was developed through bilateral agreements. Thus, the mutual agreements were so framed that the municipal laws of the States did not get affected by the treaties. This was because the private rights of the citizens were of utmost importance for these States.

Thus, extradition came to be known as law of imperfect obligations as only mutual agreements and treaties could bind the States. It also largely depended on the reciprocity or courtesy principle.

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²⁶⁷ Cambridge Dictionary, *Meaning of Extradite in the English Dictionary*, CAMBRIDGE, (January 22, 2017, 10:45 AM) <http://dictionary.cambridge.org/dictionary/english/extradite>

Hence, the power to demand extradition by one State from another State in which the fugitive has found asylum and the duty of the latter State to surrender such person, rests largely on the obligation under the treaty between the States. The conditions for extradition, in each treaty depended largely on the political, economic and the legal structure of the State parties. These conditions have been discussed in the next section of the paper.

The main underlying need for development of the concept of extradition was to ensure that no offender could find a safe haven by fleeing to other countries, i.e in furtherance of the maxim *aut puniri aut dedere*²⁶⁸ (offenders must be punished by States of refuge or surrendered to the State which can and will punish them). The other impetus being, the territory in which the offence was committed is the best judge to decide the grave nature of the offence. Hence, sending back of a fugitive is the best mode of securing justice. The requests for extradition were maintained through diplomatic channels. This makes the system organised.

The need was later realized by the United Nations and in 1985, for the first time General Assembly adopted the Model Agreement on Transfer of Foreign Prisoners. Later, in 1990, it adopted the Model Treaty on Extradition, along with three other Model Treaties on international co-operation on criminal matters.

CONDITIONS OF EXTRADITION

As discussed earlier, international law applies the maxim, 'aut puniri aut dedere', i.e. offenders must be punished by the state of refuge or surrendered to the state which can and will punish them. The practice of Extradition is treaty-based (both bilateral and multilateral) and does not exist as an obligation upon states in customary international law.²⁶⁹

The most modern extradition treaties seek to balance the rights of the individuals with the need to ensure extradition process that operates effectively and are based on principles that are now regarded as established international norms, which are designed not only to protect the integrity of that process itself, but also to guarantee the fugitive offender a degree of procedural fairness²⁷⁰

²⁶⁸ Abegunde Babalola Esq, *Extradition under International Law: Tool for Apprehension of Fugitives*, 22 JLPJ, 25 (2014)

²⁶⁹ M.A SHAW, INTERNATIONAL LAW 482-483, (4th ed. 1997)

²⁷⁰ ILIAS BANTEKAS & SUSAN NASH, *INTERNATIONAL CRIMINAL LAW 181*(Routledge-Cavendish London, 2edn.,2003)

The general desire of all states to ensure that the serious crimes do not go unpunished results in the law and practice of extradition. The request for Extradition is usually made and answered through the diplomatic channel.

The two essentials as a rule required before the application is made by the diplomatic channels before extradition are:

1. There must be an extraditable person.
2. There must be an extradition crime.

Extraditable person:

Extraditable person is the person who is capable of being extradited. There is uniformity of state practice to the effect that the requesting state may obtain the surrender of its own nationals of a third state. But many states usually refuse the extradition of their own nationals who have taken refuge in their territory, although as between states who observe absolute reciprocity of treatment in this regard, request for surrender are sometimes acceded to. This does not necessarily mean that a fugitive from justice escapes prosecution by the country of his or her nationality, for that country may ascertain jurisdiction on the basis of nationality, over all crimes committed by their citizens abroad.

For example, the United Kingdom and United States of America extradite their nationals where an extradition treaty provides for obligatory extradition of a national of the requested state.²⁷¹

Extraditable Crime:

‘Serious’ and ‘Grave’ offences are subject to Extradition; any minor offence will not result in extradition. But what may be serious offence in one country may not be in other, thus to resolve this problem an ordinary practice as to extradition crimes is to list these in each bilateral extradition treaty.

Since the procedure of extradition is so cumbrous and expensive, the list of extraditing crime is limited.

As a general rule, the following offences are not subject to extradition:

²⁷¹ King v Governor of Brixton Prison (1912) 3 568 (K.B)

- I. Political Crimes
- II. Military Offences
- III. Religious Offences

It is not easy to define a 'political crime', although a clear case would be that where it is evident that the fugitive is to be punished for political beliefs or activities rather than for the offense itself.

INDIAN LAWS RELATED TO EXTRADITION

India, too, has a municipal law governing extradition in the form of The Extradition Act, 1962. The Act provides for extradition of fugitive criminals from India to foreign states. Section 2(f) of the Act defines 'fugitive criminal' as "*a person who is accused or convicted of an extradition offence within the jurisdiction of a foreign state and includes a person who, while in India, conspires, attempts to commit or incites or participates as an accomplice in the commission of an extradition offence in a foreign State.*"²⁷²

The Act also defines 'extradition offence' as an offence provided under the extradition treaty, in case the claiming foreign State is the treaty partner and in all other cases, the offence punishable with imprisonment of not less than one year.²⁷³

India has entered into many agreements and arrangements with many States. Some of them are as follows:

1. Commonwealth Countries: Specific bilateral agreements exist, but in absence of bilateral agreements, London Scheme of Extradition is resorted to.
2. India is a party to International Convention for Suppression of Terrorist Bombings, 1997, providing for extradition for terrorist crimes.
3. India ratified UN Convention against Corruption, UN Convention against Transnational Organised Crimes, along with its three protocols.
4. India has extradition treaties with as many as thirty-eight countries, including Belgium, U.K, U.S.A, Chile, Kuwait, Bangladesh, Bhutan, Switzerland, Bahrain, etc.

²⁷² Section 2(f) of The Extradition Act, 1962 (Act 34 of 1962)

²⁷³ Section 2 (c) of The Extradition Act, 1962 (Act 34 of 1962)

5. India has an extradition arrangement with ten countries, including Sri Lanka, Singapore and Sweden.

However, as it is more inclined towards mutual consensus between nations, India doesn't have an extradition treaty with China and Pakistan, though they are closest neighbours.

Procedure:

The procedure for request of extradition to India can be summarised as below:

Step 1: Request for extradition sent by State Government under whose territory the offence was committed, or by the Court of Law which by which the fugitive criminal is wanted, or by Ministry of Home Affairs in respect of cases put together by investigating agencies.

Step 2: The request is then received by the CPV division in the Ministry of External Affairs, which processes the information and makes preparation for extradition.

In case, India needs to request for the extradition of any person from a foreign State, the Ministry of External Affairs makes a request to the State through diplomatic channels.

Each extradition treaty sets forth the documents that need to be supplied with the request for extradition.

Pending formal application for extradition, India can make a request for *provisional arrest* in cases where there is a fear that the offender may flee. This request can be made through diplomatic channels or through INTERPOL.

However, it remains the discretion of the treaty partner of India whether to acknowledge its request for provisional arrest or not. This discretion largely depends on the fact that they might have to follow the municipal laws in their country.

The documents²⁷⁴ to be submitted in cases of requests for provisional arrest are:

1. A statement justifying the urgency of the request

²⁷⁴ CPV Division, *Guidelines for Indian Law Enforcement Agencies for Extradition of Fugitives from Abroad*, MINISTRY OF EXTERNAL AFFAIRS, (January 22, 2017, 10:50 AM) http://mea.gov.in/Images/pdf1/Extradition_Guidelines.pdf

2. A detailed description of the same along with his photograph and a list of the offences he has committed.
3. The location of the offender
4. Description of the offence committed
5. Prima facie evidence against the fugitive.

However, there have been many a time that other foreign States have denied to acknowledge to extradite criminals under Section 498A of the Indian Penal Code, 1860. They claim that there is no equivalence of the same in their jurisprudence. This, thus, fails the dual criminality requirement. The dual criminality is the main requirement of any bilateral agreement between parties.

CHALLENGES FACED BY INDIA

India has signed extradition treaties with many countries. Some of which have proved to be successful, whereas some have utterly failed. This section tries to analyse some of the problems faced by India due to extradition barriers.

The first case of successful extradition was of Abu Salem. He was responsible for the Mumbai blasts of 1993, the one that shook the entire nation to the core. It was a successful extradition by the CBI from Portugal. It was a joint initiative of Portuguese authorities and Indian government, despite there being no extradition treaty between the two countries.

Another much anticipated extradition is that of Mr. Vijay Mallya. The CBI had requested the Supreme Court for issuance of a non-bailable warrant against him for he fled to UK on March 2 in 2016. On February 9, 2017 a formal request for extradition was handed over to the U.K embassy in New Delhi.

This development is largely considered to be a touchstone of the strong relations between India and the U.K. In a news report by *Times of India*, entitled 'India requests U.K to extradite Vijay Mallya', dated February 10, 2017 stated as follows:

".....Swarup who said, "We have an extradition treaty with the UK, and we believe we have a legitimate case against Mallya." It would be an example of Indo-British cooperation, he stressed. There has not been any similar extradition request for for mer cricket administrator Lalit Modi, who is also a fugitive from Indian justice, residing in the UK. After the UK refused to deport Mallya

last year, the CBI's request for the liquor baron's extradition was sent through the foreign ministry."²⁷⁵

Thus, it is not development or existence of any bilateral treaties between the countries, but whether the other State acknowledges the law of the other nation or not. In the above two cases, it is evident that the treaty between Portugal and India did not help but the mutual cooperation. On the other hand is the relation between U.K and India which has special treaty charted out yet, the extradition seems to be a mere probability.

It is rightly, therefore, stated by Phillip C. Jessup that international law is the law applicable to States in their **mutual relations** with other States. The authority to command obedience from nations is still a big drawback in such areas.

²⁷⁵ TNN, *India requests UK to extradite Vijaya Mallya*, TIMES OF INDIA, (February 12, 2017, 11:50 AM) <http://timesofindia.indiatimes.com/india/india-requests-uk-to-extradite-vijay-mallya/articleshow/57073053.cms>

GIVING BACK TO THE SOCIETY: UNDERSTANDING THE CSR INITIATIVES OF COMPANIES OF INDORE DISTRICT

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ABSTRACT

A large corporation's existence and decisions can be justified if they serve social purpose.²⁷⁸ CSR initiatives are important as they deliver not only corporate and employee benefits but also non-profit benefits. In order to have efficient and enduring resolution of social adversities, corporates need to collaborate with either NGO's or the Government to bring a change in the current social situation in India.

This study endeavours to find out the Corporate Social Responsibility initiatives of 50 companies in and around Indore district. These companies are from both manufacturing as well as service sector and comprise of small, medium and heavy industry. Data pertaining to CSR activities in four major areas namely: 'Environmental Care', 'Education & Employability', 'Healthcare' and 'Community Welfare & Infrastructure' were collected and analysed. A conceptual-cum-analytical view of CSR has been depicted based on evolution and different responsibilities as proposed by Carroll (1991). These responsibilities – economic, legal, ethical and philanthropic– have been adopted by different companies and the paper tries to argue, with the help of the collected data, that the wheels of CSR are already set in motion and gradually making CSR a widespread practice.

The paper also discusses the challenges that these companies have to face in the successful implementation of CSR and concludes that for the existing gaps between what needs to be done and what has been done; the companies have to cater to Triple Bottom Line in the form of giving back to the society whilst practicing CSR.

Keywords: Carroll's Model, Corporate Social Responsibility, Company Size Engaged employees and CSR Practices, Triple Bottom Line

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²⁷⁸ Robert A. Dahl, 'A Prelude to Corporate Reform', (1972) Business and Society Review, 17, 18.

1. INTRODUCTION

Corporate Social Responsibility has been an important corporate phenomenon in India since a long time. Most of the big organizations in India are involved into various CSR activities. The private sector organizations are by and large more considerate and dynamic in performing CSR activities as compared to Government or public sector organizations.

The CSR initiatives have been started in India somewhere in mid 1990s. Among all the initiatives, the first one was – “*Desirable Corporate Governance: A Code*” (April 1998) taken by the India’s largest business association; Confederation of Indian Industry (CII), which was later partnered with National Foundation for Corporate Governance (NFCG); established by Ministry of Corporate Affairs. NFCG encourages the effective implementation of corporate governance practices in Indian organizations, which in turn helps an organization to acquire stability and growth.

CSR aims at protecting the rights of organizations’ employees, including labourers. International Labour Organization (ILO) plays a significant role in protecting labour rights. Child Labour Act (1986) does not give permission to the children below 14 years of age to work in factories and mines. According to UNICEF, India is still to eradicate child labour as the Act does not cover children in all sectors.

CSR needs to take care of the remuneration that has to be given to the employees on the basis of Minimum Wages Act (1948), as some people still breach this Act.

Environment is another issue covered under Environment Protection Act (1986), which gives authority to the Central Government for safeguarding and improving the quality of environment by controlling and reducing pollution from all sources. Many organizations have emerged with voluntary guidelines about environmental friendly practices.

2. LITERATURE REVIEW

2.1 EVOLUTION OF CSR

CSR has gained prominence as it helps in intensifying the relationship between the company and the shareholders. The outcome of this activity is innovation with continuous improvement helping the managers to manage according to stakeholder expectations (Werther & Chandler, 2006).

The concept of CSR is over hundred years old but the term CSR has evolved recently. Indian culture and religion has always believed in helping the poor and the needy and its mention is prevalent in ancient literature of almost all religion.

- **Kautilya and CSR:** Ethical practices and principles are a must while conducting business as emphasized by Kautilya.
- **CSR & Hinduism:** Giving alms to poor and needy, constructing temples and night temples was done by Hindu merchants'. Also Hindus followed Dharmada. In Dharmada, the product manufacturer and/or the seller had to take some amount from the purchaser. This amount was then used for charity.
- **CSR & Islam:** Zakaat, a law in Islamic religion says that a percentage of an individual's earnings has to be given to the poor in the form of donation.
- **CSR & Sikhism:** Sikhs followed Daashaant which is similar to Zakaat.

2.1.1 EVOLUTION OF CSR IN INDIA

The idea of community development was practiced in pre-independent India through philanthropy or sporadic donations by businessmen or through trusts. CSR in India evolved through four phases as follows:

2.1.1.1 Phase 1: (1850 -1914)

In Phase 1, CSR practices were influenced by an individual's traditions, culture, religion, family values and hence the phase was known for charity and philanthropic nature.

Wealthy businessmen utilized their wealth in constructing temples and other religious institutions, also during critical times offered food to the poor and hungry. Gradually this approach has undergone a significant change. Before Independence, big industrialists like Godrej, Bajaj, and Tata promoted CSR activities by opening charitable organizations, educational institutions, health care centres and various trusts for community welfare and development.

2.1.1.2 Phase 2: (1910-1960)

This was the era of Independence where according to Mahatma Gandhi Indian companies were "Temples of Modern India". He put forth the concept of trusteeship which increased the stress on

the industrialists to exhibit their perseverance towards building the nation and contributing to its development. These businesses established schools, colleges, institutions, training centres and working for abolishing untouchability, women empowerment and development of rural villages.

2.1.1.3 Phase 3: (1950-1990)

This phase represented mixed economy and emergence of Public Sector Undertakings. Because of rigorous and inflexible legal rules and regulations in private sectors, this phase is called as the ‘era of command and control’. Public sectors were set up to ensure distribution of resources and wealth in the society. Since PSUs’ were successful only to a limited extent, the focus got shifted from public sectors to private sectors. Restrictions on private sectors, licensing policy, taxes levied resulted in malfunctioning of private sectors.

A nationwide workshop was conducted in 1965 by politicians, academicians and businessman who emphasized on social accountability and transparency.

In spite of all these, CSR activities could not gain momentum.

2.1.1.4 Phase 4: (1980 onwards)

It talks about the liberalization; privatization and globalization era leading to country’s economic growth. CSR was characterized as a sustainable business strategy. Industrial growth picked up momentum and companies started contributing back to the society (Burke & Logsdon, 1996). CSR, which was initially considered to be charity, was accepted as a responsibility.

2.1.2 BEGINNING OF CSR

A book titled “*Social Responsibilities of the Businessmen*” by Howard R. Bowen (1953) marked the beginning of Corporate Social Responsibilities. According to Bowen, Companies are power centres and decision making by the companies have an impact on the life of citizens.

2.1.3 CSR MODELS IN INDIA OVER THE YEARS

In 2001, Tata Energy Research Institute (TERI), conducted a survey and concluded that CSR evolution in India has four chronological model:

Table 1: Models of CSR Evolution (TERI)

S. No.	Model	Year	Focus	Pioneer
1	Ethical Model	1930-1950	<ul style="list-style-type: none"> The businessman contributed towards community development through trusts. The contribution was in the form of donations and philanthropy. 	M.K. Gandhi
2	Statist Model	1950-1970	<ul style="list-style-type: none"> The era was marked by mixed and social economy. The community development issue was taken care by the State ownership and legal requirement. 	Jawahar Lal Nehru
3	Liberal Model	1970-1990	<ul style="list-style-type: none"> The businesses had to obey the law of business to generate wealth and taxes. The taxes and private donations were directed towards social welfare. 	Milton Friedman
4	Stakeholder Model	1990-Present	<ul style="list-style-type: none"> Other than paying taxes, businessmen had accountability to all stakeholders in business. The model is based on Triple Bottom Line Approach with 	R. Edward Freeman

			Planet, People and Profit as bottom lines. <ul style="list-style-type: none"> • It is about doing well by doing good. 	
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Source: R. Prabhakar & S. Mishra. A Study of Corporate Social Responsibility in Indian Organization: An Introspection. Proceedings of 21st International Business Research Conference, 10-11 June, 2013, Ryerson University, Toronto, Canada, ISBN: 978-1-922069-25-2.

2.2 TYPES OF CSR

According to Geoffrey Lantos there are 3 main types of CSR:

- 1) **Ethical CSR:** It deals with the responsibilities related to harms and social injuries.
- 2) **Altruistic CSR:** It deals with contributing to the common good at the possible expenses of the business for altruistic, humanitarian or philanthropic causes.
- 3) **Strategic CSR:** It talks about a company's social welfare responsibilities benefitting both the company and the shareholders.

2.3 TRIPLE BOTTOM LINE

A company practicing CSR is committed to Triple Bottom Line. It means doing business which leads to sustainability. The 3Ps' (People, Planet, Profit) accounts for social, environmental and financial aspects of business operations. It shows that a business is dedicated to people (employees, stakeholders and community), the environment in which the business is done (irrespective of benefits) and the profit which has to be given back to the society whilst practicing CSR.

The business performance should be based on Triple Bottom Line as it summarizes how a business should actually operate against how business nowadays choose to operate.

Businesses must meet the needs and requirements of the present without compromising the ability of future generation to meet their own needs (World Commission on Environment and Development). The 3Ps' should be balanced while doing business for making a significant difference in the society.

2.4 GOVERNMENT'S ROLE

Organizations pursuing CSR should do so from strategic perspective rather than complying with it as a voluntary action. Also, Government can facilitate by creating an enabling environment, by setting certain minimum standards like minimum age for an employee, emission levels, need for reporting etc., by providing technical assistance, developing policies and incentives structures, capacity building and making information available to the interested participants to promote CSR. Researches based on key issues related to social and environmental challenges of the society must be promoted by the Government, meetings can be held and awareness of CSR can be raised through CSR awards and endorsing CSR related procedures, guidelines and systems.

As per CSR rules given by Ministry of Corporate Affairs, political funding by Indian companies and foreign companies operating in India will not qualify as spending on CSR.

In CSR, activities must be aimed at reducing the disparity faced by economically and socially backward groups.

Activities that help only company employees and their families will not be a part of CSR activities. After consultations with the stakeholders, the companies will have CSR activities promoting health care, sanitation skill development in educational system and environmental protection.

2.5 CSR MANDATE – COMPANY BILL 2013

The CSR clause 135 in the Companies Bill (hereafter referred to as “the Bill”) states that a firm has to spend 2% of net profit made in the previous 3 years.

The Bill is applicable to any company with a net worth of Rs 500 crores or more or otherwise a net profit of Rs 5 crores or more in any fiscal year.

Procedure to Company

- 1) Create a CSR Committee
- 2) Develop CSR Policies
- 3) Allocate 2 percent of net profit (2% - average net profits during last 3 years).
- 4) Report-CSR Initiatives to be Reported

The Board reports have to include annual report on CSR activities. For foreign companies, balance sheet will have an annexure on CSR spend.

2.6 MODELS OF CSR

2.6.1 *Friedman Model (1962-73)*

According to this model, businessmen should perform their duties well, since he is performing a social as well as a moral duty. He has no other social responsibility to perform except to serve his shareholders & stockholders.

2.6.2 *Ackerman Model (1976)*

This model has 4 stages of undertaking CSR and emphasizes on the relation between internal policy goals and CSR. Managers need to identify the social problem and must take the initiative whole heartedly to find a solution to the problem. Once they have made up their mind, hiring experts to analyse the problem in detail and their suggestions to make it operational is the second stage. In the third stage, the managers actively get involved in the project working and finally after evaluating the project the social issue is addressed.

Six strategies are adopted by the managers for CSR initiatives: Rejection strategy, Adversary strategy, Resistance strategy, Compliance strategy, Accommodation strategy and Proactive strategy.

2.6.3 *Carroll Model (1991)- (Base Model of CSR)*

CSR has been around for so many years but gained importance in late 90s'. The Archie Carroll's "Pyramid of Corporate Social Responsibility" has helped in defining CSR perspectives (Carroll 1979).

According to this model, company managers have 4 responsibilities:

- **Economic:** Responsibility to produce quality goods and services for profits (Be Profitable).
- **Legal:** Responsibility to follow rules, regulations and laws set by Government (Obey the Law).
- **Ethical:** Responsibility to do the right things even when the company is not duty-bound to do so by law (Be Ethical).

➤ *Discretionary/Philanthropy*: Responsibility to contribute company resources for the betterment of the society (Be a good Corporate Citizen).

2.6.4 Environmental Integrity & Community Health Model (2002)

This model was developed by Redman and used in the U.S. It provided that for expansion opportunities, companies have to work for human health and environmental integrity.

2.6.5 Corporate Citizenship Model

According to this model, a company has to fulfil four conditions to be a corporate citizen: ethical actions as well as behaviour, sustainable economic performance, consistently satisfactory and commitment. For commitment to corporate citizenship, a company has to fulfil certain social responsibility. This model includes: Transport, Procurement Facilities Management Employment and Skills, Community Engagement and Building.

2.6.6 New Model of CSR

This model is based on 'Ethical Rooting' and 'Financial Capability' of an organization. If both are strong, CSR can be undertaken. If ethical rooting is strong but financial capability is poor or vice versa, CSR cannot be undertaken. Also if both are poor, again CSR cannot be undertaken.

2.7 SIZE OF THE COMPANIES AND CSR

A company is categorized on various parameters like Number of working Employees, Total Sales of a company, and Total Assets in a company (Waddock and Graves, 1997; Brammer and Millington, 2006; Turban and Greening, 1997; Dooley and Learner, 1994; Graafland et al., 2003).

Large scale companies integrate their CSR activities in their operations because they seem to be more visible to public and the social impact is bigger (Brammer and Millington, 2005). For e.g. - companies in the retail and banking sector have high visibility and spend more on society (Useem, 1988). Also, the cost of CSR instruments, code of conduct and reports for large scale companies are found to be lesser as compared to medium sized or small firms (Werther and Chandler, 2005; Graafland et al., 2003). It has also been observed that the larger companies allocate more money to philanthropic activities (Levy and Shatto, 1980).

Small firms are using CSR to achieve a delineation strategy resulting into competitive advantage (Udayasankar, 2008). Also they have lower visibility as they deal with less pressure (Chen and Metcalf, 1980).

2.7.1 Large Industries

- **Manufacturing Sector:** Invest in Plants & Machineries- More than Rs 10 crores.
- **Service Sector:** Invest in Equipments – More than Rs 5 crores.

2.7.2 MSMEs (Micro, Small, Medium Enterprises)

According to the provisions of MSMED Act 2006, they are of two types:

➤ Manufacturing Enterprises-

- who invest in Plant & Machinery;
- Produce goods according to Development and regulation Act, 1951; or
- Employ machines for value addition to final products with a distinct name.

➤ Service Enterprises

- who invest in equipment

Table 2: Limit for Investment (notified vide S.O.1642 (E) dtd.29/9/6) for both Manufacturing and Service enterprises

Enterprises	MANUFACTURING	SERVICE
	Investing in plants/machineries	Investing in Equipment
MICRO	Not more than 25 lakhs	Not more than 10 lakhs
SMALL	More than 25 lakhs but below 5 crores	More than 10 lakhs but below 2 crores
MEDIUM	More than 5 crores but less than 10 crores	More than 2 crores but less than 5 crores

Source: http://www.dcmsme.gov.in/ssiindia/definition_msme.htm

2.8 CSR, ETHICS AND CORPORATE BEHAVIOR

Apart from Carroll's four responsibilities of a manager, other definitions of CSR covered more comprehensively, the corporate behaviour, stakeholder expectations and the society narrowed down to stakeholders. A company's manager has to be more than an ethical and legal person. CSR is not always a legal necessity but it has to be socially responsible (Aras & Crowther, 2008); which is an important requirement for CSR. This provides a platform for social responsibility.

Ethically responsible behaviour and businesses both have a direct impact on the stakeholders, the shareholders and the entire economy. If business decision making processes are done in an ethical manner, there will be more productivity and efficient use of human resources.

3. RATIONALE OF THE STUDY

A company has to operate in economically, socially and environmentally friendly manner (Bernard 1938). Environment related damages, unhygienic and unsafe working conditions, faulty and sub-standard products or services to customers are the issues on the rise that have been noticed due to customers' increasing awareness and consciousness. Apart from profit maximization, companies must operate for the "common good" and work for the benefit of the society.

CSR is a means by which the companies can give back to the society, identify social and environmental challenges and provide innovative solutions. The study tries to identify the CSR priorities and the related areas of involvement of the companies in and around Indore region. The need of the hour is to develop professionals and business communities to make CSR-a phenomena. This study gives an insight regarding how corporate (large, medium, small) have been successfully implementing CSR related activities for the fulfilment of the basic needs, providing better health care facilities, awareness camps, skill development programs and hence improving living standards for all; for a better protected and managed eco system; to have safer and prosperous future.

4. RESEARCH METHODOLOGY

The Study is an Exploratory Study. The data was collected using a pre-defined questionnaire from various respondents across Indore and vicinal to Indore through mails as well as in hard copies

through personal meetings. Data was collected from 50 companies including both-Manufacturing sector (large, medium, and small), Service sector (large, medium, and small) and MSMEs’.

Snowball sampling was used to contact the industries. Since information to be collected was on CSR practices, CEO /MD/HR managers were contacted and debriefed about the purpose of questionnaire. In order to get a more representative and heterogeneous representation of CSR practices across the place, MSMEs’ as well as large scale industries as well as service sector were approached.

The CSR questionnaire captured the companies CSR practices on four thematic areas: ‘Environmental Care’, ‘Education & Employability’, ‘Healthcare’ and ‘Community Welfare & Infrastructure’.

Each theme had sub-themes capturing the detailed responses in each area.

The companies were requested to substantiate their responses with proofs.

Tools for data collection: Structured Questionnaire

Tools for data analysis: Percentages

5. **OBJECTIVES OF THE STUDY**

- 1) To find out the core CSR activities of the companies from both manufacturing as well as service sector (Small, Medium and Heavy industry) in and around Indore city.
- 2) To explore the management system certifications used by various companies.
- 3) To know the importance of management system certifications.
- 4) To study various models of CSR.
- 5) To understand the various challenges in the implementation and execution of CSR activities.

6. **ANALYSIS AND DISCUSSION**

Table 3: Company Types

Types	Number	Percentage
Large	21	42%

Medium	18	36%
Small	11	22%

Source: Author

Data analysis in **Table 3** shows that, out of 50 companies as participants, 42% of the companies were large-sized companies (including manufacturing as well as Service), 18% were medium sized and only 11% were small sized companies. This includes MSMEs as well.

Table 4: Business Management System Certifications

Certifications Types	Total Companies	Percentage
ISO 9001	29	58%
ISO 14001	15	30%
OHSAS 18001	12	24%
SA 8000	4	8%
EICC Self Questionnaire	0	0%
EICC 3 rd party audit	1	2%
EICC member	0	0
Others	11	22%

Source: Author

Table 4 shows the various management certifications used by the companies for CSR. An effective business management system, when implemented effectively in organizations, does build confidence among its employees and shareholders regarding the processes along with the services or products the company produces. This helps in reducing the risk which exists in their minds. Not only is this an effective management system but also creates a basis for continuous improvement in quality and processes which lead to greater customer satisfaction.

The various management system certifications that these companies were running are ISO 9001 (52%), ISO 14001 (30%), OHSAS 18001 (24%), SA 8000 (8%), EICC 3rd party audit (2%). None of the companies were using EICC Self Questionnaire and EICC member Certifications. Also 22% of the companies were using other certifications like DNV, IS/TS 16949, FSSAI, and BPP & RJC.

Based on the principles of Customer Focus, Leadership, Mutually Beneficial Supplier Relationship and System Approach to Management, **ISO 9001** is the world's highly recognized certification adopted by both, manufacturing and service industries, to achieve consistent, measurable cost-saving performance leading to improvements and helping to meet customer needs, motivate and engage staff resulting in high value customers with better customer service. ISO 9000 is the management certification which is used for sustainability helping business to improve the quality of their products or services and with Health and Safety practices (Taylor & Brown, 2005).

ISO 14000 is developed and published by the International Organization for Standardization (ISO). It provides a framework for companies for standardizing and improving their environmental related managerial efforts.

Developed and published by the International Organization for Standardization (ISO) for organizations, **ISO 14000** brings forth the framework for companies that need to standardize and get better their environmental management efforts. It is a sequence in which ISO 14001 is for small and large companies which provides requirements of environmental management system (EMS). It has 5 cycles: Plan-Check-Do-Review-Improve. Depending upon the size of the company, the entire cycle gets covered.

Table 5: CSR Implementation Framework (ISO 14000)

Cycles	What is to be done	How it is to be done
PLAN	<i>Conducting a CSR Assessment</i>	<ul style="list-style-type: none"> • CSR team coming together & defining CSR, reviewing legal requirements, processes, documents, and engaging key stakeholders

	<p style="text-align: center;">&</p> <p style="text-align: center;"><i>Developing CSR strategy</i></p>	<ul style="list-style-type: none"> Assessing what others are doing, recognizing CSR instruments, taking support from top management, preparing proposed plan of actions ,decide on directions and focusing on the areas.
DO	<p style="text-align: center;"><i>Developing CSR related commitments</i></p> <p style="text-align: center;">&</p> <p style="text-align: center;"><i>Implementing CSR related commitments</i></p>	<ul style="list-style-type: none"> Checking of CSR commitments, discussions with stakeholders, creating a working group, making preliminary draft and consulting with stakeholders. Developing and implementing CSR business plan with measurable targets, measuring performance, working on the gaps identified, developing communication plans and making commitments public.
CHECK	<p style="text-align: center;"><i>Ensuring</i></p> <p style="text-align: center;">&</p> <p style="text-align: center;"><i>reporting on the progress</i></p>	<ul style="list-style-type: none"> Ensuring and checking performance and then reporting on the performance
REVIEW & IMPROVE	<p style="text-align: center;"><i>Evaluating the performance</i></p> <p style="text-align: center;">&</p> <p style="text-align: center;"><i>improving the performance</i></p>	<ul style="list-style-type: none"> Evaluating and working upon the improvements. Involving stakeholders.

Source: Paul Hohnen, Corporate Social Responsibility, An Implementation Guide

OHSAAAS 180001 is an international occupational health and safety management system and has two parts, 18001 and 18002. It helps companies to control occupational health and safety risks.

EICC 3rd Party Audit figures out which companies are following EICC code of conduct and which needs some help coming into compliance. It provides a comprehensive Social and Environmental assessment.

SA 8000 is an international certification which influences organizations to develop, apply and Economic Priorities created Social Accountability International (SAI) in 1989 to ensure healthy, hygienic, sustainable workplace for all employees. According to SA 8000, there should be no child or forced compulsory labour, no forming of associations by employees, right to collective bargaining, no discrimination on the basis of caste, religion, nationality, age, gender, colour, union affiliation, political affiliation, etc.

An international certification body **DNV** deals in risk management, advisory and technical assessment.

FSSAI is the Food Safety and Standards Act, 2006 to strengthen food related laws. In India, the Act covers the activities throughout food distribution chain (production to catering). The Government has powers to make rules that regulate food safety when it is in the food distribution chain.

RJC (Responsible Jewellery Council) maintains consumer confidence in diamonds. The diamond and jewellery industry certifies their business on their ethical, social and environmental practices according to RJC. Launched in 2009, it is applicable to members from mining to retail.

BPP (Best Practice Principles) encourages continuous improvement on yearly basis The BPP Programme is found in the Indian diamond manufacturing industry, related to diamond cutting and employee welfare.

Table 6: Media Coverage

Tools used to popularize	Number	Percentage
News bulletins	12	23.5

Reports	16	31.4
Weekly News Video Magazine	3	5.9
News papers	18	35.3
Websites	33	64.7
Other	11	21.6

Source: Author

Table 6 shows the reporting of CSR activities done by various companies using various tools of communication. As seen; most of the companies (64.7%) update the information on their companies' websites. The second preference is publishing the news in the newspapers (35.3%). Some companies (31%) prefer Reports and News Bulletins (23.5%). Very few (5.9%) go with the video shoot of the activities. Rest prefer taking photographs in soft copy.

Table 7: Companies and Related CSR Areas

CSR Related areas	Companies	Percentage
Environmental Care	47	94%
Education & Employability	43	86%
Healthcare	33	66%
Community Welfare & Infrastructure	27	54%
Any Others	5	10%

Source: Author

The major CSR areas in which the various companies were operating were Environmental Care, Education & Employability, Healthcare, and Community Welfare & Infrastructure. Few companies were doing CSR apart from these areas.

Following initiatives pertaining to the above mentioned CSR related areas were taken are as follows:

Table 8: CSR Initiatives in related areas

S. No.	ACTIVITIES	1 Poor	2 Satisfactory	3 Good	4 Excellent	Not Applicable
A. <u>Environmental Care:</u>						
1	Pollution control	0	12	21	14	2
2	Waste Management	2	8	24	14	5
3	Development of Green belt	2	14	9	19	5
4	Energy Conservation	4	8	18	11	4
5	Rain water harvesting	11	4	17	7	6
6	Safety and Environment initiatives	5	10	17	16	4
B. <u>Education & Employability:</u>						
1	Scholarships/Awards to students	1	12	12	8	7

2	Building & Furniture to Schools/Colleges	1	10	4	11	5
3	Teaching –Learning Material in schools / Colleges	2	12	8	12	5
4	Trainings to students	5	8	10	13	5
5	Special School buildings to Physically Challenged Persons	4	4	5	1	7
6	Special Focus on Skill development training to tribal youth	3	8	9	7	6
7	Special Focus on Girl/Women Education	5	5	6	9	4
8	Provision of meals	4	4	6	6	6
9	Vocational Training for adult & youth	2	6	5	11	5
<u>C. Health Care</u>						
1	Health check-up & awareness camps	3	6	11	17	5
2	Potable water	6	2	10	11	6

3	Provide Hospital buildings	7	3	6	4	7
4	Provide Blood Banks	7	5	8	12	4
5	Mobile clinics & Ambulance support	6	2	7	8	6
6	Support & Associate to Special Care hospitals	5	7	8	3	6
7	Women & Child Health	3	4	10	12	5

D. Community Welfare & Infrastructure

1	Awareness Campaigns & Drives to enhance Safety & Quality of life.	6	4	4	10	5
2	Supporting Community Welfare Centres	7	1	5	7	5
3	Multipurpose Halls	8	1	4	2	7
4	Supporting Counselling & Rehabilitation Centres (Personal problems, Natural calamities, etc.)	8	1	6	5	5

5	Donating goods for sustaining livelihoods (sewing machines, hand cart, etc.)	4	5	4	8	5
6	Subsidies for medical treatment.	3	10	5	4	5
7	Community Infrastructure like constructing roads, water tanks, bridges, drainages, providing subsidies for agricultural practices, etc.	4	9	3	7	6
8	Any other (Please Specify)	-	-	-	-	-

Source: Author

6.1 ENVIRONMENT

Environment and society are closely related and are in fact inter-dependent. One of the major causes of environmental degradation is pollution, which is now a threat to human survival. Considerable environmental degradation takes place either in and around areas where companies are located or in rural areas due to lack of awareness about environmental issues among village folks.

It has been found that 70% of the companies are engaged in Environment related CSR activities like development of green belt, rain water harvesting, energy conservation and environment related safety issues and have a mark in this segment particularly in pollution control and waste management. Conservation oriented awareness camps related to development of rural areas are

organized. Whether urban or rural a general worsening of the environment is certain. Also there are serious environmental consequences of extreme urbanization. Unabated rural to urban migration has created large majority of urban dwellers. The rapid growth of urban population has created unprecedented pressure on sanitation, water and other resources. The footprints are seen in both manufacturing as well as service sectors. The variety and the intensity of CSR however, differ across a wide spectrum depending upon the size of the firm and the after effects of its business.

It may be said that environmental CSR is one area that almost all industries indulge into. The mandatory requirements of Government, public awareness and NGO's may be the prime reasons behind this. The large scale manufacturing units specially the automobile, engineering and chemical sectors are conscious of the affluences and waste produced in the conversion process and diligently follows the environment guidelines and norms.

A few mega giants even go beyond the statutory CSR requirement. They indulge in activities like plantations, pollution free zone, and green belt developments preservation of wild life and so on.

The large scale service industries like the telecom, IT, real estate, hospitality and banking are not far behind. They too have a corporate CSR cell and conduct environmental CSR activities like green belt promotion, plantations, green constructions, etc.

The MSME's, though mark their presence in this segment, but they indulge in activities more out of compulsion than by choice. One obvious reason stated by the responders is that they are too small to take up any CSR at large scale and they are not economically sound for it. There also seems to be a lack of awareness about CSR and the various modes and ways in which an organization large or small can contribute to CSR.

6.2 EDUCATION & EMPLOYABILITY

Out of the 64% of the companies that were found to be into education and employment, majority were into training and skill development for their employees and locals of the place. The indulgence of firms on education is variable across the industry size and segment. As there is no compulsion or statutory requirement for the firms on this front, their involvement is purely voluntary. Hence the organizations that are into this segment, understand their role and

responsibility in generating employability, empowerment and livelihood for the individuals in and around their locality.

Some of the large scale organizations employed tribal youth, provided them vocational training and thus, contributed towards development of livelihood for them. They have their vestibule training centres, tie ups with training institutes, certificate courses and sponsored programmes to foster skill development amongst youth and tribal communities so as to enable them to sustain. Also emphasis on girl child education and women empowerment were the areas that have been seriously catered to by a few business giants. However, the CSR efforts in this area are far from sufficient and even do not skim the peripheral layers of the society.

The small scale enterprise had a nominal presence in this category with the only contribution in the form of training and skill development for the employees.

A few medium scale enterprise contribute in this category by providing scholarships, awards and aides to employees' family and community.

The service industries mark their presence in this area by felicitating child education programmes through awards, scholarships, infrastructural support and learning aids. To emphasize women education and empowerment, there are customized programmes for them and customized job profiles only for females so that they develop sustainability.

A collaborative partnership with Government and NGO's in this segment was also seen to promote education and employability.

The MSME's however confined themselves to providing on-the-job training to their employees, sponsor education for the employees' family, donate furniture in school, etc.

The obvious reason, once again, appears to be the lack of knowledge about CSR modes and options. The firms think they are too small to contribute in employability development and their contribution will hardly make any difference to the herculean goal of building a sustainable society. They need to understand that tiny drops of water make the mighty ocean.

6.3 HEALTH CARE

Giving back to the society is embedded in the value system of many companies and they aim to bring about a positive change in the nearby areas. The 50% Companies which are working in health

care sector are engaged in health awareness camps, potable drinking water, child and women care, blood banks, mobile clinics, specialty hospitals and medical aides.

MSMEs are not very prominently present in this segment of CSR. Their presence, if any, is limited to working employees and at the most extended to the families of these employees in the form of medical check-ups and medical insurance. They do provide medical support, donations to hospitals, ambulance facility, potable drinking water, etc. but all this is limited to the employees and their families and at the most, the locales where the plant is located. They are too small to contribute substantially to this segment of the society.

Little bigger brands were into organizing regular health camps, awareness programs, child and women related health camps, blood camps, anaemia and thyroid dis-balance camps, dental check-up camps, bone density check-up camps, eye testing camps, awareness program on cervical cancer, nutrition and balanced diet camps for children, etc.

These companies, in partnership with societies, educational institutions, government bodies, NGOs, wellness foundations and a host of other organizations, try to create difference in the lives of the common man.

6.4 COMMUNITY WELFARE & INFRASTRUCTURE

Infrastructure development and community welfare is another area to indulge in if we want a sustainable society. This segment covered activities like road safety campaigns, quality of life programs, welfare centres, old age homes, rehabilitation centres, community infrastructure, etc. There is a lot that can be done but due to the enormity of the task not many firms have actually reached on to this level of CSR.

Out of the total respondents, only 40% companies were found to be engaged into it. This segment of CSR had been attended to by large scale and few medium scale industries. But the contribution was limited to, building roads and house in the vicinity of their plant, old age homes, rehabilitation centres, donating means of livelihood and so on. This may be more out of necessity than the will to do CSR. Nevertheless even this effort is worth appreciation as it actually contributes to infrastructure development.

The small scale firms were not into it and the medium scale firms that were into this segment restricted their scope and boundary to their immediate community.

Major brands that have a national presence can be seen into this segment, whether it is a manufacturing firm or a service provider firm. They are working in collaboration with NGO's, associations and the Government.

The MSME's are not much really into this as they feel it is beyond their reach.

Will or compulsion, everyone is getting aligned to CSR somehow or the other. CSR myopia can be said to be the reason behind low involvement of firms into CSR. An understanding that CSR is for all and all are beneficiaries from it needs to be developed.

7. CHALLENGES IN IMPLEMENTING AND EXECUTING THE CSR ACTIVITIES

7.1 LACK OF ORGANIZATIONAL COMMITMENT

Employees lack organizational commitment. One reason for this could be lack of benefits offered to them. Studies have shown that commitment of employees is directly proportional to the fringe benefits offered to them.

7.2 ECONOMIC AND COMMERCIAL PRESSURE

All business exists for economic efficiency. Any deviation from profit maximization will divert the companies from their mission. For any social obligations, a huge amount of money is required which may hamper the financial position of a company. Hence, economic values rather than social values are considered as the only criteria to measure a company's success. Therefore, CSR related activities are overlooked while achieving the main objective of a company i.e. profit maximization.

7.3 VISIBILITY

If the CSR activities of companies are highlighted by the media, the company leaves an impact on the minds of its stakeholders. This branding creates a positive image and may force other companies and NGOs to start with CSR. Thus media can play an important role at meaningful grass roots interventions which many companies let pass and fail to notice.

7.4 NON-AVAILABILITY OF EFFICIENT NGOs

There is a need to build local capacities that can actually plan and execute CSR initiatives at grass root level. Lack of trained staff and skills in NGOs limits the CSR initiatives to be planned at macro level and executed federally to micro levels.

7.5 LACKADAISICAL APPROACH OF COMMUNITY PARTICIPATION IN CSR

The lackadaisical approach of the beneficiaries of CSR often squanders the CSR effort in futility. It is a general misconception that CSR is the onus of only a few, contrary to this; CSR is the responsibility of each and every individual. This may be due to lack of awareness, communications and promotion of CSR.

7.6 MISSING AGREEMENTS ON IMPLEMENTING CSR ISSUES

A dissonance on CSR plans and priorities amongst the key CSR prime movers often leads to lack of firm and coherent CSR efforts. The companies, NGOs, agencies and the Government are often on different platforms regarding CSR. Coherence in setting goal, planning and execution is often missing.

Nowadays, due to technicalities in the routine operations of manufacturing companies working on CSR initiatives becomes difficult due to lack of human resources. Also, due to the nature of company's mission, basic plans and policies are just other statements whose implementation seems impractical. In such a case, the management staff needs to understand the needs of the local people, take out some time for community, understand local specific problems and then integrate CSR initiatives into larger developmental plans. Secondly, if one manager is devoted authentically for CSR initiatives and the other managers are not dedicatedly involved; it may hinder the CSR program started by the antecedent. In such a case, all the employees need to be sensitized to change their social attitude.

7.7 TRANSPARENCY ISSUE

Transparency issues evolve due to lack of information sharing between NGOs and companies regarding the plan, scope, impact and the assessment of CSR activities. This lack of trust is detrimental to the success of CSR initiatives.

Transparency, here, refers to the fact that the external impact of CSR activities can be ascertained from the company's reporting. Transparency is important to any external user of such information

since he may not have the information, background details and knowledge which an internal user possesses.

8. CONCLUSION

It was good to find that many companies in Central India, specifically in and around Indore city have started incorporating CSR initiative and hence developing a culture for good corporate citizenship. The companies believe that they have a responsibility towards their local community in terms of doing well. Their ways of fulfilling the responsibilities may be different but they all are doing it.

70% of the companies were organizing CSR activities pertaining the Environment, 64% were engaged into Education and Employability through training and skill development programme and other programmes as well. In Health Care segment, only 50% of the companies were found to take the lead whereas only 40% were into Community Welfare and Infrastructure Development.

The study also shows that most companies show versatility in related CSR activity and covers a huge array covering philanthropic to sustainable to shared values. Also, some firms seemed to be less involved as it was found that their CSR activities were not aligned with the business strategies. A rational, convincing CSR program was found to be missing.

But few large companies were leading by examples. They were found to be investing a lot of their earnings into sustainability projects.

The companies, whether large or medium or small, if practicing CSR, needs to develop logical, rational and consistent CSR strategies in order to have a positive impact on the society.

CSR in our country is moving in a optimistic and affirmative direction, the reason being the existence of huge number of enabling organizations and regulatory bodies like Indian Institute of Corporate Affairs (IICA), the Department of Public Enterprises (DPE), and Ministry of Corporate Affairs (MCA). They are working upon removing disparities without creating a risk in the business growth of the companies.

When all company's employees are socially active, more profits will be generated, leading to the reimbursement of the cost to bottom line with the supported community engaging with the firm. It

is fundamental for all people to do their part, contribute to the improvement of the world and help in the survival of this planet. The bonus in return will be a sustainable world.

9. SUGGESTIONS

- The study reveals that companies have embraced the broad vision of CSR, but somewhere there exists either poor co-ordination or the logic behind the CSR activities. Generally, the managers at different levels are rather involved instead of the top management's serious involvement. Generally, CSR creates value for society. Companies who have been contributing back to the society carry a good image and are considered selfless. Consumers and stakeholders must be aware of a company's philanthropy and CSR is one of the best ways to create a favourable image in the minds of one and all. CSR activities must be inter-related to the company's goal. (Michael Porter and Mark Kramer, 2006) and should provide for increased economic and social values (Miliman et al. 2008).
- Also MSME's clusters of the area, industry association and councils can join hands to systematically work in CSR related areas.
- Diverse factors like societal environment in which the company operates, motivational level of employees, the type of company (manufacturing or service), government funding are the major determinants of successful CSR practices. It is practically not possible for every company to be involved with the same types of CSR activities. But companies need to benefit themselves while benefitting the society. A manufacturing company should come up with its responsibilities to reduce environmental impact. Likewise a finance based company will be successful related to financial literacy and related areas.
- Companies need to identify the areas for the related CSR activities if they want it to be successful in the social areas. An area which may lack sufficient funding for community health and welfare, it becomes a moral responsibility of the company to come up with the funding for welfare rather than putting efforts into other types of CSR initiatives.
- Again if the companies are socially responsible, it should help reduce regulation of funds by the government or otherwise if the Government provides the community with vigorous provisions for society welfare, then the firms must come up with CSR activities and awareness programmes related to environmental concerns.

- Businesses are known for innovations. Such innovative abilities, if aligned parallel to in the implementation of CSR practices, may be helpful in giving solutions to social issues.
- The unsustainable lifestyles of people and the unacceptable levels of poverty are the root causes of the major environmental and social problems. If these two issues are attended with due urgency and seriousness, the road will lead us to better common future. Development, which is not equitable, will not be sustainable and if there is no better common present, there can be no better future for mankind (Swaminathan , 1992).
- It becomes very important for small and medium sized companies to have credibility and long lasting relationships with its stakeholders in the society. This is an important aspect of CSR. This is particularly important in case of MNEs' when they want to establish themselves in small places. If the community or the society feel that the MNEs' are not doing business responsibly, it might be harming the image of the MNEs' and hence, prevent them from conducting business and thus, an intimate relationship must exists between the MNEs' and the stakeholders in small towns.

10. LIMITATIONS OF THE STUDY

- 1) The study does not talk about the impact of the CSR related activities of the companies on the society.
- 2) The study talks about only the 50 companies located in and around Indore city were taken for study. More companies could have been included for the study.
- 3) Similar study can be done at State level.

11. SCOPE FOR FURTHER RESEARCH

The impact of CSR on corporate reputation, corporate performance, corporate financial growth, etc. can be explored.

A study can be conducted on how marketing of CSR activities and other factors can act as a moderating variable in enhancing the corporate reputation.

A study can be also be conducted to analyse the role of CSR on employee satisfaction and hence its possibility on affecting organization performance.

A study can also be conducted on finding out whether CSR helps in trust building for a company.

A study on the kind of the relationship arising due to CSR activities between the stakeholders and the companies can be explored.

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AN ANALYSIS OF SUBSTANTIAL QUESTION OF LAW AND BENCH STRUCTURE

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ABSTRACT

The expression 'Substantial Question of Law' has not been defined in any of the Act nor in any of the Statutes nevertheless the true meaning and connotation of this expression is well settled by catena of judicial pronouncements. The Supreme Court had regretted that in a number of cases no efforts were made to differentiate between "question of law" and "substantial question of law." This paper endeavours deduction and reasoning of the same and attempts to peruse the following:

- 1) Introduction
- 2) Study on Benches
- 3) Need for permanent Constitutional Bench
- 4) Legal Provisions and Law Commissions Report
- 5) Differentiate between Question of Law and fact, Question of Law and Substantial Question of law.
- 6) Critical analysis
- 7) International Perspectives
- 8) Conclusion

The present study is an attempt to highlight the necessity for establishment of a permanent constitutional bench in India.

Key Words: Substantial Question of Law, Benches, Supreme Court, Constitution of India, 1950.

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INTRODUCTION

The postulation of the term substantial question of law has not been explained in any of the Statutes or Acts explicitly. The true meaning and connotation of this expression “substantial question of law” is now well settled by the Courts which have come up with various tests to determine whether the questions raised before the Courts are substantial in nature or not.

A question of law will be substantial question of law if it directly affects the rights of the parties and there must be some doubt or difference of opinion or there is a room of difference of opinion. The Apex Court in several cases has reiterated this principle.²⁸² The question whether a particular case involves a substantial question of law or not is to be examined at the time when the case first comes before the Court.

Therefore, the adjective “substantial” is subject to the opinion of the Courts. There are catena of cases like *Sir Chunilal V Mehta & Sons v Century Spinning and Manufacturing Co. Ltd*²⁸³, *People Union for Civil Liberties v Union of India*²⁸⁴, *Pramati Educational and Cultural Trust v Union of India*²⁸⁵, *Gujarat Steel Tubes v Majdoor Sabha*²⁸⁶ etc which expound on what exactly a substantial question of law is but it may not be possible to provide a straight jacket formula. This is because question of law would be substantial in nature if it is of considerable importance in relation to the final decision of the case. On the other hand, a question so remote and not related to the disputes of the case won't be a substantial question of law. Hence it is left to the discretion of the Court to decide whether a case involves a substantial question of law or not, and whether the same needs to be entertained or not, and this may vary depending upon the facts and circumstances of each case.

STUDY ON BENCHES

The etymological meaning of the term benches is “persons who administer justice or magistrate or judge or judges sitting in Court in judicial capacity to compose the court collectively.” Further, the etymological meaning of Constitution is “the way in which someone or something is composed or

²⁸² Neek Ram Sharma & Co v Income Tax Appellate Tribunal & others, 2003 262 ITR 692 J K, and Santosh Hazari V. Purushottam Tiwari, 2011 3 SCC 179.

²⁸³ 1962 AIR 1314, 1962 SCR Supl. (3) 549

²⁸⁴ AIR 1997 SC 568

²⁸⁵ 2104 (8) SCC 1

²⁸⁶ (1279) UJSC 166

the law determining the fundamental political principles of the government.” Thereby, combining both these terms we get as to what is called as a Constitutional Bench. Thus, Constitutional Bench is the name given to the benches of Supreme Court of India, which consist of at least five judges of the Court, which sit to decide any case involving substantial question of law as to the interpretation of the Constitution. It needs to be noted that the Constitutional Bench is empowered only to hear such question that directly or substantially involves interpretation of the Constitution in the context of the intent of the framers of Constitution. This implies that question of law not forming constitutional importance can be encouraged by Courts other than Constitutional Bench which is exclusively established for the purpose of determining issues of constitutional importance.

Therefore, the scope of entertaining substantial question of law by the Apex Court and High Court is mandated by Article 136, Article 132 to 134 and Article 228 of the Constitution, which vividly elucidates the enhanced horizon of both Apex Court and High Courts to hear cases involving substantial question of law. The only difference which can be drawn in relation to the gamut of Constitutional Benches in entertaining questions of law, only as to those which carries constitutional importance or interpretation of any constitutional provisions. Whereas, Supreme Court while exercising its Appellate and extra ordinary jurisdiction and High Court while exercising its original as well appellate jurisdiction are empowered to hear cases forming general importance or a decision which shocks the conscience of the Court. Hence, the scope of hearing cases involving substantial question of law by the High Courts and Supreme Court is not confined when compared to the realm of Constitutional Benches.

Moreover, the composition of Benches is made by the Chief Justice of India acting in his administrative capacity and hence decides that the Court should sit in divisions consisting of Judges whose number may be determined by the exigencies of judicial need or depending upon the nature of the case including any statutory mandate relating thereto and such other considerations which the chief Justice in whom such authority devolves by convention, may find appropriate. Constitutional Benches have decided many of India’s best known and important cases, such as *A.K Gopalan v State of Madras*²⁸⁷, *Keshavananda Bharati v State of Kerala*²⁸⁸, *Ashoka*

²⁸⁷ 1950 AIR 27, 1950 SCR 88

²⁸⁸ (1973) 4 SCC 225

*Kumar Thakur v Union of India*²⁸⁹, *Ram Dalmia v S.R Tendolkar*²⁹⁰, *Indra Sawhney v. Union of India and Ors.*²⁹¹etc. It is submitted that once a Constitutional Bench takes the session of the case and starts hearing the case then that Bench alone must decide the whole of the case including constitutional issues or otherwise, arising in the case.

LEGAL PROVISIONS

Article 145 (3) Constitution of India expressly lays down that the Constitution itself provides that not less than five judges shall sit for deciding any case involving any substantial question of Constitutional interpretation and for hearing reference under Article 143 of the Constitution.

By virtue of Article 145(3) of the Constitution, the practice of hearing cases by Division Courts is thus sanctioned by the Constitution, but in the view of comparative seriousness of Constitutional decisions, the Constitution prescribes a minimum strength of a Division Bench, which could hear such cases, ensuring thereby that the constitutionality of a law shall never be determined by less than five judges. This principle has been enshrined in case of *Abdul Rahim v State of Bombay*²⁹²and further been upheld in many cases²⁹³. Therefore, Article 145(3) insists that all constitutional questions should be heard and decided by a Bench of not less than five judges.

The need for five or more judges sitting in judgment over questions of constitutional importance traces its history to the deliberations of the Drafting Committee in October 1948 when it recommended that the Proviso to Article 121(2) what is now Article 145(3) read that “it shall be the duty of every judge to sit for the said purposes”, the purpose herein being “deciding any case involving a substantial question of law as to the interpretation of this Constitution.” While this suggestion was not adopted in its entirety, we do have Article 145(3) in this place instead.

Article 141 of the Constitution elucidates that law declared by the Supreme Court shall be binding on all courts throughout the territory of India. The “*litera legis*” of the above provision clearly indicates to Courts other than Supreme Court. The effect of this interpretation is that the smaller Bench has the competency to doubt the correctness of a larger bench decision. On the other hand

²⁸⁹ 2007(7)SCR 63, 2007(4)SCC39

²⁹⁰ 1958 AIR 538, 1959 SCR 279

²⁹¹ [1992] Suppl. 3 SCC 217

²⁹² AIR 1959 SC 1315

²⁹³ *Ram Charan v State of Bihar*, AIR 1966 SC 1629, *Bhagwan v state of Maharashtra*, AIR 1956 SC 682

lacks the competency to overrule the decision laid by the larger Bench, implying that a smaller bench is bound by the decision of the larger bench not owing to demands of Article 144 but the need for certainty in law and judicial propriety requires it.

Further, it can be observed that Order 7 Rule 1 of the Supreme Court Rules, 1966 states that subject to the other provisions of the Rules, every cause, appeal or matter shall be heard by a Bench consisting of not less than two Judges nominated by the Chief Justice. The proviso to Order 7 Rule 1 empowers the Chief Justice to nominate a Single Judge to hear and dispose of certain matters. The same has been reiterated by Supreme Court Rules, 2013. And Order 35 Rule 1(1) requires every petition under Article 32 of the Constitution to be heard by a Division Court of not less than five Judges and if such petition does not raise any substantial question of law as to the interpretation of the Constitution, it may be heard and decided by a Division Court of less than five Judges. Sub-rule (2) of Rule 1 of Order 35 empowers a Bench of less than five Judges to decide interlocutory and miscellaneous applications filed in a writ petition under Article 32 even though the writ petition may involve substantial question of law as to the interpretation of the Constitution.

Adding on Rule 10 of Order 38-A of the Supreme Court Rules requires a reference under Section 257 of the Income Tax Act, 1961 to be heard by a Bench of not less than three Judge and Order 39 Rule 13 requires the preliminary hearing of an election petition filed challenging the election of President or Vice-President to be heard by a Bench of five Judges and Rule 20 of Order 39 requires not less than five Judges to hear the final hearing of such election petition.

Therefore, the Supreme Court Rules highlights the circumstances under which the matter needs to be referred by a Bench of at least five judges of the Supreme Court. Thereby the scope of referring cases to Constitutional Bench is not just confined to cases involving constitutional interpretation but also extends to reference under taxation issues and election petitions as specified above and thus embracing the enhanced scope of Constitutional Benches in entertaining various cases of substantial importance.

MATTERS OF SUBSTANTIAL QUESTION OF LAW HEARD IN HIGH COURT:

Under Section 100 of the Civil Procedure Code, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied

that the case involves a substantial question of law. This section was applied in a few cases like *Haryana Wakf Board v Mahesh Kumar*²⁹⁴, *Ashok Rangnath Nagar v Shrikant Govindrao Sangvikar*²⁹⁵, *Nasib Kaur and Ors v Col. Surat Singh (Deceased) Through L. RS & Ors*²⁹⁶ etc.

INTERNATIONAL PERSPECTIVE ABOUT PERMANENT CONSTITUTION BENCH:

“To decide any case of constitutional importance or involving substantial question of law as to the interpretation of the constitution, there is a need that five or more judges have to sit to decide these proceedings”, this was a precedent held by Justice Felix Frankfurter of the Supreme Court of the United States advising Sir B.N.Rau that the court should sit en banc so as to lend finality and authoritativeness to its decisions.

Further, Nick Robinson captures this facet perfectly in his book titled “ A Quantitative Analysis of the Indian Supreme Courts Workload” that an “Indian Supreme Court” is in many ways a misnomer for the Court speaks through its various benches and not in a single voice like the Supreme Court of U.S.A. Thereby, Robinson also calls it a “polyvocal court” where every bench has a different interpretation of law when compared to another bench this is because the polyvocality of the Court has repercussions for the quality of the jurisprudence as well as the manner in which litigant see the court.

The Indian Supreme Court functions quite differently from the UK Supreme Court. The UK Supreme Court hears about 65 cases in a year while the Indian Supreme Court hears close to 50,000. Panels of five judges usually make decisions of the UK Supreme Court whereas the two-judge bench is the norm in the Indian Supreme Court. (The recent Brexit judgement by the UK Supreme Court was rendered by a panel of 11 judges).

The sheer output from the Indian Supreme Court makes it difficult for academics and practitioners alike to critically and comprehensively analyse the jurisprudence of our court. On days when the Indian Supreme Court functions at full strength it has up to 15 benches deciding cases, each with potent judicial review powers. While we take judicial review as a facet of constitutionalism for

²⁹⁴ [2013] 12 S.C.R. 596

²⁹⁵ (2015) 43 SCD 087

²⁹⁶ 2013 (1) CLR (SC) - 817

granted, and constitutional adjudications are possibly as old as democratic constitutionalism, this was a lonely journey for the US Supreme Court for nearly a century and a half.

Therefore, comparing different forms of government, it can be seen that there are constant cases dealing with various constitutional matters which are of substantial importance this has also lead subsequent issues of excessive cases filed of the same matters and difficulties in disposing the same. In order, to reduce the same an inclusion of Constitution Bench mechanism could help solve this perspective of cases, however the more viable solution will be to have a permanent Constitutional Bench to just deal with matters relating to Constitution and Judicial Review. The High Courts and other subordinate courts to deal with matters relating any other legal discipline to endure justice. This will bring forth a structure and reduce the burden of the Apex Court and will be a possible solution for easier disposal of cases of all level.

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As constitutional adjudication occupies a place of its own, it always merits consideration as to whether there should be a separate constitutional court, as is the position in about 55 countries of the world (Austria established the world's first separate constitutional court in 1920), or at least the Supreme Court should have a Constitutional Division. Many continental countries have constitutional courts as well as final courts of appeal called courts of cassation ("Cour de Cassation" in French) for adjudication of non-constitutional matters. A court of cassation is the judicial court of last resort and has power to quash (casser in French) or reverse decisions of the inferior courts.

This paper is in dire search for solution for the unbearable load of arrears under which our Supreme Court is functioning as well as the unbearable cost of litigation for those living in far-flung areas of the country. The agonies of a litigant coming to New Delhi from distant places like Chennai, Thiruvananthapuram, Puducherry in the South, Gujarat, Maharashtra, Goa in the West, Assam or other States in the East to attend a case in the Supreme Court can be imagined; huge amount is spent on travel; bringing one's own lawyer who has handled the matter in the High Court adds to the cost; adjournment becomes prohibitive; costs get multiplied.

The tenth Law Commission in its 95th Report titled "Constitutional Division within the Supreme Court – A proposal for", submitted in 1984, recommended that the Supreme Court of India should

consist of two Divisions, namely, (a) Constitutional Division, and (b) Legal Division. The proposed Constitutional Division of the Supreme Court should be entrusted with matters of constitutional law i.e., every case involving a substantial question of law as to the interpretation of the Constitution or an order or rule issued under the Constitution and every other case involving a question of constitutional law. Other matters coming to the Supreme Court will be assigned to its Legal Division. It was further recommended that judges appointed to the Supreme Court would, from the very beginning, be appointed to a particular division. For effecting these recommendations, it was opined in the said Report, amendment of the Constitution would be necessary; ordinary legislation, vide article 246(1) read with Entry 77 of the Union List or statutory rules, vide article 145 of the Constitution would not be adequate.

CONCLUSION

An important factor which needs to be kept in view is that in India, according to the Law Commission's 120th Report titled "Manpower Planning in Judiciary: A Blueprint", submitted in 1987, the ratio between judges and population is 10.5 judges per million (Shri Justice S. P. Bharucha, former Chief Justice of India, in his Law Day address in 2001 stated this figure to be 12 or 13), whereas it is 107 per million in USA, 75.2 per million in Canada, 50.9 per million in U.K. and 41.6 per million in Australia. 2.9 It is, therefore, evident that the ratio between judges and population is hopelessly low in our country. The same is apparent in the apex court as well since the Judges were 25 and the institution of cases was 28,007 cases in January-April 2008. The ratio works out to 1: 112. The figure given above is of institution of new cases only. If the pending arrears of 46,374 are taken into account, the ratio will be 1: 1855. 2.10 Therefore, it is argued that the bench-strength of the Supreme Court should be increased drastically to cover the backlog of pending cases and to promote future developmental programs in the judiciary and thereby minimize delays in the justice-delivery system and promote speedy justice, which is the avowed goal of the Constitution. But it is equally effectively argued that mere increase in number of Judges might not help improve the system.

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