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Alignment	:	Justified
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Font	:	Times New Roman
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ONLINE HATE SPEECH AND ITS LEGAL IMPLICATIONS IN INDIA

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ABSTRACT

India constitutes a democratic nation, and our right to freedom of expression is one of our fundamental rights. However, there are some restrictions to free speech, such as the possibility of punishment for those whose words are offensive, dangerous, or endanger others. Several provisions of the Indian Penal Code ban discussing hate speech because the country's rules against it are intended to avoid strife among its numerous communities and citizens. Any words that disparage or demean a group of people based on their race, caste, gender, religion, or other characteristics are considered hate speech. Other than expressing hatred for other individuals, the words have no other significance. Hate speech is on the rise in India on a daily basis because of carelessness and misunderstandings that freedom of expression does not necessarily mean that a person can say whatever they feel is appropriate. People will discriminate against one another and adhere to the caste system because India is a very populous nation with a variety of religions. This is turning into a significant issue for the growth of hate speech in India, thereby showcasing the importance of its regulation.

Keywords: Democracy, Freedom of expression, Hate speech, Discrimination, Regulation

1.1. INTRODUCTION

Bringing together of people from every corner of the globe has sped up technical advancement, but it has also raised some extremely odd problems about the law and how it is applied. Given that whatever is composed on the web may have been generated by anybody; from any part of the entire world; published on a server anyplace in the global community; and accessible to (or directed at) any individual; wherever in the world as a whole, the term "hate speech" by itself, which had previously been ambiguous, was made increasingly so. Hate speech is now widely acknowledged as posing an imminent danger to civilization. With the message reaching a large audience quickly in this digital age, the problem of hate speech becomes even more significant. Since there is now no effective legal framework in place, the creation and distribution of internet information has become a new problem in the fight against hate speech. In order to close the legal gaps created by this, legislation must be introduced. A new legislation governing hate speech on the internet in India has been frequently stressed by the Supreme Court of India. Additionally, the Law Commission of India and many expert committees have submitted studies suggesting various changes to the current laws.

1.2. RESEARCH PROBLEM

The meaning to hate speech has historically been vague, although it is typically constrained and geared toward the objectives of the state's governing power. It is often simpler to agree on definitions of "hate speech" where societies are clearly defined such as by geography. The concepts of "hate speech" tend to rely upon the social and philosophical norms of any civilization. The reason for this was due to the fact that only an imposing organization that was well-known, revered, or believed among everybody within the area could impose the definition there. Such territorial limitations have been eliminated by

the expansion of the Internet as a worldwide channel of interaction.

1.3. LITERATURE REVIEW

Chinmayi Arun, *On WhatsApp, Rumours, Lynchings, and the Indian Government*

This article analysed WhatsApp's role in the propagation of rumours that resulted in mob violence in India. Because of WhatsApp's end-to-end encryption, it emphasized the difficulties in holding individuals accountable. The Indian government demanded that WhatsApp accept responsibility for the propagation of fake information and adopt preventative steps. The article, however, contended that tackling the core causes of violence, such as social and economic disparities, is critical. The importance of improved media literacy education and critical thinking abilities was also stressed. To solve the issue, it finished by proposing for a multi-stakeholder approach involving the government, technology corporations, civic society, and individuals.

Barrie Sander, *Freedom of Expression in the Age of Online Platforms: The Promise and Pitfalls of a Human Rights-Based Approach to Content Moderation*

The difficulties of content control on online platforms were examined in this article, focusing on hate speech. It discussed the drawbacks of a human rights-based approach to content management and made the case that platforms need to be more proactive in preventing harm from online hate speech. It also emphasized the possibility of unexpected repercussions of content moderation rules, such as restricting appropriate speech. The necessity of cooperation between platforms, civil society, and governments was stressed, as well as the significance of transparency, accountability, and participation in content moderation choices. The paper called for a balanced and context-specific approach to content management that respects freedom of expression while averting harm from hate speech.

Ganesh Bhutkar, Vidhi Raghvani, and Siddharth Juikar, *User Survey about Exposure of Hate Speech among Instagram Users in India*

To determine the scope and effects of hate speech on Instagram users in India, a poll was undertaken. The survey's findings were discussed in this article. Numerous users were subjected to hate speech on the social media platform, according to the survey. The article examined the various forms of hate speech recognized and emphasized the detrimental effects it has on both people and society at large. Additionally, it highlighted the shortcomings of Instagram's content control guidelines and the want for more effective reporting systems. According to the authors, teaching users on how to spot hate speech and report it could be a useful strategy for doing so. It emphasized, in its conclusion, the importance of online platforms accepting accountability for the dissemination of hate speech and taking meaningful action to solve the problem.

Abhishek Velankar, Hrushikesh Patil, and Raviraj Joshi, *A Review of Challenges in Machine Learning based Automated Hate Speech Detection*

This article looked at the difficulties in creating automated systems for detecting hate speech based on machine learning. It talked about how difficult it is to define hate speech and how accurate identification requires strong training datasets. It also brought to light the shortcomings of current algorithms in identifying hate speech that is dependent on context and the possibility of biased results. The essay went into more detail about the moral issues of automated hate speech detection, including issues with free speech and privacy. To create more accurate hate speech detection systems, the authors recommended interdisciplinary cooperation between specialists in machine learning, linguistics, and social sciences. The article's conclusion emphasized the value of ongoing study and advancement in order to deal with the complicated problems related to automated hate speech identification.

Mehvish Ashraf, *Online Hate Speech in India: Issues and Regulatory Challenges*

This article addressed the problem of hate speech on Indian online forums. The article emphasized how hate speech could have a detrimental effect on both individuals and society at large. It also looked at how difficult it is to control hate speech online because of the vast volume of content and the absence of precise definitions and rules. The necessity of a thorough legal system that strikes a balance between the right to free speech and the need to suppress hate speech was discussed. The risk of censorship

and the significance of accountability and openness in content filtering were also underlined.

1.4. SCOPE AND OBJECTIVES

This paper aims to analyse online hate speech in India. This research paper includes the evolution of online hate speech in India. It discusses the role of social media in amplifying hate speech. It also talks about the legal frameworks for freedom of religion and hate speech on religion. This paper also covers various cases where online hate speech led to hurting of religious sentiments. It looks into why the term "hate speech" could not be defined yet. Lastly, it talks about the ways in which such unfair use of freedom of expression can be curtailed.

1.5. METHODOLOGY

The Doctrinal method will be followed for conducting research on the topic. The kind of research done was Descriptive and Explanatory. Normative research will be conducted where various books were referred to and so were many websites, articles, for a clear view on the research paper. The study will also review relevant literature, laws, and statutes related to the online hate speech in India. Various cases will be studied and analysed, which will be collected from case law search engines like Manupatra and SCC Online.

1.6. RESEARCH QUESTION

- What are the legal regulations available in other countries to curb online hate speech?
- Has the term "hate speech" been defined yet in India?

1.7. HYPOTHESIS

Different countries have different rules and regulations to curb the menace of online hate speech in India.

India has not defined the term "hate speech" till now. However, as per the United Nations, "hate speech" refers to offensive discourse targeting a group, or an individual based on inherent characteristics (such as race, religion or gender) and that may threaten social peace.

2. INTRODUCTION

Since the beginning of mankind, people have always had a tribal nature. The concept of "us" vs. "them" is unavoidably born out of the collectivist idea of a group based on uniform characteristics like complexion, race, language in question, and traditions. The man was ultimately compelled to interact with individuals who were distinct from him on similar conditions so as to meet his numerous requirements. However, the prejudice that existed between the two communities did not entirely disappear as a result of this interaction. The physical violence and verbal abuse are the two main ways that a discriminating attitude manifests itself. This led to the idea of hate crimes being acknowledged by the government.

The freedom of expression is a right secured under the Indian Constitution. It is protected in Article 19(1)(a) of the Constitution that states all citizens have the freedom of expression. This right allows individuals to express their thoughts, opinions, beliefs, and ideas freely through various mediums, such as speech, writing, printing, publishing, and other forms of communication. However, it is important to note that this right is subject to certain reasonable restrictions mentioned under Article 19(2) of our Constitution. These restrictions allow the government to impose limitations on freedom of speech in the public order interest, decency, morality, security of the state, friendly relations with foreign states, defamation, incitement to an offense, and integrity and sovereignty of India. [1]

The Indian judiciary plays a crucial role in understanding and safeguarding the freedom of speech. The Apex Court of India has consistently held this freedom to be the foundation of a democratic civilization and should be given a broad interpretation to protect and promote diverse viewpoints and ideas. The court has recognized that the right to criticize, dissent, and engage in peaceful protest is an essential component of this freedom. However, the Supreme Court has also recognized the need to balance freedom of speech with other competing rights and interests, such as maintaining public order,

1 Mehvish Ashraf, Online Hate Speech in India: Issues and Regulatory Challenges https://www.ijlmh.com/online-hate-speech-in-india-issues-and-regulatory-challenges/ accessed 20th May 2023

preserving communal harmony, and preventing hate speech and incitement to violence. The court has laid down various tests and principles to determine the constitutionality of restrictions on freedom of speech, emphasizing the importance of proportionality and reasonableness.

The development of the internet has changed the way people interact with one another. The speed and wide audience reach of internet communication, combined with the ability to remain anonymous, bring together people who share similar views, and the inadequacy of current legal frameworks to deal with such issues, make it an ideal environment for hate-related crimes. Abuse that is directed in online forums frequently carries over and is reflected in real life as well. Due to some internet content, numerous cases of mob lynchings, racial unrest, and horrific murders have been documented recently. [2]

3. EVOLUTION OF HATE SPEECH IN INDIA

3.1. Pre-Independence Era

In the pre-independence era of India, hate speech often played a significant role in exacerbating communal tensions and divisions within society. The period leading up to India's independence from British colonial rule was marked by social and political movements that sought to assert the rights and aspirations of various religious and communal groups. During this time, hate speech was employed by different political factions to mobilize support, consolidate power, and advance their agendas. The rhetoric used in public speeches, writings, and propaganda often targeted specific religious or communal groups, aiming to create fear, animosity, and mistrust. The communal divides between Hindus and Muslims were particularly exploited for political gains. Leaders from both communities used inflammatory language to incite religious sentiments and deepen the sense of separateness between the two groups. This rhetoric often portrayed the "other" community as a threat, fostering an "us vs. them" narrative. [3]

One notable example of hate speech during this era was the partition of India in 1947, which led to the creation of India and Pakistan as separate nations. The communal tensions between Hindus and Muslims escalated to a point where hate speech fuelled violence and large-scale riots, resulting in the loss of thousands of lives and mass displacement of people. Political and religious leaders, as well as influential speakers and writers, played a crucial role in shaping public discourse and influencing public opinion through hate speech. Divisive rhetoric, based on religious, cultural, and communal identities, was employed to garner support and consolidate power among specific groups. However, it is important to note that not all leaders and movements resorted to hate speech. Many prominent figures, such as Mahatma Gandhi and Jawaharlal Nehru, advocated for unity, peace, and harmonious coexistence among different communities. They emphasized the values of tolerance, non-violence, and inclusivity in their speeches and actions.

3.2. Post-Independence Period

In the post-independence era of India, hate speech continued to be a significant issue, although the nature and context of hate speech evolved in response to changing socio-political dynamics. While India's leaders emphasized secularism and the ideals of unity in diversity, instances of hate speech persisted, often leading to communal tensions and acts of violence.

- **Communal Riots:** The post-independence period witnessed several instances of communal riots, often fuelled by hate speech. These riots were triggered by religious or communal tensions and resulted in violence, destruction of property, and loss of lives. Hate speech, both in public speeches and through media outlets, played a role in inciting and exacerbating these conflicts.
- **Extremist Groups and Political Rhetoric:** Various extremist groups emerged, promoting religious nationalism and divisive ideologies. Some political parties and leaders used hate speech to rally support and consolidate their base. Inflammatory language, targeting specific religious or communal groups, was employed to create fear, polarize communi-

2 Supra n1
3 Supra n1

ties, and gain political mileage. [4]

- **Caste-Based Discrimination:** Hate speech was also prevalent in the context of caste-based discrimination. The caste system, although officially abolished, continues to influence Indian society. Hate speech targeting lower-caste communities, such as Dalits, often perpetuated discrimination, reinforcing social hierarchies, and creating a hostile environment.
- **Technological Advancements and social media:** The advent of the internet and social media platforms in the 21st century has had a significant impact on the spread and amplification of hate speech. Online platforms provide a medium for individuals to express and disseminate hateful ideas and stereotypes, often anonymously. This has contributed to the rapid spread of hate speech and its ability to incite violence and create social tensions.

4. DEFINING HATE SPEECH

In layman's terms, "hate speech" refers to offensive statements that may endanger societal harmony and targets a group or a person based on intrinsic traits (such as race, religion, or gender). The UN Strategy and Plan of Action on Hate Speech defines hate speech as "any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor" in order to give the UN a unified framework to address the issue on a global scale. International human rights legislation does not, as of yet, have a standard definition of hate speech. [5]

Hate speech refers to any form of communication, be it spoken, written, or expressed through other means, that promotes, incites, or advocates hatred, discrimination, hostility, or violence towards individuals or groups based on attributes such as their race, religion, ethnicity, nationality, sexual orientation, gender identity, or other protected characteristics. Hate speech typically involves derogatory, offensive, or inflammatory language, gestures, symbols, or actions that aim to demean, marginalize, or dehumanize targeted individuals or groups. It often seeks to perpetuate stereotypes, promote prejudice, and create an atmosphere of fear, intolerance, or animosity. It is important to note that hate speech is distinct from legitimate criticism, freedom of expression, or the peaceful expression of dissenting opinions. It goes beyond the boundaries of respectful and constructive dialogue, violating the dignity, equality, and rights of individuals or communities.

Various international and national legal frameworks and human rights instruments provide guidelines for understanding and addressing hate speech. However, the definition and boundaries of hate speech may vary depending on cultural, social, and legal contexts. While the freedom of speech is a fundamental right, hate speech is generally not protected under this right. Many countries have enacted laws or regulations that aim to restrict or penalize hate speech, striking a balance between protecting individuals' rights and ensuring social cohesion, equality, and the prevention of harm.

5. HATE SPEECH vs. FREEDOM OF SPEECH IN INDIA

Freedom of speech is a fundamental right protected under the Indian Constitution. It is contained in Article 19(1)(a) of the Constitution, which states that all citizens have the right to freedom of speech. This right allows individuals to express their thoughts, opinions, beliefs, and ideas freely through various mediums, such as speech, writing, printing, publishing, and other forms of communication.

The recognition of freedom of speech in India reflects the importance placed on the values of democracy, pluralism, and open dialogue in a diverse society. It is considered a cornerstone of a vibrant democracy and serves as a crucial tool for fostering public debate, challenging existing norms, and holding those in power accountable.

Nevertheless, it is critical to observe that freedom

4 Barrie Sander, Freedom of Expression in the Age of Online Platforms: The Promise and Pitfalls of a Human Rights-Based Approach to Content Moderation, 43 FORDHAM INT'l L.J. 939 (2020).

5 United Nations, [https://www.un.org/en/hate-speech/understanding-hate-speech/what-is-hate-speech] (last visited 17 May 2023).

of speech is subject to certain reasonable restrictions mentioned in Article 19(2) of the Constitution. These restrictions include the interests of public order, decency, morality, security of the state, friendly relations with foreign states, defamation, incitement to an offense, and the integrity and sovereignty of India. These limitations are intended to strike a balance between protecting individual rights and ensuring the welfare and well-being of society. Hate speech is considered a reasonable restriction on freedom of speech in India. Freedom of speech is not an absolute right and is subject to certain limitations in the interest of public welfare, social harmony, and the rights of others. [6]

The restrictions on hate speech are justified for several reasons. First, hate speech undermines the principles of equality, dignity, and non-discrimination enshrined in the Constitution. It perpetuates stereotypes, fosters prejudice, and promotes social divisions, hindering the goal of a harmonious and inclusive society. Second, hate speech has the potential to incite violence and disturb public order. It can trigger communal tensions, riots, and other forms of social unrest, posing a threat to the security and stability of the state. By restricting hate speech, the government seeks to prevent the escalation of conflicts and maintain social harmony. Third, hate speech infringes upon the rights of individuals and communities targeted by such speech. It denies them their right to dignity, respect, and equal participation in society. Restricting hate speech is necessary to protect the rights and well-being of those who may be subjected to discrimination, harassment, or violence because of such speech.

6. CAUSES BEHIND INCREASE IN ONLINE HATE SPEECH IN INDIA

Online hate speech in India can stem from various factors, including social, political, and technological elements. Understanding the causes can provide insight into addressing this issue effectively. Here are some factors that contribute to the prevalence of online hate speech in India:

- **Communal and Religious Tensions:** India is a diverse country with various religious and cultural communities. Deep-rooted communal and religious tensions can contribute to the spread of hate speech online. Divisive narratives, misinformation, and stereotypes can be amplified through digital platforms, exacerbating existing tensions and fuelling hate speech.
- **Misinformation and Fake News:** The spread of misinformation and fake news contributes to the propagation of hate speech. False narratives, rumours, and manipulated images or videos can be shared virally, leading to the creation of an environment conducive to hate speech. Lack of media literacy and critical thinking skills among users exacerbates this problem.
- **Political Polarization:** Political divisions and polarization can play a significant role in the proliferation of hate speech online. Political leaders, parties, or supporters may engage in or tolerate hate speech to target opponents, incite their followers, or reinforce their ideologies. This can further polarize society and create an environment conducive to hate speech. [7]
- **Anonymity and Online Disinhibition:** The anonymity afforded by online platforms can lead to a sense of detachment and disinhibition, making individuals more likely to engage in hate speech. People may feel emboldened to express hateful views without facing immediate consequences, leading to the spread of vitriolic content online. [8]
- **Lack of Digital Literacy and Awareness:** Limited digital literacy and awareness about the responsible use of online platforms can contribute to the spread of hate speech. Many individuals may not fully understand the consequences of their actions or may not be equipped with the skills to critically evaluate information, leading to the inadvertent or deliberate sharing of hate speech content.
- **Online Trolling and Harassment Culture:** Online trolling and harassment are preva-

6 Supra n4

7 Evolution of hate speech in India, Legal Service India (17th May 2023), https://www.legalserviceindia.com/legal/article-6408-evolution-of-hate-speech-in-india.html

8 Ibid

lent in India, and they often overlap with hate speech. Individuals may engage in targeted harassment or abuse under the guise of anonymity, creating an atmosphere of fear and intimidation. This culture of online harassment can further propagate hate speech and discourage open and respectful dialogue.

7. REGULATION OF ONLINE HATE SPEECH IN INDIA

In India, hate speech is addressed and governed by various provisions under the Indian Penal Code (IPC), the Information Technology Act (IT Act), and other legal frameworks. These provisions aim to prevent the promotion of hatred, enmity, discrimination, or violence based on factors such as religion, race, caste, gender, or other protected characteristics. Here are some key provisions governing hate speech in India:

- **Section 153A of the IPC:** This section deals with acts that promote enmity between different religious, racial, or linguistic groups, and prohibits deliberate and malicious acts intended to outrage religious feelings or disturb public harmony. Violations of this section can result in imprisonment and/or fines. [9]
- **Section 295A of the IPC:** This section criminalizes intentional and malevolent acts aimed to disgrace the religious feelings of any community by abusing their religious principles, symbols, or places of worship. Offenders can face imprisonment and/or fines.
- **Section 298 of the IPC:** This section targets hate speech directed at any religious, racial, or linguistic group to wound their religious feelings. It aims to prevent the promotion of enmity or disharmony between communities and imposes penalties for offenders.
- **Section 505 of the IPC:** This section deals with statements or rumours circulated with the intent to incite any class or community to commit an offense against another, creating fear or alarm in the public. It seeks to prevent the spread of hate speech that may disrupt public order or peace. Violations can lead to imprisonment and/or fines.
- Under Section 8 of the Representation of People's Act of 1951, person who has been found guilty of using their right to free expression unlawfully is prohibited from running for election. [10]
- The Sections 123(3A) and 125 of the Representation of People's Act of 1951 prohibit and classify as corrupt electoral practices the propagation of hatred based on race, religion, community, caste, or language in relation to elections. [11]
- **Section 66A of the IT Act (no longer in force):** Section 66A was added to the Information Technology Act in 2008 to punish online hate speech, but it was later declared unconstitutional by the Supreme Court in **Shreya Singhal v. Union of India**[12] . The Court found that the provision restricted the right to freedom of speech in an arbitrary and disproportionate manner, and therefore violated Article 19(1)(a) of the Constitution. The case involved two girls who were charged u/s 66A for a post on Facebook that was deemed to be hate speech. The widespread condemnation of the arrests led to a Public Interest Litigation and ultimately the provision was struck down. [13]
- **Section 69A of the IT Act:** This section empowers the government to issue directions to block public access to any online content that is deemed to be against the interests of the integrity and sovereignty of India, defence, security of the state, friendly relationships with foreign states, public order, or to prevent provocation to the commission of any offense. This provision can be used to restrict access to online hate speech.

9 Supra n8

10 An Indian law on hate speech: the contradictions and lack of conversation, CJP (20th May 2023), https://cjp.org.in/an-indian-law-on-hate-speech-the-contradictions-and-lack-of-conversation/

11 Hate Speech & Dissenting Views of the Supreme Court, CJP (21st May 2023), https://cjp.org.in/hate-speech-dissenting-views-of-the-supreme court/#:~:text=But%20hate%20speech%2C%20whatever%20its,the%20foundations%20of%20human%20dignity.

12 Shreya Singhal v. Union of India, AIR 2015 SC 1523

13 Supra n10

- **Section 79 of the IT Act:** This section provides immunity to intermediaries (such as social media platforms) from liability for any third-party information, data, or communication link made available or hosted by them. However, intermediaries are required to comply with certain due diligence requirements and guidelines prescribed by the government to prevent and disable access to objectionable content, including hate speech.
- **Intermediary Guidelines and Digital Media Ethics Code:** The Government of India recently introduced new guidelines in February 2021 to regulate social media intermediaries, over-the-top (OTT) platforms, and digital news media. These guidelines impose obligations on intermediaries to proactively monitor and remove or disable access to unlawful content, including hate speech. Non-compliance with these guidelines can result in penalties and loss of safe harbour protection.

It is important to note that the interpretation and application of these provisions rely on the judiciary's understanding of hate speech. Courts consider factors such as intent, context, potential harm, and likelihood of incitement when determining the legality of speech. In addition to these specific provisions, the Indian legal system also recognizes the broader framework of fundamental rights, including the right to freedom of speech under Article 19(1)(a) and its reasonable restrictions as specified in Article 19(2) of the Constitution. [14]

8. INTERNATIONAL LAWS GOVERNING ONLINE HATE SPEECH

India does not have specific legislation dedicated solely to online hate speech that aligns with international laws. However, India is a member of the United Nations and is obligated to adhere to international human rights standards that address hate speech. The following international principles and conventions guide India's approach to online hate speech:

- **International Covenant on Civil and Political Rights (ICCPR):** India is a signatory to the ICCPR, which protects the right to freedom of expression. While this right is subject to restrictions to safeguard the rights and reputations of others and protect public order, India's approach to hate speech must align with the principles outlined in the ICCPR.
- **International Convention on the Elimination of All Forms of Racial Discrimination (ICERD):** India is a party to ICERD, which obligates the country to take measures to combat racial discrimination, including hate speech. The principles of ICERD apply to both offline and online contexts.
- **United Nations Universal Declaration of Human Rights (UDHR):** India upholds the principles of the UDHR, which emphasizes the right to freedom of expression alongside the responsibilities that come with it. India's approach to online hate speech should be consistent with the UDHR's promotion of tolerance, respect for others' rights, and prevention of incitement to hatred.
- **Safer Internet Day and European Frameworks:** While not legally binding, India, as part of its commitment to creating a safe online environment, observes international initiatives like Safer Internet Day and takes inspiration from European frameworks and regulations such as the Digital Services Act (DSA) and the Digital Markets Act (DMA) to shape its own policies and guidelines.

9. LACUNA IN REGULATING ONLINE HATE SPEECH IN INDIA

While India has made efforts to address online hate speech through legal frameworks and regulations, there are some lacunas or gaps that exist in effectively combating this issue. These include:

- **Lack of Comprehensive Legislation:** India lacks comprehensive legislation specifically dedicated to online hate speech. While provisions under the Indian Penal Code (IPC) and the Information Technology Act (IT Act) can be applied to online hate speech, the absence of a dedicated law leaves room for

14 Supra n10

ambiguity and inconsistent application.

- **Vague Definitions:** The definitions of hate speech and related terms in Indian laws are often broad and open to interpretation. This lack of clarity can create challenges in determining what constitutes hate speech and can lead to inconsistencies in its enforcement.
- **Limited Accountability of Online Platforms:** Online platforms, including social media networks and messaging apps, play a significant role in the dissemination of hate speech. However, the accountability of these platforms for monitoring and moderating hate speech content remains a challenge. The intermediary guidelines recently introduced in India aim to address this issue, but their effectiveness and implementation are still evolving.
- **Inadequate Reporting Mechanisms:** There is a need for robust reporting mechanisms to enable individuals to report instances of online hate speech easily. Awareness about reporting procedures, the role of law enforcement agencies, and the effectiveness of reporting mechanisms need to be strengthened to encourage victims to come forward and take action against hate speech.
- **Overburdened Judicial System:** The Indian judicial system faces a significant backlog of cases, leading to delays in resolving legal disputes, including those related to hate speech. This can hinder timely action against online hate speech offenders and impact the effectiveness of legal measures.
- **Limited Focus on Education and Awareness:** Efforts to address online hate speech should go beyond legal frameworks. There is a need to focus on promoting digital literacy, media literacy, and awareness campaigns to empower individuals to recognize and counter hate speech, promote responsible online behaviour, and foster a culture of respect and tolerance.
- **Intersectionality and Multiple Forms of Discrimination:** Hate speech often targets marginalized communities based on various factors such as religion, caste, gender, and sexual orientation. The existing legal frameworks may not adequately address the intersectionality of these forms of discrimination, which can leave certain communities more vulnerable to online hate speech.

10. LEGISLATIONS OF OTHER COUNTRIES COMBATING ONLINE HATE SPEECH

10.1. Germany

The Network Enforcement Act (NetzDG) of Germany, enacted in 2017, aims to combat online hate speech and illegal content. It requires social media platforms with a significant user base to promptly remove or block illegal content, including hate speech. NetzDG imposes a legal obligation on social media platforms to remove or block illegal content, including hate speech, within 24 hours of receiving a valid complaint or risk facing penalties. In case of non-compliance, social media platforms can face substantial fines. For instance, failure to remove illegal content can result in fines of up to $60 million for the most serious offenses. The law also requires social media platforms to provide transparent reporting on their handling of complaints, including the number of received complaints and the actions taken to address them. NetzDG establishes an independent complaints process, allowing users to report illegal content directly to the platforms. If the content is not removed within the specified timeframe, users can escalate their complaints to the regulatory authorities.

10.2. France

The Avia Law, implemented in France in 2020, focuses on combating online hate speech and terrorist content. It mandates social media platforms to remove hate speech within 24 hours of notification. The Avia Law requires social media platforms to promptly remove hate speech and terrorist content from their platforms within 24 hours of receiving a notification from users. In cases of non-compliance, social media platforms can face substantial fines. The law allows for fines of up to $1.48 million or 4% of global revenue, whichever is higher, for platforms that

fail to remove illegal content promptly. The law also imposes reporting obligations on platforms, requiring them to report on their efforts to combat hate speech and terrorist content. It aims to enhance transparency and accountability in content moderation practices.

10.3. United Kingdom (UK)

The Communications Act 2003 in the UK addresses various offenses related to electronic communications, including hate speech. It makes it an offense to send or post grossly offensive, indecent, or menacing messages through public electronic communications networks, including social media platforms, if the intent is to cause distress or anxiety. Offenders found guilty of sending grossly offensive or indecent messages can face criminal charges and potential imprisonment of up to six months, along with fines. When determining if an offense has been committed, the court considers the context, including the sender's intent, the target of the communication, and the potential harm caused. Victims or witnesses of online hate speech can report incidents to law enforcement agencies, who can investigate the matter and take appropriate legal action against the offenders. It seeks to strike a balance between protecting individuals from harm caused by hate speech and safeguarding freedom of expression. The law aims to address speech that goes beyond legitimate expression and incites hatred or causes distress.

The Malicious Communications Act 1988 in the UK addresses offenses related to malicious communications, including online hate speech. Offense of Sending Malicious Communications: It makes it an offense to send any electronic communication that is indecent, grossly offensive, threatening, or false with the intention to cause distress or anxiety to the recipient. Offenders found guilty of sending malicious communications, including online hate speech, can face criminal charges and potential imprisonment of up to two years, along with fines. The Act covers various forms of electronic communications, including emails, social media posts, text messages, and other digital means of communication. Courts consider the context and intent behind the communication when determining if an offense has been committed. The subjective effect on the recipient, as well as the sender's intention, are considered. Victims or witnesses of online hate speech can report incidents to law enforcement agencies, who can investigate the matter and take appropriate legal action against the offenders.

11. DEFINING HATE SPEECH IN INDIA

11.1. Judicial Perspective on Hate Speech

Man is a rational entity who desires to do many things, but in a civil society, his desires must be restrained, regulated, and reconciled with the exercise of similar impulses by other people, according to Justice Patanjali Shastri in **A.K. Gopalan v. State of Madras.** [15] In **S. Rangarajan Etc. vs. P. Jagjivan Ram**[16] , the court ruled that the right to free speech cannot be restricted until the circumstances that led to the situation were detrimental to the community as a whole or the general welfare, and that this risk could not be imagined, remote, or implausible. The expression chosen should have a close and direct connection.

Hate speech is defined by Merriam Webster as *"a speech expressing hatred of a particular group of people."* According to Collins Dictionary, hate speech is "speech that disparages a group on the grounds of colour, race, ethnicity, nationality, religion, sex, sexual orientation, gender identity, or disability, or a person who identifies with such a group". "Hate speech" is defined by the Oxford Dictionary as *"speech or writing that attacks or threatens a particular group of people, especially based on race, religion, or sexual orientation."* It is described as *"speech that carries no meaning other than the expression of hatred for some group, such as the expression of bias against a particular race, especially in circumstances where the communication is likely to incite violence"* by Black's Law Dictionary.[17]

As opposed to this, the Cambridge Dictionary defines hate speech as *"public speech that expresses hate or encourages violence toward a person or group based on something such as race,*

15 A.K. Gopalan v. State of Madras, AIR 1951 SC 21.
16 S. Rangarajan Etc. vs. P. Jagjivan Ram, 1989 SCR (2) 204
17 Indian Law Watch, Issue of Hate Speech: Law Commission Report No. 267, (20th May 2023) https://indianlawwatch.com/issue-of-hate-speech-law-commission-report-no-267/

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religion, sex, or sexual orientation (the fact of being gay, etc.)". In accordance with the United Nations Strategy and Plan of Action on Hate Speech, hate speech is *"any kind of communication in speech, writing, or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, that is, based on their religion, ethnicity, nationality, race, color, descent, gender, or other identity factors."* [18]

In **Arup Bhuyan v. State of Assam**[19] , the judiciary ruled that a person cannot be penalized for a simple conduct unless they also used violence against someone else or incited someone else to use violence.

In **Pravasi Bhalai Sangathan v. Union of India**[20] , the petitioners requested the court to step in and deem "hate speeches" made by elected officials, political figures, and religious leaders to be unlawful. It was directed specifically to those who had the ability to have a significant effect on society. The Supreme Court defined hate speech as an attempt to marginalize people based on their membership in a group and one that *"seeks to delegitimize group members in the eyes of the majority, reducing their social standing and acceptance within society"*. It also observed that the Law Commission of India should examine hate speech more thoroughly and determine if it is necessary to define it. They should also make suggestions to parliament on how to empower the election commission to prevent hate speech from occurring.[21]

The Supreme Court ruled in **Amish Devgan v. Union of India**[22] that the hate speech does not have any justification or genuine goal apart from inciting hatred against a certain population.

Justice B.V. Nagarathna, in the case of **Kaushal Kishor v. State of Uttar Pradesh & Ors.**[23], wrote about hate speech in her dissenting judgment. The Constitution Bench consisting of Justices S. Abdul Nazeer, B.R. Gavai, A.S. Bopanna, V. Ramasubramanian and B.V. Nagarathna ruled on a case involving two politicians who made controversial statements that infringed on the rights of victims. A writ petition was filed against Azam Khan, Minister for Urban Development of the Government of Uttar Pradesh, for calling a rape incident, which occurred in Uttar Pradesh in 2016, a political conspiracy. The incident involved a family being attacked by robbers who also gang-raped the wife and minor daughter. Khan's statement was deemed to infringe on the right to life and personal liberty of the victims.

Out of the five major legal issues dealt with in this case, one of them was whether the other fundamental rights restrict freedom of speech and expression, or were the justifications listed in Article 19(2) the only ones for such restrictions. The Bench determined that an entire set of justifications for exercising free speech and expression is provided under Article 19(2). Hence, even when two fundamental rights compete with one another, no further limitations may be imposed.

Justice B.V. Nagarathna stated that in a democracy based on human dignity, freedom of speech must be exercised in a way that protects the rights of others. Hate speech, regardless of its content, violates human dignity, as seen in Amish Devgan v. Union of India[24] . She was worried about speech that may not lead to discrimination or marginalization, but still has negative effects on societal values. According to her, hate speech is when someone uses their freedom of speech to attack the fundamental rights of another person. The values of equality, liberty, and fraternity are important to the Constitution, and hate speech goes against these values by creating an unequal society and violating the unity of citizens from different backgrounds. It is important for society as a whole and individuals to uphold these values and prevent any speech that undermines them[25].

She emphasized the importance of fraternity, which requires citizens to respect each other's dignity. Mutual respect is crucial for fraternity. She also stated that the limits of freedom of speech and expression should be evaluated based on fraternity and fundamental duties outlined in the Constitution.

18 Ibid
19 Arup Bhuyan v. State of Assam, 2011 3 SCC 377
20 Pravasi Bhalai Sangathan v. Union of India, AIR 2014 SC 1591
21 Supra n20
22 Amish Devgan v. Union of India, 2021 SCC Online Del 3353
23 Kaushal Kishor v. State of Uttar Pradesh & Ors., WRIT PETITION (CRL.) NO. 113 OF 2016
24 Ibid
25 Supra n23

She further stated that public officials and other influential people have a responsibility to be more careful and considerate with their speech, as their words can have a significant impact on the public:

> ***"It is a no brainer that the right to freedom speech and expression, in a human-rights based democracy does not protect statements made by a citizen, which strike at the dignity of a fellow citizen.[26]"***

They should be aware of the example they are setting and the potential consequences of their words. She parted with the suggestions that Parliament should consider enacting a law or code to prevent disparaging remarks against fellow citizens and that political parties should regulate their members' speech and actions.

11.2. The 267th Law Commission Report

This report cited various legislations around hate speech and examined this issue. Relying on **Ramji Lal Modi v. State of Uttar Pradesh**[27], it noted that not all acts of insult or attempts to "insult the religion or the religious beliefs of a class of citizens" are punishable under Section 295A of the IPC; rather, only those acts of insult or attempts that are committed with the purposeful and malicious intent of upsetting the religious sentiments of that class are punished. Additionally, it was noted that "maintenance of public order" is only one aspect of the phrase "in the interest of public order," which is used in article 19(2). Thus, if an act is restricted "in the interest of public order," it will be considered acceptable even if it does not really create a breach of the peace.

The Report stated that freedom of speech has historically been regarded as the foundation of all democracies. The liberal concept served as a check on the state's undemocratic authority. One of the basic freedoms that was included in the Bill of Human Rights was the freedom of speech. The higher significance placed on expression in the hierarchy of freedoms indicates why legislators and the judiciary are hesitant to make a few exceptions that might weaken the essence of this liberty. Maybe this explains why it has been difficult to define hate speech.

Then it discusses three criteria that courts have used to determine whether a speech qualifies as hate speech. When it is proven that there has been a restriction on the right to free speech, the courts use a three-part approach to assess whether the restriction is legitimate - Whether laws permit the restriction, If the restriction is in line with the justifiable goal being pursued and if such restriction is required in a democracy.

Regarding hate speech and the internet, the Report states that when determining whether or not a speech is permissible, the expression's substance and background are crucial factors to consider. The court considers several factors, including the nature of the remarks, their dissemination and potential impact, the status of the person being targeted, the status of the author of the remarks, the nature and severity of the penalty imposed (to assess the proportionality of the interference), etc.[28]

With respect to a speech being counted as a hate speech, it talked about the "clear and present danger test" which was redeveloped in **Schenck v. United States** [29]. The Court stated that, unless such expression is intended to inspire or create an anticipated illegal action as well as has the potential to encourage or trigger this kind of conduct, a State cannot prohibit advocacy of the application of force or of breaching the law.

It says that the Indian law is currently considering measures like prior restraint or punishment for hate speech. The following non-legal approaches to combat hate speech are also discussed.

- Well-known television series that gently and successfully encourage peace between hostile groups
- proactive measures (particularly in the area of social media networking) to control the transmission of hate speech and mob mobilization. • the participation of religious leaders to foster compassion throughout religious lines to lessen inter-religious animosity.

26 Supra n23

27 Ramji Lal Modi v. State of Uttar Pradesh, 1957 AIR 620 1957 SCR 860

28 The 267th Law Commission Report, https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081654-1.pdf

29 Schenck v. United States, 249 U.S. 47 (1919)

- Convincing those who are the most vulnerable component to stop distributing false information.

This Report also led to amendments to the Indian Penal Code of 1860 as well as The Code of Criminal Procedure of 1973, via The Criminal Law (Amendment) Act, 2017.

11.3. Parameters Of Hate Speech

Not every one of speeches fit the definition of hate speech. Only some speeches are considered to have been hateful in substance. Someone may differentiate between words, debate, campaigning, and provocation using specific criteria. In the case of Shreya Singhal v. Union of India , the Supreme Court distinguished between three types of speech: debate, advocacy, and provocation. The Court ruled that a speech can only be restricted based on the exceptions listed in Article 19(2) when it crosses the incitement level. According to Article 19(1) (a), all other forms of speech must be protected, even if they are offensive or unpopular. The key to establishing whether a restriction on free speech is legal is whether it incited the speech in question.

- **Aggressive speech:** If a speech is derogatory and exhibits strong emotion, it may be categorized as hate speech. In the case Chaplinsky v. New Hampshire , the US Supreme Court ruled that advocacy statements and discussions of contentious and divisive topics qualify as “low-value speech” and are therefore not protected by the Constitution.
- **Status of the author and victim of the hate speech:** The status of the author is vital to know how significant the impact it might have on the people. To ascertain whether the speech ought to be restrained, it is additionally critical to consider the position of the intended audience. For a politician, there is a greater range of appropriate criticism than there is for an individual.
- **Racial and religious discrimination:** One of the criteria used to assess the extreme nature of speech in a society that is multicultural is the practice of racial and religious discrimination.
- **Impact:** Another crucial factor is the prospective impact of the speech and its power to influence the public’s views. The Supreme Court considered the legality of the ban by considering how the movie would affect the viewing public in Ramesh v. Union of India.
- **Context:** Not all speech can be considered as hate speech. The appropriateness of the speech is determined by its context.

12. CONCLUSION AND SUGGESTIONS

It is important to strike a balance between addressing hate speech and safeguarding the principles of freedom of speech. The restrictions on hate speech must be carefully defined and implemented to prevent the abuse of power and to ensure that legitimate expressions of opinions or criticism are not curtailed. The interpretation of hate speech laws by the judiciary plays a crucial role in maintaining this delicate balance. Courts consider factors such as the intent, context, potential harm, and likelihood of incitement when determining the legality of speech. Judicial scrutiny ensures that restrictions on hate speech are proportionate, reasonable, and consistent with the principles of freedom of speech. Addressing the evolution of online hate speech in India requires a multi-pronged approach. Now and then the absence of a definition regarding ‘hate speech’ is being felt. The Legislators should formulate a legislation or a code of conduct to define, limit and control the spread of hate speech. People could be reprimanded with respect to their first offence; however, it could also range from reprimand to punishment consisting of imprisonment and fine depending on the severity of the offence. Punishment consisting of imprisonment and fines must be fixed for repeated offences. Filters should be set in the social media which could identify a certain term or phrase as ‘incitement’ and remove it, thereby maintaining it as a safe space. Efforts should focus on raising awareness about responsible online behaviour, promoting media literacy and critical thinking, enhancing digital literacy, fostering inclusive and respectful online communities, and holding platforms accountable for monitoring and addressing hate speech. Collaboration among government, civil society organizations, technology companies, and individuals is crucial to mitigate the negative impact of online hate speech and create a safer and more

inclusive digital space. Although liberty has the same logical interpretation as being set free from all restraints, it has a different legal connotation. Everyone must live with all the legitimate constraints that come with freedom.

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IMPORTANCE OF ORAL EVIDENCE IN ARBITRATION PROCEEDINGS: TRIBUNALS WITNESS GATING POWERS UNDER THE ARBITRATION & CONCILIATION ACT, 1996

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I. Introduction:

Arbitration proceedings are usually of two kinds, i.e., 'documents only' and proceedings involving fact and/or expert witness testimony. As per the most fundamental principle of Arbitration, the Parties while exercising party autonomy may decide to conduct a 'documents only' arbitration in the event the Parties agree that the dispute is mainly on the issue of contractual interpretation, or the Parties want an economical conduct of proceedings. However, in the event the facts and circumstances pertaining to the dispute are such that a party wishes to lead oral evidence in support of its case then a 'documents only' arbitration is not preferred by the Parties.

As per the usual practise, Parties seldom agree beforehand on the type of proceedings that they wish to conduct. Therefore, the question with respect to the possibility of leading oral evidence is left open at the time of passing of the 'Procedural Order No. 1'. It is a settled position of law that in arbitration proceedings, the principles of natural justice have to be followed and in this regard, Article 18 of the Model Law provides that each party must be provided with equal opportunity to present its case[1]. However, under the Arbitration and Conciliation Act, 1996 (**"the Act"**), the Tribunal under Section 24(1), the Tribunal has certain witness gating powers that the Tribunal may exercise to bar or refuse the leading of 'oral evidence' in any arbitration proceedings.

The present Article shall examine the extent of witness-gating power that a Tribunal has under the Act and the importance of oral evidence in arbitration proceedings.

II. Importance of Oral Evidence:

Oral testimony by fact witness is a standard feature of arbitrations as the testimony of the witness is crucial in supplementing and clarifying written documents; it can also provide necessary insights into the dispute[2]. Since each party is tasked with obtaining and demonstrating the evidence, therefore, calling of a witness to give oral evidence is a strategic decision.[3]

In her Commentary *Malhotra, Commentary on the Law of Arbitration, 4th Edition Vol. 1*, Indu Malhotra J., has stated that:

> *"Oral testimony of the witnesses in cases involving complex facts is not only useful but also invaluable. It is usual for the arbitral tri-*

1 Rational Intellectual Holdings Ltd. v. Sunny Karira, (2018) SCC OnLine Del 8341

2 ALAN JS DE ROCHEFORT-REYNOLDS, WITNESS-GATING IN INTERNATIONAL COMMERCIAL ARBITRATION, IN SINGAPORE ACADEMY OF LAW JOURNAL § 229, 229-250 (2022)

3 See id.

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bunal to hear the evidence of witnesses at a formal hearing of the case. The tribunal may put questions to witnesses during the course of evidence, or after the parties have completed their cross-examination. If the tribunal adopts inquisitorial approach, it will take the lead in conducting the cross-examination of the witness."

Therefore, it may be said that rather than attaching a prima-facie, cost, and delay component to the leading of oral evidence, the Tribunal may consider the oral evidence to be led by a witness to be a key factor in understanding the nature of complex factual disputes and thereafter, rightfully determine the liabilities of a party. The Tribunal is also tasked with the function of fact finding, which it has to perform with utmost seriousness, by determining the relevant facts through evidence which may also be lead orally.[4]

Whilst it is uncontroverted that the Tribunal may decide the procedure for conduct of the arbitration proceedings, much depends upon the sufficiency of the material that is before the Tribunal post the completion of the written stages. In the event the written stages have not provided sufficient material and the documentary evidence is scarce, then the Tribunal would probably be benefitted through leading of oral evidence before the Tribunal decides whether a party has discharged its burden of proof. [5]

Cross-Examination, which is the most crucial facet of oral evidence, if efficiently and properly done and confined to the material issues, may be seen as the best procedure for arriving at the truth.[6]

III. Full Opportunity & Breach of Natural Justice:

As stated above under Article 18 of the Model Law and Section 18 of the Act, parties have the right to an equal opportunity to present its case before the Tribunal. The text of Article 18 of the Model Law is reproduced below:

"Article 18. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a ***full opportunity*** *of presenting his case."*

The text of Section 18 of the Act is *pari-materia* to that of Article 18 of the Model Law. The operative part of this provision is that the Parties must be given 'full opportunity' to present their case. However, the "full opportunity" that has to be provided to a party cannot be detached from reasonableness, efficacy, and fairness.[7] In the facts and circumstances of a case, if the Tribunal is of the opinion that the leading of oral evidence is necessary as the proper adjudication of the dispute may not be possible on the basis of 'documents only'. Therefore, the extent of full opportunity depends on the facts and circumstances of each case.[8] The term full opportunity may be defined as "full opportunity to be given to both the parties before the Tribunal, which includes the parties' opportunity to lead evidence.[9] Further, "what constitutes a "full opportunity" is a contextual inquiry that can only be meaningfully answered within the specific context of the particular facts and circumstances of each case. The overarching inquiry is whether the proceedings were conducted in a manner which was fair, and the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done."[10]

When the question of full opportunity is raised, it is often subsumed in the larger question which is whether the arbitration proceedings were conducted in a fair and reasonable manner. This question is commonly raised as a ground for challenge to arbitral awards under Section 34(2)(A)(iii) of the Act. The Courts have recognised the inability of a party

4 NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 6.76 (6TH ed. 2015)

5 See id. § 6.198

6 JOHN TACKABERRY & ARTHUR MARRIOTT, BERNSTEIN'S HANDBOOK OF ARBITRATION AND DISPUTE RESOLUTION PRACTICE § 304, 2-799 (4TH ed. 2003).

7 China Machine New Energy Corp v. Jaguar Energy Guatemala LLC, (2020) 1 SLR 695

8 Triulzi Cesare Srl v. Xinyi Group (Glass) Co Ltd, (2015) 1 SLR 114

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to present its case due to the unreasonable conduct of proceedings by a Tribunal as a ground for setting aside of an arbitral award.[11]

IV. What is witness-gating?

The term witness gating in common legal parlance means that "– *where arbitration tribunals refuse to allow certain witnesses to give evidence – is only permitted where the parties agree or the arbitral rules provide. Refusing to hear witnesses, or demanding witness statements to decide whether to allow witnesses, is not justifiable under an arbitrator's general power to control proceedings."*[12] It must be borne in mind that the powers of witness gating are usually exercised when the Tribunal is of the opinion that the oral evidence of any witness, fact or expert may be irrelevant, repetitive or unreasonably burdensome as it may be time consuming and expensive. Tribunals have various degrees of witness gating powers under different arbitral rules. The degree of witness gating powers may be classified into three categories: - (a) power to exclude all witnesses; (b) power to exclude a witness; and (c) power to limit witness testimony.[13]

V. Scope of Witness-Gating under the Act:

When a question is raised with respect to the leading oral evidence, then the provision under Section 24(1) becomes relevant. The text is reproduced below:

> 24. Hearings and written proceedings. - (1) Unless otherwise agreed by the parties, ***the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials:***
>
> Provided that the arbitral tribunal shall hold ***oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.***
>
> ***[Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis***, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.]

The heading of Section 24 of the Act reads as ***"Hearings and written proceedings",*** and upon reading the provision under Section 24(1) it can be fairly stated that in the event the parties have not agreed to lead oral evidence in an arbitration proceeding, then the Tribunal has the power to decide whether to exclude oral evidence altogether. Interestingly, upon careful consideration of the text of Section 24(1) of the Act and the Proviso thereto, it may be seen that 'oral hearings' include both the presentation of the evidence and oral arguments, and such oral hearing may not be refused by a Tribunal in the event a party has requested for the same at an appropriate stage.[14]

Further, the Tribunal does have the latitude to decide whether oral evidence is necessary in the proceedings, however, the proviso to the Section 24(1) limits this power of the Tribunal and the Proviso should be construed strictly.[15] The Courts have also recognised[16] the practise of leading oral evidence as evinced in the Halsbury's Laws of England:

> ***"…Fundamental to notions of justice are the rules that each party has a right to know the case made against him and a right to put his own case, but it does not***

11 Ssangyong Engg. and Construction Co. Ltd. v. National Highways Authority of India, (2019) 15 SCC 131

12 "Witness Gating": CBS v CBP (2021) SGCA 4, https://www.squirepattonboggs.com/-/MEDIA/FILES/INSIGHTS/PUBLICATIONS/2021/04/WITNESS-GATING/WITNESS-GATING.PDF?REV=2EB1A2C04F2E4E3BB0FD2298FF-1B0976#:~:TEXT=PAGE%201,1,OR%20THE%20ARBITRAL%20RULES%20PROVIDE

13 ALAN JS DE ROCHEFORT-REYNOLDS, supra note 2

14 Adv Consultant v. Pioneer Equity Trade (India) Pvt. Ltd. And Anr, (2009) SCC OnLine Mad 1072

15 Anand Viswanathan v. Kotak Mahindra Bak Ltd., (2019) SCC OnLine Mad 12621

16 Mahesh Kumar Agarwal & Anr. v. Suresh Chand Agarwal & Ors., (2015) SCC OnLine All 6246

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follow that a party is entitled to an oral hearing.

If the agreement of reference requires the evidence to be taken on oath or affirmation, the arbitrator or umpire has no option but so to take it; and even where the agreement is silent as to whether the evidence shall be given on oath, since it is the ordinary practice that it should be so given, the arbitrator or umpire should not take it otherwise than on oath unless with the parties consent."

While, recognising the above principle, the Court held that in the facts and circumstances of the case, if oral evidence is necessary to prove a party's case, then the Tribunal must provide reasonable opportunity to the parties to lead oral evidence, and if the same is not provided then it may amount to misconduct on the part of the Ld. Arbitrator.

The above principles have been comprehensively summarised by the Delhi High Court in a recent decision [17], while tracing the true purport of Section 24(1) of the Act, through the legislative history of the Model Law. The Court observed that in the Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General as published in the United Nations Commission on International Trade Law Yearbook, 1985 (Vol. XVI)], the proviso to Section 24(1) must be construed to limit the discretion of the Tribunal to the extent that in the event a party requests for leading oral evidence then the same must be granted by the Tribunal. However, the Tribunal does have the right to limit the length and scope of the oral evidence depending upon the facts and circumstances of the case. The Court also highlighted the supplemental powers of a Tribunal when a party's request for leading oral evidence is not entirely reasonable, then the Tribunal may under Section 31(8) read with 31A of the Act, impose costs against such party while allowing the oral evidence.

However, for the sake of completeness of the present Article, it is important to highlight another recent decision[18] of the Delhi High Court, wherein the Court has read down the proviso to the Section 24(1) of the Act. A perusal of the said decision showcases that the prior judgment of the Court in Sukhbir Singh[19] was not presented to the Court or the Court had not considered the same. It is relevant to note that in Telecommunications Consultants[20], the High Court was approached under the Writ Jurisdiction on account of which the High Court also declined to interfere with the order of the Tribunal rejecting the request of a party to lead oral interference as it may be opposed to the settled principle of the law of minimal interference under Writ Jurisdiction.[21]

From the discussion held above and upon a perusal of Telecommunications Consultants and Sukhbir Singh, it may appear that the decision in the latter is beneficial to the Parties in an arbitration proceeding on the lines of providing full opportunity. It can be fairly stated that there exists a limit to the discretion of the powers of a Tribunal as per the Act. However, in the absence of a judgment by a larger bench of the High Court or a judgment by the Supreme Court, it may not be possible at this juncture to conclusively determine the interpretation of Section 24 of the Act. A possible way it may be done is through a comparative analysis with similar rules of another institutional arbitration.

VI. Singapore Chambers of Maritime Arbitration Rules: A comparative analysis:

To supplement the above analysis, we may compare Section 24 of the Act with provisions under Rule 25.1, 25.2 read with Rule 28.1 of Singapore Chambers of Maritime Arbitration Rules, 3rd Edition 2015, which have to read in conjunction with Section 24 of International Arbitration Act, 1994 ("IAA") of Singapore. The relevant provisions of both are reproduced below:

Singapore Chambers of Maritime Arbitration Rules, 3rd Edition 2015:

"25. Conduct of the Proceedings

17 Sukhbir Singh v. HPCL, (2020) SCC OnLine Del 228

18 Telecommunication Consultants India Ltd. v. B.R. Sukale Construction, (2021) SCC OnLine Del 4863

19 Sukhbir Singh, supra note 17

20 Telecommunications Consultants, supra note 18

21 Surender Kumar Singhal v. Arun Kumar Bhalotia, (2021) SCC OnLine Del 3708

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25.1. **The Tribunal shall have the widest discretion allowed by the Act** *(where the seat of the arbitration is Singapore) or the applicable law (where the seat of the arbitration is outside Singapore) to ensure the just, expeditious, economical, and final determination of the dispute.*

25.2. **Subject to these Rules, it shall be for the Tribunal to decide the arbitration procedure, including all procedural and evidential matters subject to the right of the parties to agree to any matter.**

xxx

28. Hearings

28.1. Unless the parties have agreed on a documents-only arbitration or that no hearing should be held, ***the Tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral submissions."***

***

International Arbitration Act, 1994 of Singapore:

24. Despite Article 34(1) of the Model Law, the General Division of the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —

(a) the making of the award was induced or affected by fraud or corruption; or

(b) ***a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.***

Upon a perusal of the above Rules and Section 24 of IAA, it may appear that the any Tribunal conducting arbitration proceedings has the widest discretion to determine the arbitration procedure including evidential matters, subject to the limits imposed by the principles of natural justice. The Court of Appeal of the Republic of Singapore in CBS v. CBP [22], was seized of a question that whether a Tribunal can refuse a party's request to lead oral evidence. The Court in its judgment while discussing the ambit of a Tribunal's power under the Rules, held as follows:

"61 ***We have little difficulty accepting that tribunals have the power to limit the oral examination of witnesses as part of their general case management powers.*** This can occur when the evidence from multiple witnesses are repetitive or of little or no relevance to the issues. This much is also envisioned by Art 19(2) of the Model Law. ***However, r 25.1 cannot be an unfettered power that overrides the rules of natural justice. This is evident from the plain language of the provision itself. The "widest discretion" afforded to the tribunal is that "allowed" by the IAA and s 24(b) of the IAA specifically provides that an award rendered in breach of the rules of natural justice by which a party's rights have been prejudiced is liable to be set aside."***

Ultimately, the Court held that the Tribunal's powers to decide the procedure for evidential matters do not supersede party autonomy and in the event a party requests for leading oral evidence, the Tribunal must allow the same unless, as per the facts and circumstances of the case, it may appear that the party has produced multiple witnesses, which may provide repetitive oral testimony which may not be material to the case. Therefore, the principles of Natural Justice, flowing through the notions of providing 'full opportunity' to the parties to present their case have been held to be sacrosanct by the Court.

The judgment of the Court of Appeal of the Republic of Singapore in the CBS v. CBP is on similar lines as Sukhbir Singh, therefore, it may appear that the provision under Section 24 of the Arbitration and Conciliation, Act 1996 may have been holistically interpreted by the Court in Sukhbir Singh which is in line with the approach of an arbitration institution of a pro-arbitration jurisdiction.

VII. Conclusion:

In conclusion, oral evidence holds significant importance in arbitration proceedings. It complements written documents, provides necessary insights, and aids in the understanding of complex factual disputes. The principles of natural justice dictate that parties must be given a full opportunity to present

22 CBS v. CBP, (2021) 1 SLR 935

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their case, including the right to lead oral evidence when necessary.

While arbitral tribunals have certain powers to control the proceedings and gate the witnesses, such powers should be exercised reasonably and in line with the principles of natural justice. The discretion to exclude or limit oral evidence should be balanced with the need for a fair and comprehensive presentation of the parties' cases.

The interpretation of Section 24(1) of the Arbitration and Conciliation Act, 1996, highlights the Tribunal's authority to decide on the use of oral evidence, but it should be guided by the proviso, which emphasizes the importance of allowing oral hearings upon a party's request. The tribunal's powers should be exercised within the limits set by the principles of natural justice, ensuring that parties have a genuine opportunity to present their case.

In light of comparative analysis with other arbitral rules, such as the Singapore Chambers of Maritime Arbitration Rules, it is evident that party autonomy and the right to lead oral evidence are generally respected, with limitations imposed only in cases of repetitiveness or irrelevance.

Ultimately, striking a balance between the efficient conduct of proceedings and the parties' right to present their case through oral evidence is crucial for upholding the integrity and fairness of arbitration proceedings.

NAVIGATING THE LEGAL FRONTIERS: THE EMERGENCE OF LAW IN THE AGE OF ARTIFICIAL INTELLIGENCE

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ABSTRACT

This article explores the legal status of artificial intelligence with special reference to the laws of India. It draws a contrast between the rights enjoyed by humans, animals,the environmental laws and the idea of extending such rights to AI.Through this article the author investigates the various legislations in place today in order to theorize and evaluate them with reference to AI.

This article argues that AI must be given certain rights and there must be rules and regulations to ensure proper functioning of it in society. These rights must come into place gradually with the evolution of AI. However, it is argued that AI cannot be given the same rights as humans since the very purpose of life of both the creatures is poles apart.

The resources included data from academia and the media, as well as national and international legal cases and legislations. The study was founded on integrated legal interpretation, modeling, and comparative legal analysis.

The author concluded by arguing that it is too early for any rules and regulations to be in place in relation to AI. The law must evolve alongside the developments and innovations in AI. Moreover, the legislations enacted for AI must target their unique challenges which cannot be determined as of now.

Keywords: AI, legal status, legal rights, legal interpretation

INTRODUCTION

Artificial Intelligence (AI) refers to the field of computer science and technology that focuses on the development of intelligent machines capable of performing tasks that typically require human intelligence. AI systems are designed to simulate various aspects of human cognitive abilities, such as learning, reasoning, problem-solving, perception, and language understanding.

With the growth of development, AI has formed a crucial role in society today. The technological paradigm of the virtual space creates new markets and new subjects for regulation, such as artificial intelligence (AI). AI is used in every aspect of human life, the dependency on which is increasing surpassingly.

Ever since the industrial revolution, humans have delegated manual work to machines. However, as development and resources have expanded machines are now capable of doing much more than that. Now machines have cognitive abilities and might

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also develop emotional and psychological abilities in the future. Machines no longer need constant inputs for developing and growing their database as they are capable of learning and evolving on their own.

Legal status guarantees a standing in the society and a mechanism for relief in cases of disputes and injustice. In recent years, the question of the legal status of AI has come to the forefront.

Much of these debate and discussions began when Sophia, a Hanson Robotics humanoid robot, received citizenship from Saudi Arabia in 2017. Although Sophia was not given the same legal status as human citizens, it sparked debates regarding the legal standing of AI entities.

However, giving Sophia rights, without taking into account all of her human qualities, was an ill-advised and reckless action on the part of Saudi Arabia. Sophia's outstanding AI technology was not the real reason she was granted rights; rather, it was a calculated publicity ploy designed to attract attention and put Saudi Arabia at the leading edge of innovation. [1]

It is a matter of fact that all over the world, AI is now starting to replace humans in various fields. Therefore, the question related to the status of AI in law becomes pertinent to address.

Can AI be given the same rights as humans?

Laws were enacted in order to bring peace in a predicament of chaos and destruction. Laws not only safeguard the rights of individuals but also provide a mechanism for redressal in case of violation of any of these rights. Once any individual is protected under law that means they form a part of that society, have equal status and have certain basic rights. If something is banned or not recognised by the law, then it has no standing in the society as well as no mechanism for reinstallation of its legal or socio-personal rights.

The very purpose of the creation of AI was to make the lives of humans easier. AI devices are not biological creatures and are man-made, which is why the laws that apply on creatures that are a part of the environment will not necessarily apply on registered computers.

The law as recognised today deals with matters solely related to human needs and conflicts. Any other non-human species do not encounter the same problems. Moreover, the law penalizes in case of defiance. However, in the case of AI, there cannot be an assessment of guilt or innocence and it cannot be punished for compensation or with imprisonment.

Moreover, the legal system works on the principle of apprehension of some form of punishment which forces individuals to abide by the law. However, since AI is not capable of thinking emotionally and is not scared for its very life, there might not be any organized control over it.

While AI has taken upon tasks that once required extensive human labour, helped with cost efficiency and performed tasks that are considered too dangerous for humans, many have expressed concerns regarding the rapid growth of AI. With the introduction of technologies such as self-learning, AI might replace humans altogether.[2] Moreover, with the ever growing population of humans and the depleting resources, AI could prove to be the end of the human race. Having said that, these are mere assumptions as observed by many. However, in conditions like these it becomes of great importance to issue some rules and guidelines in order to achieve tranquility in the management of AI.

Some argue that AI cannot be given the same rights as humans. Rather it shall be given rights gradually as it evolves, in the same manner that humans got rights, by demanding them. Moreover, AI shall be given rights based on the functions it performs and mere transfer of human rights to AI will not benefit.

For example, giving rights such as "Right to marry and have a family" cannot be transferred to AI devices such as Alexa.[3] However, copyright rights, intellectual property rights as well as certain duties relating to non- destruction of human life and the environment can be bestowed upon AI devices.

The question as to whether AI can be given the right to life is particularly interesting.Article 21 of the

1 A. Atabekov & O. Yastrebov2, Legal Status of Artificial Intelligence Across Countries: Legislation on the Move, XXI European Research Studies Journal , 773–782 (2018)

2 Should AI machines have rights? JD Supra, https://www.jdsupra.com/legalnews/should-ai-machines-have-rights-4583419/ (last visited Jul 9, 2023)

3 SHOULD AI HAVE RIGHTS? SCL STUDENT BYTES, https://bytes.scl.org/should-ai-have-rights/ (last visited Jul 15, 2023)

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constitution of India states that, "Every person has the right to life and personal liberty."[4] The mere reason that AI makes the lives of humans is not a sufficient enough reason for this.[5] Right to life is not extended to any other organism excluding humans today. There are laws in place in India that encourage citizens to protect the environment and wildlife such as article 51A,[6] however there is no legal obligation in place and these are not enforceable in the court of law. Therefore, to give the most important of all Fundamental Rights to AI, while failing to provide this to animals who have been a part of the biosphere for time immemorial would be unjust, discriminatory and against the law. Moreover, the word "life" represents a sentient and sapient being which was never meant to include any man made objects such as AI devices.

Humans and AI are inherently different from one another in manners that other organisms aren't. [7]Biologically, AI does not possess a mind like humans do, and while through developments, it can be made possible, there is so much about the human body and mind that even humans are unaware of that it cannot be passed on to robots such as the unconscious mind. Moreover, AI might in the future develop feelings in the same manner as humans. However, since AI does not age like humans, the motivation and purpose in life can never be the same. Laws came into place for humans in order to bring tranquility, however this can be achieved through software developments in case of AI. Therefore, the laws relating to both must be different based on different roles, responsibilities and needs of the two.

Can AI be equated to animals while assessing their status in law?What kind of rights can be transferred to AI?

In the case of Animal Welfare Board of India v. A.Nagaraja, the SC reasoned that,

a. " Every Species has a right to life and security. Article 21 of the constitution, while safeguarding the rights of humans, protects life, and the word "life" includes animal life.
b. Concerning animals, life means something more than mere survival or existence or instrumental value for human beings, but to lead a life with some intrinsic worth, honor, and dignity.
c. The standard to apply in deciding the issue on hand is the "Species Best Interest"."[8]

In Subhas Bhattacharjee v. State of Tripura, The Tripura HC while ordering a ban on sacrifices of animals and birds in the temple, reasoned that the Article 21 of the Constitution applies to the class of non-human animals.[9]

Despite such judgements, the status of animals is not equivalent to that of humans. Moreover, rights transferred to animals are extremely minimal. Under the constitution of India, animals are not given the same status as humans, however, there are various acts and legislations for the safety and security of animals. These have been enacted taking into consideration the needs and roles that animals have in the environment.

In a New York judgment, the court held that chimpanzees don't have the same rights as humans do because the linguistics and cognitive capabilities of chimpanzees do not translate to their ability to bear legal duties or be held legally accountable for their actions.[10]

In the Jallikattu judgment, the SC held that fundamental rights are not extended to animals and that non-humans are not protected under the fundamental rights.[11]

Non-human species have never been protected under the law like humans have. However, the entire biosphere including animals is recognised under the law and acts and ordinances are passed in order to safeguard basic rights for them. If animals and nature such as rivers, atmosphere etc were given legal rights, our lives would be very different from what we know it to be now. Legal personhood for animals is rejected, arguing that as rights and duties are correlative, animals cannot hold rights because

4 INDIA CONST. art. 21
5 SHOULD AI HAVE RIGHTS? SCL STUDENT BYTES, https://bytes.scl.org/should-ai-have-rights/ (last visited Jul 15, 2023)
6 INDIA CONST. art. 51
7 How human is AI and should AI be granted rights? Jessica Peng, https://blogs.cuit.columbia.edu/jp3864/2018/12/04/how-human-is-ai-and-should-ai-be-granted-rights/ (last visited Jul 10, 2023)
8 (2014 (6) SCALE 468)
9 2019 SCC Online Tri 441
10 Non Human Rights Project v. New York, FILE NO. P-72.254/15
11 (2014) 7 SCC 547

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they cannot bear duties.[12]

Therefore, it is clear that animals have themselves been given very minimal rights and these rights correspond directly to the needs of the species. Assuming that the rights and duties owed by AI and animals are both similar is a gross mistake under law. Animals lack the cognitive abilities that AI is expected to develop in the years to come, while AI lacks the biological structure and rules that all the species abide by.

The consideration for giving legal rights to AI cannot be based solely on the criteria of consciousness. Legal rights bequeath rights and duties upon individuals, therefore the capacity of AI to work without human assistance and directions must be tested. While it is contended by scholars that soon AI will be capable of self learning, the standard of liability that can be bestowed upon it needs to be measured.

Moreover, humans follow the law either due to the fear of a punishment for its violation or due to the moral obligations they owe to the society. Since, biologically AI and Humans are different it is not known whether AI would fear death the same way humans do. As for the moral obligations owed, till now there have been no determining results as to whether AI understands emotionally complex concepts in the same way that humans do.

Moreover, the manner in which AI interacts with the data available and the complexity of the structure of algorithms is not entirely understood by humans, this is referred to as the Black Box Paradox.[13] This means that it is not possible at least today to determine what the future of AI will be like. Since, the very nature of AI is not predictable at this time, making any law regarding the same might be a gross miscarriage of justice.

CONCLUSION

The comparison of AI with humans is not the correct measurement to determine whether AI should be given rights. Before drafting any law for AI, it is essential to check how AI and what it does can be protected correctly since their needs are not corresponding to human needs. Some rights such as copyright and patent law, the recognition of rights of AI may be justified on the basis of moral considerations; however, as of now, AI has not matured to the point where its rights could be practically enforced. Some rights such as copyright and patent law, the recognition of rights of AI may be justified on the basis of moral considerations; however, as of now, AI has not matured to the point where its rights could be practically enforced. That is not to say that those rights won't change when AI advances towards levels of intelligence that it might be unsettling. Though it may seem unusual to us now to believe that AI merits legal protection, one day our grandchildren may reflect back and consider this something that should have been done ages ago.

12 Cupp Jr, R.L., 2009. Moving beyond animal rights: A legal/contractualist critique. San Diego L. Rev., 46,p.27

13 Yavar Bathaee, THE ARTIFICIAL INTELLIGENCE BLACK BOX AND THE FAILURE OF INTENT AND CAUSATION, 31 Harvard Journal of Law & Technology , 906–908 (2018)

THE CONDITION OF GUILTLESS CHILDREN AND THEIR PRISONER MOTHER IN PRISON

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ABSTRACT

In India, prison supervision is a state topic that is protected by item 4 of the State List, also known as List II of the seventh schedule to the Indian Constitution. The State Governments are entirely responsible for and in full control of the management of the prisons under their jurisdiction. The Prison Act of 1894 and the Prison Manuals, which are independently enacted by the State governments, serve as the controlling Statutes. Every state are responsible for periodically making the necessary updates to the prison manuals, prison laws, rules, and regulations. All the matters related to the prisons in each State and their territories are under the supervision of the Inspector General of Prison (I.G, Prisons). Other concerns such as security measures in the prisons, provisions for their repair and maintenance, renovation of old prisons, medical facilities, constructing borstal schools, training prison officials, adequate facilities to female prisoners etc. are taken care of by the State Government. The Central Government assistances the State in achieving these minimum standards.

The Supreme Court of India has delivered guidelines continuously and laid down standards to be met by the Prison authorities and other guidelines related to imprisonment and custody. Categorically, there are three guidelines which are primarily stressed upon by the Hon'ble Apex Court. They are:

Firstly, a person in prison does not become a non-person. Secondly, a person is prison is entitled to all human rights within the limitations of imprisonment. Lastly, there is no justification for aggravating the suffering already inherent in the process of incarceration.1

Children of incarcerated parents continue to be a largely misunderstood and yet, a very vulnerable group. The extensive discourse on the possibility of their culpability without evidence to support the same, has driven attention away from the fact that their childhood needs to be protected and that their entitlements cannot be denied by virtue of their parent's alleged involvement in offending behavior

Keywords: Women Prisoners, Guiltiness Child, Human Rights, International Covenants.

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PRISON SYSTEM IN INDIA AND TYPES OF PRISONS

Introduction

The administration and organization of facilities in the prisons falls solely in the space of the State Governments, and is regulated by the Prisons Act, 18942 and the Prison Manuals of the particular State governments. Consequently, States have the essential part, duty and power to change the present prison laws and standards.3 Everyday organization of detainers lays on standards fused in the Prison Act 1894, the Prisoners Act 1900 and the Transfer of Prisoners Act 1950. An Inspector General of Prisons oversees jails issues in each State and territory.4 The Central Government gives help to the states to enhance security in detainment facilities, for the repair and redesign of old jails, restorative offices, advancement of borstal schools, professional preparing, medical facilities, facilities to women prisoners, modernization of jail ventures, preparing to jail work force and for the formation of high security enclosure.

The Supreme Court of India in its judgment on different issues of jail organization, has provided three standards with respect to detainment and custody. Right off the bat, a human in jail does not turn into a non-human. Also, a man in jail is qualified for every single human right inside the confinements of detainment. Finally, there is no excuse for exasperating the agony during the time spent in imprisonment.5

PRISONS AND THEIR TYPES

Prison system in India includes eight classes of prisons.6 The most widely recognized and standard prison organizations are Central Jails, District Jails and Sub Jails. Other sorts of prisons are Women Jails, Borstal Schools, Open Jails and Special Jails.7

Women in Prison and their guiltless children living with them

It is a well-known fact that, compared to the general population, prisoners experience higher rates of mental illness and emotional health problems.8 The rates are obviously significantly greater as a result of female convicts and their innocent children.9 In spite of the fact that women still constitute a little minority of the jail populace over the world, the number of female prisoners is increasing. Notwithstanding the regular sorts of misery both men and women face in jail, women are more defenseless for gender discrimination, disregard, viciousness, physical and sexual abuse. In spite of these issues, little consideration has been given to the wellbeing worries of female prisoners and their guiltless children.10

The Relevance of Gender Issues with regard to women

Women, by and large, and usually have ensured existences and are great home makers who are not presented to the travails of the outside world. It is time when they come in strife with law and are detained, they think that it is extremely hard to adapt up to the jail condition. Jail disconnects them from their family and companions because of which they cannot play out their standard obligations. This causes misery, blame and puts enormous weight on them. As far as physical and psychological wellness is concerned requirements of women are diverse in comparison to men. Customarily, most of the jail inmates are men and the jail condition is subsequently molded by their necessities11 and do not take the unique needs of women into account.12

There exists a twofold disservice with respect to female prisoners. Right off the bat, the gender inconvenience and segregation gets intensified amid imprisonment, and furthermore, it is additionally increased upon their discharge from jail.

As women in jails are every now and again victims of physical and sexual man handle, Rule 53 of the Standard Minimum Rules for the Treatment of Prisoners expresses “Women prisoners must only be guarded by female officers.”13 Be that as it may, sadly male staffs keep on having unchecked visual and physical access to women in what constitutes their restoration rooms and restrooms in many Indian jails and even, male staff does not waver to do search seek on female prisoners. There are cases when jail staff has embraced and bolstered harassing and verbal manhandle of women prisoners.14

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National Scenario

In spite of several committees and legislations, the condition of jails is terrible. Though the bitter truth is known to the administration and authorities, nothing is done to address these issues. Commonly, below listed are the various issues relating to women inmates:

Despite of numerous legislations and reform committees, the state of prisons is horrible. In spite of the fact that the sharp truth is known to the authorities and administration, these issues have not been addressed properly. Various issues relating to female prisoners are:

(a) Entry to Prison

(b) Categorization

(c) Rehabilitative Programs

(d) Employment Training

(e) Physical Fitness

(f) Mental Issues

(g) Visitors and Emergency Leave

(h) Reintegration into the society

Detainment of a mother with kids is a serious issue and it should be addressed on an urgent basis.15 The impacts of detainment can be especially disastrous on the kids and exorbitant to the state regarding accommodating their care, and due to the social issues emerging from early separation.16

JUDICIAL CONTRIBUTION

It is unfortunate that the largest democracy in the entire world has a “very poor political will” to enhance the position of women prisoners. Great and exemplary work with respect to female convicts has been started by the judicial wing. The Hon’ble Supreme Court in a public interest litigation suit filed in the case of R.D. Upadhyay v. State of Andhra Pradesh17, has propounded various recommendations in the form of guidelines with respect to pregnancy, antenatal, and post-natal care in which it has laid down many guidelines.

POLICE CUSTODY AND PROBLEMS

It is provided under the law relating to criminal procedures, the Code of Criminal Procedure, 197318 that any person who is arrested cannot be detained into custody for an unreasonable period and that period in no case shall extend more than 24 hours, excluding the time necessary for moving from place of arrest to the Court. Section 57 of the Code19 provides that unless a special order has been obtained from a judicial/executive magistrate for the continued detention further beyond 24 hours, no person arrested can be detained beyond a period of 24 hours. Police remand cannot be more than 15 days in whole. Judicial custody at the stage of investigation cannot exceed 90 days in any case. In case where the prescribed sentence is under ten years imprisonment, detention into judicial custody may not exceed 60 days.

At the trial stage, the under trials are provided with legal counsels in case he/she is indigent and cannot afford a legal counsel on its own. This legal aid is provided at the state expense.

WOMEN IN POLICE CUSTODY

Women who are detained in custody are posed to a very serious threat of being ravished during custody. There are many of these cases which have been reported and many have gone unreported due to their weak connections in the community.21

One of the instances of custodial rape is of Renu Mandal, aged 27 years, who hailed from West Bengal and had arrived in New Delhi in January, 1990. She resided in Chittaranjan Park, densely populated with Bengali migrants with her sister and her sister’s husband. On the following day of January 11, Renu had engaged in a quarrel with her neighbor’s child. This led to a dispute between the two families. Renu and her brother-in-law were taken into custody by the two police officials of the neighborhood. After beating the brother-in-law, he was released while Renu was detained and raped. Shortly after when she was released, she got back to her sister’s home and she narrated the entire incident to her. Her rape was confirmed after she was examined at the All-Indian Institute of Medical Sciences (AIIMS). One of the Police Officers involved was dismissed and other was suspended.

RIGHTS OF WOMEN PRISONERS IN INDIA

The place of women and children in every

THE CONDITION OF GUILTLESS CHILDREN AND THEIR PRISONER MOTHER IN PRISON

society is very pivotal to the foundation of every family, especially in an Indian family setup. She has gained equal respect as a daughter, as a mother, as a house wife or as a woman in gender particular. The constitution of India promotes equality among women and children on an equal footing to women and any discrimination on the grounds of gender is prohibited. Apart from enabling provisions contained in the Articles, the Constitution also embarks a duty upon the State to convert the letters and spirits of its provisions into reality. The constitution also imposes a duty upon the state to protect their rights in accordance with the standards laid down in domestic legislations as well as international conventions.

Even the ancient literatures like the Vedas or the Upanishads bestow women with the position of a mother or goddess. According to Manu Smriti, "A woman is considered as a precious being or be projected first by her father, then by her brother and husband and finally by, her son."

The researcher through this study has tried to enumerate the rights available to the women prisoners in light of domestic legislations as well as international conventions. In this particular chapter, the focus is mainly on the Constitutional safeguards and other beneficial provisions engrafted under other Indian legislations. While the international conventions and their standards of rights to be maintained, is discussed in the following chapter.

HUMAN RIGHTS AND PRISON

"The marginalization and discrimination experienced by women in society does not stop at the prison entrance, rather it continues to impinge on their lives even when in state custody, perhaps in its most aggravated forms.'

Hon'ble Justice Geeta Mittal

INTERNATIONAL HUMAN PRINCIPLES FOR PRISON OFFICIALS

By: Niraj Pandey, Research Scholar, Central University of South Bihar Gaya

General doctrine

Human Right is an important facet of International Human Rights Law which is binding on all ratifying State and their agencies. These agencies include prison administering officials as well. Agencies responsible for law enforcement are duty bound to observe these standards.23

INTERNATIONAL CONVENANTS

India has ratified International Covenants like the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which was adopted by the general assembly on 16 December 1966.

In spite of the fact that the Human Rights typified in the pledges were considerably ensured by the Constitution. There was growing tension in the nation and abroad issues related with Human Rights.

Section 30 of the Act provides, "the human rights courts are established for providing speedy trial of offences arising out of violation of human rights,"

Section 2(d) defines human rights, "to mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution in the International Covenants and enforceable by courts in India."

CONCLUSION:

In order to promote healthy physical development and prevent unintentional injuries and accidents among children, fundamental physiological and safety needs of inmates were met to some level (physical facilities, nutrition, medical, or educational facilities).

Children were not only denied access to play areas and the love of their fathers or other family members, but they were also exposed to the criminogenic influences of other prisoners (as seen by their abusive language and frequent fights), placing them at risk for developing problem behavior in the future. Additionally, moms who were incarcerated stated their worry about the behaviors, education, and social development of their children in the future.

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HATE CRIMES IN INDIA

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ABSTRACT

Hate crimes are harsh displays of narrow-mindedness that have a substantial detrimental impact on both the victim and the group with which they identify. They influence social stability and group cohesion. As a result, a robust reaction is required for both individual and societal security.

The motivation of the criminal distinguishes hate crimes from other forms of crime. Because the motivation of the criminal is usually irrelevant to demonstrating the major parts of a crime, it is rarely carefully probed in order to find the underlying reason of the crime. If a criminal justice system does not recognise the phrase "hate crime," the motive is not seen as a critical component of the act, and hate crimes go unnoticed.

Keywords : Hate crime, Indian penal code, RP act

Introduction[1]

Hate crimes are criminal acts performed with a preconceived prejudice. Hate crimes are distinguished from other forms of crimes by this way of thinking. Hate crime is not a solitary offence. It might be a violent act, a threat, property damage, an attack, murder, or another form of crime.

As a result, rather than referring to a specific criminal violation, the phrases "hate crime" or "bias crime" designate a type of crime. Due to bias or prejudice, a person may conduct a hate crime in a nation where there are no explicit criminal repercussions. The phrase describes a concept rather than a legal meaning. One of the two components of all hate crimes is a criminal offence performed with a prejudiced motivation.

The first ingredient of hate crime is conduct that constitutes a crime under fundamental criminal law. This crime is referred to as the "basic offence" in this handbook. There are certain discrepancies in the sorts of behaviour that add up to wrongdoing due to slight changes in legal systems between nations, but they all share a common set of core principles that render some forms of nasty actions criminal. A fundamental offence must always have happened in order for there to be a hate crime.There can be no hate crime if there is no fundamental offence.

History of hate crimes[2]

Hate crime is not a new phenomena; it has existed for centuries. The Holocaust, for example, is a recent example of a hate crime. The religious minority, Jews, were persecuted. Anti-Semitism is the view that Jews are the racially "inferior" segment of society, while Germans are the "superior," and that this was the primary cause of the Holocaust. The Holocaust was the Nazi regime's premeditated and state-sponsored murder of more than 6 million Jews on the basis of race. These Jews were sent to concentration camps and gas chambers, where they were tortured to death. Such crime exposes society's narrow-mindedness and disrupts the country's peace and calm.

One such example is the persecution of minority Hindu Kashmiri Pandits in India. The Muslim majority in Kashmir has made life in the state unbearable for the people who were born there. Kashmiri pandits were given the option of leaving Kashmir or preparing to die. As a result, individuals with guns

1 https://legalserviceindia.com/legal/article-8812-hate-crime.html

2 https://legalvidhiya.com/hate-crimes-their-nature-and-the-laws-connected-with-them/

roamed the streets, intending to kill innocent people in order to assert their territorial rights and establish a pure Islamic state. During this time, thousands of Kashmiri pandits were slain. A large number of Kashmiri Pandits fled. Thousands upon thousands of individuals left overnight to save their lives.

Possible ways to deal with hate crimes[3]

- Awareness Campaigns: Raising awareness about the negative impacts of hate crime on people and society as a whole is the first step in combating it.People can be educated about the effects of hate crime and encouraged to report such instances through mass media campaigns and community engagement programmes.
- Community Participation: Communities may play a significant role in combating hate crime. This may be accomplished by establishing locations for individuals to gather and engage in open and honest talks about the problems that divide them.This can also serve to create greater understanding and respect among diverse communities.
- Use of Technology: Technology may be utilised to improve hate crime reporting and monitoring. This might involve creating online reporting systems and employing data analytics to identify hate crime patterns and hotspots.Restorative justice programmes strive to heal harm and develop connections between victims, offenders, and the community.In incidents of hate crime, these programmes can be utilised to foster healing and reconciliation among impacted populations.
- Stricter punishments: Another strategy to combat hate crime is to put harsher punishments on those who engage in it. This may act as a deterrence to those who are thinking about committing hate crimes.

Hate speech as a hate crime[4]

Hate speech has no purpose other than to generate hatred for a certain group or community, which can escalate to violence. Hate crimes involve the use of insulting language against any group in order to instill hatred. The Honourable Supreme Court granted a broad meaning of the word hate speech in the case of Pravasi Balai Sangathan versus Union of India.

Hate speech is characterised by incendiary remarks that might pave the way for further apocalyptic attacks on bigger sectors of the marginalised population, whose existence may already be dependent on majoritarian support. These hate statements might also be inspired by politics. One such case may be traced back to Azam Khan's indirect comment that many of the Rashtriya Swayamsevak Sangh's workers are unmarried due to their gay inclination. Returning to Kamlesh Tiwari, the leader of the Hindu Mahasabha, who made a contentious comment against Prophet Mohammed.

As a result, many of these remarks might be considered politically motivated. They are also used to discredit a political party's philosophy. People with radical ideals who support these parties operate as a vote bank for the parties. As a result, hate speeches are a strong weapon that may sow the seeds of prejudice in a community or group and can act as a vandalising force against India's secular nature.

Laws on hate crimes in India

Indian penal code

Some important provisions in the Indian Penal Code address incendiary words and phrases that attempt to penalise hate speech.

- Section 153A of the IPC makes it a crime punishable by three years in jail to promote animosity among distinct groups of people based on religion, race, place of birth, domicile, language, and so forth, and to engage in activities that are detrimental to preserving peace amongst them. If committed at a

3 https://www.drishtiias.com/daily-updates/daily-news-analysis/hate-crimes-in-india

4 https://legalvidhiya.com/hate-crimes-their-nature-and-the-laws-connected-with-them/

house of worship or an assembly engaged in religious worship or religious rites, it is punished by a five-year prison sentence.

- Section 295A of the IPC makes it a crime to promote religious hatred against any group of people or religion by insulting their faith or beliefs.
- Any speech that fosters hate or national disaffection against the government is punished as sedition under section 124A of the IPC.
- Section 505 of the IPC makes it a crime to make "statements conducive to public mischief."
- Furthermore, section 505(1) of the IPC applies to publications, reports, or rumours that inspire military mutiny, produce such dread and concern that individuals conduct crimes against the state or public order, or should urge or promote an offence against a distinct class or group. This is punishable by up to three years in jail.
- Section 505(2) of the IPC criminalises comments that incite hostility, animosity, or ill will between classes.
- According to Section 505(3) of the IPC, committing the same crime at a place of worship or any other assembly that engages in religious worship or religious rites will result in a punishment of up to five years in jail.

1951 Representation of the People Act

The 1951 Representation of the People Act governs the qualification, disqualification, and behaviour of MPs and MLAs. Here are its parts on hate speech:

- Section 8 of the Representation of the People Act, 1951, bars a person from running for office if he is convicted of exercising free speech or expression illegally.
- Promoting hostility based on religion, race, caste, community, or language during elections is an unconstitutional perversion of the democratic process, according to sections 123(3A) and 125 of the Representation of the People Act, 1951.

Case laws

The Honourable Supreme Court held in **Babu Rao Patel vs State of Delhi**[5] that section 153A of the IPC "does not function exclusively within the confines of promotion of enmity solely on grounds of religion but takes into cognizance other motivations such as race, place of birth, caste or community identity, linguistic affiliation."

The Supreme Court stated in **Ramji Lal Modi vs State of UP**[6] that "freedom of speech under Article 19(2) of the Constitution "in the interests of public order" would be valid only if the speech was likely to create public disorder, with its connection to the disorder being proximate." The court also maintained the constitutionality of IPC section 295A.

Sukumar vs. State of Tamil Nadu[7] concluded that freedom of speech and expression does not shield individuals from hate speech on social media sites. Article 19 of the Indian Constitution guarantees freedom of speech and expression, but it also acknowledges reasonable constraints on it in Article 19(2).

Conclusion

It has been the practise of the mighty to exploit the helpless from time immemorial. These practises have presented themselves in a variety of ways throughout India, including racism, hate speeches, and maltreatment of minorities. Hate separates society and categorises it into various religions, sects, and so on, which should not be the mind process of any Indian given the country's pluralism and variety. Those in powerful positions expect obedience from those in inferior positions. The current situation in India is extremely volatile, with reports of hate crimes on the rise. If these crimes are not halted, they can constitute a serious danger to Indian society's diversity, especially if they are accompanied by public indifference.

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THE RAJASTHAN PLATFORM-BASED GIG WORKERS BILL, 2023 (REGISTRATION AND WELFARE) – AN OVERVIEW

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AIM AND OBJECTIVE OF THIS STUDY

This article aims to decipher "The Rajasthan Platform-Based Gig Workers Bill, 2023 (Registration and Welfare)" passed on 24th July 2023 by the State Legislature of Rajasthan. The legislation created is not only engrossed in acquiring performance-based gig workers' social security but also plays a cardinal role in ensuring the welfare of such workers.

NEED FOR THE BILL?

A survey conducted by the International Labour Organization concluded that only 40% of workers on digital platforms have health insurance, and only 20% have access to disability insurance or retirement benefits. Even the percentage of gig workers having access to accidental insurance or unemployment benefits is as low as 15%. Gig workers remain unprotected due to ambiguous employment conditions and the absence of an employment contract allows the companies or clients to evade from providing protections and benefits to gig workers. Workers in the gig industry are easy to dismiss causing job insecurity. They are paid at low rates due to which the workers are often forced to undertake multiple jobs to secure a decent livelihood.

As a result, the need for authorities to act as facilitators and regulate such engagements emerged. The Rajasthan state legislature is the first in India to recognize the need for legislation regulating engagements in the and hence issued singular legislation "The Rajasthan Platform-based Gig Workers (Registration and Welfare) Bill" (act), 2023, tabled on 21st July 2023 and passed on 24th July 2023.

CONCEPT OF GIG WORK

The term "Gig" emerged from the music industry, where musicians performed once with no expectations of future work. However, over time gig work emerged as an alternative arrangement to traditional employment in pre-capitalist Europe during the 1980s and 1990s, particularly with the increase in part-time employment. It emerged as a bridge between supply and demand factors in the industry.

Gig work redefined the meaning of labour and gained prominence because of flexibility in working hours, independence, and cost-effectiveness. It allows the workers to escape from the traditional employment structure and offers consumers fast service.

The gig industry expands to various sectors such as home services, professional services, manufacturing, technology, and e-commerce. The industry gained momentum after the creation of the first freelancing website "Craigslist" in the late 90's and reached heights after the year 2000 with the development of app-based platforms such as Airbnb, Uber, Zomato, UrbanClap, Swiggy etc. Indian gig industry constitutes of approximately 7.7 million gig workers that are expected to grow in number to 23.5 million by 2029-30.

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Although there is no proper definition of gig work, however in its narrow sense gig work means labour supply being matched with labour demand by e-platforms. Gig work is often referred to as Crowd-work, on-demand work or temporary work. In the modern environment it can also be called electronically facilitated employment arrangement.

The optimistic approach of such engagements is to enjoy a certain degree of flexibility in employment as a gig worker can work remotely and determine their own working hours. This flexibility enables the workers to manage other commitments such as education along with work.

In contrast to the optimistic approach of gig work, it also has certain detrimental effects being a new variation of employment. It lacks job security and certainty of payment, benefits and protections extended to traditional employees. Often gig workers undertake multiple jobs with odd working hours to secure adequate means of livelihood. The gig industry is an unorganized sector that is not only difficult to measure but also to regulate due to ambiguous employment conditions.

The gig industry comprises of 3 main participants:

A. Gig Worker: Engages in short-term projects with companies or clients, with flexible working hours and minimum intervention of clients or companies.

B. Aggregator: Digital intermediary between gig workers and consumers.

C. Consumer: End user who requires the services or goods for its consumption.

WHO IS A GIG WORKER?

Gig workers are those typically engaged in activities such as food delivery, traveling services, house help services, etc. They are free from traditional employment contracts and inflexible work environments. These workers enjoy autonomy in their work engagements without any supervision from clients or companies. The term gig worker was coined to describe workers who take up multiple jobs or are employed temporarily for short-term projects.

Gig workers are typically paid for the services rendered by them rather than fixed wages or salaries. The absence of an employment contract enables the companies or clients to evade from providing social security, and other protections to gig workers, hence adding to their profits. Consequentially gig workers lack access to health, unemployment and disability insurance, pensions and other retirement benefits and they cannot indulge in collective bargaining as the population of gig workers is geographically dispersed.

The bill defines a gig worker as a person who performs work or participates in a work arrangement and earns from such activities outside of the traditional employer-employee relationship and who works on a contract that results in a rate of payment based on terms and conditions laid down in such contract and includes piece-rate work.

CLASSIFICATION OF GIG WORKERS

Due to the recent downturn in the economy, full-time job seekers have been forced to take up contractual jobs (gig work) which can be broadly classified into the following:

1. FREELANCERS

Freelancing is rooted back to the 1970's and gained momentum since the 1980's. Freelancer is a self-employed person who engages in a certain primary skill such as web design, writing, software development, food delivery etc. and works with multiple clients on short-term projects. Such people take up multiple tasks in accordance with their working capacity. They have full control over the projects having pre-determined periods. Freelancers may charge clients hourly or lump sum for the entire project, e.g., food delivery partners, content writers, etc.

2. INDEPENDENT CONTRACTORS

An independent contractor is a separate entity that runs its own business and works with different companies or clients for a slightly long-term project. Unlike freelancers, independent contractors do not have control over the projects, they are required to perform the tasks assigned to them as per the guidelines of companies or clients. To appoint an independent contractor, it is necessary to enter into a valid contract and establish a hirer-independent

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contractor relationship, e.g., carpenters, house constructors etc.

3. CONSULTANTS

Consultants are professionals who advise their clients on matters relating to their field of expertise. The period of such services may vary from an hour to a year or more, depending upon the client's requirements. Consultants are of several types such as strategy consultants, financial consultants, legal consultants etc. They are hired for specific terms or to supervise specific projects e.g., lawyers, accountants, etc.

INGREDIENTS FOR BEING A GIG WORKER

After closely analyzing the definition of gig workers, it can be concluded that following are the essential characteristics to qualify for being a gig worker:

1. Absence of Traditional Employer-Employee Relationship:

There is no implicit or explicit contract of employment. A gig worker is someone who works independently, for clients or companies. These workers are not considered employees by the companies, rather they are referred to as partners, e.g. the famous food delivery app Zomato refers to the delivery personnel as delivery partners rather than employees.

2. No Paid Wages or Salary

A gig worker is only paid in respect of the services rendered by him/her. They are not entitled to a fixed salary or wage by the company or client.

3. No Social Security and Protection

As they are not considered employees, benefits such as pensions, paid leaves, retirement benefits, and health insurance are not offered to them by employers.

4. Short-Term Work

Gig workers usually get engage with clients or companies on a short-term basis. They are employed temporarily or until the completion of a project.

5. Flexible Working Hours

Gig workers are free from the traditional 9-5 working hours notion. The gig industry offers flexibility to workers, they can work anytime, anywhere. Studies have shown how workers enjoy the flexibility and freedom that comes from determining working hours, where and when to work.

TABLE 1: Analysis Of The Eligibility Criteria For Gig Workers In Various Engagements.

Work Arrangement	Employment Contract	Social Security	Flexibility of Working Hours	Short-Term Employment	Gig Worker
Full Time Employee	Yes	Yes	No	No	No
Consultant	No	No	Yes	Yes	Yes
In House Consultant	Yes	Yes	No	No	No
One-Day-Labour	No	No	Yes	Yes	Yes
Freelancer	No	No	Yes	Yes	Yes
On Demand Worker	No	No	Yes	Yes	Yes
Independent Contractor	No	No	Yes	Yes	Yes

WHO ARE AGGREGATORS AND PRIMARY EMPLOYERS?

AGGREGATORS

The bill defines aggregators as digital intermediaries for buyers of services to connect with the service providers including those entities which co-ordinate with one or more aggregators. These digital intermediaries are generally referred to as digital labour platforms.

The gig economy is vastly supported by technology such as digital platforms, playing a crucial role in transforming the economic landscape for gig

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workers. The gig industry is often referred to as electronically mediated employment arrangements where individuals have access to short-term tasks/ projects through websites or mobile applications.

Digital platforms may have varied target markets but all of them serve as intermediaries between clients and service providers and while doing so, they do not control the communications between the two parties.

These platforms do not identify as employers of gig workers but they are mere agents who receive commissions from gig workers or clients. The main function of these platforms is to bridge the gap between labour demand and supply, hence reducing job search and lowering entry barriers.

Digital labour platforms can be broadly classified into two types:

1. Location-Based Platforms: Where services provided are dependent on the location and performed offline in local areas such as taxi services and food delivery services.
2. Online Platforms: Where the services provided are not dependent on the location hence, hirer and workers may be geographically dispersed such as coding and content writing.

Gig workers are required to register on these platforms to engage with clients through them however merely registered on these platforms is not an implication of the activeness of the worker on the platform.

BENEFITS OF AGGREGATORS IN GIG ECONOMY

1. Reduces entry barriers in the gig industry as workers simply have to sign up on the platform to be matched with customers or companies.
2. Efficient in reducing job search as it quickly matches service providers to clients.
3. Reduced cases of discrimination in comparison to offline work.
4. Cost efficient as reduces the need for physical capital significantly.
5. Allows the gig worker to work independently with minimum intervention from the client or company.
6. Allows them to take on other commitments, along with work.

PRIMARY EMPLOYERS

Primary employers are those individuals or organizations who engage with gig workers directly for a particular task and in return gig workers are paid for their services. This is the traditional method of employing gig workers eliminating digital platforms as intermediaries.

TABLE 2: Comparative Analysis Between Aggregators and Primary Employers

Organization	Employee-Employer Relationship	Direct Contact with the Workers	Offer Short-Term Employment	Digitally Based	Aggregator/ Primary Employer
Easy Day	Yes	Yes	No	No	Primary Employer
Zomato	No	No	Yes	Yes	Aggregator
Uber	No	No	Yes	Yes	Aggregator
Retail Shops	Yes	Yes	No	No	Primary Employer
Swiggy	No	No	Yes	Yes	Aggregator

SALIENT FEATURES OF THE BILL

1. APPLICABILITY OF THE BILL

The Bill applies to aggregators or primary employers in Rajasthan providing any one or more services mentioned in the schedule of the bill or any service or work that comes under the purview of the definitions of gig work and platform as per the bill.

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2. PLATFORM-BASED GIG WORKERS WELFARE BOARD

Aiming to curb the unfair treatment given to gig workers in the industry and to effectuate social security benefits, the bill provides for the establishment of a Platform-Based Gig Workers Welfare Board, (headquarters in Jaipur, Rajasthan) for addressing the grievances and recommendations of gig workers, aggregators, and primary employers under the chairmanship of the Minister in charge of the Department of Labour of Rajasthan. The board constitutes an equal number of representatives of gig workers and aggregators/primary employers, and at least 1/3rd of the members should be women. The board is to meet at least twice a year to address the grievances and concerns, additional meetings may be convened by the chairperson upon a written request from at least 6 members.

The board has been conferred various duties under the bill such as:

a) Registering platform-based gig workers, primary employers, aggregators in the state.

b) Formulate and notify schemes for the welfare of platform-based gig workers.

c) Ensure that the workers have access to welfare schemes and measures taken for their upliftment.

d) Ensure the rights of platform-based gig workers are not being violated.

e) Engage with registered unions working with platform-based gig workers and hold regular consultations with them.

f) Constitute committees to formulate, review and implement schemes.

3. REGISTRATION OF PLATFORM-BASED GIG WORKERS

Primary employers and aggregators are required to provide information about all the performance-based workers engaged with them within 60 days (about 2 months), enabling the board to register these workers and maintain a database for the same. Thereafter a Unique Identification Number is assigned to all the performance-based gig workers so registered for an indefinite period which helps the concerned authorities to keep track of the gig industry.

4. REGISTRATION AND OTHER REQUIREMENTS FROM AGGREGATORS AND PRIMARY EMPLOYERS

Aggregators and primary employers are required to get registered with the board within 60 days (about 2 months) of the enforcement of the bill and update the board regarding any changes in the number of gig workers in the data provided within one month of such change. They are also required to deposit welfare cess and submit monthly returns by the 5th day of every month.

5. SETTING UP WELFARE FUND AND WELFARE SCHEMES

The Bill ensures the setting-up of a Platform-based Gig Worker's Social Security and Welfare Fund. It is utilized for the implementation of schemes formulated for workers lacking financial security, and other welfare schemes. Money received from welfare cess, by way of grants, gifts, donations, and contributions made by individual platform-based gig workers shall form part of this fund.

6. TRACKING AND MONITORING

The bill allows the Board to administer and monitor all the payments, including the breakup of commission charged, payments made to gig workers, GST deducted, and Welfare cess deducted on the platforms by mapping them through Central Transaction Information and Management System (CTIMS).

7. GRIEVANCE SETTLEMENT

The bill provides for the setting up of a grievance settlement mechanism to inquire into the grievances of the gig workers and accord redressals. The aggrieved gig worker may file a petition before the officer appointed by the state, online through the web portal.

Appeal against the order of the officer can be filed within 90 days (about 3 months) to the adjudicating authority, thereafter the adjudicating authority may

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take such action as it deems necessary.

8. PENALTIES

To procure the welfare of the gig workers and minimize contraventions, stringent penalties are imposed on offenders, i.e., up to two lakhs in the case of primary employers, up to 50 lakhs if the offender is an aggregator.

HURDLES UNDER THE BILL

1. LEVYING A 2% CESS ON AGGREGATORS

Levying of the welfare cess on primary employers and aggregators may cause them to revise the payments made to gig workers to adjust the additional cost of cess, shifting the burden of payment indirectly on gig workers.

Providing social security to these workers is the obligation of the government and employers, hence cannot be transferred to gig workers. It should be aided by the government from the taxes already levied on companies or individuals.

2. INDEFINITE TERM OF REGISTRATION

When a gig worker is registered with an aggregator, he/she will automatically be registered with the board and a unique identification (UIN) number will be issued to him/her. The UIN is valid for an indefinite period which may cause difficulty in determining active and inactive gig workers. Labour other than gig workers may register themselves on platforms to acquire UIN and to falsely avail the benefits of the welfare schemes implemented for gig workers.

3. INCLUSION OF PIECE-RATE WORK

The definition of gig workers in the bill includes piece-rate work, which may give rise to potential conflicts with other labour laws, as piece-rate work comes under the purview of other labour laws as well.

4. INCREASED COMPLIANCES

Companies and clients lean towards hiring gig workers because of the low compliance and profitability resulting from the absence of employment contracts. Hence, the regulations under the bill may cause them to refrain from engaging in gig work arrangements due to increased compliance and transparency.

CONCLUSION

Due to independence, flexibility, and low cost; a significant rise has been observed in short-term employment mediated by online platforms termed gig work rather than traditional employment. Companies also lean towards short-term, project-based or medium-term employment due to less compliance and increased profits. With the increased number of workers in the gig industry the need for stringent regulations has arisen.

Securing a decent standard of living, social and cultural opportunities for gig workers is becoming an emerging concern. In pursuance of this, the provisions put forward in the bill are aimed to curb any unjust or inhumane exploitation of the workers in the gig industry and uplifting the status of economically backward gig workers by way of various welfare schemes that are funded by the Platform-based Gig Workers Fund and welfare cess.

The enactment of this legislation is a positive step towards acquiring labour in the unorganized sector with social security and redefining the meaning of employee. If job availability and security are not provided to the gig workers, then the entire effort of introducing the legislation becomes futile. However, the actual impact of the bill cannot be apprehended just yet as details of the benefits and schemes to be introduced are still awaited.

This article is intended only as a general discussion of issues and is not intended for any solicitation of work and should not be regarded as legal advice.

HUMAN TRAFFICKING: ISSUES AND CHALLENGES IN INDIA

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ABSTRACT

Human trafficking has been prevalent in society for ages. It is the trade of human beings for various purposes like sexual slavery, sexual exploitation, forced labour etc., which can occur both at national and international level. The United Nations Convention against Transnational Organized Crime, adopted by General Assembly on 15 November 2000, is the main international instrument in the fight against transnational organized crime. The Convention is supplemented by three Protocols, which target: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

Keywords- human trafficking, trade, money, crimes.

1.General Introduction of the topic

Human trafficking has been prevalent in society for ages. It is the trade of human beings for various purposes like sexual slavery, sexual exploitation, forced labour etc., which can occur both at national and international level. The United Nations Convention against Transnational Organized Crime, adopted by General Assembly on 15 November 2000, is the main international instrument in the fight against transnational organized crime. The Convention is supplemented by three Protocols, which target: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, was adopted by General Assembly resolution 55/25 which entered into force on 25 December 2003. It is the first global legally binding instrument with an agreed definition on trafficking in persons which is to facilitate convergence in national approaches about the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in persons cases. An additional objective of the Protocol is to protect and assist the victims of trafficking in persons with full respect for their human rights.

Smuggling is not like trafficking as it involves the illegal crossing of borders and is usually consensual. The relationship between the smuggler and the person being trafficked terminates upon arrival to the destination country. Smuggling indebtedness can lead to trafficking to resolve a fee owed to the smuggling entity.[1]

The Constitution of India has prohibited all kinds of trafficking under Article 23 and any contravention of this legal provision will be a punishable offence in accordance with law. In Indian context, the Criminal Law (Amendment) Act, 2013 amended Section 370 of Indian Penal Code which talks about Trafficking of Persons and its punishment, whereas Section 370A of Indian Penal Code states about Exploitation of a Trafficked Person. Trafficking is an offence

1 TammyJ Toney-butler, 'Human Trafficking' (StatPearls, 29 January) < https://www.statpearls.com/ArticleLibrary/view-Article/36310> accessed 4 April 2023

under the Indian Penal Code, 1860 which defines trafficking as (i) recruitment, (ii) transportation, (iii) harbouring, (iv) transfer, or (v) receipt of a person for exploitation by use of certain forceful means. There are various laws which regulate trafficking for specific purposes. For instance, the Immoral Traffic (Prevention) Act, 1986 deals with trafficking for the purpose of sexual exploitation, the Bonded Labour Regulation Act, 1986 and Child Labour Regulation Act, 1986 deal with exploitation for bonded labour. Each of these laws operate independently, have their own enforcement machinery and prescribe penalties for offences related to trafficking.

India over the last few years has witnessed an increasing trend in trafficking. According to the latest NCRB data, a total of 2,189 human trafficking cases were registered in the country in 2021, as compared to 1,714 cases in 2020 and 2,208 cases in 2019. The Ministry of Women and Child Development has put in the public domain the Trafficking in Persons (Prevention, Care and Rehabilitation) Bill 2021 which aims to prevent and counter-trafficking in persons, especially women and children, to provide for the care, protection, and rehabilitation to the victims while respecting their rights, and creating a supportive legal, economic and social environment for them, and also to ensure prosecution of offenders, and for matters connected therewith or incidental thereto. It is an improved version of the bill introduced in and passed by the Lok Sabha in 2018 (but lapsed).

1.1 Literature Review

Ms. Shatabdi Bagchi and Ms. Ambalika Sinha in the article "Human Trafficking in India: Theoretical perspectives with special reference to Human trafficking scenarios in Northeastern part of India", have highlighted the conditions of women who are the vulnerable target of human trafficking and found that trafficking is not a single issue but rooted with multiple aspects.

As per a report published by Thompson Reuters Foundation in 2019, based on research by anti-slavery advocacy group Tafteesh, out of 429 people charged with involvement in 198 trafficking cases in the states of West Bengal and Andhra Pradesh from 2008 until 2018, only three convictions were made.

Ms. Viman Vidushi in the article named "Human trafficking in India: an analysis", has addressed the issues of human trafficking and the preventive measures as to how to deal with it.

1.2 Research problem:

The current legal framework on trafficking only criminalizes the act of trafficking but presently there are no legal provisions for the prevention of trafficking, or the protection and rehabilitation of victims.

1.3 Research Question:

What will be the effect of Trafficking in Persons (Prevention, Care & Rehabilitation) Bill 2021 if it's implemented in India?

1.4 Objectives of the paper:

1. To analyse the role of the judiciary on human trafficking in India.
2. To suggest the measures to combat human trafficking in India.

1.5 Research Methodology

The research methodology adopted for this study is doctrinal in nature. The data has been collected through various sources like articles, journals, websites, and research papers.

2.1 Causes of human trafficking

1. Poverty

Poverty is one of the leading causes of human trafficking in India. Poor families often sell their children, usually girls, into forced labor or prostitution to earn money. The poverty-stricken parents are easily manipulated by traffickers who offer to take their children to the city and give them jobs or education.[2]

2. Demand for cheap labor

There is a demand for cheap domestic and agricultural labor. Employees are often initially

2 Vimal Vidushy, 'Human trafficking In India: An analysis' [2016] 2(6) International Journal of Applied Research 168-171

promised a safe workspace and a steady salary, only to later find that they are paid less than minimum wage and worked overtime. Business owners continue to practice such illegal norms as the victims of trafficking can rarely protect themselves as they have very few alternatives.

3. Social and Cultural practices

With little opportunities of upward mobility and with little value placed on women and girls; they are more vulnerable to human trafficking. Certain cultural practices in India, such as child marriage and dowry, also contribute to human trafficking. Child marriage led to early pregnancy and forced labor, while dowry creates a financial burden on the bride's family, leading to trafficking for forced labor or prostitution.

4. Lack of education

Lack of education is another significant factor that contributes to human trafficking in India. Illiterate or uneducated people are more vulnerable to traffickers, who lure them with promises of a better life or a good job opportunity in the city.

5. Gender discrimination

Gender discrimination is also a crucial factor that leads to human trafficking in India. Girls and women are often seen as a burden in Indian society, and they are trafficked for forced labor, domestic servitude, or prostitution.

6. Inadequate law enforcement

Inadequate law enforcement is a significant factor that contributes to human trafficking in India. Traffickers operate with impunity, knowing that they are unlikely to be caught or punished. Corruption within the law enforcement agencies further exacerbates the problem.

2.2 Categories of human trafficking

In India, there are various forms of human trafficking that occur, including:

1. Sex Trafficking: This is the most common form of human trafficking in India, which involves the forced or coerced commercial sexual exploitation of women and children. Victims are often lured with the promise of a job or a better life but are then forced into prostitution.
2. Forced Labor: Forced labor is another form of human trafficking that is prevalent in India. Victims are often forced to work in hazardous conditions, for little or no pay. This includes domestic work, construction, agriculture, and other forms of manual labor.
3. Bonded Labor: Bonded labor, also known as debt bondage, is a form of modern-day slavery. Victims are forced to work to pay off a debt, but the debt is often impossible to pay off, leading to a cycle of exploitation.
4. Child Labor: Child labor is a form of trafficking that affects millions of children in India. Children are forced to work in hazardous conditions, for little or no pay, and are often subjected to physical and emotional abuse.
5. Forced Marriage: Forced marriage is a form of trafficking that involves the forced marriage of women and girls. Victims are often abducted or coerced into marriage and are then subjected to sexual and domestic violence.
6. Organ Trafficking: Organ trafficking is a form of trafficking that involves the illegal trade of human organs. Victims are often lured with the promise of money but are then forced to undergo surgery to remove their organs.

2.3 Legal provisions regarding Human trafficking

There are several legal provisions in India that aim to prevent and punish human trafficking. Some of the key provisions are:

Article 23 of the constitution of India prohibits trafficking in human being and other similar forms of force labor and pronounce that such acts are offences punishable in accordance with law. Article 24 of the constitution also provides that no child, below the age of 14 years, shall be employed to work in any factory or mine or engaged in any other hazardous employment. And Article 37 provides that the state shall direct its policy towards securing that children are given adequate opportunities and facilities to

develop in a healthy manner, so that children and the youths are protected against such exploitation.[3]

The Immoral Traffic (Prevention) Act, 1956: This act is aimed at preventing trafficking for the purposes of prostitution. It criminalizes procurers, traffickers and profiteers of the trade but in no way, it defines trafficking per se as a human being. It provides for the punishment of traffickers and those who are involved in running brothels and other similar establishments.

The Bonded Labor System (Abolition) Act, 1976: This act prohibits the practice of bonded labor and prescribes stringent punishment for offenders. It also provides for the rehabilitation of bonded laborers.

The Protection of Children from Sexual Offences Act, 2012 (POCSO): This act provides for the protection of children from sexual abuse and exploitation, including trafficking for sexual purposes. It prescribes strict punishment for offenders, including life imprisonment and a fine.

The Juvenile Justice (Care and Protection of Children) Act, 2015: This act provides for the care, protection, and rehabilitation of children who are victims of trafficking. It also provides for the punishment of traffickers.

The Criminal Law (Amendment) Act, 2013: This act amended several provisions of the Indian Penal Code (IPC) and other laws related to sexual offenses. It introduced new offenses such as stalking, acid attacks, and trafficking of persons for exploitation, and provided for more stringent punishment for these offenses.

3.1 Role of judiciary on human trafficking in India

The judiciary in India has taken several steps to combat human trafficking. The Supreme Court of India has been proactive in protecting the rights of victims of human trafficking and ensuring that the perpetrators are brought to justice. The court has issued various guidelines and directions to the government and law enforcement agencies to prevent human trafficking and protect victims.

In the case of People's Union for Democratic Rights v, Union of India (1982) 3 SCC 235, the meaning of forced labor vis a vis Article 23 of the Constitution of India was defined by the Supreme Court of India.

In the case of Neerja Chaudhary v. State of Madhya Pradesh AIR 1984 SC 1099, the Supreme Court gave the directions on rehabilitation of the bonded labors and that the rehabilitation must follow in the footsteps of identification and release, if not, released bonded laborers would be driven by poverty, helplessness and despair into serfdom.

In another case of Bandhua Mukti Morcha vs Union of India (1984) - The Court has elaborated upon Article 23 and laid that wherever it is shown that a person is working for less than minimum wage, the presumption must be that he is a bonded laborer.

In Kamaljit v. State of NCT of Delhi 2006, the court highlighted a fact that in December 2002, India became signatory to UN Convention Against Transnational Organized Crime and has stated that trafficking is an organised crime, and the stringent measures are required to combat it.[4]

In Budhadev Karmaskar v. State of West Bengal (2011) 11 SCC 538, where it was observed by the Supreme Court that a women is compelled to indulge in prostitution not for pleasure but because of poverty. So, the court appointed a panel to monitor and suggest rehabilitation scheme for trafficked sex workers and trafficked victims.

In the case of Bachpan Bachao Andolan v. Union of India (2011) SCC (5) 1, the Solicitor General of India provided a detailed report on child trafficking issues in India and submitted that each state government must identify an officer who is responsible for implementation of schemes in relation to the children.

3.2 Analysis of the draft bill 2021

The draft its Trafficking in Persons (Prevention, Care and Rehabilitation) Bill was published in June 2021 by the Ministry of Women and Child Welfare

3 Arunima Bose, 'Human Trafficking' (SCC Online, September 20) <https://www.scconline.com/blog/post/2020/09/20/human-trafficking/> accessed 2 April 2023

4 NATIONALLEGAL Research desk, 'Landmark Rulings of the Courts in India on Combatting Human Trafficking' (NATIONAL LEGAL RESEARCH DESK, October 15, 2013) <https://nlrd.org/landmark-rulings-of-the-courts-in-india-on-combatting-human-trafficking-trafficking/> accessed 3 April 2023

which has increased the scope of the nature of offenses of trafficking as well as the kind of victims of these offenses, with stringent penalties including life imprisonment, and even the death penalty in cases of an extreme nature.

The purpose of the draft is to prohibit and combat human trafficking while also aiding and safety to sufferers by broadening the geographical jurisdiction of crimes involving cross-border effects. As per the proposed Bill, the legislation will extend to every Indian resident, both inside and outside the territory, as well as anyone aboard any vessel or airplane licensed in India and conveying Indian nationals wherever they might be, and any overseas resident or stateless people residing in India.[5]

The term 'victim' has been expanded to encompass transgender people as well as females and juveniles. The Bill expands the list of those who can be arrested under the legislation, including governmental employees, defense officials, and anybody in a place of responsibility.

The Bill specifically describes human trafficking as a global offense with worldwide ramifications, attempting to separate trafficking from sex labor while preserving the rights of the victim to rehabilitation & reimbursement outside of judicial procedures. It divides crimes into two categories: "Trafficking & Exacerbated types of Trafficking," with the first having a maximum sentence of ten years in prison and a charge of 1 Lakhs, and the latter carrying a capital punishment and a fee of up to 30 Lakhs.

The Bill provides for the formation of "National Anti-Trafficking Committees" as well as bodies at the state and district levels. It further includes rehabilitative provisions that are not included in Section 370 of the Indian Penal Code, (1860). Referencing the Prevention of Money Laundering Act, (2002), it also enforces monetary penalties, and property acquired through such earnings and utilized for trafficking can also be seized. The proposed bill stipulates that the investigation must be concluded within 90 days (about 3 months) of the offender's arrest.

The draft Bill conflates the issues of human trafficking and sex labor. Prostitution and pornography have been included in the definitions of exploitation and sexual abuse and are now recognized forms of human trafficking. The assent of the sufferer is no longer significant.

The Bill fails to define the implementation of existing legislation against coerced labor and sexual exploitation resulting in ambiguity and overlapping. The proposed Bill doesn't include the "Rescue Guidelines" which are essential instances of human trafficking. In the lack of rescue guidelines, there is constantly the risk of the forcible rescue of adult people who have been exploited but would not want to be rescued. However, the investigating agents is given discretionary rights to intervene in a matter if he/she has grounds to suspect there is an incident of human trafficking, rendering the existing involvement of the Anti- Human Trafficking Units (AHTU) in rescuing and post-rescuing activities ambiguous.

Thirdly, the Bill had given the National Intelligence Agency (NIA) authority to combat cross-border human trafficking to bring closure to it. The NIA, on the other hand, is burdened by such modifications. Further, incorporating NIA authorities in the investigation of human trafficking offenses concerning juveniles as sufferers goes against the concept of the ideal interest of the juvenile. In this regard, the proposed Bill contradicts the Juvenile Justice Statue, (2015), which places a significant focus on child-friendly methods by creating Child Welfare Boards, Specialized Juvenile Police Forces, and Child Development Police Agents. In circumstances of rescue activities, the Bill is quiet on the precise functions of the NIA in comparison to jurisdictional police officials. The flaws in the Bill are indicative of the absence of general populace engagement. Civil community associations claim that the public comment period is too short (two weeks), considering that the draft Bill is exclusively provided in English; the Bill must be translated before it can be debated with all participants.

Lastly, issues have also been raised concerning the lack of society-based restoration, the lack of a description of reconciliation, and the resources allotted to the rehabilitation of survivors in the proposed Bill.

There is a requirement for sensitization and

5 Law& Policy, 'Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021' (JournalsOfIndia, 6 July) <https://journalsofindia.com/trafficking-in-persons-prevention-care-and-rehabilitation-bill-2021/> accessed 4 April 2023

structural transformation. The ability to operate effectively in the criminal justice process is critical in combating the threat of human trafficking. Increased conviction percentages require filling positions, designating specialized units, and appointing an attorney. The police department must be trained to cope with incidents of human trafficking. The Act must acknowledge and alleviate the problems of the marginalized, including sex laborers of the nation.

3.3 Measures to combat Human Trafficking

Human trafficking is a serious issue in India and combating it requires a multifaceted approach involving various stakeholders including the government, civil society, and international organizations. Here are some suggestions to combat human trafficking in India:

Strengthening laws: India has laws in place to prevent human trafficking, including the Immoral Traffic (Prevention) Act, 1956 (ITPA) and the Protection of Children from Sexual Offences (POCSO) Act, 2012. However, these laws need to be strengthened and enforced more effectively to ensure that perpetrators of trafficking are brought to justice. [6]

Awareness campaigns: Raising awareness about the dangers of human trafficking and the rights of victims can help prevent trafficking and provide support to survivors. Awareness campaigns can be carried out in schools, colleges, and other public places to reach a wider audience. Women and girls are particularly vulnerable to trafficking in India, and empowering them through education, vocational training, and other opportunities can help reduce their vulnerability. Providing support and services to survivors of trafficking, including legal aid, medical care, and psychosocial support, is essential for their recovery and reintegration into society.

Collaboration among stakeholders: Collaboration among government agencies, NGOs, and international organizations can help ensure a coordinated response to human trafficking. This can include sharing information, resources, and expertise to prevent trafficking and support survivors.

Addressing root causes: Addressing the root causes of human trafficking, such as poverty, inequality, and discrimination, is essential to prevent trafficking from occurring in the first place. This can involve providing economic opportunities, improving access to education and healthcare, and addressing social and cultural norms that perpetuate trafficking.

International cooperation: Human trafficking is a global issue, and international cooperation is necessary to combat it effectively. India should work with other countries to prevent trafficking and prosecute traffickers who operate across borders.

4.1 Conclusion

Indian Judiciary plays a pivotal role in combating human trafficking. It not only administers justice but also protects the rights of the citizens. India is a democratic welfare state which allows equal opportunity to all irrespective of caste, color, creed, sex or other form of discrimination. Human trafficking jeopardizes the dignity and security of trafficked individuals, and severely violates their human rights. Constitution of India guarantee the equal rights of men and women, but they are often merely rhetoric when it comes to the question of practical implementation.

The network of trafficker's agents is very complex in drawing attention to one single entity, since the situation is neither regards in terms of forming a real-to-real protection. They have been set up by the traffickers in not being captured, but then the international treaty law and trafficking protocol depend on such context that is related to the principles. Furthermore, victims who have been involved in the sex trafficking are frequently attached by engaging to preserve their commercial acts, and it was difficult to identify whether it was forced, or it could even be the other part that kept them active to earn for their interests vice versa.

Also, such traffickers are the people from the low-caste evolving and they are discriminated by the commercial sex buyers and even the laborers largely discriminated as well, which shows their insights of their vulnerable economic position and hence, it leads to the non-sustainable employment and more numbers of exploiters are known to be corrupted in getting rid of taxes and other charges that are to be

6 United Nations Office on Drugs and Crime, An Introduction to Human Trafficking: Vulnerability, Impact and Action (c2008) 105-120

made.5 To combat trafficking and thus to protect the human rights of the vulnerable people, strong political will of the government is vital in implementing their anti-trafficking mandates. Thus, we can say any crime which can be used as business one day becomes a big social evil as in the case of human trafficking. The problem is still in our hands to be solved if strong steps are taken deliberately and policies are made and implemented strictly.

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- Law& Policy, 'Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021' (JournalsOfIndia, 6 July) < https://journalsofindia.com/trafficking-in-persons-prevention-care-and-rehabilitation-bill-2021/ > accessed 4 April 2023
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EXPLORING THE EFFICACY OF ARBITRATION IN RESOLVING NHAI CASES UNDER THE NATIONAL HIGHWAYS ACT, 1956: A COMPREHENSIVE LEGAL ANALYSIS

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ABSTRACT

This scholarly research article offers a comprehensive and in-depth legal analysis that delves into the efficacy of arbitration as a means of resolving cases pertaining to the National Highways Authority of India (NHAI) under the framework of the National Highways Act, 1956.[1] The National Highways Act was enacted to govern and regulate the development, maintenance, and management of national highways within India, and it establishes a legal framework for addressing disputes that may arise in this context. Given the intricate nature and substantial magnitude of NHAI cases, the establishment of an effective and efficient dispute resolution mechanism is of utmost importance in ensuring the prompt and equitable resolution of conflicts. The study commences by providing a contextual backdrop concerning the National Highways Act, 1956 [2], and underscores the imperative need for a streamlined and efficient mechanism for resolving disputes arising within NHAI cases. It delves into the concept of arbitration, elucidating its relevance and applicability in the realm of legal disputes, particularly in the context of NHAI cases[3]. Furthermore, the legal framework governing arbitration under the purview of the National Highways Act is meticulously examined, encompassing a comprehensive analysis of pertinent provisions and their judicial interpretation. Moreover, the research presents a series of illustrative case studies that exemplify the practical application of arbitration within the realm of NHAI cases. These real-life examples are subject to scrutiny, thereby elucidating the utilization of arbitration and the resultant outcomes. The effectiveness of arbitration as a means of resolving NHAI disputes is subjected to critical assessment, taking into consideration various

1 Kylasam Iyer, D., Ismath, M., Harish, P. and Khosla, S., 2016. Analysing Road Regulation in India through the Arie Freiberg Framework of Regulation. Available at SSRN 2845174.

2 https://www.indiacode.nic.in/bitstream/123456789/1651/1/AAA1956____48.pdf (Accessed on 9th July 2023 at 6:30 PM)

3 KS, H., 2013. Rethinking dispute resolution in public–private partnerships for infrastructure development in India. Journal of Infrastructure Development, 5(1), pp.21-32

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factors such as expediency, cost-efficiency, the expertise of arbitrators, and the enforceability of arbitration awards.

A comparative analysis is undertaken to juxtapose arbitration against the traditional methods of litigation commonly employed within NHAI cases. This analysis entails a meticulous evaluation of the advantages and disadvantages inherent in each approach, thereby shedding light on the unique benefits and challenges associated with the utilization of arbitration.[4] Based on the findings derived from this research, a series of recommendations are presented with the aim of bolstering the efficacy of arbitration within NHAI cases. These recommendations are centered around measures intended to enhance the arbitration process, address prevalent challenges, and optimize the benefits of arbitration in the resolution of NHAI disputes. Suggested measures include the promotion of awareness and understanding of arbitration among stakeholders, the assurance of the appointment of qualified arbitrators, the streamlining of procedural requisites, and the establishment of mechanisms for the effective enforcement of arbitration awards. In conclusion, this comprehensive legal analysis illuminates the efficacy of arbitration as a means of resolving NHAI cases under the ambit of the National Highways Act, 1956. The research underscores the significance of cultivating a robust and efficient dispute resolution mechanism to facilitate the expeditious and equitable resolution of conflicts within the realm of national highways development and management. By delving into the potential of arbitration and offering recommendations for improvement, this study makes a substantial contribution to the ongoing endeavours aimed at enhancing the effectiveness of dispute resolution within NHAI cases.

Keywords: Arbitration, NHAI Cases, National Highways Act, 1956, Dispute resolution

4 Mattli, W., 2001. Private justice in a global economy: from litigation to arbitration. International Organization, 55(4), pp.919-947

Introduction

Arbitration has emerged as a prominent alternative dispute resolution mechanism in various legal systems worldwide, offering an effective and efficient means of resolving conflicts.[5] In the context of infrastructure development and management, such as national highways, the importance of a robust dispute resolution mechanism cannot be overstated. It ensures timely and fair resolutions, contributing to the seamless progress of projects. This research article endeavors to delve into the efficacy of arbitration in resolving cases pertaining to the National Highways Authority of India (NHAI) under the National Highways Act, 1956. Through a comprehensive legal analysis, this study aims to enhance our understanding of arbitration's role in NHAI cases and identify potential avenues for improvement.

The National Highways Act, 1956, was enacted in India to regulate the development, maintenance, and management of national highways, establishing a legal framework for various aspects of highway

5 Osi, C., 2008. Understanding Indigenous Dispute Resolution Processes And Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods In Lieu Of Litigation. Cardozo J. Conflict Resol., 10, p.163

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administration, including dispute resolution.[6] Given the complexities and scale of NHAI cases, a robust mechanism capable of effectively handling disputes is imperative. This mechanism must take into account the unique characteristics of infrastructure projects and the need for expeditious resolutions.

Background information on the National Highways Act, 1956

The National Highways Act, 1956, stands as a significant milestone in India's transportation infrastructure development.[7] Its enactment aimed to provide a legal framework for the construction, maintenance, and management of national highways across the country. The Act delineates the powers and functions of the NHAI, the entity responsible for the development and upkeep of national highways.

Under the purview of the Act, the NHAI is empowered to acquire land for highway development, engage in contracts, and establish regulations governing highway administration.[8] Additionally, the Act incorporates provisions for dispute resolution, with arbitration recognized as one of the legitimate methods for resolving conflicts that may arise between the NHAI and other stakeholders.

Brief overview of NHAI cases and the need for effective dispute resolution

NHAI cases encompass a wide spectrum of disputes that arise throughout the lifecycle of national highways, spanning planning, construction, maintenance, and operation. These disputes involve diverse parties, including contractors, subcontractors, landowners, government entities, and various stakeholders. The intricate nature of NHAI cases often emanates from factors such as technical specifications, project delays, cost escalations, land acquisition challenges, and environmental considerations.

The imperative for an effective dispute resolution mechanism in NHAI cases cannot be emphasized enough. Timely resolution of conflicts is paramount to ensure the seamless progression of infrastructure projects, minimize financial losses, and uphold public trust in the NHAI's capacity to deliver top-quality highways. Traditional litigation processes, burdened with backlogs and protracted timelines, prove inadequate for the fast-paced nature of infrastructure development. [9]

Arbitration, on the other hand, offers several advantages that render it a viable option for resolving NHAI cases. Primarily, arbitration proceedings can be tailored to suit the unique requirements and complexities of infrastructure projects.[10] The involved parties can appoint arbitrators possessing expertise in relevant domains, guaranteeing that disputes are adjudicated by individuals with the requisite technical knowledge and industry acumen.

Furthermore, arbitration facilitates a flexible and confidential process compared to traditional court litigation. The parties retain greater control over the procedure, encompassing the selection of rules, language, and venue. This flexibility facilitates efficient case management, ensuring prompt resolutions and relieving the burden on the courts. Moreover, confidentiality in arbitration safeguards sensitive information, which assumes particular significance in the context of infrastructure projects entailing commercial and technical data.

Additionally, arbitration awards typically carry finality and enforceability, providing certainty to the involved parties.[11] This aspect holds great

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11 Schmitz, A.J., 2002. Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis. Ga. L. Rev., 37,

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significance for infrastructure projects, enabling the implementation of decisions without undue delays. The conclusive nature of arbitration awards also diminishes the risk of protracted legal battles and fosters amicable settlement of disputes.

Notwithstanding the advantages, challenges persist in effectively harnessing arbitration in NHAI cases. These challenges encompass the need for widespread awareness and comprehension of arbitration among stakeholders, the selection of qualified arbitrators, and the enforcement of arbitration awards. Addressing these challenges and maximizing the benefits of arbitration in NHAI cases necessitates meticulous examination and analysis of the existing legal framework and practices.[12]

Case Studies on the Application of Arbitration in NHAI Cases:

Arbitration has emerged as a highly effective mechanism for resolving disputes in NHAI cases, exemplifying its practicality and applicability. This section presents a series of case studies that shed light on real-life instances where arbitration has been utilized within NHAI cases, offering valuable insights into the outcomes achieved through this alternative dispute resolution method.

Case Study 1: Resolving Land Acquisition Disputes for Highway Construction

An intriguing case materialized, involving the acquisition of land for a significant highway construction project. Within this context, a dispute arose between the NHAI and the affected landowners, primarily concerning the fair and just compensation amount. The inability of the parties to reach a mutually acceptable settlement prompted them to resort to arbitration.

This arbitration endeavor commenced with the appointment of a proficient arbitrator, possessing profound expertise in the realms of land valuation and infrastructure projects. Diligently scrutinizing the evidence presented by both parties, encompassing the market value of the land, the incurred damages borne by the landowners, and any additional expenses necessitated by the acquisition, the arbitrator embarked on a meticulous evaluation process.

Subsequent to an extensive analysis and deliberate examination, the arbitrator delivered an arbitration award that precisely determined the compensation amount. The award encompassed a comprehensive consideration of the fair market value of the land, the consequential damages sustained by the landowners, and the reasonable expenses intertwined with the land acquisition process.

The arbitration proceedings in this instance facilitated a swift, equitable, and efficacious resolution to the land acquisition dispute, thus ensuring minimal project delays. By enabling the affected landowners to secure just compensation for their land and concurrently ensuring the NHAI's adherence to requisite legal obligations, this arbitration mechanism manifested itself as a proficient and equitable dispute resolution avenue.

Case Study 2: Resolving Contractor Disputes in Highway Development

Another notable case arose when a contractor engaged in a prominent national highway development project encountered a disagreement with the NHAI pertaining to payment terms and project variations. Escalating tensions propelled the parties to opt for arbitration as a means to resolve their divergences.

In this arbitration endeavor, an arbitrator possessing extensive experience within the realm of construction and infrastructure-related disputes was duly appointed. Scrutinizing the contractual terms, examining the project variations, and evaluating the conduct exhibited by both parties during the project's execution formed the crux of the arbitrator's responsibilities.

The arbitration process enabled the arbitrator to meticulously scrutinize the merits of each party's claims and defenses, evaluate the evidence furnished, and deliberate upon the relevant legal principles. Ultimately, the arbitrator issued an arbitration award

p.123

12 Kudtarkar, S.G., 2020. Resetting PPP in infrastructure model in india post-COVID-19 pandemic. The Indian Economic Journal, 68(3), pp.365-382

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that definitively resolved the dispute by stipulating the payment obligations and delineating the respective responsibilities of each party.

This arbitration process emerged as a vital instrument in expeditiously resolving the contractor dispute, bypassing the prospects of protracted litigation and potential project delays. By furnishing an impartial and efficient platform for the parties to present their arguments and evidence, this arbitration mechanism culminated in an equitable and enforceable resolution.

Discussion on the Outcomes and Effectiveness of Arbitration in Resolving NHAI Cases

The case studies presented above serve as compelling illustrations of the favorable outcomes and overall effectiveness of arbitration in resolving NHAI cases. The arbitration process offers several inherent advantages that substantially contribute to its efficacy within this context.

Primarily, arbitration facilitates the selection of arbitrators possessing specialized expertise in relevant fields such as land valuation, construction, and infrastructure projects.[13] The presence of such domain knowledge ensures that disputes are judiciously adjudicated by individuals who possess the necessary acumen and comprehension of the intricacies inherent to the industry, thereby engendering well-informed and sound decisions.

Secondarily, arbitration affords a degree of flexibility concerning procedural aspects, venue selection, and language preferences. This flexibility fosters efficiency and allows for the effective management of NHAI cases, which often encompass multifaceted technical and legal complexities.

Moreover, arbitration awards typically bear finality and binding force, thereby bestowing certainty and enforceability upon the involved parties.[14] The enforceability of arbitration awards serves to curtail the risks associated with protracted legal battles and augments the prospects of compliance, thereby facilitating the timely execution of NHAI projects.

Nonetheless, it is crucial to acknowledge that the effectiveness of arbitration within NHAI cases is contingent upon various factors, including the careful selection of competent arbitrators, unwavering adherence to principles of procedural fairness, and the genuine willingness of all parties to engage in the process in good faith. In addition, concerted efforts aimed at heightening awareness and promoting the benefits of arbitration among stakeholders hold the potential to further enhance its efficacy in resolving NHAI disputes.[15]

Benefits and Limitations of Arbitration in NHAI Cases: An Analysis

Arbitration has emerged as a preferred mechanism for resolving disputes in NHAI cases, offering a range of benefits and advantages. However, it is crucial to acknowledge the limitations and challenges associated with its application in this specific context. This section critically evaluates the advantages of arbitration in addressing NHAI disputes while identifying potential limitations and challenges that warrant careful consideration within the academic and professional sphere.[16]

Advantages of Arbitration in Resolving NHAI Disputes

Expertise and Technical Knowledge: One of the primary strengths of arbitration lies in its ability to empower parties to appoint arbitrators with specialized expertise in relevant fields such as land valuation, construction, and infrastructure projects.[17]

13 Mistarihi, A.M., Al Refai, M.S., Al Qaid, B.A. and Qeed, M.A., 2012. Competency requirements for managing public private partnerships (PPPs): The case of infrastructure projects in Jordan. International Journal of Business and Management, 7(12), p.60

14 Curtin, K.M., 1999. An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards. Ohio St. J. on Disp. Resol., 15, p.337

15 Ahuja, V. and Basu, C., 2020. Programmes, initiatives, achievements and challenges. Improving the Performance of Construction Industries for Developing Countries: Programmes, Initiatives, Achievements and Challenges

16 Moza, A. and Paul, V.K., 2018. Analysis of claims in public works construction contracts in India. Journal of Construction in Developing Countries, 23(2), pp.7-26

17 https://uk.practicallaw.thomsonreuters.com/9-502-0625?transitionType=Default&contextData=(sc.Default)&firstPage=true (Accessed on 11th July,

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By entrusting dispute resolution to professionals possessing comprehensive technical knowledge and industry understanding, arbitration ensures informed decision-making and technically sound resolutions. This expertise contributes to the credibility and effectiveness of arbitration as a dispute resolution mechanism in NHAI cases.

Flexibility in Procedure and Procedural Efficiency: Unlike conventional litigation, arbitration provides unparalleled flexibility in terms of procedure, venue, and language. This adaptability enables parties to tailor the arbitration process to the unique complexities and requirements inherent in NHAI cases.[18] The ability to design a customized procedure that aligns with the specific characteristics of infrastructure projects often leads to enhanced efficiency, expeditious dispute resolution, and reduced burden on judicial systems. Arbitration's procedural flexibility remains a vital advantage that academicians and professionals should carefully consider.

Confidentiality: Maintaining the confidentiality of sensitive commercial and technical information is a paramount concern in NHAI cases. Arbitration proceedings, by their nature, are conducted in private, ensuring the protection of confidential information.[19] This confidentiality fosters an environment conducive to open communication and cooperation among the parties involved. Moreover, the confidential nature of arbitration can facilitate information sharing, ultimately fostering the possibility of amicable settlements. The inherent advantage of confidentiality is an important aspect that academia and professionals must appreciate while assessing the efficacy of arbitration in NHAI disputes.

Finality and Enforceability of Awards: The final and binding nature of arbitration awards contributes to their effectiveness in providing certainty to the parties. This finality minimizes the risk of protracted legal battles and promotes the timely execution of NHAI projects. Furthermore, under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arbitration awards can be enforced internationally. [20] The enforceability of awards across borders establishes arbitration as a robust mechanism for resolving cross-border disputes within the NHAI context, warranting attention from scholars and practitioners alike.

Specialized Decision-Makers: The appointment of arbitrators with specialized knowledge and experience in the relevant areas of law and industry is a key attribute of arbitration. In NHAI cases, where intricate technical complexities often arise, the presence of arbitrators with expertise in infrastructure projects is invaluable. The specialized decision-makers ensure that dispute resolutions are guided by professionals who possess a deep understanding of the nuances within the industry. The inclusion of specialized decision-makers enhances the fairness and accuracy of outcomes in arbitration, making it a desirable choice in the academic and professional discourse surrounding NHAI disputes.

Limitations and Challenges of Arbitration in NHAI Cases

Cost: While arbitration offers numerous advantages, it is important to acknowledge that it can be costlier than traditional litigation, particularly when parties engage high-profile arbitrators or opt for complex procedural mechanisms. The costs associated with arbitration, including arbitrator fees, administrative expenses, and legal representation, can potentially create financial barriers for parties with limited resources.[21] Therefore, the consideration of cost-related challenges is imperative in assessing the feasibility of arbitration as a dispute resolution mechanism in NHAI cases.

Limited Precedent: Unlike court judgments, arbitration awards do not establish binding precedents. Each arbitration case is treated as an

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18 Rab, A., 2022. Interim Measures in International Commercial Arbitration: A Comparative Review of the Indian Experience

19 Brown, A.C., 2000. Presumption meets reality: an exploration of the confidentiality obligation in international commercial arbitration. Am. U. Int'l L. Rev., 16, p.969

20 Choi, S., 1995. Judicial enforcement of arbitration awards under the ICSID and New York Conventions. NYUJ Int'l L. & Pol., 28, p.175

21 Gottwald, E., 2006. Leveling the playing field: is it time for a legal assistance center for developing nations in investment treaty arbitration. Am. U. Int'l L. Rev., 22, p.237

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individual matter, and decisions rendered do not serve as legal precedents to guide future disputes.[22] Consequently, the absence of binding precedent may lead to inconsistencies in outcomes, as different arbitrators may interpret similar issues differently. However, it is worth noting that arbitral decisions can still carry persuasive value and exert influence on future cases, even in the absence of binding precedent.

Limited Discovery and Disclosure: Arbitration proceedings often involve more restricted discovery and disclosure obligations compared to traditional litigation. While this contributes to procedural efficiency, it may also limit parties' access to relevant evidence and information. In NHAI cases that entail complex technical and financial data, the restricted scope of discovery and disclosure can present challenges for parties in presenting their cases comprehensively.[23] Academics and professionals should duly consider this limitation when evaluating the suitability of arbitration in the NHAI context.

Limited Remedies: Arbitration awards typically provide monetary compensation and may not grant certain remedies available in court, such as specific performance or injunctions. In NHAI cases where specific performance plays a pivotal role in ensuring the completion of infrastructure projects, the limited range of remedies available in arbitration can pose challenges. Nonetheless, it is important to acknowledge that parties can tailor the scope of remedies through carefully drafted arbitration clauses, thus mitigating some of the limitations associated with remedy options.[24]

Enforcement Issues: Although arbitration awards are generally enforceable, challenges may arise when seeking enforcement in certain jurisdictions. Cross-border enforcement, in particular, can be complex due to variations in legal frameworks and procedures across different countries. NHAI cases involving international parties or requiring enforcement in foreign jurisdictions necessitate meticulous consideration of enforcement mechanisms to ensure the efficacy of arbitration as a dispute resolution mechanism. The examination of enforcement issues is crucial for academia and professionals studying arbitration's practical applicability within the NHAI domain.

Comparative Analysis of Arbitration and Traditional Litigation

Arbitration and traditional court litigation represent two distinct approaches to resolving disputes within NHAI cases. The selection of the appropriate method for resolving NHAI disputes requires careful consideration of the advantages and disadvantages associated with each approach. This section provides a comparative analysis of arbitration and traditional litigation, emphasizing their respective strengths and weaknesses.[25]

Comparison of Arbitration and Traditional Litigation for NHAI Cases

Procedural Flexibility:

Arbitration: Arbitration affords a greater degree of flexibility in terms of procedural customization, allowing parties to tailor the process to their specific requirements. Parties have the autonomy to select arbitrators, establish procedural rules, and determine the timeline for resolution. This procedural flexibility enables a streamlined and efficient resolution of NHAI disputes.[26]

Traditional Litigation: Traditional litigation operates within a framework of formal court procedures, which may exhibit a higher degree of

22 Weidenmaier, W.M.C., 2011. Judging-lite: How arbitrators use and create precedent. NCL Rev., 90, p.1091

23 Mukhopadhyay, C., 2016. A nested framework for transparency in Public Private Partnerships: Case studies in highway development projects in India. Progress in Planning, 107, pp.1-36

24 Blackman, S.H. and McNeill, R.M., 1997. Alternative Dispute Resolution in Commercial Intellectual Property Disputes. Am. UL Rev., 47, p.1709

25 Pai, S.K., 2019. Developing a framework for mitigation of project delays through impact assessment of critical factors causing time overruns in roads and highways sector projects in India (Doctoral dissertation, UPES, Dehradu

26 Kapur, G., 2020. Resolving Disputes Avoiding Litigation Alternate Dispute Resolution Practices for Indian Infrastructure Industry. Issue 3 Int'l JL Mgmt. & Human., 3, p.193

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rigidity and time consumption compared to arbitration. Litigation entails adherence to statutory regulations, court-imposed timelines, and procedural protocols that can lead to delays and increased costs. The lack of procedural flexibility in traditional litigation can impede the prompt resolution of NHAI disputes.

Expert Decision-Makers:

Arbitration: The arbitration process empowers parties to appoint arbitrators possessing specialized expertise in relevant fields such as infrastructure projects, land valuation, and construction. This specialized knowledge ensures that decision-makers possess a deep understanding of the technical complexities inherent in NHAI cases. The involvement of skilled arbitrators contributes to informed decision-making and the accurate resolution of disputes.[27]

Traditional Litigation: In traditional litigation, judges possess legal expertise but may not possess specialized knowledge pertaining to the technical aspects of NHAI cases. This can potentially hinder their comprehension of intricate details concerning infrastructure projects, thereby impacting the quality of decision-making. Nevertheless, judges retain the authority to enlist independent experts to assist in understanding technical matters when necessary.

Confidentiality:

Arbitration: Confidentiality stands as a significant advantage in arbitration proceedings. Typically conducted in private, arbitration ensures the protection of sensitive information, trade secrets, and technical details. The confidentiality offered by arbitration facilitates the free exchange of information between parties, fostering the potential for amicable settlements. In NHAI cases involving commercially sensitive data, confidentiality assumes paramount importance.

Traditional Litigation: Traditional court litigation generally takes place in public, lacking the same level of confidentiality as arbitration. The open nature of court proceedings can result in the accessibility of sensitive information to the public, potentially impacting the parties' reputation and commercial interests. Nonetheless, it is important to note that courts can impose restrictions on public access to certain sensitive information through protective orders. [28]

Costs:

Arbitration: The costs associated with arbitration can vary depending on factors such as case complexity, the number of arbitrators, and the arbitration venue. While arbitration holds the potential for cost savings compared to litigation, it can still incur expenses, especially in cases involving high-profile arbitrators or complex procedures. Managing arbitration costs within NHAI cases involving multiple stakeholders may present challenges.

Traditional Litigation: Traditional litigation can be costly, primarily due to legal fees, court costs, and the potential for protracted proceedings. Litigation entails multiple court appearances, document filings, and legal representation, all of which can accumulate significant expenses. NHAI cases involving complex technical and legal issues may require extensive legal resources, further adding to the overall costs.

Finality and Enforceability:

Arbitration: Arbitration awards are generally considered final and binding upon the parties involved. This finality reduces the risk of prolonged legal battles and facilitates the timely execution of NHAI projects. Moreover, under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arbitration awards can be internationally enforced, making them effective tools for resolving cross-border disputes.

Traditional Litigation: In traditional litigation, the finality of court decisions is subject to the appellate process. Parties dissatisfied with the initial judgment can appeal to higher courts, which can lead to additional time and expenses.[29] While appellate review ensures the opportunity for reconsideration of decisions, it may also result in delays and

27 https://ui.adsabs.harvard.edu/abs/2018JIEIA..99..287I/abstract (Accessed on 12th July, 10:30 PM)

28 Miller, A.R., 1991. Confidentiality, Protective Orders, and Public Access to the Courts. Harv. L. Rev., 105, p.427

29 Crick, C.M., 1931. The Final Judgment as a Basis for Appeal. Yale LJ, 41, p.539

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uncertainty in the resolution of NHAI disputes.

Advantages and Disadvantages of Arbitration and Traditional Litigation for NHAI Cases

Advantages of Arbitration:

- Tailored procedural flexibility to suit the specific needs of NHAI cases.
- Selection of arbitrators possessing expertise in relevant technical areas.
- Confidentiality, safeguarding sensitive commercial and technical information.
- Potentially faster resolution due to streamlined procedures.
- Final and enforceable awards, reducing the risk of prolonged legal battles.

Advantages of Traditional Litigation:

- Access to judicial expertise and impartial decision-making.
- Availability of appellate review for reconsideration of decisions.
- Public nature of proceedings, promoting transparency and accountability.
- Availability of remedies beyond monetary compensation, such as injunctions or specific performance.
- Potential for precedential value in subsequent similar cases.

Disadvantages of Arbitration:

- Potential costs, particularly when involving high-profile arbitrators or complex procedures.
- Limited precedent, leading to inconsistency in outcomes.
- Limited discovery and disclosure compared to traditional litigation.
- Limited range of remedies available, restricting the scope of relief.
- Challenges in cross-border enforcement of arbitration awards.

Disadvantages of Traditional Litigation:

- Formal court procedures and adherence to strict timelines, potentially leading to delays.
- Lack of specialized technical expertise of judges in NHAI cases.
- Public nature of proceedings, potentially exposing sensitive commercial information.
- Potentially higher costs due to legal fees and prolonged court proceedings.
- Uncertainty regarding the finality of decisions due to the possibility of appeals.

Recommendations for Enhancing the Efficacy of Arbitration in NHAI Cases

Arbitration serves as a pivotal mechanism for resolving NHAI cases, providing a flexible and efficient alternative to traditional court litigation. This article presents a set of recommendations to improve the efficacy of arbitration in NHAI cases by addressing challenges and maximizing the benefits of this dispute resolution method. The suggestions encompass various aspects, including promoting awareness and understanding of arbitration, appointing qualified arbitrators, streamlining procedural requirements, encouraging early dispute identification, adopting efficient case management practices, ensuring transparency, strengthening enforcement mechanisms, and conducting periodic reviews.[30] By implementing these recommendations, stakeholders involved in NHAI cases can optimize the effectiveness of arbitration and contribute to the efficient resolution of disputes in the infrastructure sector.

Arbitration plays a pivotal role in resolving NHAI cases, offering a flexible and efficient alternative to traditional court litigation.[31] This section provides an

30 Jenkins, J., 2021. International construction arbitration law. Kluwer Law International BV

31 Kapur, G., 2020. Resolving Disputes Avoiding Litigation Alternate Dispute Resolution Practices for Indian Infrastructure Industry. Issue 3 Int'l JL Mgmt. & Human., 3, p.193

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overview of the importance of enhancing the efficacy of arbitration in NHAI cases and sets the stage for the subsequent recommendations.

Promoting Awareness and Understanding of Arbitration

To bolster the efficacy of arbitration in NHAI cases, it is imperative to foster a clear understanding of its benefits and procedures among stakeholders.[32] Initiatives should focus on raising awareness about arbitration through informative programs and engaging stakeholders such as contractors, landowners, government entities, and legal professionals. Collaborative efforts between the NHAI, legal associations, and industry bodies can effectively disseminate information and promote the utilization of arbitration.

Appointment of Qualified Arbitrators

The expertise and knowledge of arbitrators significantly influence the effectiveness of arbitration. Given the technical complexities inherent in NHAI cases, arbitrators must possess qualifications and experience in infrastructure projects, land valuation, and construction. Establishing a pool of qualified arbitrators and promoting their availability to the parties involved can enhance the quality and efficiency of arbitration proceedings. Collaborations between the NHAI, professional organizations, industry bodies, and arbitration institutions can facilitate the identification and accreditation of arbitrators with the requisite qualifications.

Streamlining Procedural Requirements

Efforts should be directed towards streamlining procedural requirements in arbitration to ensure efficiency and cost-effectiveness. The NHAI can develop guidelines or model arbitration clauses specifically tailored to NHAI cases. These guidelines should encompass crucial procedural aspects such as arbitrator selection, arbitration timelines, disclosure requirements, and the utilization of expert witnesses. Clear and standardized procedural guidance will enhance stakeholder understanding of the arbitration process and promote consistency in the resolution of NHAI disputes.

Early Identification of Disputes

The early identification and resolution of potential conflicts are crucial to minimizing delays and costs associated with NHAI disputes. Encouraging parties to include dispute resolution clauses in contracts that stipulate the use of mediation or negotiation as a preliminary step before commencing arbitration can be highly beneficial. Early dispute resolution mechanisms facilitate open communication and amicable settlements, potentially obviating the need for formal arbitration. Mediation or negotiation fosters a collaborative approach to dispute resolution. [33]

Encouraging Collaborative and Efficient Case Management

Efficient case management is pivotal for the timely resolution of NHAI disputes through arbitration. Collaborations between the NHAI and arbitration institutions can yield case management guidelines and procedures tailored to NHAI cases. These guidelines promote efficient information exchange between parties, timely submission of evidence, and well-structured hearing schedules. By adopting effective case management practices, arbitration proceedings can be streamlined, resulting in quicker and cost-effective resolution of NHAI disputes.

Enforcing Transparency in Arbitration Proceedings

Transparency, within certain limits, contributes to the fairness and accountability of NHAI cases despite confidentiality being an advantage of arbitration. Parties can include provisions in arbitration agreements that allow for the publication of redacted arbitration awards. Appropriately

32 Shah, M. and Bhagwat, K., 2022. Critical Assessment of Infrastructure Investment Trusts (InvITs) in India and Suggesting measures to increase their Efficiency in comparison with International Instruments. Australasian Accounting, Business and Finance Journal, 16(5), pp.106-129

33 Bordone, R.C., 1998. Electronic Online Dispute Resolution: A Systems Approach--Potential, Problems, and a Proposal. Harv. Negot. L. Rev., 3, p.175

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redacted awards, excluding confidential or commercially sensitive information, can guide future NHAI cases and promote transparency in decision-making. Transparency in the publication of awards aids in developing jurisprudence and enables parties to comprehend the rationale behind arbitration outcomes.

Strengthening Enforcement Mechanisms

Efficient enforcement mechanisms are indispensable for the efficacy of arbitration in NHAI cases. Collaborations between the NHAI and relevant government agencies can streamline and expedite the enforcement of arbitration awards. Establishing specialized enforcement mechanisms or fast-track procedures can instill confidence in the arbitration process and foster compliance with awards. Furthermore, advocating for the recognition and enforcement of arbitration awards in international jurisdictions facilitates the resolution of cross-border disputes.[34]

Periodic Review and Evaluation

Regular review and evaluation of the effectiveness of arbitration in NHAI cases are essential for continuous improvement. The NHAI can establish mechanisms to monitor and evaluate the performance of arbitrators, arbitration institutions, and the overall arbitration process. Soliciting feedback from parties involved in NHAI cases helps identify areas for improvement and address concerns or challenges.[35] This ongoing review process ensures that arbitration remains an effective and preferred method of dispute resolution in NHAI cases.

Conclusion:

In conclusion, the comprehensive legal analysis underscores the immense potential of arbitration in effectively resolving cases pertaining to the National Highways Act, 1956 under the purview of the NHAI. The meticulous examination of the legal framework governing arbitration and its comparative analysis with traditional litigation brings to light the distinct advantages and disadvantages associated with each approach. Notably, arbitration presents a host of benefits including expertise, flexibility, confidentiality, finality, and enforceability, rendering it a compelling alternative to court litigation in NHAI cases.

The well-established legal framework outlined within the National Highways Act provides a robust foundation for arbitration, affording parties the opportunity to seek alternative means of dispute resolution when dissatisfied with the compensation amount determined by the competent authority. Moreover, the incorporation of the Arbitration and Conciliation Act, 1996 ensures that arbitration in NHAI cases adheres to well-defined legal principles and procedures.

The presentation of case studies further bolsters the efficacy of arbitration in resolving NHAI disputes, exemplifying successful instances of arbitration employed to address land acquisition conflicts and contractor disagreements, ultimately leading to equitable and expeditious resolutions.

While acknowledging the substantial advantages offered by arbitration, it is imperative to recognize the attendant limitations and challenges associated with this mechanism of dispute resolution. Factors such as cost considerations, the scarcity of binding precedents, limited discovery, restricted remedies, and potential enforcement issues necessitate careful contemplation when opting for arbitration in NHAI cases.

To maximize the benefits of arbitration and effectively address the aforementioned challenges, a range of recommendations have been proposed. These encompass initiatives to foster awareness and comprehension of arbitration, the appointment of qualified arbitrators, the streamlining of procedural requirements, the encouragement of early dispute resolution, the implementation of efficient case management practices, the promotion of transparency, the fortification of enforcement mechanisms, and the regular review of existing practices.

34 Winship, P. and Teitz, L.E., 2006. Developments in Private International Law: Facilitating Cross-Border Transactions and Dispute Resolution. Int'l Law., 40, p.505

35 Gupta, N., Solanki, S.K. and Mittal, M., 2022. Effectiveness of Amendment of GCC on Claims by CPWD in 2019. International Journal for Research in Applied Science & Engineering Technology (IJRASET), pp.3130-3146

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By embracing these recommendations, the stakeholders involved in NHAI cases can significantly enhance the efficacy of arbitration, improve the efficiency of the dispute resolution process, and ensure equitable outcomes for all parties concerned.

Suggestion:

To fully unlock the vast potential of arbitration in resolving NHAI cases in accordance with the National Highways Act, 1956, it is paramount for stakeholders to actively embrace and promote the utilization of arbitration as the preferred method of dispute resolution.

Primarily, the NHAI should assume a leadership role in generating awareness and providing comprehensive guidance on the benefits and procedural aspects of arbitration. Collaborative efforts with legal associations, industry bodies, and arbitration institutions should be undertaken to conduct workshops, training programs, and seminars aimed at educating stakeholders about the merits of arbitration and its effective application in resolving NHAI disputes.

Furthermore, the NHAI should establish a pool of accomplished arbitrators possessing expertise in the domains of infrastructure projects, land valuation, and construction. Ensuring the availability of competent arbitrators will empower parties involved in NHAI cases to access decision-makers equipped with the requisite technical knowledge and experience to effectively resolve intricate disputes.

Concerted endeavors should also be directed toward streamlining procedural requirements in arbitration to ensure enhanced efficiency and cost-effectiveness. The NHAI can develop tailored guidelines or model arbitration clauses specifically catering to NHAI cases, addressing key procedural facets and providing standardized guidance to all parties involved.

To facilitate the early resolution of disputes, the NHAI can actively encourage the inclusion of dispute resolution clauses in contracts, mandating the preliminary utilization of mediation or negotiation as a precursor to commencing arbitration. This approach will foster open lines of communication, potentially culminating in amicable settlements and obviating the need for formal arbitration proceedings.

Efficient case management assumes paramount importance in ensuring the expeditious resolution of NHAI disputes through arbitration. Collaborative efforts between the NHAI and arbitration institutions can lead to the establishment of case management guidelines customized to suit the distinctive requirements of NHAI cases. Such guidelines can promote the swift exchange of information, the timely submission of evidence, and the effective scheduling of hearings, thereby facilitating the prompt resolution of disputes.

Transparency in select aspects of the arbitration process should be actively encouraged. Parties may consider incorporating provisions within arbitration agreements that permit the publication of redacted arbitration awards. This practice will foster transparency in decision-making, thereby contributing to the development of jurisprudence pertaining to NHAI cases.

Lastly, the reinforcement of enforcement mechanisms is essential to guarantee the efficacy of arbitration in NHAI cases. Collaborative efforts between the NHAI and pertinent government agencies can be undertaken to expedite and streamline the enforcement of arbitration awards. Specialized enforcement mechanisms or expedited procedures can be implemented to facilitate the swift enforcement of awards and engender compliance.

By embracing these suggestions, the NHAI and other stakeholders can significantly bolster the efficacy of arbitration in resolving NHAI cases, leading to expedited, cost-effective, and equitable outcomes. The widespread adoption of arbitration as the preferred method of dispute resolution will undoubtedly contribute to the seamless execution of NHAI projects while safeguarding the rights and interests of all parties involved.

PRINCIPLES OF RES JUDICATA AND ITS OBJECTIVE AND APPLICATION

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What if a person is allowed to institute a suit again for the same matter against the same party whose matter has already been heard and finally decided by the competent court? Does not it will lead to uncertainty of legal relationships between parties and does not will create uncertainty of judicial decisions, also there are chances of conflict of judgment on the same matter, therefore, it is required to introduce a concept where one can be stopped from taking the same matter again for adjudication by court. Therefore, the concept of res judicata under section 11 of the Code of Civil Procedure, 1908 has been introduced.. Res Judicata literally means "a thing which has been decided". The doctrine operates as a bar to the trial of a subsequent suit on the same cause of action between the same parties. The doctrine is not merely a technical doctrine. It is a fundamental doctrine based on the principle of conclusiveness of the judgment and the finality of litigation. "One suit and one decision are enough for any single dispute." The doctrine has been accepted in all civilized legal systems.

(Keywords: Res Judicata, Section 11 CPC, Estoppel, res sub judice)

Introduction

Through this article, we tried to answer some questions relating to the principle of res judicata. The following questions have been answered in the article:

- Principles on which res judicata is based
- Purpose of Res Judicata
- Meaning of the phrase "No Court shall try"
- Constructive Res Judicata and inconsistent pleadings
- Application of res judicata on
    - On Co-plaintiffs and co-defendants
    - on appeal
    - on interim orders made during the proceeding
    - on writs under the Constitution of India
- Nature of decree if it was passed in ignorance of res judicata?
- What if the former court has erroneously decided any issue of law then in the subsequent suit will res judicata applies?
- Can a party waive his right to res judicata?
- Nature of the decree which is passed in ignorance of res sub judice?
- Difference of Res Judicata with the principle of Estoppel
- Difference of Res Judicata with the principle of res sub judice

Principles on which res judicata is based.

Res Judicata is based upon the principle of equity, justice, and a good conscience and it relates to public policy as well. It also relates to individual social beings. However, this principle has been

PRINCIPLES OF RES JUDICATA AND ITS OBJECTIVE AND APPLICATION

derived from various Latin terms/maxims. These maxims are as follows –

1. **Exceptio res judicata:** previous judgment will be a bar to any subsequent suit.
2. **Nemo debit bis vexari pro uno eadem causa:** no person shall be vexed twice for the same cause.
3. **Interest republicae ut sit finis litium:** it is in the interest of the state that litigation shall be brought to an end.
4. Res judicata pro veritate occupitur: judicial decision shall be accepted as correct and final.

Purpose of Res Judicata

1. Purpose: to prevent multiplicity of proceedings and to create certainty of judicial decisions.
2. For example, Suit between A and B- is decided. So, there the party should be certain about the judgment. But if one believes that one may file the same matter again, so there will be no certainty of the judgment, and this will create chaos in society. And one will refrain from making improvisation (in property) and that will also result in the uncertainty of legal relations—and to do away with such a situation – the rule of Res Judicata came/inserted.
3. If Res Judicata doesn't apply then the parties will be uncertain about their legal status or legal relationship with respect to the subject matter of the suit and hence the successful party will be deterred (put off) from making any improvisation upon the sub-matter of the suit.
4. Res Judicata is based upon the principle of equity justice and good conscience, and it relates to public policy. It also relates to individual and social well-being.
5. It is related to public policy in the sense that it creates general stability of legal relationships and also certainty and faith in judicial decision and it is related to individual well-being in the sense that it gives certainty of legal status to the individual who has been successful in the suit.

Since Res Judicata is related to public policy it cannot be limited to section 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'). Res Judicata is a broad principle, and its manifestation may be found at several places in the CPC. Section 11 is just one explicit dimension of Res Judicata. For example, an arbitration proceeding is not a suit. So, section 11 would not apply. But still broad principles of Res Judicata would apply.

Res Judicata and estoppel

The principle of res judicata is said to be one of the principles of Estoppel. There are following four kinds of estoppel. Estoppel by judgment or record is considered as res judicata. This principle has been discussed as follows -

Types of Estoppels

1. Estoppel by conduct
2. Estoppel by deed
3. Estoppel by pious
4. Estoppel by record or judgment- (known as res judicata)

Res Judicata is also based on the principle of estoppel by record. In a suit, the parties are expected to raise all their pleadings, contentions, and evidence and on the faith of that, the opposite party alters his position and takes the defence. Once the judgment has been passed the parties now cannot turn back and alter their positions. If the fact has been raised in the former suit, then also there will be a bar upon the subsequent suit and if the fact was not raised in the former suit but it might and ought to be raised as the party has knowledge or with due diligence, he could have had the knowledge, then also the bar will apply.

Meaning of the phrase "No Court shall try".

1. Means mandate is upon the competency to try. This means the court will not have the competency to try that suit and that will become a lack of sub-matter jurisdiction.
2. Generally, the court is not deprived of subject matter but only regarding this kind of suit. So,

competency to try this suit will not be there because that matter has already been heard and decided.

3. If the condition of section 11 is satisfied in a particular suit, then the court in the subsequent suit will be said to be incompetent to try that suit and such incompetency will mean that the court is not having the subject matter jurisdiction upon that particular suit and hence if the subsequent court tries the suit and passes the decree, the decree will be void as it was a case of lack of subject matter jurisdiction upon that suit.
4. Note: "Can't try" doesn't mean even issues etc cannot be settled as at least the issue of Res Judicata needs to be framed. i.e., to check whether the suit is based on res judicata or not. But it means that in the subsequent suit, there will be no hearing on the merits of the case but at least the preliminary issue has to be framed.

Constructive Res Judicata and inconsistent pleadings -

The provision for Constructive Res Judicata has been provided in Explanation IV of section 11 of CPC. It provides that 'any matter which might and ought to have been made a ground of defense or attack in such former suit, shall be deemed to have been a matter directly and substantially in issue in such suit.' From this explanation, we can say that

1. A party has the duty to raise all matters in issue which were known to him in a former suit or could have been known by him in the former suit with due diligence. It is presumed that he had raised all such issues and the court has decided all such issues. In the subsequent suit when that issue is raised the court will presume that the issue was heard and finally decided in the former suit and therefore constructive res judicata will apply to the issue in the subsequent suit.
2. For constructive res judicata it is essential to prove that the issue concerned might have been raised in the former suit and ought to have been raised in the former suit, therefore if for some legal reason, the issue might not have been raised in the former suit then in a subsequent suit on that issue res judicata would not apply.

Inconsistent pleading and pleading mutually destructive -

In a suit a party may have pleadings which are alternative in nature and the party can prove his legal right based on either of them. For instance, he can prove his ownership of property by way of succession as well as by way of will. He can also prove it by succession or purchase or can prove it by succession or gift. Such pleading should have been claimed in the former suit then in the subsequent suit constructive res judicata will apply.

If pleadings are inconsistent with each other i.e., they are apparently inconsistent (conflicting) with each other then also both pleadings can be claimed in the same suit. However, if the pleadings are based upon such facts which are not only inconsistent rather, they are mutually destructive then they cannot be claimed in the same suit i.e., if the evidence required to prove one such pleading is destructive of the other pleading then the two cannot be claimed together unless the party proves that he was not aware of one of the pleadings.

Every inconsistent pleading is not mutually destructive. Inconsistent is of such an extent that they cannot sustain together then it can be said that inconsistent pleading in such a case could not have been raised.

Questions dealing with the application of res judicata on –

- Can res judicata be appliable between co-plaintiff and co-defendant?

We cannot outrightly say whether the principle of res judicata will apply between co-plaintiff and co-defendant or not. Rather we must examine whether the opposite parties to the present suit were co-plaintiffs or co-defendants in the former suit and there it has to be examined whether in the former suit there was a conflict of interest between the parties. If an actual conflict is found in the former suit with respect to the matter in issue (ex. - where one party is pro

PRINCIPLES OF RES JUDICATA AND ITS OBJECTIVE AND APPLICATION

forma defendant), then res judicata will be applicable in the subsequent suit. If there is no such conflict, then res judicata will not apply between co-plaintiff and co-defendant.

Note: as per section 44 IEA- if the former suit was obtained by fraud or collusion, then that decree will not be binding.

- Whether res judicata apply upon appeals as well?

An appeal is considered to be a continuation of the suit. So if res judicata applies upon the suit, it should also be applicable on appeal as well.

Once the appeal is filed and it is heard and finally decided on merits. Later on, another appeal is filed. Now subsequent appeal will be called a subsequent suit and the former appeal as a former suit for the purpose of section 11.

When the matter goes into appeal so suit which was decided earlier, is once again opened in appellate court and in appeal, the matters become sub judice. So, it will be said that what was res judicata in the trial court, becomes res judice in the appellate court.

- What will be the consequence of the dismissal of the appeal?

The trial court's judgment will become final and therefore what was res sub judice upon filling of appeal, now becomes res judicata.

- Dismissal of appeal can be

1 On some technical ground: for e.g., the appeal is barred by limitation or dismissed on the ground of non-prosecution (i.e., need to furnish some document but the party did not furnish or attach those documents or didn't submit the required court fee.)

Non-prosecution means- the appellate is not interested in prosecuting the appeal because not file the required document.Here also the judgment of the trial court becomes final and therefore res judicata will apply.

2 On merits: i.e., the appellate court has properly heard the parties i.e., hearing of parties on evidence etc.

Thus, if the appeal is dismissed either on merits or on technical grounds, the trial court judgment becomes final and now once again becomes res judicata. But the decision of the trial court must be upon merits.

The Supreme Court in **Narhari v Shankar (1953 AIR 419, 1950 SCR 75)** held that where the two appeals have arisen from the same suit and therefore the identities of both appeals are not distinct from each other and therefore one of the appeals cannot be considered to be distinct from the other and hence one of the appeals cannot be considered to be the former suit with respect to the other – and hence res judicata would not apply.

Sheodan Singh vs Smt. Daryao Kunwar (AIR 1966 SC 1332)

The Supreme Court held that -

1. The facts of Narhari v Shankar have to be distinguished from the facts of the Sheodan Singh case. In the Sheodan Singh case, there were several suits that were consolidated and various appeals were filed from the various suits therefore they had distinct identities and if one of the appeals was dismissed it will be considered to be a former suit for the purpose of res judicata. Whereas in Narhari v Shankar the appeals were two but the original suit was only one and therefore the various appeals didn't have distinct identities. Hence if an appeal is dismissed, it cannot be said to be a former suit for the other pending appeal.
2. It was also held that the trial court had decided the suits on merits then if more than one appeal have been filed by a party against the various decrees then if some of the appeals have been dismissed on technical grounds the result will be that the trial courts decree will become final which was on merits and hence it shall be deemed that the appellate court has heard and finally decided the appeal even though the appellate court actually didn't decide the appeal on merits. If it is held otherwise, then the consequence would be that the losing party files an appeal and deliberately gets it dismissed. The consequence is that the trial court's judgment will not become final and the matter will not be res judicata anymore. And thus, the losing party can file a fresh suit that would be illogical or absurd.

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For Sheodan Singh's judgment to apply it is essential that:

1. There was more than one suit consolidated in the same trial and appeals were filed from different decrees.
2. All the appeals were filed by the same party.
3. That the trial court's judgment was on merits.

- Will the interim order of the court made during the proceeding apply as res judicata?

We cannot outrightly say whether res judicata applies or not as that would depend upon whether the issue depends upon the same facts which are subject to change or not.. Res judicata may apply upon the interim issues if the issue is such is dependent upon facts that are not subject to change for instance, the issues of jurisdiction of the court, the bar of limitation, valuation of suit, impalement of party, amendment of pleadings etc are such issues which are not subject to change and therefore once such issue has been decided, if it subsequent heard in same suit the decision will not change as the facts are the same and therefore on such issues res judicata will apply. However, if the issues are such as are dependent upon facts that are subject to change then in the same suit if the issue is raised subsequently res judicata would not apply.

- Res Judicata on writs under the Constitution of India

A writ is not considered to be a suit and therefore directly section 11 CPC will not apply. However, the broad principle of res judicata will be applicable. But if the writ was decided inlimine i.e. without hearing of the parties it cannot be said to have been heard and finally decided and hence res judicata would not apply. If the writ was withdrawn and later on another writ is filed then res judicata would not apply but estoppel would apply.

Nature of decree if it was passed in ignorance of res judicata?

If there are two decree and in the second suit the defendant had not raised the plea of res judicata then the second decree is also valid and since the defendant fails to raise the plea of res judicata in the second suit so estoppel will apply upon him. And the second decree will be valid. However, if he is able to prove the plea of res judicata in appeal provided the appellate court allows him to do so then the second decree will be void. And also if he is able to prove that the second decree was obtained by fraud then also the second decree will be void. Accordingly, the first decree will be valid.

What if the former court has erroneously decided any issue of law, then in the subsequent suit will res judicata applies?

The general rule is that even if a decision was wrong, res judicata would apply upon subsequent suit and the party against whom the former decree was passed cannot claim the decision in former suit was wrong. In that case, he has the option of going in appeal or filing review but he cannot file fresh suit to challenge suit decree on that ground.

Can a party waive his right to res judicata?

Once res judicata has been proved the court per se becomes incompetent to try the suit and once the court becomes incompetent thereafter a party unilaterally or by agreement cannot confer competency upon that court.

What will be the nature of the decree which is passed in ignorance of res sub judice?

Res sub judice is only a technical matter and the subsequent court doesn't become incompetent to try the subsequent suit rather the only mandate is that the subsequent court shall stay the trial of the subsequent suit if conditions of sec 10 are fulfilled. Thus, if a subsequent court tries the suit despite res sub judice and decided it, the decree will not be void as the subsequent court was not incompetent to try it and there was no inherent lack of competency. Rather the subsequent decree will apply as res judicata upon the former pending suit.

Note: in order to apply res sub judice, it is essential that what is pending before the court should be a suit and not just any other proceeding (For eg - application to sue as forma pauperis so till the application hearing going on it is not a suit, so in such case no stay on the subsequent suit.)

Difference between res judicata and estoppel

PRINCIPLES OF RES JUDICATA AND ITS OBJECTIVE AND APPLICATION

1. Res judicata applies directly upon the court as it takes away the very competency of the court to try the suit whereas estoppel applies upon a party.
2. res judicata is based upon the principle of public policy, equity, and justice whereas estoppel is based upon only equity and justice i.e., estoppel only between two parties and no public policy involved.
3. The purpose of res judicata is to prevent a multiplicity of suits whereas estoppel is related to preventing a multiplicity of representations.
4. Res judicata is the rule of procedure whereas estoppel i.e., rule of evidence under 115 Indian Evidence Act.
5. Res judicata is based upon the principle that a party cannot say the same thing again and again whereas in estoppel the principle is that the party cannot say the opposite things again and again.
6. Res judicata binds the court and thereby it binds both parties whereas estoppel is between only one party.

Difference between res sub judice and res judicata

1. Res judicata prohibits a second trial of the same dispute while res sub judice prohibits proceedings of two parallel suits between parties.
2. Defence of res judicata can be taken in a written statement whereas in res judice defence cannot be taken in a written statement.
3. Res judicata applies to suits as well as issues but res sub judice applies only to suits.
4. Res judicata applies to the matters already adjudicated upon whereas res sub judice applies to proceeding pending in the court.
5. Res judicata bars the trial of a suit whereas res sub judice stays the latter suit instituted.
6. Res judicata denies in section 11 whereas res sub judice in section 10.

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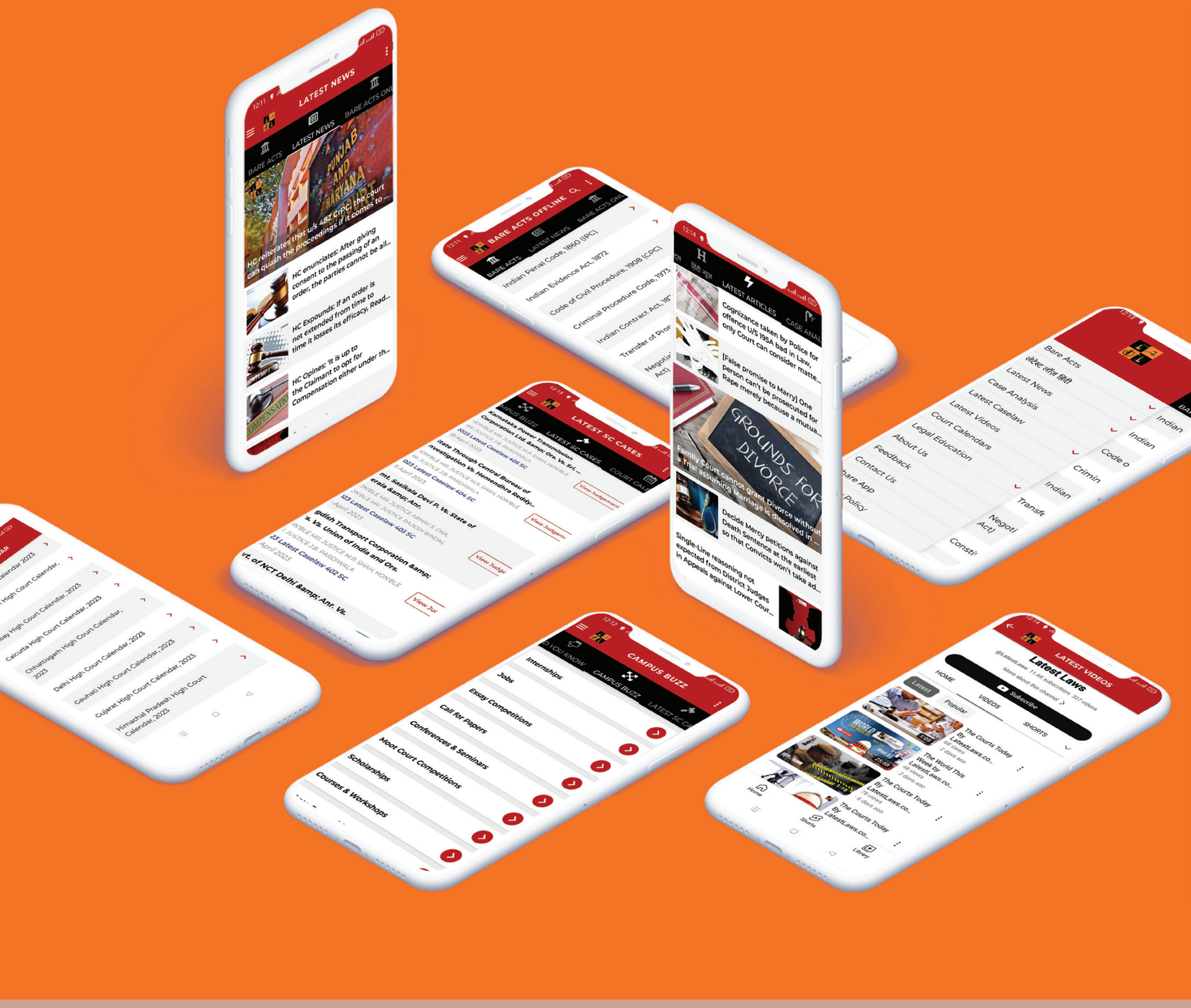

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