PRAYAGRAJ LAW REVIEW

Volume 2 Issue 2: Summer Issue

ISSN: 2583-5432

Visit: plreview.net Email: execouncil@plreview.net

PRAYAGRAJ LAW REVIEW: SUMMER ISSUE: VOLUME 2 ISSUE 2

Copyright @ 2024 by Prayagraj Law Review

All Rights Reserved. No articles of this journal may be reproduced or utilized in any form or by any means, electronic or mechanical, including but not limited to photocopying, recording, or by any information storage and retrieval system without the prior written permission of the author.

Inquiries should be addressed to: execouncil@plreview.net , www.plreview.net

---

ISSN: 2583-5432 (E-ISSN)

All opinions expressed in the articles published in this issue are solely of the author. In case of any kind of rights infringement, journal will not hold any liability. Responsibility shall rest upon the author.

First Issue: released in 2022

Current Issue: Volume 2 Issue 2 published in 2024

Frequency: Bi-annual

ISSN: 2583-5432 VOL2 ISSUE 2 2024

Prayagraj Law Review

Editorial Board

Honorary Council

Dr. Sonal Shankar
(Patron)
Associate Professor at Faculty of Law, University of Allahabad

Dr. Ajai Singh
(Patron)
Associate Professor at Faculty of Law, University of Allahabad

Steering Council

Mr. Siddharth Singh
(Editor- in- Chief)
PhD. Scholar at South Asian University, Delhi, Former Assistant Professor at Faculty of law, University of Allahabad

Dr. Gautam Mishra
(Senior Editor)
Assistant Professor at Shambhunath Institute of Law

Dr. Sandeep Mishra
(Senior Editor)
Assistant Professor Allahabad Degree College, Prayagraj

Dr. Pallavi Gupta
(Senior Editor)
Assistant Professor at Galgotias University, School of Law.

Dr. Sanjeev Kumar
(Senior Editor)
Assistant Professor at Faculty of Law, University of Allahabad.

Dr. Ramesh Kumar Bharti
(Senior Editor)
Assistant Professor at C.M.P. Degree College, Prayagraj, Uttar Pradesh

Mr. Utkarsh Dixit
(Senior Editor)
Lawyer at Supreme Court of India and High Court of Judicature at Allahabad, Founder of Dixit and Associates

Dr. Raghav Pandey
(Advisor)
Assistant Professor at National Law University, Delhi

Miss Stuti Wahal
(Associate Editor)
PhD Scholar at University of Delhi, Former Guest Faculty at Faculty of Law, University of Allahabad

Mr. Vibhor Pratap Singh
(Associate Editor)
PhD. scholar at Banaras Hindu university, Varanasi, Former Assistant Professor at Amity Law School, Mumbai.

Mr. Chintan Nirala
(Associate Senior)
PhD. Scholar, McGill University, Canada

Executive Council

Miss Pragati Raj
(Journal Manager)
Assistant Professor at S.S. Khanna Girls Degree College, Prayagraj

Miss Pragya Srivastava
(Managing Editor)
LLM. Hidayatullah National Law University

Miss Vidushi Singh
(Copyeditor)
Lawyer at High Court of Judicature at Allahabad

Table of Contents

1. **EDITORIAL BOARD .... III**

2. **ABOUT THE JOURNAL .... VI**

3. **ABOUT THIS ISSUE .... VII**

4. **A CRITICAL ANALYSIS OF THE REGULATORY FRAMEWORK RELATING TO CYBERSQUATTING IN INDIA 1**

5. **A PRISON WITHOUT BARS, CHAINS, OR LOCKS: SHOULD INDIA ADOPT FINLAND'S OPEN PRISONS MODEL? 27**

6. **LEGAL EDUCATION IN INDIA: ISSUES AND CONCERNS 50**

7. **DEMYSTIFYING THE DOCTRINE OF BASIC STRUCTURE .. 65**

8. **HORIZONTAL RESERVATION FOR TRANSGENDERS: JOURNEY FROM *NALSA V. UOI* TO DISMISSAL OF GRACE BANU'S PETITION 80**

9. **ABOUT THE PUBLISHER 93**

About the Journal

Prayagraj Law Review (PLR) is an open-themed, double-blind peer reviewed open access journal. It is solely dedicated to expressing opinions on the current perception of law while keeping a tab on the modern jurisprudence and socio-political thinking. It strives to give a proper platform to detailed analytical and research works on topical issues and how they will be shaping a society of liberal and responsible individuals.

PLR brings together prestigious Academicians, Lawyers, Scholars, and Law Students while focusing on the single goal of encouraging research and empirical studies on the new dimensions of law along with a fresh perspective on the classic legal and political dictums. Our team believes in providing opportunities to diverse intellectual pursuits from all the corners of the society to disperse such exchange of knowledge, assessment, and interpretations.

Our ambition is to provide an amiable and accessible platform for legal research and analysis to encourage, guide, and lead our younger generation in the field of legal research and modern analytical approach towards its understanding.

About this Issue

With the aim of encouraging research temperament among young minds and promoting quality research in the field of law, Prayagraj Law Review was established. Today we proudly and gladly publish this Fourth Issue titled Summer Issue: VOL 2 ISSUE 2 (2024).

After extensive and rigorous review process followed by our esteemed reviewers through double blind peer review process, out of huge quantity of submissions, 5 submissions were able to make their way to final publication categorised under Articles and Short Articles.

First Article titled A CRITICAL ANALYSIS OF THE REGULATORY FRAMEWORK RELATING TO CYBERSQUATTING IN INDIA authored by Dr. Anis Ahmad and Nikki Kumar addresses the lack of specific legislation to tackle cybersquatting matters, how the courts apply the various approaches as well as the common law principle of the trademark to resolve the disputes. They also critically analyze the international and national legal and policy frameworks related to cybersquatting.

Second Article A PRISON WITHOUT BARS, CHAINS, OR LOCKS: SHOULD INDIA ADOPT FINLAND'S OPEN PRISONS MODEL? authored by CHETNA ANJUM tries to bring out the contrast between the Indian and Finnish Open Prisons as Finland is the

perfect example to study the implementation of reformative justice in prison administration. Author has also critically discussed the conditions of the open prison system in India and tried to suggest measures to augment conditions just like the Finnish Open Prisons

Third Article titled LEGAL EDUCATION IN INDIA: ISSUES AND CONCERNS authored by Dr Sanjeev Singh uses doctrinal approach to gain a proper understanding of current issues and concerns in legal education in India at higher education. Furthermore, it also examines recent legal education reforms in the light of New Education Policy, 2020 along with various issues and concerns in legal education in India.

In the category of Short Articles, First Short Article titled DEMYSTIFYING THE DOCTRINE OF BASIC STRUCTURE authored by Subodhika Sharma examines the various elements that constitute the Basic Structure of the Indian Constitution, including the supremacy of the Constitution, the rule of law, democracy, secularism, federalism, and the protection of fundamental rights.

Second Short Article titled HORIZONTAL RESERVATION FOR TRANSGENDERS: JOURNEY FROM NALSA V. UOI TO DISMISSAL OF GRACE BANU’S PETITION authored by Prachi Kumari discusses the rightfulness of demand of honrizontal reservation by Transgenders

PRAYAGRAJ
LAW REVIEW
PLR

A CRITICAL ANALYSIS OF THE REGULATORY FRAMEWORK RELATING TO CYBERSQUATTING IN INDIA

Dr. Anis Ahmad[*]

Nikki Kumar[**]

ABSTRACT

The advent of the internet has brought an explosion in the process of registration of domain names that has resulted in the issue of cybersquatting for financial gain. As per the WIPO data, the cases related to domain name disputes have dramatically increased. For the first time in 1999, the ICANN adopted a uniform policy framework (UDRP) to address the problem of cybersquatting for speedy disposal of domain name disputes. At the global level, only the United States of America has specific legislation to make cybersquatting a crime. In the Indian context, there is no specific legislation to tackle cybersquatting matters, the courts apply the various approaches as well as the common law principle of the trademark to resolve the disputes. The article wishes to critically analyze the international and national legal and policy frameworks related to cybersquatting.

Keywords: *Domain Name, Cybersquatting, ICANN, UDRP, Trademark.*

[*] Associate Professor, Department of Law, Babasaheb Bhimrao Ambedkar University, Lucknow (UP)-226025, India. <*Anisbbau@gmail.com*>

[**] Research Scholer, Department of Law, Babasaheb Bhimrao Ambedkar University, Lucknow (UP)-226025, India. <*Nik.legal21@gmail.com*>

INTRODUCTION

The amazing expansion of the Internet as a commercial medium has given rise to a new set of challenges in the field of intellectual property.[1] The last two decades have witnessed the extraordinary blast of the internet and the related upheaval of web-based business. With the increase in the popularity of the internet, companies have realized the importance of the web to expand their business. Now internet users and companies are rushing to register every possible combination of their business name as a domain name.[2]

Domain names are a simple and human-friendly form of an internet address that enables the user to easily locate and remember the address.[3] With the increase in business on the internet, high-street retailers have gradually realized the potential of this vast market and have begun to integrate an online presence alongside their 'bricks-and-mortar' stores. On the other hand, new technology brings new opportunities to exploit, and as a result, a new breed of cybercriminals has emerged. Cybersquatting is a specific dispute that has gotten a lot of attention from the courts and that policymakers have been eager to address.[4]

---

[1] Kenneth Sutherlin Dueker, "Trademark Lost in Cyberspace: Trademark protection for Internet addresses" 9 *Harvard Journal of Law* 483 (1996).

[2] Kevin Cheatham, "Negotiating a Domain Name Dispute: Problem Solving v. Competitive Approaches" 7 *Willamette Journal of International Law and Dispute Resolution* 35 (2003).

[3] Shahid Alikhan & Raghunath Mashelkar, *Intellectual Property and Competitive Strategies in the 21st Century* 194 (Kluwer Law International, Netherland, 2nd edn., 2007).

[4] Mairead Moore, "Cybersquatting: Prevention better than Cure?" 17 *International Journal of Law and Information Technology* 220 (2008).

Cybersquatters took advantage of the internet's growing importance and lack of business understanding, to register domain names that were identical to business trademarks. Businesses suffer financial losses as a result of cybersquatting and a tarnished reputation. The domain name dispute cases filed with the WIPO have increased dramatically over the years. According to data available at WIPO, in 2019 the WIPO registered 3693 cases, while in 2020 the cases increased to 4204, and the year 2021 witnessed a sudden surge in the cases and the number of disputes registered with the WIPO was 5128. As of June 2022, the WIPO has registered 2709 domain name dispute cases. WIPO saw another record year in domain name dispute filings, administering nearly 6200 complaints in 2023, an over 7% increase from 2022 and a 68% increase since the onset of the COVID-19 pandemic.[5]

For the speedy disposal of domain name dispute cases, the Internet Corporation for Assigned Names and Numbers (ICANN)[6] in October 1999, adopted the Uniform Domain Name Dispute Resolution Policy (UDRP), designed to provide a quick resolution of domain name disputes. The UDRP permits a trademark owner to challenge any domain name that is confusingly similar or identical to his mark.[7] It was created to give a reasonably rapid, efficient, and low-cost alternative to infringement or passing-off

[5] Total number of cases per year, *available at:* https://www.wipo.int/amc/en/domains/statistics/cases.jsp (last visited on December 31, 2023).

[6] is a non-profit organisation, created in 1998 for the management of the Domain Name System (DNS).

[7] Patrick D. Kelly, "Emerging Patterns in Arbitration Under the Uniform Domain Name Dispute Resolution Policy" 17 *Berkeley Technology Law Journal & Berkeley Centre for Law and Technology* 181 (2002).

proceedings. Apart from the UDRP, the United States of America has enacted the sui generis system i.e., the Anti cybersquatting Consumer Protection Act, 1999 (ACPA), making cybersquatting a crime. Whereas in countries like India and the United Kingdom, there is no specific legislation to tackle cybersquatting cases, the courts apply the common law principle of the trademark to resolve the dispute. Keeping in view the above facts, the present paper is a humble attempt to analyse the problem relating to cybersquatting and the existing legal framework at an international and national level to deal effectively.

CYBERSQUATTING: CONCEPTUAL FRAMEWORK

Whenever a trademark and a trading name of someone else are registered by an unauthorized or unconnected person as his domain name, it is called cybersquatting. The Anti cybersquatting Consumer Protection Act, 1999 of the United States defines cybersquatting as, "The registration, trafficking in, or use of a domain name that is identical or confusingly similar to a trademark or service mark of another that is distinctive at the time of the registration of the domain name, or dilutive of a famous trademark or service mark of another that is famous at the time of the registration of the domain name, without regard to the goods or services of the parties, with the bad-faith intent to profit from the goodwill of an other's mark".

The concept of cybersquatting also known as domain squatting, is the practice of registering domain names, especially well-known company or brand names or trademarks, in the hope of reselling them at a profit. It is used to describe an individual or company who intentionally purchases a

domain and holds that domain with the sole intention of selling it at a premium price. Cybersquatting is further divided into four categories, Typo-squatting (typo-squatters takes advantage of typing errors that consumers make while trying to visit websites, for example, the domain name for Google is “google.com”, thus typo-squatting maybe, ‘goggle.com’, ‘goole.com’, etc.), Name Jacking (is the registration of a domain name that is associated with any individual, who is a well-known celebrity or well-known public figure), Identity Theft (purchase a domain that was unintentionally not renewed by the previous owner) , and Reverse Cybersquatting (includes coercion and pressure to transfer the legitimate possession of a domain name to the person or organization that owns a certified trademark mirrored in the domain name).

The problem of cybersquatting impacts businesses in various ways. Firstly, the cybersquatters confuse and change the behaviour of the consumers. Secondly, it restricts the rightful owners of the business to expand their business across the globe. Thirdly, it causes a loss of revenue as it restricts businesses to engage in online transactions. Let’s analyze the approach of the USA, UK, India, and the ICANN’s Uniform Domain Name Dispute Resolution Policy (UDRP) in Tackling cybersquatting disputes.

DIFFERENT APPROACHES

(A) THE UDRP APPROACH:

Apart from the traditional litigation, the ICANN (managing authority for DNS) was also proactive in terms of tackling the cybersquatting

cases.[8] In June 1998 the World Intellectual Property Organisation (WIPO) accepted the US government's proposal for the development of a consistent international approach to the resolution of domain name disputes. Within a year, WIPO published a report concluding that ICANN should create a uniform administrative procedure for the resolution of disputes concerning top-level domain name registration. ICANN adopted Uniform Domain Name Dispute Resolution Policy (UDRP)[9] on August 26, 1999, and was implemented on October 24, 1999.

The UDRP sets out the legal framework for the resolution of disputes between a domain name registrant and a third party (a party other than the registrar) over the abusive registration and use of an Internet domain name in the generic top-level domains (gTLDs) and those country code top-level domains (ccTLDs) that have adopted the UDRP policy voluntarily.[10]

The UDRP is designed to resolve the dispute between the trademark holder and the domain name registrant. To initiate the administrative

---

[8] Lisa M. Sharrock, "The Future of Domain Name Dispute Resolution: Crafting Practical International Legal Solutions from within the UDRP Framework" 51 *Duke Law Journal* 818 (2001).

[9] Full text of UDRP is available at: https://www.icann.org/resources/pages/policy-2012-02-25-en (last visited on May 21, 2023).

[10] WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP), *available* at: https://www.wipo.int/amc/en/domains/guide/#:~:text=The%20UDRP%20Administrative%20Procedure%20is%20only%20available%20to%20resolve%20disputes,against%20a%20domain%20name%20registrant (last visited on Oct 25, 2023).

proceeding under the UDRP the complainant must prove that each of these three elements is present:[11]

a. the registered domain name is identical or confusingly similar to a trademark or service mark in which the complainant has right, and

b. the registrant has no rights or legitimate interests with respect to the domain name, and

c. the domain name has been registered and is being used in bad faith.

To prove the bad faith of the registrant of a domain name, the complainant can give evidence to establish that, the registrant has registered the domain name primarily for selling or renting it to the complainant, or registered it to prevent the trademark owner from using the mark in a corresponding domain name, or registered it to disrupt the business of a competitor, or registered the domain name for the commercial gain by creating a likelihood of confusion in the minds of Internet users.[12]

The UDRP proceedings do not apply if the registrant can prove that he is known by the registered domain name, or he used the domain name in connection with a bona fide offering of goods or services, or there is a legitimate or non-commercial use of the domain name.[13]

---

[11] Uniform Domain Name Dispute Resolution Policy, Paragraph 4 (a).
[12] *Id*., Paragraph 4 (b).
[13] *Id.,* Paragraph 4 (c).

The proceedings under the UDRP are conducted by the service providers approved by the ICANN. Currently, there are six approved dispute resolution service providers. They are the World Intellectual Property Organization (WIPO) Arbitration and Mediation Centre,[14] National Arbitration Forum (NAF)[15], Asian Domain Name Dispute Resolution Center (ADNDRC),[16] Czech Arbitration Court (CAC),[17] Arab Center for Dispute Resolution (ACDR),[18] and Canadian International Internet Dispute Resolution Center (CIIDRC).[19] These service providers follow UDRP rules and as well as their own supplemental rules in resolving domain name disputes.

The remedies available under the UDRP proceedings are only limited to the cancellation of the domain name or the transfer of the domain name to the complainant,[20] it does not involve any monetary compensation to the complainant. If the administrative order is issued in the favour of the complainant, then the cancellation or transfer of the domain name will take place after ten business days

[14] *Available* at: https://www.wipo.int/amc/en/ (last visited on May 12, 2022). Approved on December 1, 1999.

[15] *Available* at: https://www.adrforum.com/ (last visited on May 12, 2022). Approved on December 23, 1999.

[16] *Available* at: https://www.adndrc.org/ (last visited on May 12, 2022). Approved on February 28, 2002.

[17] *Available* at: https://eu.adr.eu/about_us/court/index.php (last visited on May 12, 2022). Approved on January 23, 2008.

[18] *Available* at: http://acdr.aipmas.org/default.aspx?lang=en (last visited on May 22, 2023). Approved on May 18, 2013.

[19] *Available at:* https://ciidrc.org/ (last visited on May 22, 2023). Approved on November 7, 2019.

[20] *Supra note* 19, Paragraph 4 (i).

unless the penal is informed by the defendant that they are commencing a lawsuit against the complainant in a court of competent jurisdiction.[21]

Some Important Judgments Under UDRP

World Wrestling Federation Entertainment Inc. v. Michael Bosman[22], was the first case decided by the WIPO under UDRP Rules. In this case, the domain name at issue is worldwrestlingfederation.com. The 'WORLD WRESTLING FEDERATION' is the registered service mark and the trademark of the complainant in the U.S. and is authorized to use and has used its mark in connection with entertainment services. The respondent registered the domain name 'worldwrestlingfederation.com' on October 7, 1999, with Melbourne IT, based in Australia. Three days after registering the domain name, the respondent contacted the complainant and offered to sell, rent, or otherwise transfer it to the complainant for valuable consideration. The complainant contends that the respondent has registered as a domain name a mark that is identical to the service mark and trademark registered and used by the complainant, that respondent has no rights or legitimate interests in respect to the domain name at issue, and that respondent has registered and is using the domain name at issue in bad faith, the respondent has not contested the allegations of the Complaint.

---

[21] *Supra note* 19, Paragraph 4 (k).

[22] WIPO Case No. D99-0001, *available at:* *https://www.wipo.int/amc/en/domains/decisions/html/1999/d1999-0001.html* (last visited on June 3, 2023).

The panellist found that "it is clear beyond cavil that the domain name <worldwrestlingfederation.com> is identical or confusingly similar to the trademark and service mark registered and used by complainant, WORLD WRESTLING FEDERATION. It is also apparent that the respondent has no rights or legitimate interests with respect to the domain name. Since the domain name was registered on October 7, 1999, and since respondent offered to sell it to complainant three days later, the Panel believes that the name was registered in bad faith." Accordingly, under Paragraph 4 (i) of the Policy, the Panel requires that the registration of the domain name <worldwrestlingfederation.com> be transferred to the complainant.

Lotto Sport Italia S.p.A. v. David Dent[23], the complaint was filed with the WIPO on December 14, 2016. The domain name in dispute is <lottoworks.com> and <lottostore.com>. The complainant is the manufacturer and distributor of the sportswear, and over the years, the complainant has sponsored several sporting events and professional players. The complainant holds the international trademark for LOTTO WORKS since 1974. The respondent is involved in the gambling industry and he started the business under the trade name "Trimark", which operates lotto and casino games. The respondent registered the disputed domain in July 1998 and January 2011 respectively.

[23] WIPO Case No. D2016-2532, *available at:* https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2016-2532 (last visited on June 21, 2023).

The panellist found that the disputed domain name is identical or confusingly similar to the complainant's trademarks, the complainant has not authorized the respondent to use the LOTTOWORKS or LOTTO trademark, and there is no relationship between the complainant and the respondent which would otherwise entitle the respondent to use such trademark. The panellist further found that the use of the words 'store' and 'works' in combination with the word 'lotto' in the disputed domain name is not a generic phrase. For the foregoing reasons, and under Paragraph 4 (i), the Panellist orders that the disputed domain names be transferred to the complainant.

(B) THE U.K. APPROACH

In the United Kingdom, there is no specific legislation that deals with dispute resolution in connection with cybersquatting.[24] In the United Kingdom the Trade Marks Act 1994, is only the law that protects trademarks whether on the Internet or in reality. Essentially, there are two possible legal grounds on which the courts in the U.K. rely in addressing domain name disputes, i.e., trademark infringement and the principle of passing-off.

The domain name dispute governing principle laid down by the UK Supreme Court in the case of British Telecommunications

[24] *Available* at: https://www.gov.uk/guidance/keeping-your-domain-name-secure (last visited on June 21, 2023).

Plc and others v. One in a Million Ltd and others[25] the defendants had registered as domain names, several well-known trade names, associated with large corporations, including sainsburys.com, marksandspencer.com, and britishtelecom.com, with which they had no connection. They then offered them to the companies associated with each name for an amount, much more than they had paid for them. The court observed that,

"The history of the defendants' activities shows a deliberate practice followed over a substantial period of registering domain names which are chosen to resemble the names and marks of other people and are intended to deceive. The threat of passing-off and trademark infringement and the likelihood of confusion arising from the infringement of the mark are made out beyond argument in this case, even if it is possible to imagine other cases in which the issue would be more nicely balanced."

Apart from the UK courts, Nominet UK[26] also, resolve disputes relating to ccTLDs in the UK through its Dispute Resolution Service (DRS)[27] which is adopted by the Nominet on the line of UDRP. In Tyson Foods, Inc. v. Sisusa Sphelele[28] the dispute was

---

[25] (1999) E.T.M.R.

[26] manage and register domain names ending with .uk in the UK since 1996. *Available at:* https://www.nominet.uk/domain-solutions/ (last visited on June 15, 2023).

[27] *Available at:* https://www.nominet.uk/domain-support/uk-domain-disputes/ (last visited on June 15, 2023).

[28] Nominet Dispute Resolution Service, D00024418, *available at:* https://secure.nominet.org.uk/drs/search-

regarding the registration of <tysonfood.co.uk> domain name. The complainant is a food giant based in the USA since 1935. The complainant demanded the transfer of the disputed domain name. The panel found that "Circumstances indicate that the Respondent is using or threatening to use the domain name in a way which has confused or is likely to confuse people or businesses into believing that the Domain Name is registered to, operated or authorized by, or otherwise connected with the Complainant". Thus, the expert ordered the transfer of the domain name to the complainant.

(C) THE US APPROACH

Before 1999, trademark owners sued the cybersquatters under the Federal Trademark Dilution Act (FTDA). But lawsuits under FTDA were "expensive and uncertain,"[29] and for its application, the mark must be the famous one. To overcome this problem Congress in 1999 passed the Anti-cybersquatting Consumer Protection Act ("ACPA") to protect American consumers and businesses, promote the growth of online commerce, and provide clarity in trademark law by prohibiting cybersquatting.[30]

---

disputes.html?action.browseBasicSearchResults=y&sortAscending=false&sortColumn=&page=8 (last visited on June 15, 2023).

[29] J. Ryan Gilfoil, "A Judicial Safe Harbor Under the Anti Cybersquatting Consumer Protection Act" 20 *Berkeley Technology Law Journal 187 (2005).*

[30] Sue Ann Mota, "The Anti cybersquatting Consumer Protection Act: An Analysis of the Decisions from the Courts of Appeals" 21 *Journal of Computer Information Law* 355 (2003).

//doi.org/10.61120/plr.2024.v221-26

The ACPA provides a cause of action against the cybersquatters who register the domain names containing trademarks to profit from the marks. The ACPA has jurisdiction over both types of cybersquatters i.e., those cybersquatters who can be found, and on whom a United States court can assert personal jurisdiction and the second category of cybersquatters is those who cannot be found or are beyond the personal jurisdiction because they are located in the foreign countries (in rem action).[31]

The Trademark Provision of ACPA

The trademark provision of the ACPA imposes liability on the cybersquatters who can be found in the United States. To bring a lawsuit under the ACPA, an aggrieved party must prove all three elements required under the statute:[32]

(1) the plaintiff has a mark that is distinctive or famous,

(2) the defendant's domain name is identical or confusingly similar to the plaintiff's distinctive or famous mark; and,

(3) the defendant used and registered, the domain name with a bad faith intent to profit from the plaintiff's mark.

[31] Bhanu K Sadasivan, "Jurisprudence Under The In Rem Provision Of The Anti cybersquatting Consumer Protection Act" 18 *Berkeley Technology Law Journal* 237 (2003).
[32] 15 U.S.C. § 1125(d)(1) (A).

In the ACPA a court may order the forfeiture or cancellation and transfer of the disputed domain name to the owner of the mark,[33] in addition, the court can award statutory damages award of not less than $1,000 and not more than $100,000 per domain name.[34]

The first case that was decided under ACPA was Sporty Farm L.L.C. v. Sportsman's Market, Inc.[35], the defendant (Sportsman's Market) - a catalogs company that uses the trademark and logo 'Sporty's' to classify its catalogs. Omega registered the domain name <sportys.com> and later sold it to its subsidiary Sporty Farm. The Sportsman claimed for trademark infringement under FTDA. The district court ruled in favour of Sportsman and issued an injunction forcing Sporty's Farm to relinquish all rights to Sportys.com.

In an appeal, the court applied the ACPA and found that "there was more than enough evidence on record to demonstrate bad faith. Neither Omega nor Sporty's Farm had at all intellectual property rights in sportys.com and Sporty's Farm did not begin use of the name in a bona fide offering of services or goods until after the litigation began". The court upheld the decision of the district court.

In Rem Action under ACPA

In rem jurisdiction of the ACPA allows the trademark owner to file a suit against the domain name, where the domain name

[33] *Supra note* 11, s. 3 (d)(1)(A).
[34] *Id.*
[35] 202 F.3d 489 (2d Cir. 2000).

registrant cannot be found or who does not reside within the United States. The owner of the trademark may file an in rem civil action against a domain name if:[36]

i) the domain name violates any right of the registrant of a mark registered in the Patent and Trademark Office or protected under section 43 (a) or (c) of the Lanham Act, 1946,

ii) the court finds that the owner has demonstrated due diligence and was not able to find a person who would have been a defendant in a civil action.

The remedies of an in-rem action are only limited to a court order for the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.[37]

(D) THE INDIAN APPROACH

In India, no legislation explicitly refers to dispute resolution in connection with domain names. The Trade Marks Act, 1999 sought to be used for protecting the use of trademarks in domain names is not extra-territorial, therefore it does not allow for adequate protection of domain names.[38] However, in India, it is well settled that domain name disputes are to be resolved under the Trade Marks Act, 1999.

[36] *Supra note* 11, s. 3 (2)(A).
[37] *Id.* s. 3 (2)(B).
[38] *Supra note* 10 at 795.

The Indian Parliament has enacted the Information Technology Act, of 2000 to make way for the acknowledgment of electronic information and data. Even though the legislature tries to enact laws to keep pace with the technological changes, neither the Trade Marks Act, 1999 nor the Information Technology Act, 2000 deals with the matter relating to the domain names dispute.

The judiciary in India has noted the proliferation of cases relating to domain name disputes in India. The Indian courts have been consistent in applying the law relating to passing off domain name disputes.[39] In India, the disputes identifying with domain names have been managed under the trademark law, as done by the courts in the UK and USA. Let us analyze the approach of the Indian courts in dealing with cybersquatting cases.

The first domain name dispute case in India was of, YAHOO! Inc. v. Akash Arora & Anr[40], a lawsuit was filed by the plaintiff against the defendants seeking a decree of permanent injunction restraining the defendants from operating any business, selling, advertising, and/or dealing in any services or goods on the Internet or otherwise under the trademark and/or domain name ‘yahooindia.com’, or any other trademark and/or domain name that is identical with or deceptively similar to the plaintiff’s well-known trademark “Yahoo!”. The defendant contended that the “Yahoo!”

---

[39] *Id.* at 798.
[40] 1999 PTC (19) 201 (Del), *available* at: https://indiankanoon.org/doc/1741869/ (last visited on June 25, 2023).

trademark/domain name purportedly belonging to the plaintiff was not at the time registered in India and therefore could not be used as a basis for an action about trademark infringement. The defendant also argued that the word "Yahoo!" is a general word that is neither unique nor invented and as such, did not possess an element of distinctiveness. It was further submitted that since the defendants had been using a disclaimer all along, there was no deception, and hence no action of passing off could be taken against the defendants. Refusing all contentions of the defendant the court awarded the interim injunction to the plaintiff and restrained the defendants from using the domain name yahooindia.com, the court observed:

"The services of the plaintiff under the trademark/domain name 'Yahoo!' have been publicized and written about globally. In an Internet service, a particular Internet site could be reached by anyone anywhere in the world who proposes to visit the said Internet site..., in a matter where services are rendered through the domain name on the Internet, a very alert vigil is necessary and a strict view is to be taken for its easy access and reach by anyone from any corner of the globe...there can be no two opinions that the two marks/domain names 'Yahoo!' of the plaintiff and 'Yahooindia' of the defendant are almost similar...and there is every possibility and the likelihood of confusion and deception being caused."

The judgment in Yahoo! Inc. case was followed by the Bombay High Court in Rediff Communication Ltd. v Cyberbooth[41], the court observed that,

"A domain name is more than an Internet address and is entitled to equal protection as a trademark. With the advancement and progress in technology, the services rendered in the Internet site have also come to be recognized and accepted and are being given protection to protect such providers of service from passing off the services rendered by others as their services."[42]

Supreme Court of India was presented with an occasion to ponder over domain name disputes in Satyam Infoway Ltd. v. Sifynet Solutions Pvt. Ltd[43], the principal question which came before the Supreme Court was whether the trademark law applies to Internet domain name disputes. The Supreme Court observed,

"The use of the same or similar domain name may lead to a diversion of users, which would result from such users mistakenly accessing one domain name instead of another. This may occur in e-commerce with its rapid progress and instant (and theoretically, limitless) accessibility to users and potential customers and particularly so, in areas of specific overlap. Ordinary consumers/users seeking to locate the functions available under one domain name may be confused if

[41] 1999 (19) PTC 201 (Del).

[42] Rediff Communication Ltd. case, op cit, note 91, p 30.

[43] 2004 PTC (28) 566 (SC), *available* at: https://indiankanoon.org/doc/1630167/ (last visited on June 25, 2023)

they accidentally arrive at a different but similar website, which offers no such services. Such users could well conclude that the first domain name owner has misrepresented its goods or services through its promotional activities, and the first domain owner would thereby lose its customers. It is apparent, therefore, that a domain name may have all the characteristics of a trademark and could find an action for passing off."

The Court further added that in India, there is no specific legislation that refers to domain name dispute resolution. The Trade Marks Act, 1999, does not have an extra-territorial application and may not allow for the protection of domain names. This doesn't mean that domain names are not to be legally protected under the Trade Marks Act, 1999, and the laws relating to passing-off.

The functions of the National Internet Registry (NIR) were delegated to the NIXI in 2004. The NIR has been named as Indian Registry for Internet Names and Numbers (IRINN). With the increase in cybersquatting cases in the country, the NIXI has adopted the. IN Domain Name Dispute Resolution Policy (INDRP).[44] The INDRP was written by international norms (from the World Intellectual Property Organization) and the provisions of the Information Technology Act of 2000. The INDRP governs trademark disputes using domain names that finish in .IN or .Bharat, such as Tata.in,

[44] *Available* at: https://www.registry.in/system/files/IN_Domain_Name_Dispute_Resolution_Policy.pdf (last visited on May 21, 2023).

sony.in, or apple. bharat, etc. The INDRP is supplemented by Rules of Procedure[45], which describes the fees, communications, how to respond to a complaint, how to file a complaint, and the other procedures that can be used in processing a complaint.

NIXI has been able to transparently and efficiently resolve over 1177 cases in its nearly fifteen years of existence. An examination of the dispute resolution procedure, as well as the results rendered under the INDRP regime, reveals that the number of decisions rendered in favour of the complainants has decreased slightly. According to a recent examination of cases submitted and decided over the last 15 years, the Complainants or Right holders received a substantial percentage of favourable decisions (almost 97 percent).[46]

Some important judgements under INDRP

The first case that came before the INDRP arbitral tribunal was, Rediff.com India Ltd. v. Abhishek Verma and Advance Media[47] the dispute was regarding the registration of the domain name "rediff.in" by the respondent. The complainant argued that the domain name 'rediff.in' is confusingly similar and identical to the complainant's trademark, 'rediff.com', rediffmail.com, etc. The complainant

[45] *Available* at: https://www.registry.in/indrp-rules-of-procedure (last visited on June 25, 2023).
[46] Ibid.
[47] INDRP/001, April 3, 2006, *available* at; https://registry.in/Policies/DisputeCaseDecisions. (last visited on May 16, 2023).

further argued that the registration of the domain name 'Rediff.in' by the respondent was in bad faith and to gain monetary benefit.

The Arbitral Tribunal concluded that "the respondent registered the alleged domain name mainly to sell or otherwise transfer it to the complainant and there is no nexus between the word 'rediff' and the respondent's firm's name. Without any such proof, it can be deduced that the respondent deliberately endeavoured to draw in Internet users to the proposed site by confusing the complainant's name. After going through the fact that "the purpose of registering the domain name by the registrant is renting, transferring or otherwise selling the domain name registration, to the complainant who is the owner of the trademark." Finally, the arbitral tribunal ordered the transfer of the domain name to the complainant.

In Maruti Suzuki Ltd. v Nitin Bhamri,[48] the dispute was regarding the registration of the domain name 'marutisuzukieeco.co.in' by the respondent. The complainant argued that the domain name is similar and identical to the complainant's trade mark and it will cause confusion in the mind of the innocent internet user and divert the customers from the complainant's websites.

The Arbitrator observed that the minor addition of the word 'eeco' to the complainant's trademark is insufficient to avoid similarity. The Arbitrator found that the respondent registered the disputed

---

[48] INDRP/137, April 24, 2010, *available* at: https://selvams.com/indrp-domain-name-dispute-cases/indrp137/ (last visited on May 25, 2023).

domain name with the intent of attracting Internet users to the respondent's website or other online locations by creating a likelihood of confusion with the complainant's trade name or trademark as to the source, sponsorship, affiliation, or endorsement of the respondent's website or online location. The tribunal ordered the transfer of the domain name to the complainant.

In Sazerac Brands, LLC v. Dean Chandler[49], the registrant claimed to have registered in order to create an alumni network for the McMaster Faculty of Engineering, which he said has been known as the 'Fireball Family' since 1995. The registrant also mentioned that he was an interested astronomer and that fireballs were often where the college was located. The arbitrator noted that the registrant's mark was identical to the complainant's and that the registrant had failed to demonstrate a reasonable interest in the domain name through use. Furthermore, the registrant's explanation for using the disputed domain name looked to be a spur-of-the-moment decision. The arbitrator held:

"Tribunal is of the view that the Respondent has been unable to prove that it has been using the mark 'FIREBALL' or the disputed domain name 'fireball.in' in connection with a bona fide offering of goods or services. The Complainant has thus proved that the Respondent has no rights or legitimate interests in the disputed domain name".

---

[49] INDRP/1243, *available* at: https://www.algindia.com/lack-of-use-indicates-lack-of-legitimate-interest-in-domain-name/ (last visited on May 26, 2023).

Accordingly, the disputed domain name <fireball.in> was transferred to the Complainant.

Conclusion

At the Internet's origin, few might have anticipated its quick development. Likewise, only a few would have imagined that the next race for gold would be in valuable domain names. The internet has provided an opportunity for cybercriminals to commit cybercrime, cybersquatting is one such cybercrime committed by cybersquatters. The problem of cybersquatting has received the attention of the governments of several countries and requires serious attention.

Apart from the traditional methods, ICANN's dispute resolution policy (UDRP) has established itself as an effective tool to tackle cybersquatting. UDRP promotes a quick, efficient, and cost-effective mechanism to resolve cybersquatting cases. Apart from the ICANN's UDRP, the USA is the first and only country in the world that has enacted ACPA, special legislation for the protection of businesses from cybersquatters. Whereas, the United Kingdom lacks any specific legislation on cybersquatting. The courts in the U.K. apply the trademark infringement and the passing-off principle of the Trade Mark Law of 1994 to resolve the cybersquatting disputes.

While in India the Information Technology Act of 2000 is India's only cyberspace legislation, and it makes no provision for dealing with trademark-domain name issues. Furthermore, the Trademark Act of 1999 contains no provisions regarding domain names. Nonetheless, some domain

name conflicts are being decided by Indian courts under the Trademark Act. With the increase in cybersquatting cases, NIXI has adopted the INDRP, it is only applicable on the domain name ending with .in or. bharat.

The following suggestions are recommended:

The domain name registrars follow the first-come, first-served policy for the registration of the domain name. Before registering the domain name, the registrar should advertise the application for the registration of the domain name, to allow the public to oppose the registration of the domain name. This will help in reducing the cybersquatting cases.

It is suggested that the WIPO member nations should take the initiative to develop a global convention like the Paris Convention, etc which particularly deals with the domain name system, its registration, dispute resolution mechanism, etc., so that member states can enact the local law parallel to the convention and it will also bring the uniformity of law governing the domain name system.

It is also suggested that, like that of the United States, Anti-Cybersquatting Consumer Protection Act (ACPA), 1999, India should also enact the law to prevent cybersquatters from registering domain names similar or identical to trademarks to sell them to the trademark holder. The INDRP adopted by the NIXI for tackling the cybersquatting cases is not shaped in law by the competent legislature, thus not making it mandatory to follow. To make INDRP more effective, the inconsistency between the UDRP and INDRP must be removed.

The UDRP stands to be useful in resolving domain name dispute cases, but certain limitations under UDRP need to be fixed. It is suggested that the following changes be made to the UDRP:

i) the UDRP has limited applicability to gTLDs and some ccTLDs, provision should be made for the universal applicability of the UDRP to all domain names.

ii) There is a need to tackle inconsistent panel decisions and the tribunal must follow the doctrine of precedent.

iii) A review mechanism should also be introduced in the UDRP so that the aggrieved party can file for the review of the award.

iv) The period of 10 days to file the lawsuit in the court of mutual jurisdiction by the losing party should also be increased, as it takes time to develop a consensus between the party and to find an expert lawyer in the concerned field.

PRAYAGRAJ LAW REVIEW
PLR

A PRISON WITHOUT BARS, CHAINS, OR LOCKS: SHOULD INDIA ADOPT FINLAND'S OPEN PRISONS MODEL?

*Chetna Anjum**

ABSTRACT

Krishna Iyer, J. in his judgments has always supported humanitarian over punitive treatment of inmates. The Indian Constitution guarantees the fundamental right to life and personal liberty to all people, including prisoners. Previously, prisons were thought to be small rooms where convicted criminals were kept away from luxury and public life to allow them to reflect on their crimes and repent. Since ancient times, prisons have been used both domestically and abroad as punitive and correctional facilities. One of the concepts employed by the criminal justice system to help prisoners become law-abiding citizens is the open prison.

This article begins with a brief study of the concept of open prisons and a comparative discussion of open prisons in Finland and India. This article tries to bring out the contrast between the Indian and Finnish Open Prisons as Finland is the perfect example to study the implementation of reformative justice in prison administration. The researcher has also critically discussed the conditions of the open prison system in India and tried to suggest

* Research Scholar, Deen Dayal Upadhyay Gorakhpur University, Uttar Pradesh *<chetna.rmnlu@gmail.com>*

measures to augment conditions just like the Finnish Open Prisons. In the end, the researcher has concluded the paper with some suggestions that can be implemented to improve the conditions of the open prison system in India.

Keywords: *Open Prison System, Reformative Justice, India, Finland, Fundamental Rights, New Model Prison Act 2023.*

INTRODUCTION TO FINLAND'S OPEN PRISON

The world's happiest nation is Finland. Finland and its neighboring Nordic countries are regularly included in the top 10 of the United Nations' annual World Happiness Report. Finland has held the top spot for the past seven years.[1]

Since many people would likely identify a happy nation with pleasant weather, beautiful locations and prodigious natural resources with pleasure, happiness, and joy, it would seem that the happiest nation would have beautiful geographical conditions. The long, dark winters of Finland, albeit beautiful and reminiscent of a forest wonderland, have nothing in common with pleasant geographical conditions. The researchers from the Nordic region have examined previous research, theories, and data to delve deeper into the idea of happiness. The two most popular theories that came up are a democracy that runs smoothly and low levels of corruption. The secret to happiness in Finland is trust in institutions. However, in contrast, India as

[1] 'Finland Is World's Happiest Country For 7th Time Straight, India Stands At 126' (2024) NDTV <https://www.ndtv.com/world-news/finland-is-worlds-happiest-country-for-7th-time-straight-india-stands-at-5278059> accessed 29 July 2024.

per the World Happiness Report 2024 out of 143 countries surveyed, is ranked 126th, the same as last year, while the neighboring countries, like China is ranked 60th, Nepal is at 93 and Pakistan is at 108.[2]

According to a survey, "Nordic citizens experience high levels of social trust towards each other, as well as a high sense of autonomy and freedom, which play an important role in determining life satisfaction."[3]There are numerous factors leading Finland to the top of the happiness index and one significantly contributing factor is their prison system. Every tool available to a prisoner to alter the course of their life and their view of themselves is applied as soon as they are imprisoned in Finland. There is an extreme emphasis on rehabilitation programs rather than punishment, and the care is incredibly humane. This signifies the focus of the government lies in the reformation of the prisoners rather than just sentencing them.[4] When combined, all of these elements drive this country to the top of the global happiness index.

India, as can be inferred from the World Happiness Report[5] lies at the bottom of the list due to various factors. It is high time that the focus of Indian government and other State agencies be brought to increase the happiness

---

[2]**World Happiness Report 2024**https://worldhappiness.report/ed/2024/ accessed 7 July 2024

[3]**'Finland: The So-Called Happiest Country on Earth - But Not for Everyone'** (Pulitzer Center) https://pulitzercenter.org/stories/finland-so-called-happiest-country-earth-not-everyone accessed 29 May 2024.

[4] Kirsti Kuivajärvi, 'Prison Life in Finland: The Importance of Rehabilitation and Reintegration' (2020) 22(4) Punishment & Society <https://doi.org/10.1177/1462474520964939> accessed 29 July 2024.

[5]**Supra** n 1.

index of the country and for this apart from other factors one leading factor is the increasing incarceration rate in the country. There is an immediate need to shift our attention towards rehabilitation and reintegration of prisoners into society and the best way is by focusing more on the open prison model of incarceration. The researcher was once going through a news article that mentioned Finland is closing its prisons due to lack of prisoners.[6] The inquisitive mind made the researcher delve deeper into this aspect, which led to knowledge about the fact that it is only partially true as Finland was focusing majorly on converting its prison system into an open prison model. This further intrigued the researcher that there is a criminal justice system that allows inmates to leave daily for work or school. This led to further study about the open prisons in India and their comparison to the Finnish open prison model.

Numerous "open prisons" exist in Finland. The facilities don't have gates, locks, or uniforms; prisoners apply to be there. Inmates can go out and earn money. Alternatively, they can decide to forgo employment in favor of pursuing a university degree. Since it hasn't increased crime, the model is regarded as successful[7]. The guiding principle is rehabilitation. Finland discovered that the solution to societal issues is not incarceration. The Nordic nation had a high rate of incarceration until its criminal justice

---

[6] 'The Countries Closing Their Prisons' (RNZ National) https://www.rnz.co.nz/national/programmes/sunday/audio/2018633586/the-countries-closing-their-prisons accessed 29 May 2024

[7] Emmanuel Y. A. Ekunwe, 'Prisoner Rehabilitation in Finland: The Views of Former Inmates' (2012) <http://www.antoniocasella.eu/nume/Ekunwe_2012.pdf> accessed 29 July 2024.

system was reexamined and new legislation was established under the guidance of research.[8]

Finland in the 1800s believed that solitary confinement, combined with a combination of religious observance and penance, would control inmates. Hard living conditions and overcrowding persisted until the end of World War II. Decades of efforts have gone into the attempt to humanize the Finnish prison system, beginning with worker colonies.

Taking a "tough on crime" stance helped Indian policymakers win electoral points. They firmly established a system of disproportionate punishment that has wreaked havoc on communities through mass incarceration. The prisoners are paid the regular minimum pay for their labor while they are behind bars. Once a week, the public is allowed to shop for their preferred items at the local food market for a specified number of hours. Apart from repeat offenders and major crimes against humanity, the maximum sentence is reportedly 21 years in prison, with very few exceptions. Their general belief is that you have lost everything and experienced shame and embarrassment after being excluded from the community for a year or three, which should be enough to motivate you to alter your behavior. Decades of incarceration neither prove a point nor increase society's safety.

UNDERSTANDING THE CONCEPT OF OPEN PRISON

[8] **'Finland's Open Prisons'** (Pulitzer Center) https://pulitzercenter.org/projects/finlands-open-prisons#:~:text=Finland%20realized%20incarceration%20is%20not,was%20drafted%2C%20guided%20by%20research. accessed 1 June 2024

The doctrine behind punishment for a crime has been changed a lot by the evolution of new human rights jurisprudence. The concept of reformation has become the watchword for prison administration. Human rights jurisprudence advocates that no crime should be punished in a cruel, degrading, or inhuman manner.[9]Quite the contrary, it is argued that any penalty that can be considered cruel, inhuman, or degrading ought to be considered an offense in and of itself. It is in order to respect the basic Human Rights of the prisoners the system of open prison was adopted in India. To understand what is an open prison we first need to understand what is a prison?

A comprehensive definition of the term "prison" is provided by the Prisons Act of 1894[10].

"prison means any jail or place used permanently or temporarily under the general or special orders of a State Government for the detention of prisoners, and includes all lands and buildings appurtenant thereto, but does not include

(a)any place for the confinement of prisoners who are exclusively in the custody of the police;

---

[9]UNGA 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 1, para 1
UNGA 'Universal Declaration of Human Rights' (adopted 10 December 1948) UNGA Res 217 A(III), art 5
UNGA 'International Covenant on Civil and Political Rights' (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 7
[10] The Prisons Act 1894, s 3(1)

(b)any place specially appointed by the State Government under section 541 of the [Code of Criminal Procedure, 1882 (10 of 1882)] [Now see the Code of Criminal Procedure, 1973 (2 of 1974).]; or

(c)any place which has been declared by the State Government, by general or special order, to be a subsidiary jail;"

Since prisons are established by government ruling, prisons can exist anywhere. Therefore, in accordance with this definition, even a jail will fall under the category of prisons.

Now, open jails are special Jails that exclusively confine only convicted prisoners. Convict Prisoners with good behaviour, satisfying certain norms prescribed in the respective prison rules are lodged in open prisons. Minimum security is kept in such prisons and prisoners are engaged in agricultural and such other activities.[11] These are special kind of jails that provides opportunities for employment and living a life in the open to convicted prisoners.[12]

The 1972 Rajasthan Prisoners Open Air Camp Rules define an open jail as "prisons without walls, bars, and locks."[13]

The definition of "open prison" according to the prison manuals for Tamil Nadu and Maharashtra is "any place so used permanently (or temporarily)

[11]National Crime Records Bureau, 'Prison Statistics India 2022' (NCRB 2023) https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/psiyearwise2022/1701613297PSI2022ason01122023.pdf accessed 1 June 2024

[12]Model Prison Manual-2016 (Ministry of Home Affairs, 2016).

[13]**Rajasthan Prisoners Open Air Camp Rules 1972** (Rajasthan, 1972).

//doi.org/10.61120/plr.2024.v2227-49

under any order of the State Government for the detention of prisoners [under clause (1) of section 3 of the Prisons Act, 1894]."[14]

A more thorough definition of open jail is offered by the West Bengal Notification of 1986,[15] in contrast, "A Prison House not surrounded by walls or fencing of any kind" is what it refers to.

Open jail was described as "a framework dependent on self-control and the detainees' feeling of obligation towards the gathering in which he lives" and "a lack of material or actual safeguards against escape (dividers, locks, bars, equipped or skewered safety officers)" in the UN Congress on the Prevention of Crime and the Treatment of Offenders at Geneva, 1955.[16]

In furtherance to this, Judges have also shaped the contemporary concept of incarceration through their decision-making process. Even the idea of "open jails" has changed over time. The reputation of prisons as a place where negative experiences are had is now history.

The Supreme Court stated in Ramamurthy v. State of Karnataka,[17]stated that "open air-prisons play an important role in the scheme of reformation of a

---

[14]**Maharashtra Open Prison Rules 1971**, sec. 2(b).
Government of Tamil Nadu, *Tamil Nadu Prison Manual*, vol. II, chap. XXXVI: Open Air Prisons, vol. II, p. 149.
[15]**Government of West Bengal, Home (Jails) Dept.**, *Notification No. 1819-HJ*, dated 2 August 1986, amending the *West Bengal Jail Code*. See *West Bengal Jail Code*, chap. XXXIX: Open Prisons, sec. 635.
[16]Ishwar Chandra Vatsa, *Open Peno Correctional Services* (Vedams: Book from India 1997) 42.

[17]**(1997) 2 SCC 642 (659)**

prisoner which has to be one of the desideratum of prison management. They represent one of the most successful application of the principle of individualism of penalties with a view to social readjustment. Though open-air prisons, create their own problems which are basically of the management, we are sure that these problems are not such which cannot be sorted out. For the greater good of the society, which consists in seeing that the inmates of a jail come out, not as a hardened criminal but as a reformed person, not managerial problem is insurmountable. So let more and more open-air prisons be opened. To start with, this may be done at all the district headquarters of the country."

The Supreme Court of India also observed in Dharmbir vs State of Uttar Pradesh[18] that "open prisons had certain advantages in the context of young offenders who could be protected from some of the well-known vices to which young inmates are subjected in conventional jails."

OPEN PRISON IN INDIA

In 1949, the Model Prison in Lucknow housed the first-ever open-air camp in the history of independent India. In 1953, the state of Uttar Pradesh also set up an open prison camp in order to build a dam over the Chandraprabha River close to Varanasi. Open prison camps were established in the 1950s in several locations, including Chakiya, Naugarh, and Shahgarh. The first open jail camp in Rajasthan was established in Sanganer in 1963. The reformist politician Sampurnanand, who actively supported the notion as

[18] **(1979) 3 SCC 645**

//doi.org/10.61120/plr.2024.v2227-49

chief minister of Uttar Pradesh in the 1950s and as governor of Rajasthan in the 1960s, is credited with giving these camps their common name.[19]

These were the first instances of the open model, which let inmates to work in forestry, agriculture, cottage industries, and public utility-related fields. In exchange for their labor, they received compensation. Rather than prisoners, the inmates were referred to as "mazdoor."

Do Aankhen Barah Haath,[20] a 1957 Hindi feature film, is a prime example of the open prisons philosophy in India, which is fundamentally grounded in humanistic psychology. In the movie, a youthful jail warden transforms six deadly killers into virtuous people after releasing them on parole. On a run-down country farm, he forces them to labor alongside him to rehabilitate them with diligence and thoughtful supervision.

According to the latest NCRB, Prison Statistics of India Report,[21] only 17 States have reported about the functioning of open jails in their jurisdiction. Total number of open prisons in India is currently 91. Amongst these States, Rajasthan has reported the highest number of 41 open jails followed by Maharashtra (19), Madhya Pradesh (7), Gujarat and West Bengal (4 each) and Kerala, Tamil Nadu (3 each). The remaining 10 States – Andhra Pradesh, Assam, Bihar, Himachal Pradesh, Jharkhand, Karnataka, Odisha,

---

[19]N V Paranjape, *Criminology and Penology* (11th edn, Central Law Publications 2001).

[20]The film is inspired by the story of an "open prison" experiment at Swatantrapur in the then princely state of Aundh near Satara (Now in Sangli district of Maharashtra).

[21]**National Crime Records Bureau**, *Ministry of Home Affairs, Government of India*, *Annual Report 2022* (2023).

Punjab, Telangana and Uttarakhand have one open jail each. The States Arunachal Pradesh, Chhattisgarh, Goa, Haryana, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura & Uttar Pradesh and all the UTs do not have any Open Jail in their State/UT. Only two states, Maharashtra and Kerala, have built capacity in open jails for female detainees.

A total of 4,473 inmates population consisting of 4,341 males and 132 females were lodged in various Open jails of the country against the total Capacity of 6,043 inmates consisting of 5,913 males and 130 females.[22] The highest number of inmates were lodged in the jails of Maharashtra (1,725), followed by Rajasthan (1,367), Kerala (437), and West Bengal (261). The Occupancy rate of Open Jails at the National level was 74.0% and Maharashtra (107.0%) has reported the highest crowding in open jails. However, overcrowding may differ on a day-to-day and jail-to-jail basis. The number of jails, capacity, the population of inmates, and their

Sl. No.	Type	Number of Jails	Capacity	Population of Inmates	Occupancy Rate
(1)	(2)	(3)	(4)	(5)	(6)
1	CENTRAL JAIL	148	197052	246155	124.9
2	DISTRICT JAIL	428	168981	264534	156.5
3	SUB-JAIL	574	47270	45679	96.6
4	SPECIAL JAIL	42	7573	7171	94.7
5	OPEN JAIL	91	6043	4473	74.0
6	WOMEN JAIL	34	7080	4258	60.1
7	BORSTAL SCHOOL	10	1204	489	40.6
8	OTHERS	3	1063	461	43.4
9	**TOTAL**	1330	436266	573220	131.4

Table 1

[22]**National Crime Records Bureau**, *Report as on 31 December 2022* (2023).

occupancy rate in Open Jails as of 31st December, 2022 in respect of States/UTs as published by NCRB are presented in Table 1[23] below:

LESSONS TO LEARN FROM FINLAND

Since crime hasn't increased, Finland's prison model is regarded as successful. The theory is rehabilitation. This does not imply that they are lenient toward offenders; rather, it indicates that they sincerely try to help out of debt to society by providing them with enough financial support and healthcare. It is not allowed for prospective employers to inquire into an individual's background or to refuse them employment because of it.[24]

Suomenlinna Open Prison on Suomenlinna island, Finland, a sea fortress is a well-liked tourist destination and a UNESCO World Heritage Site.[25] The majority of tourists are unaware that the men who are sentenced there contribute to the upkeep of the open prison. The stark, concrete, and boring prisons seen in India are not at all like the prison structures in Suomenlinna. We can develop our prison structures in such a way that they attract the masses. This will not only spread awareness about open prisons but will also contribute financially to the national income.

---

[23] *Ibid.*

[24] **'Commentary: What I Learned Visiting Finland's Open Prisons'** (Pulitzer Center) https://pulitzercenter.org/stories/commentary-what-i-learned-visiting-finlands-open-prisons accessed 1 June 2024.

[25] **'Suomenlinna (Sveaborg)'** (UNESCO World Heritage Centre) https://whc.unesco.org/en/list/583/#:~:text=Suomenlinna%20(Sveaborg)%20is%20a%20sea,geographical%20features%20of%20the%20region. accessed 1 June 2024.

One of the main proponents of orienting inmates toward reformative treatment was Krishna Iyer, J. His attempts to instill reforming principles in the jail administration were evident in every decision he made.

Krishna Iyer, J opined open prison as:

"A reformative philosophy, rehabilitative strategy, therapeutic prison treatment and enlivening of prisoner's personality through the technology of fostering the fullness of being such a creative art of social defense and correctional process activating fundamental guarantees of prisoner's rights is the hopeful note of national prison policy struck by the constitution and the court."[26]

As a result, prisoners can now enjoy their full human dignity while incarcerated. The conventional definition and understanding of a prison are out of date. The impact of penal reforms in India was greatly influenced by human rights jurisprudence. India is also impacted by the global criminal justice changes.

As a result of adopting open prisons, Finland observed a sharp decline in the number of inmates.

After working with prisoners for over ten years, Smita Chakraborty, a social reformist created Prison Aid and Action Research (PAAR) in 2018 with the

---

[26] **'Reformative Theory of Punishment'** (Lawctopus) https://www.lawctopus.com/academike/reformative-theory-of-punishment/ accessed 3 June 2024.

goal of reforming prisons.[27] She is credited with promoting the concept of open jails in India. She asserts, "If they can think of a parole system, then they can think of an open prison."[28]

The World Prison Population List, like the World Female Imprisonment List[29] and the World Pre-trial/Remand Imprisonment List,[30] complements the information held on the World Prison Brief. This is an online database[31] and updated monthly. The Institute for Crime & Justice Policy Research (ICPR) at Birkbeck, University of London, hosts and maintains the World Prison Brief database and publishes the Prison Lists.[32] This thirteenth edition of the World Prison Population List gives details of the number of prisoners held in 223 prison systems in independent countries and dependent territories. It shows the differences in the levels of imprisonment across the world and makes possible an estimate of the world prison population total.

---

[27]**'India's Open Prisons: A Trust in Escape'** (Reasons to be Cheerful) https://reasonstobecheerful.world/india-open-prisons-escape-trust/ accessed 1 June 2024.

[28]Chakraburtty, Smita (2020): "Unsafe Behind Bars," *The Telegraph*, 5 April, <https://www.telegraphindia.com/opinion/coronavirus-pandemic-people-behind-bars-are-unsafe/cid/1762310.> accessed 01 June, 2024.

[29]World Prison Population List (4th edn, Institute for Criminal Policy Research, November 2017).

[30] World Pre-trial/Remand Imprisonment List (4th edn, Institute for Criminal Policy Research, April 2020) <www.prisonstudies.org> accessed 29 July 2024.

[31]Ibid.

[32]**World Prison Population List** (1st-5th edns, Research and Statistics Directorate, UK Home Office 1999-2004; 6th-10th edns, International Centre for Prison Studies 2005-2013).

The figures include both pretrial detainees/remand prisoners and those who have been convicted and sentenced.[33]

The prison population trends since 2000 in Asia have varied greatly between the different parts of the continent: total prisoner numbers in south-eastern Asia and in western Asia (Middle East) rose by 116% and 119% respectively while the total in central Asia fell by 44%. China and India, with their high national populations, strongly influence the overall Asian prison population level, but show contrasting trends: the total prison population in China rose by 18%, and in India by 76%. Excluding these two countries, the Asian prison population rose by 52%. Europe is the only continent that has seen a fall in its total prison population since 2000.[34] Thus we see that the rise in prison population in India is very alarming and it's high time that we should start focusing on rehabilitation, reformation and reintegration of prisoners in society and establish as many open prisons in the country as possible.

THE NEW MODEL PRISON LAW

The current "Prisons Act, 1894" is about 130 years old and dates back to the time before independence. The primary goals of the Act are the detention of offenders and the upholding of law and order in prisons. The current Act makes no mention of prisoner reform or rehabilitation. Globally, during the past few decades, a completely new viewpoint on jails

[33]**International Centre for Prison Studies**https://www.prisonstudies.org/ accessed 1 June 2024.

[34]**Institute for Crime & Justice Policy Research**, *World Prison Population List* (13th edn, 2021) https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_13th_edition.pdf accessed 1 June 2024.

and prisoners has emerged. Prisons are now viewed as correctional and reformative facilities where inmates undergo transformation and rehabilitation to become law-abiding members of society, rather than as sites of retributive deterrence.

The Ministry of Home Affairs (MHA) has been observing over the last few years that the current Prisons Act, which governs the management of prisons in every State and Union territory save for a few that have passed new Prisons Acts, has several gaps. It was felt that the Act needed to be updated and revised to better meet the demands of contemporary prison administration, in addition to the obvious absence of the correctional focus from the original legislation.

Following current demands and correctional ideology, the Indian government decided to study and amend the outmoded Prison Act of the colonial era. The Ministry of Home Affairs tasked the Bureau of Police Research and Development with updating the Prisons Act of 1894. Following extensive consultations with State Prison officials, correctional specialists, etc., the Bureau created a draft.The government has finalized a comprehensive "Model Prisons Act, 2023," which may serve as a guiding document for the States and for adoption in their jurisdiction. The Act's goals include comprehensively providing guidance and addressing the gaps in the current Prisons Act, including the use of technology in prison management, making provisions for grant of parole, furlough, remission to prisoners to encourage good conduct, special provision for women/transgender inmates, the physical and mental well-being of prisoners, and a focus on the

reformation and rehabilitation of inmates, among other things.[35] However, it still does not have detailed provisions regarding the operation of open prisons in India.

The new Model Prisons Act, 2023 in Chapter XVII Sec 50 deals with "Open and semi-open Correctional Institutions". It states [36]

"(1) The Government may establish and maintain as many open and semi-open correctional institutions for prisoners, as may be required.

(2) The Government may allow such facilities or concessions in such open or semi-open correctional institution which may assist the prisoner in his rehabilitation into the society, as may be prescribed under the rules.

(3) The rules for management of open or semi-open institutions, including the procedure and eligibility of prisoners who can be transferred to such correctional institutions, dealing with prisoners who violate any condition of transfer to an open or semi open correctional institution, etc. shall be such as may be prescribed by the Government."

The Ministry of Home Affairs has also examined "The Prisons Act, 1894," "The Prisoners Act, 1900," and "The Transfer of Prisoners Act, 1950," and the pertinent provisions of these Acts have been incorporated into the "Model Prisons Act, 2023." Adopting the Model Prisons Act, 2023 in their

[35]**Press Information Bureau**https://pib.gov.in/PressReleseDetailm.aspx?PRID=1923682 accessed 1 June 2024.

[36]**Model Prisons Act 2023**, s 50, ch XVII: Open and Semi-Open Correctional Institutions.

jurisdictions will benefit State Governments and Union Territory Administrations.

Here are a few noteworthy aspects of the recently passed Model Prisons Act:

1. Provisions for security evaluation, prisoner segregation, personalized sentence planning;
2. Redress of grievances; prison development board; and a shift in perspective regarding convicts.
3. Providing distinct housing for female inmates, transsexual people, etc.
4. Provisions for the use of technology in jail management to increase administrative transparency.
5. Offering tools for scientific and technological interventions in jails, video conferencing with judges, etc.
6. Guidelines for the construction and administration of open and semi-open jails, high-security jails, etc.
7. Offering parole, furlough, early release, and legal assistance to inmates, among other measures, to reward better behavior.
8. Emphasize the development of inmates' skills and vocational training to facilitate their reintegration into society.

CHALLENGES OF THE OPEN PRISON SYSTEM IN INDIA:

Despite the importance of open prisons in India, the system faces significant obstacles with their execution due to the system's shortcomings. A few of them are mentioned as follows-

- The Open Prisons are underutilized. The occupancy rate is just 74%.[37]This demonstrates that open penitentiaries are empty even though closed correctional facilities are overcrowded.
- In most states, an advisory body that selects inmates has little authority because it is not required of them to provide justifications for their selections. This leads to discrimination and depravity.
- There are inadequate open detention facilities in every state. There are multiple open prisons in some states, one in others, and none at all in any Union Territory in India. States differ from one another in this way because this is the subject matter of the State List hence, there is no parity among the States.
- According to the Indian Constitution, "prisons" and "persons detained therein" are regarded as "State" subjects. The only bodies that have the authority to pass legislation required to manage prisons and oversee prisoners are state governments. They are therefore solely accountable for carrying out their duties. However, given the critical role that efficient jail management plays in the criminal justice system, the Indian government focuses a great lot of emphasis on assisting the States and Union Territories in this area.

[37]**NCRB Data Report 2022**, Table 1.1.

SUGGESTIONS

PRAYAGRAJ LAW REVIEW

In order to address the lack of uniformity across states in the establishment and management of open prisons, it is open to the Centre to frame a law under Article 253 of the Constitution, which empowers the union to frame laws to give effect to the international agreements. India has already ratified the International Covenant on Civil and Political Rights, 1966.[38]

'Prisons'/'persons detained therein' is a "State-List" subject under Entry 4 of List II of the Seventh Schedule to the Constitution of India. Administration and management of prisons and prisoners is the responsibility of respective State Governments who are competent to take appropriate action in this regard. However, given the significance of prisons in the Criminal Justice System, the Ministry of Home Affairs has been providing regular guidance and support to the States and UTs on diverse issues relating to prison administration.[39] However, it is suggested that the prison administration should be moved to the concurrent list from the state list of Schedule VII of the Indian Constitution. This will help in the better administration of prisons at the national level. The states that are not actively working on the opening of open prisons will then have to follow the mandates of the Central Government, hence all the states will have to compulsorily make provisions

PLR

---

[38]**Bureau of Police Research and Development**, *Model Prison Manual for the Superintendence and Management of Prisons in India* (Ch XXI, 2003) http://bprd.nic.in/WriteReadData/userfiles/file/5230647148Model%20Prison%20Manual.pdf accessed 1 June 2024.

[39]**Ministry of Home Affairs**, *Prison Reforms* https://www.mha.gov.in/en/divisionofmha/Women_Safety_Division/prison-reforms accessed 1 June 2024.

for open prisons. For example, a state like Uttar Pradesh where the first open prison was established does not have a single open prison operational now.

Another legal option recommended is the incorporation of principles of management of prisons and treatment of offenders into the Directive Principles of State Policy under Part IV of the Constitution by way of a constitutional amendment under Article 368.[40]

CONCLUSION

It is possible to make improvements to the Indian prison system by reducing punishments for non-violent offenses, eliminating the practice of detaining non-violent criminals with violent offenders, and refraining from overcrowding prisons with convicts in minor cases. We need to search for alternatives to jail, ideally, ones that don't involve a felony conviction that harms society more than the small-time, nonviolent offense that many of these men were originally found guilty of.

The pattern of recidivism keeps happening to people. A youthful, robust, and physically fit man finds himself in difficulties usually as a result of a desperate deed, is imprisoned, found guilty of a crime, and released into society with a criminal record. This man is now unable to find a respectable job and place in society. He finds himself back where he started—in a precarious situation.

[40]**A N J Mulla**, *Report of the All-India Committee on Jail Reforms (1980–1983)*, Ministry of Home Affairs, Government of India https://www.mha.gov.in/MHA1/PrisonReforms/report.html accessed 1 June 2024.

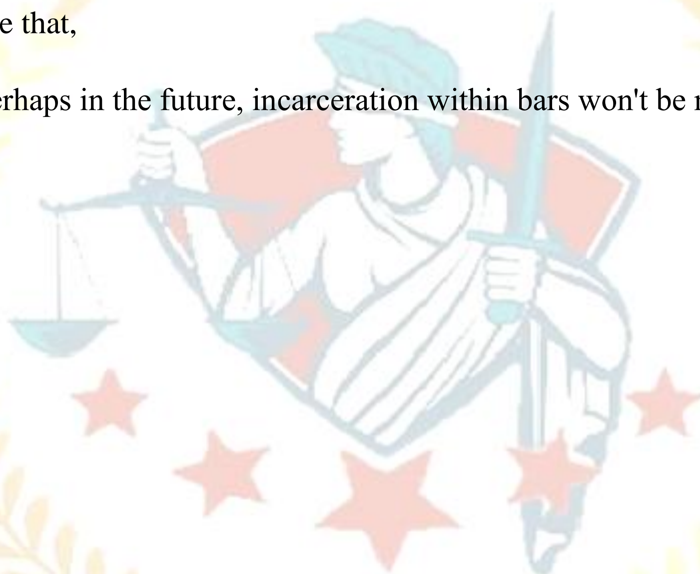
We should save harsh sentencing for violent offenders; if we want to reform the prison system. We should stop expecting it to solve every social problem, stop seeing it as some sort of biblical punishing weapon, and strive to help otherwise capable individuals with honest rehabilitation and vocational training. In the case of non-habitual offenders, the reformative theory can indeed be effective. It does not always work well, though, as a hardened criminal is not always able to change. Crimes will be committed by the same people again if we let it. Because of this, he ought to be punished rather than attempting to change his criminal thinking. The Reformative approach will therefore be more successful if it is meant to enhance traditional punishment rather than to completely replace it.

The Indian jail system, which accounts for a large portion of the global prison population, is characterized by mass incarceration, racism, and punishment. Our system is determined to make jails ticking time bombs notwithstanding a sharp increase in the number of inmates. Comparatively speaking, Finland has one of the lowest rates of incarceration in the world, with about 3,000 inmates, and one-third of its jails are open-access. Since it hasn't increased crime, this methodology is regarded as successful. The guiding principle is restoration. Once they are released from jail, they possess the necessary life skills and a trade that allows them to work in a respectable job.

Justice V R Krishna Iyer rightly says,

“Every saint has a past and every sinner a future, never write off the man wearing the criminal attire but remove the dangerous degeneracy in him,

restore his retarded human potential by holistic healing of his fevered, fatigued or frustrated inside and by repairing the repressive, though hidden, injustice of the social order which is vicariously guilty of the criminal behaviour of many innocent convicts. Law must rise with life and jurisprudence responds to humanism."[41]



If the ultimate goal of open prisons is achieved it wouldn't be wrong to conclude that,

"Perhaps in the future, incarceration within bars won't be needed."

[41] **J Iyer Krishna**, 'Death Sentence on Death Sentence' (1978) 18 *The Indian Advocate* 28 (Jan–June).

//doi.org/10.61120/plr.2024.v2250-64

LEGAL EDUCATION IN INDIA: ISSUES AND CONCERNS

PRAYAGRAJ LAW REVIEW

Dr. Sanjeev Kumar[*]

ABSTRACT

Legal education plays a crucial role in shaping the future of any country. The legal education imparted in various institutions helps to promote more awareness and civic sense in the citizens of any nation. In India, legal education helped in the proper and just development of Indian society. After the independence of India, various regulatory bodies involved in improving the status of legal education made several reforms, keeping in mind the needs of present stakeholders. In this research paper doctrinal approach is used to gain a proper understanding of current issues and concerns in legal education in India at higher education. The aim of the study is to highlight the importance of legal education in India. Furthermore, it also examines recent legal education reforms in the light of New Education Policy, 2020. Moreover, it also discusses various issues and concerns in legal education in India.

KEYWORDS: legal-system, multilingualism, multidisciplinary, socio-cultural, NEP

PLR

---

[*] Assistant Professor, Faculty of Law, University of Allahabad, < sanjeevkumar246052@gmail.com>

INTRODUCTION

In a democratic nation, the significance of legal education cannot be side-lined. The well-organised and high standard of "legal education" in the educational institutes of a nation is the cornerstone of a sound legal and judicial system. Legal education is the interdisciplinary study of system of laws which seeks to produce lawyers and strengthen the legal and judicial system. "Legal education is an educational process which equips the future lawyer, judge, administrator, counsellor and legal scientist to fashion and refashion ways of peaceful and ordered attainment of ideals of human governance on the one hand and democratic right on the other."[1]

Legal education is crucial to achieve the intended objectives of justice and to shape the nation's legal system. However, in the present day, "legal education" produces more than just practising attorneys. Nowadays, the scope of legal education is very broad, as it affects every aspect of human existence. In modern developing nations, "legal education" and social welfare have become entwined because they seek to create a welfare state and promote social, economic and political development of individuals. Therefore, in recent times the "legal education" has served as an instrument for social change.[2] On one side, Legal education prepares law scholars for practising at the bar whereas on another side, it inculcates the notion of civic

---

[1] Curriculum Development Centre Report, Vol. I, U.G.C., New Delhi, 1990, para. 3.6 page nos.16 and 17

[2] Akilali A. Saiyed, Scenario of Legal Education in India (Chapter IV), in Public Private Partnership and Legal Education: A Critique Of Policies And Practices In India, With Special Reference To State Of Gujarat, available at http://shodhganga. inflibnet.ac.in/bitstream/10603/68186/13/13_chapter%204.pdf (last visited on 26 January 2024).

//doi.org/10.61120/plr.2024.v2250-64

sense in those scholars. As a result, both lawyers and citizens have become more cultured and law abiding, having ideas of ethics and values.[3]

LEGAL EDUCATION: MEANING AND DEFINITION

It is not an easy task to define the term legal education as it assumes distinct connotations in varied situations considering the circumstances of society at the moment. One could refer to it as a discipline of rational science through which the quest for an equitable society needs to be carried out.[4] The idea of legal education is wide enough to include the legal profession as practised in the courtrooms of law, legal research, legal learning and pedagogy, and in any profession where legal studies are relevant, and all other pursuits that require and demand legal knowledge and expertise.[5]

The “Law Commission of India” defines “legal education” as “a science which imparts to students knowledge of certain principles and provisions of law to enable them to enter the legal profession.”[6]

Legal education is the interdisciplinary study of law which strive to produce lawyers and strengthen the judicial system. "Legal education is an educational process which equips the future lawyer, judge, administrator, counsellor and legal scientist to fashion and refashion ways of peaceful and

---

[3] S. Sethiya, Legal Education: A Need for Streamlining, 1 AIR (Journal) 1 (2008)

[4] P.L. Mehta and Sushma Gupta, Legal Education and Profession in India, Edition-I, 2000, page no. 16

[5] Gajendragadkar Committee on the Re-organization of Legal Education in the University of Delhi, 1964, page no. 5

[6] Supra 1

ordered attainment of ideals of human governance on the one hand and democratic right on the other."[7]

In colloquial language, it can be called as a field of study that addresses the practical implications of the legislation of the nation and includes reading of laws, debates, or legal contentions on legal challenges and the presentation of cases.[8]

IMPORTANCE OF LEGAL EDUCATION

It is duty of individual to be acquainted with the law, as "ignorance of the law is not a defence". Consequently, legal education, apart from great lawyers, produces law-abiding individuals who respect human rights.

Legal education establishes the bedrock for the legal profession through im parting the moralprinciples,ethics, expertise, and abilities essential to legal practice. "Legal Education may help in developing the legal skills of analysis, organization, fact discrimination and presentation, argumentation, draftsman ship and legal planning counselling and negotiations."[9]And since legal education educates the professionals who will provide legal help and represent individuals in the courtroom, it is crucial to guarantee justice access. It also encourages professional and responsible conduct among legal practitioners and judges which ensures that ethics of the legal profession is maintained and justice prevails.

[7] Supra 1

[8] Halsbury's Law of England, (1953), Vol. 3, page no. 3.

[9] S.V. Ramana "Legal Education in India" AIR (1968) page no. 75

Legal education is vital for furthering "rule of law" and "constitutional government" as it instils individuals with knowledge regarding the legal framework of the nation and their rights and responsibilities as its citizens. G.S. Sharma rightly pointed that "Legal Education is to nourish the values and ideal basic to democracy and it has to serve the changing needs of the developing society set forth in the directive principles."[10] Prof. Madhava Menon in his book argued that, "the legal knowledge is essential to promote democracy and constitutional government."[11]

Legal education is crucial to pull off the intended objectives of justice and to shape the nation's "social" and "economic" structure as it makes it possible for everyone to comprehend and traverse the legal framework and to take part in the creation of laws and regulations. Moreover it can act as a tool for social transformation by educating the individuals on how to support and assist the underrepresented groups and to further the foundation of a more equitable society.

HISTORICAL EVOLUTION OF LEGAL STUDIES[12]

In Vedic era, legal education was regarded as a subset of Dharma but there is nothing to put forward that there was any formal teaching of legal education. Kings themselves administered justice, and legal education was

[10] S.K. Agarwala "Legal Education in India – Problems & Perspectives", Journal of Indian Law Institute, Vol 19, 1977, page no. 339

[11] Prof. Madhava Menon, "Clinical Legal Education : Concept and Concerns", Chapter 1, page no. 1

[12] For a concise history of legal education in India in general see Lovely Dasgupta, Reforming Indian Legal Education: Linking Research and Teaching, Journal of Legal Education, Vol. 59, No.3 (2010).

primarily autodidactic. However, sometimes individuals, having knowledge of dharma, were appointed to adjudicate the dispute. They haven't obtained formal legal education but were known for their morality, justice, and adherence to Dharma.[13] Under Mughal Empire, a system of courts with official procedures to decide both civil and criminal matters was formed. As a result, attorneys started to take a significant part in the administration of law. In religious matters, parties were allowed to resolve conflicts with their religious beliefs. Following the advent of English dominance in the nation, the British introduced the current model of legal education system in India. In 1857, the initial efforts were made in the inclination of teaching formal legal education when, three universities in the cities of Calcutta, Madras, and Bombay, were founded which officially introduced "legal education" as a subject for instruction.

Following that, a number of law colleges were founded in the various regions of India. But the nation's legal education set-up was not standardized. However, teaching law as a science or as a separate field of study was not the goal of university legal education.

In the years following India's independence, from 1947 to 1960, the number of law schools increased significantly. Tragically, there was no sensible strategy behind this and as a result even the most fundamental amenities

[13] Anand, A.S. J., H.L. Sarin Memorial Lecture: Legal Education in India — Past, Present and Future, (1998) 3 SCC (Bom) 1.

//doi.org/10.61120/plr.2024.v2250-64

such as library, permanent professor etc. was missing from these law colleges.[14]

LEGAL EDUCATION IN CONTEMPORARY INDIA

In independent India, the field of "legal education" gained pace and significance. After India's independence, many of its people lived in poverty and were uneducated. Reducing inequality and giving masses of people access to fundamental necessities were among the most important concerns. Legal education was supposed to align the legal system with the nation's social, economic, and political goals.[15] Consequently, the primary goal of the legal system during the early years of India's independence was to accomplish the ends outlined in the Constitution.

Bar Council Of India (BCI)

The Advocates Act, 1961 required the BCI[16] to promote legal education and to lay down standards of such education in consultation with the Universities in India imparting such education. In exercise of the power provided in Section 49 Act the BCI framed "Bar Council of India Rules, 1965" wherein chapter- IV solely covers the minimal requirements for legal education. To elevate the standard of legal education in India these regulations have been revised on various occasions. Therefore, this Act gives the BCI the

[14] Report of the Committee on Law Reform in Legal Education in 1980s, 16 All India Teachers Association, (DU Law Faculty, 1979)
[15] Supra 12
[16] The Advocates Act, 1961 was passed by the Parliament of India by virtue of powers under List I of the Constitution of India.18 Under this Act, an apex body, namely, the Bar Council of India (BCI) was constituted at national level.

authority to specify the minimal requirements that must be complied for a student to admitted to a law course at any accredited university, as well as the standards of "legal education" that these universities must uphold.

The Apex Court in BCI v Board of Management, Dayanand College of Law,[17] examined the statutory authority conferred to BCI under the Act and the regulations implemented thereunder and held that, "as the apex professional body, the Bar Council of India is concerned with the standards of the legal profession and the equipment of those who seek entry into that profession. The Bar Council of India is also thus concerned with the legal education in the country."[18]

- University Grants Commission (UGC)

The UGC[19] is entrusted with supervising the coordination, formulation, and preservation of standards in higher education along with providing financial grants.

While BCI is authorized to advance the study of law and "to establish the minimum requirements for such education in consultation with state bar councils and universities", the UGC has the authority "to take all required steps for fostering the advancement and coordination of higher education"

[17] (2007) 2 SCC 202

[18] Ibid

[19] The University Grants Commission (UGC) was established as a statutory body in November 1956 under an Act of Parliament, the University Grants Commission Act, 1956.

as well as for establishing and maintaining standards for imparting knowledge, examination, and academic study in higher education.[20]

Law Commission in its report stated that the authority of BCI in promotion "standards of legal education" and that of UGC in establishing and maintaining "standards of education" are against one another, but must be interpreted in a harmonious way. By allowing for consultation between BCI and UGC, Section 7(1) (h) of The Advocates Act, 1961 promotes the idea that the two statutory authorities have identical objectives when it comes to the regulation of professional legal education.[21]

Above analysis indicates that BCI and UGC have a blended obligation to regulate the standards of legal education. Therefore, it is evident that there is consultative relationship between BCI and UGC, which serves as the foundation for the check of legal education standards in India.

CURRENT ISSUES AND CHALLENGES

a) There is a severe lack of appropriate infrastructure in the higher education sector. Thus, this represents a roadblock in the government's attempt to increase access to higher education. As observed by several committees and commissions in their findings and recommendations, legal education is a regular component of higher education in India. As per data submitted to the Supreme Court by the BCI, about 90% of government-operated law

[20] Jena, K.C., Role of Bar Councils and Universities for Promoting Legal Education in India, Journal of Indian Law Institute, 44(4) 2002; page no. 565

[21] 184th Report of the Law Commission of India

institutions suffer from a severe paucity of infrastructure.[22] If universities lack the essential financial resources and actual foundations, there can be no guarantee of scholarly opportunity to think critically and contribute.[23]

b) The faculties who teach law courses are among the more crucial components of the legal community. One major problem affecting law schools is the shortage of regular teaching staff. It is reasonable to state that most law schools, particularly public universities, lack enough full-time faculties. The absence of permanent instructors has a negative impact on both the educational institution and the students.

c) The profession of teaching necessitates a specific skill set. Currently, individual who is appointed as a teacher is told to just "start completing courses." Seldom does a new plan or technique reach the teaching repertory of the concerned legal faculty without prior exposure. A synthesis of these concepts sees a student recruited as a faculty to deal with the crippling challenge of creating a sui generis teaching method, carrying out so without obtaining the necessary training in skills and without a sufficient and cohesive awareness of the ultimate goal - the very purpose and objective of legal education. In 2010, for the purpose of training of faculties in teaching and research The National Knowledge Commission and the National Consultation on Second Generation Reforms in Legal Education suggested to set up of four "Centres for Advanced Legal Studies and Research".[24]

---

[22] https://www.tribuneindia.com/news/nation/almost-90-of-government-run-law-colleges-lack-faculty-infrastructure-bci-tells-sc-386904 (last visited on 27 January 2024).

[23] Bajpai, Meghna, (2018), Legal education system in India, http://www.legalserviceindia.com. (last visited on 27 January 2024).

[24] Report of the Working Group on Legal Education of the National Knowledge Commission, Chapter IV, Centers for Advanced Legal Studies and Research (CALSAR)

d) Legal education effectiveness is contingent upon a various variables, including participation in moot courts, internships, comprehensive research, and technical support. Large universities and National Law Schools have these resources, but other local colleges are not. A formal mentorship program for their moot court teams is absent at many universities. Nowadays, students compete in international moot competitions. It is, therefore, burdensome for law schools to prepare these students to compete with those in affluent countries.

e) Before entering any field or place of employment, internships are essential. It helps the student build their professional skills and experience. While many lawyers want to contribute to the community by training and mentoring future lawyers, the vast majority of these lawyers refuse to hire interns. Reason behind this attitude is because most students lack the necessary research, foundational knowledge, and presentation skills.

f) Owing to science and technology, the field of education has undergone substantial transformation. It is elicit that not many individuals employ technological advances, especially at institutions in rural towns. This has direct impact on the level of quality that legal education seeks. One major shortcoming of Indian legal education is the lack of technological innovation. Using professional teaching equipment and methods is essential, such as, "Grammarly", "Google Keep", "Turnitin", and advanced "Microsoft Word" and "Excel skills".

g) Most colleges and universities lack standard books, periodicals, encyclopaedias, surveys of research, and other resources, which hinder the research process. Most of the literature found in university libraries is out-

dated and unhelpful. Superannuated educational material is no longer viable in the cutthroat world of technological innovation.

h) Another issue with the Indian legal education system is that current law schools have given a lower priority on academic research and scholarly papers. Therefore, currently no intellectually stimulating environment is present. Research has the potential to significantly improve the quality of education and, more importantly, the resolution of several legal problems.

NATIONAL EDUCATION POLICY, 2020 (NEP) AND LEGAL EDUCATION

NEP offers academic opportunities for every economically and socially marginalized learner, including those with gender and regional disadvantages, and thereby, it seeks to promote an inclusive and equitable education system throughout the nation.[25] In relation to "legal education" in India, it states that, "Legal education must be informed and illuminated with Constitutional values of Justice—Social, Economic, and Political—and directed towards national reconstruction through instrumentation of democracy, the rule of law, and human rights."[26] On the surface, the NEP appears to reflect a reassertion of the constitutional spirit in study of laws, and thereby, it made a substantial change by incorporating these principles into the course of study while simultaneously acknowledging legal education's long-term objectives.

---

[25] Key Highlights of NEP, INSIGHT IAS, https://www.insightsonindia.com/social-justice/issues-related-toeducation-sector/new-education-policy/key-highlights-of-the-nep/ (last visited on 27 January 2024).

[26] NEP 2020, 20.4

//doi.org/10.61120/plr.2024.v2250-64

The NEP policy, in following words, stressed how important it is to include "socio-cultural" factors in legal education:

"The curricula for legal studies must reflect socio-cultural contexts along with, in an evidence-based manner, the history of legal thinking, principles of justice, the practice of jurisprudence, and other related content appropriately and adequately."[27]

It mandates that educational institutions should incorporate the development of legal history, principles of fairness, jurisprudential practices, and other fundamental values into their curricula.

The NEP further recommends that all Higher Education Institutions (HEIs), including the Centres for Legal Education, should strive to become multidisciplinary establishments with the best possible use of available infrastructure. This will enable the establishment of dynamic HEIs that would boost the development of private as well as public institutions on an equal footing. NEP emphasizes that universities offering isolated legal education should strive for multidisciplinary approaches and curricula. The nation's NLUs should expand into fields like philosophy, criminology, economics, political science, and other related fields to offer their students a well-rounded education and to promote campus diversity. Introducing multidisciplinary programs just to promote diversity would be detrimental to these institutions' core objectives.

[27] Ibid

NEP further places a significant priority on multilingualism and multidisciplinary learning, promotes vocational education, and encourages more utilization of Information Communication and Technology (ICT). It encourages state colleges to offer multilingual legal education, having roots in the language used and the experience of local courts. Besides making legal education more widely and locally accessible, it would discourage rural and semi-urban residents from migrating to larger cities to study law.

Multilingual learning encourages everyone to participate in education, but for now, its execution in real life remains an idle goal. Multilingualism will be a significant obstacle for prospective attorneys when implementing legal education in court procedures or securing employment outside the state.

The NEP additionally emphasise that technological infrastructure, online teaching resources, and online education will make law schools more accessible to a larger audience. To meet the demands of its students, law schools must bridge the technological gap and ensure the use of cutting-edge technologies. Legal education must embrace innovation, and this need extends beyond science and technology.

The NEP is a vision statement with which law institutions may embrace the essential elements and effect a beneficial transformation in pedagogy that fulfils the demands of the modern world to become Centres of Excellence.

CONCLUSION

Legal education is crucial to achieve the intended objectives of justice and to shape the nation's legal system. In recent times the legal education has

//doi.org/10.61120/plr.2024.v2250-64

served as an instrument for social change. Legal education is vital for furthering rule of law and constitutional government as it instils individuals with knowledge regarding the legal framework of the nation and their rights and responsibilities as its citizens. After independence, the number of law colleges increased significantly in every region of India. However, numerous law colleges lacked most fundamental amenities such as library, permanent professor etc. even after recommendation of various committee and commission formed to improve quality of legal education.

The “Ministry of Human Resource Development's (MHRD)” newly introduced NEP encompasses numerous changes that the legal education industry quested for years. With the advent of multidisciplinary and multilingual undergrad programs, higher education organisations would get much needed transformation. The policy addresses several issues related to the educational system, and if implemented in a proper and comprehensive manner, the nation's legal education sector will grow significantly. Now that we have a progressive policy, the aim should be on putting it into action effectively.

However, some issues, for example, proper appropriate infrastructure in the higher education, the shortage of regular teaching staff, necessary training of faculties, standard books, online resources, quality library etc., which are mentioned above are not addressed under the NEP. There is a rapid demand to address the highlighted issue to law graduates sufficient experienced before they enter in any legal field

DEMYSTIFYING THE DOCTRINE OF BASIC STRUCTURE

Subodhika Sharma[*]

Abstract

The doctrine of Basic Structure is a constitutional principle which asserts that certain fundamental features of the Indian Constitution cannot be amended by the Indian Parliament, even if the amendment process provided in the Constitution is followed. This principle has been a subject of much debate and controversy in the legal and political circles of India.

This paper seeks to demystify the doctrine of Basic Structure by providing a comprehensive overview of the judgment delivered in Kesavananda Bharati v. State of Kerala. The paper examines the various elements that constitute the Basic Structure of the Indian Constitution, including the supremacy of the Constitution, the rule of law, democracy, secularism, federalism, and the protection of fundamental rights.

Furthermore, the paper highlights that there was no common ground on the grounds for limitation on the power of amendment between on one hand Chief Justice Sikri, Justices Shelat, Grover, Hegde, Mukherjea and Reddy and on the other Justice Khanna and that the question "what is the ratio of the Kesavananda judgment?" has never been answered.

[*] Research Scholar, National Law INSTITUTE University, Bhopal, *<subodhikasharma.phd@nliu.ac.in>*

Keywords: *Basic structure, Basic features, Amendment, Ratio, Constitution*

INTRODUCTION

The decision in the Kesavananda Bharati [1] case has always been the fulcrum for many constitutional debates. The case is significant for a number of reasons viz. the significance of the Preamble, relevance of the Indian Independence Act, relevance of speeches delivered during the Constituent Assembly debates, principles of constitutional interpretation, etc. But the most important aspect of the case is the doctrine of inviolable "basic structure" of the Constitution, which limits the amending power of the Parliament. The case also holds relevance in our constitutional history because by coining the basic structure doctrine the independence of the judiciary was asserted, especially during a period of excessive interference by the executive.

The doctrine of basic structure invented by the narrow majority in this case means that certain features of the constitution are so integral to its existence that they cannot be altered by the Legislature by way of amendments. In other words, the amending power is subject to certain inherent limitations flowing from the basic structure of the Constitution. However, there were inconsistencies in identifying the provisions that constituted basic structure. It was a "hard case", as Ronald Dworkin would describe it.

BASIC STRUCTURE: OPINION OF THE BENCH

- **Chief Justice S.M. Sikri**

  Sikri CJ., focused on the limitations of the amending power, including those implied in the language of Article 368 and the Preamble to the Constitution.[1] He argued that the amending power should be exercised in furtherance of the principles drawn from the Preamble and not otherwise. The learned Chief Justice, enunciated the following features which might consist of the basic structure[2]:

1. Supremacy of the Constitution;
2. Republican and Democratic form of Government.
3. Secular character of the Constitution;
4. Separation of powers between the Legislature, the executive and the judiciary;
5. Federal character of the Constitution
6. He justified the existence of the basic structure from the whole scheme of the constitution, which was built on the basic foundation of the dignity and freedom of the individual that cannot be destroyed by any form of amendment.[3]

- **Justices J.M. Shelat and A.N. Grover**

  According to them, the Constitution has six essential elements:

1. Supremacy of the Constitution
2. Republican and democratic form of government and sovereignty of the country

[1] AIR 1973 SC 1461.
[2] *Id,* para 292.
[3] *Supra* note 2, paras 293-294.

3. Secular and federal character of the Constitution
4. Demarcation of power between the legislature, the executive, and the judiciary
5. Dignity of the individual, secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.
6. Unity and the integrity of the nation.

They explained that the Constitution is an organic document that must take into account the vast socio-economic problems of the country, particularly the improvement of the common man's lot consistent with his dignity and the unity of the nation. The Constitution is federal in its structure, but it provides a system modelled on the British parliamentary system. They also explained that the meaning of the words "amendment of this Constitution" as used in Article 368 must be such which accords with the true intention of the Constitution makers as ascertainable from the historical background, the Preamble, the entire scheme of the Constitution, its structure and framework and the intrinsic evidence in various Articles including Article 368.[4]

- **Justices K.S. Hegde and A.K. Mukherjea**

Justices Hegde and Mukherjea agreed with Chief Justice Sikri's reasoning on Article 368. They believed that the power to amend the Constitution covers all provisions, but there are implied limitations. The President's power to give assent to bills for amendments implies

[4] *Id*, para 550.

limitations on the amending power, as certain basic features of the Constitution are expected to be permanent.[5] These basic features include the sovereignty of India, the democratic character of the polity, the unity of the country, individual freedoms, and the mandate to build a welfare state and egalitarian society.[6] The judges concluded that the power to amend the Constitution does not include the power to destroy or emasculate these basic features. However, they noted that these limitations are illustrative, not exhaustive.

- **Justice A.N. Ray**

Justice A.N. Ray expressed the minority view in the case and firmly rejected the idea of limiting the power of Parliament to amend the Constitution through any theory of implied limitations. He argued in favour of the principle of parliamentary supremacy in relation to amending powers. He traced the history of Article 368 and pointed out that there was more evidence in the debates of the constituent assembly to suggest that all provisions, including fundamental rights, are within the scope of amendment.[7] The judge believed that the term "amendment" should not be unduly restricted by implying limitations that are not explicitly stated in the text. He examined various dictionaries to show that the meaning of "amend" or "amendment" broadly includes alteration, change, addition, deletion, or

[5] *Id,* para 663.
[6] *Supra* note 2, para 666.
[7] *Id,* para 866.

modification.[8] He stated that adding a provision on a new and independent subject or making changes to a specific article or clause falls within the scope of amendment.

The judge also believed that each generation has the right to establish its own laws and make changes to political institutions and principles. He argued that the people, who gave themselves the Constitution through the Preamble, have conceded the amending power to the bodies mentioned in Article 368 as they represent the people. Therefore, he concluded that it is not permissible to impose any restrictions on the amending power beyond what is stated in Article 368.

- **Justice H.R. Khanna**

Justice Khanna adopted a mono-provisional model of inherent limitations which distinguished him from Chief Justice Sikri, whose conception of implied limitations was multi-provisional in the sense that the latter derived implied limitations on amending powers of Parliament not only from Article 368 but also from other provisions of the Constitution as well. Justice Khanna proceeded with the assumption that the question of determination of the scope, ambit and width of amending powers under Article 368 post the 24th Amendment, is dependent on the meaning of the term "amendment" as it stood prior to the 24th Amendment. He proceeded on the assumption that the amending power is not subject to any implied

[8] *Id,* para 838.

limitations, however, it is subject to certain inherent limitations flowing from basic structure of the Constitution.[9]

He categorically held that the conception of the term amendment itself inheres and implicates certain inherent limitations.[10] He stated that such limitations flow from the word amendment and are closely related to its interpretation and meaning.[11]

According to him, the context in which the word "amendment" is used in the Constitution determines its meaning. Justice Khanna proceeded to articulate this context by pointing out that amending power of Parliament under Article 368 does not include the power to completely abrogate the Constitution.[12] He further added that it is not permissible to touch the foundation or to alter the basic institutional pattern, though it is permissible to effect changes and to adapt the system to the requirements of changing conditions.[13]

The most crucial part of his judgment is the Paragraph 1461 in which he wrote that:

"The word amendment postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the

[9] *Supra* note 2, para 1445.
[10] *Ibid.*
[11] *Ibid.*
[12] *Id,* para 1426.
[13] *Ibid.*

//doi.org/10.61120/plr.2024.v2265-79

amendment, the old constitution cannot be destroyed or done away with; it is retained though in the amended form."

In the same para, he has explained that what is meant by the retention of the old Constitution. He was of the opinion that a mere retention of some provisions of the old Constitution even though the basic structure or framework of the Constitution has been destroyed would not amount to the retention of the old Constitution. He further explained that the words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution.

He exemplified some provisions as features of basic framework of the Constitution. He has written that "it would not be competent under the garb of amendment, for instance, to change the democratic form into dictatorship or hereditary monarchy nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha".[14] According to him, the secular character of the State cannot likewise be done away with.[15] As regards judicial review, he was of the opinion that judicial review has become an integral part our constitutional system. In order to highlight the importance of judicial review, he referred to the speech of Dr. Ambedkar when the Constituent Assembly was dealing with the draft Article 25 (corresponding to present Article 32 of the constitution). Dr. Ambedkar observed:

---

[14] *Supra* note 12.
[15] *Ibid.*

"If I was asked to name any particular article in this Constitution as the most important an article without which this Constitution would be a nullity- I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it, and I am glad that the House has realized its importance."[16]

Thus, Justice Khanna held that the vesting of power of exclusion of judicial review in a legislature, including State Legislature, strikes at the basic structure of the Constitution.[17]

As regards the Fundamental Rights, initial understanding of the public was that he didn't consider Fundamental Rights to be a part of basic structure because in his conclusion (vii) he said that-

"The power of amendment is plenary and includes within itself the power to amend the various Articles of the Constitution including those relating to fundamental rights…."

He himself clarified his position on the Fundamental Rights in the subsequent case of Indira Gandhi v. Raj Narain[18]. He stated that –

"It has been stated by me in the judgment that the secular character of the state, according to which the State shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. The above observation shows that, the secular character of

[16] VII, *Constituent Assembly Debates*, 953.
[17] *Supra* note 2, para 1529.
[18] AIR 1975 SC 2299.

//doi.org/10.61120/plr.2024.v2265-79

the nation and the rights guaranteed by Article 15 pertain to the basic structure of the constitution. I also dealt with the matter at length to show that the right to property was not a part of the basic structure of the Constitution. This would have been wholly unnecessary if none of the fundamental rights was a part of the basic structure of the Constitution."

Lastly, as regards the Preamble, Justice Khanna held that it is the part of our Constitution and in his conclusion (x) he has written that apart from the part of the Preamble which relates to the basic structure of, the preamble does not restrict the power of amendment.

- **Justice M.H. Beg**

Justice M.H. Beg opened his judgment by opining that reference was made to the largest ever bench of thirteen judges so that the correctness of the view in Golak Nath v. State of Punjab[19] could be determined.[20] Beg's, J. view was that in Golaknath, the limitations on constitutional amendments with respect to infringement of fundamental rights on an equal footing with any other law made by the parliament was in respect of the unamended Article 368. The question about the consequence in case Article 368 is itself amended by the express power of such amendment recognized by clause (e) of the proviso to Article 368(2) of the Constitution.[21]

[19] (1967) 2 SCR 762.
[20] *Supra* note 2, para 1791.
[21] *Ibid.*

He was of the view that the constitution itself contained in various places a distinction between the Constitution and the law. It mentions both the "Constitution and the law". Thus, he opined that constitutional amendments cannot be restricted under Article 13 as it applies to laws and not to constitutional amendments.[22]

With reference to the judicial check on the amending powers of the parliament, he observed:

"No doubt the judicial organ has to decide the question of the limits of a sovereign authority as well as that of other authorities in cases of dispute. But, when these authorities act within these limits, it cannot interfere."[23]

Discarding the view that judiciary should keep a check on the amending powers of the constitution; he believed that the only check on such powers was of the public opinion. He observed:

"The pressure of public opinion, and the fear of revolt due to misuse of such powers of amendment are the only practically possible checks which can operate if and when such contingencies arise. These checks lie only in the political fields of operation."

The only implied limitation in the word "amendment" that Justice Beg was convinced of was what Wanchoo, J., in Golak Nath's case which was the limitation to completely abrogate the constitution at one

[22] *Supra* note 20, paras 1829-1834.
[23] *Id,* para 1816.

stroke. However, he observed that the power of amendment was wide enough to erode the constitution completely step by step so as to replace it by another.[24]

Thus, it can be concluded by saying that Justice Beg completely refuted the concept of basic structure and opined that anything and everything in the constitution was capable of being amended provided that the process as provided under Article 368 is followed.

- **Justice Y.V. Chandrachud**

Chandrachud J. expressed the view that he wanted to avoid writing a separate judgment and thought that after a free and frank exchange of thoughts, he would be able to share views of someone or the other of the judges, but it was not possible because of paucity of time. He nevertheless expressed that he found his opinion fairly close to Ray and Palekar JJ and he was not in agreement with some of the views expressed by Sikri CJ and Hegde and Mukherjea JJ. Therefore, he proceeded to write a separate judgment.

Examining the nature and scope of Article 368 prior to the 24th Amendment, Chandrachud J concurred with the minority judges in Golak Nath v. State of Punjab and observed that "The word "amendment" in Article 368 has a clear and definite import and it connotes a power of the widest amplitude to make additions, alterations or variations."[25] The learned judge took the view that that

[24] *Supra* note 2, para 1835.
[25] *Id,* para 2059.

the proviso to Article 368 furnishes evidence of the fact that the term "amendment" is not used in a narrow and insular sense, rather in a wide and broader sense. He concluded by saying that the power of the parliament to amend the Constitution is wide and unfettered, and it encompasses every provision of the Constitution.[26]

After examining cases cited before him dealing with the doctrine of implied or inherent limitations in major jurisdictions of the world[27], he found that the theory of implied or inherent limitations does not enjoy a wide recognition anywhere. He also rejected the contention of the petitioners that the Preamble, not being a part of the Constitution, is a limitation on the amending powers of Parliament. Rejecting the basic structure doctrine, he observed:

"I see formidable difficulties in evolving an objective standard to determine what would constitute the core and what the peripheral layer of the essential principles of the Constitution. I consider the two to be inseparable."

CONCLUSION

The Kesavananda judgment held that Parliament cannot amend the basic structure of the Constitution. However, deriving a clear conclusion from the eleven judgments delivered in the case on 24th April 1973 is challenging. Three different terms, such as basic elements, basic features, and basic structure, were used, and there was no common ground on the

[26] *Id,* para 2142.
[27] *Id,* paras 2095-2108.

//doi.org/10.61120/plr.2024.v2265-79

limitation of the power of amendment between the judges. Although six judges favored citizens, and six favored the state, Justice Khanna agreed with none and decided the case midway.

Furthermore, a common ground could not arise because no discussions took place in Court at any time, nor could they possibly have taken place in the chambers of the Judges on what was "The View by the Majority" arising from the eleven different judgments. Justice Chandrachud wrote in his judgment that because of serious constraints of time due to the retirement of CJ Sikri on 25th April 1973:

"There has not been enough time after the conclusion of the arguments for an exchange of draft judgments amongst all of us and I have had the benefit of knowing fully the views of only four of us"

All this shows that deriving a ratio that a certain portion of the constitution consists of the basic structure which is beyond the amending powers of the parliament would be a hurried conclusion.

However, the question whether Kesavananda Bharati case had truly decided that Constitutional amendment could not violate the basic structure could not be avoided. It came up for consideration in Minerva Mills v. Union of India,[28] C.J. Chandrachud observed:

"The summary of the various judgments in Kesavananda Bharati was signed by nine out of the thirteen Judges. Paragraph 2 of the summary reads to say that according to the majority, "Article 368 does not enable

[28] AIR 1980 SC 1789.

Parliament to alter the basic structure or framework of the Constitution". Whether or not the summary is a legitimate part of the judgment or is per incuriam part of the judgment or is per incuriam for the scholarly reasons cited by authors, it is undeniable that it correctly reflects the majority view".

In his separate judgment Justice Bhagwati said that finding out the ratio in Kesavananda case was "a difficult and troublesome question". Further he relieved himself of deciding this "difficult and troublesome question" by saying that in the earlier case of Indira Gandhi v. Raj Narain[29] five judges had accepted the "View by the majority" in the Kesavananda case. As a matter of fact, the Indira Gandhi case had not considered this troublesome question at all.

Today this "difficult and troublesome question" that what is the ratio of the Kesavananda judgment is easily answered by a statement that "the ratio of the Kesavananda judgment is that parliament cannot amend the basic structure of the constitution". But was this the ratio? This is the million-dollar question that the Honorable Supreme Court of India has never actually answered directly.

[29] AIR 1975 SC 2299.

//doi.org/10.61120/plr.2024.v2280 - 92

HORIZONTAL RESERVATION FOR TRANSGENDERS: JOURNEY FROM *NALSA V. UOI* TO DISMISSAL OF GRACE BANU'S PETITION

*Prachi Kumari**

ABSTRACT

The constitution of India provides for reservation, which is a form of positive discrimination, created to promote equality among marginalized sections so as to protect them from social and historical injustice. It can be divided into two parts: vertical and horizontal.The Transgender persons are demanding horizontal reservation. The demand has to do with the need for mandatory provisions for a community that has been historically marginalised in society and recognising the different aspects making up their social identity.The Transgender Persons (Protection of Rights) Act, 2019 could not do anything regarding reservation and has disappointed the community.Transgender Community has a strong historical presence in our country. Be it the era of Ramayana or Mahabharata; Transgenders played a pivotal role in society. If we leave aside these epics, the pre- independence era (before the arrival of the British) has testimony of this community's fairly dignified presence in our society. It was British law, which caused the deterioration of

* Asst. Prof., Centre of Legal Studies, S.S. Khanna Girls' Degree College, Prayagraj, <*kumariprachi12@gmail.com*>

Transgenders.When we achieved independence, we kind of continued the British legacy of not treating Transgenders as an equal. We did not even recognise their existence. It took us more than six decades to recognise that Transgenders are 'third gender' and their existence should be accepted in the society. These six decades of non- recognition made them backward. In my opinion, the SC is right in declaring them as socially and educationally backward classes of citizens and extending all kinds of reservation in cases of admission in educational institutions and for public appointments.

Keywords: *Transgender, Horizontal reservation, Transgender Persons (Protection of Rights) Act, 2019, Grace banu case, NALSA vs. UOI*

INTRODUCTION

The Supreme Court on March 27, 2023 refused to entertain an application which sought a clarification that the reservation meant for transgender persons as per the 2014 judgment in the NALSA case is horizontal reservation. The bench led by Chief Justice of India DY Chandrachud expressed disinclination to entertain the application in a disposed of matter[1]. In the wake of this refusal to grant horizontal reservation to TG Community,

[1] Horizontal Reservation For Transgender Persons : Supreme Court Refuses To Entertain Plea To Clarify NALSA Judgment *available at* https://www.livelaw.in/top-stories/horizontal-reservation-for-transgender-persons-supreme-court-refuses-to-clarify-nalsa-judgment-224932https://www.livelaw.in/top-stories/horizontal-reservation-for-transgender-persons-supreme-court-refuses-to-clarify-nalsa-judgment-224932 (last visited on September 30, 2023)

let's consider whether there exists any scope to grant Horizontal Reservation to Transgenders under Indian Reservation System?

WHO ARE TRANSGENDERS AND WHAT IS THEIR STATUS?

Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex. TG may also take in persons who do not identify with their sex assigned at birth, which include Hijras/Eunuchs who describe themselves as "third gender" and they do not identify as either male or female. Hijras are not men by virtue of anatomy appearance and psychologically, they are also not women, though they are like women with no female reproductive organ and no menstruation. Since Hijras do not have reproduction capacities as either men or women, they are neither men nor women and claim to be an institutional "third gender". Among Hijras, there are emasculated (castrated, nirvana) men, non- emasculated men (not castrated/akva/akka) and inter-sexed persons (hermaphrodites). TG also includes persons who intend to undergo Sex Re- Assignment Surgery (SRS) or have undergone SRS to align their biological sex with their gender identity in order to become male or female. They are generally called transsexual persons. Further, there are persons who like to cross-dress in clothing of the opposite gender, i.e transvestites. Resultantly, the term "transgender", in contemporary usage, has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to pre-operative, post-operative and non-operative transsexual

people, who strongly identify with the gender opposite to their biological sex; male and female.[2]

TG Community comprises Hijras, eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc. and they, as a group, have got a strong historical presence in our country in the Hindu mythology and other religious texts. The Concept of 'tritiya prakrti' or 'napunsaka' has also been an integral part of vedic and puranic literature. The word 'napunsaka' has been used to denote absence of procreative capability.[3]

Despite this strong historical presence; we somehow forgot their existence while drafting our supreme law of the land. Although, Fundamental rights were guaranteed to all persons and it can be interpreted that 'person' includes third gender as well. Article 14 of the Constitution of India states that the state shall not deny 'any person' equality before the law or the equal protection of laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. It also imposes a positive obligation on the state to ensure equal protection of laws by bringing in necessary social and economic changes. Article 14 does not restrict the word 'person' and its application only to male or female. Transgender persons who are neither male/ female fall within the expression 'person' and hence entitled to legal protection of laws in all spheres of state activity.

[2] *NALSA V. UOI*, AIR 2014 SC 1863

[3] *NALSA V. UOI*, AIR 2014 SC 1863

This includes employment, healthcare, education as well as equal civil and citizenship rights as enjoyed by any other citizen of this country.

Article 15(1) of the Constitution of India prohibits discrimination on the ground of sex. But we see gender discrimination with third genders prevalent in our country.

Articles 15 and 16 prohibit discrimination against any citizen on certain enumerated grounds including the ground of 'sex'. In fact, both the Articles prohibit all forms of gender bias and gender-based discrimination.

However, it took us more than six decades to recognise that 'third gender' exists. This delay in recognition badly affected the development of the TG community.

Finally in the year 2014, a bench comprising of Hon'ble Justice K.S. Radhakrishnan and Justice A.K. Sikri declared that Hijras, Eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.[4] The Court *inter alia* gave the following direction:-

"We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all

[4] *NALSA V. UOI*, AIR 2014 SC 1863

kinds of reservation in cases of admission in educational institutions and for public appointments."[5]

This is the direction which motivated Grace Banu to file a writ petition before Hon'ble SC to seek clarification as to horizontal reservation. The SC has dismissed this petition. Before discussing the rationale of this dismissal, let's understand the Indian reservation system first.

INDIAN RESERVATION SYSTEM

Article 14 provides the right to equality to all Indian citizens. Reservation-system constitutes an exception to this equality clause. Reservation is a form of positive discrimination, created to promote equality among marginalised sections so as to protect them from social and historical injustice.

It can be divided into two parts: vertical and horizontal.

Reservation for scheduled castes, scheduled tribes and other backward classes is referred to as vertical reservation. Horizontal reservation, on the other hand, cuts across all vertical groups to provide affirmative policies for disadvantaged groups with categories. Article 15(3) of the constitution contemplates horizontal reservation.

DEMAND FOR HORIZONTAL RESERVATION AND THE ROLE OF TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

[5] *NALSA V. UOI*, AIR 2014 SC 1863

The Transgender persons are demanding horizontal reservation. The demand has to do with the need for mandatory provisions for a community that has been historically marginalised in society and recognising the different aspects making up their social identity.

A study conducted by the National Human Rights Commission revealed that in 2017, only 6% of transgender people were formally employed.[6] They often have to make a choice between availing reservation either based on caste and tribal identity or to protect their gender identity.

In India, the trans population makes up a total of 4.88 lakh, as per the 2011 census. However, only a handful of them receive employment opportunities. According to a study conducted by the National Human Rights Commission in 2018, 96 percent transgenders are denied jobs and are forced to take low paying or undignified work for livelihood like badhais, sex work and begging. The first-ever study on the rights of transgenders also revealed that about 92 percent of transgenders are deprived of the right to participate in any form of economic activity in the country, with even qualified ones refused jobs. Among the respondents, around 89 per cent of transgenders said there are no jobs for even qualified ones. 50-60 per cent never attended schools and those who did face severe discrimination, according to the report. The NHRC further stated that 52 percent transgenders were harassed by their classmates and 15 per cent by teachers, forcing them to discontinue their studies. Only 6 per cent transgenders were employed in private sectors

---

[6] Law Commission of India, "Study on Human Rights of Transgenders as a Third Gender" (February, 2017)

or NGOs, back then, while the monthly income of only 1 percent transgenders was noted to be above Rs.25,000; the majority-26.35 percent earn between Rs. 10,000- Rs.15,000. The report further revealed that around 23 per cent are compelled to engage in sex work which has high health-related risks, which results in trans people being 49 times more at risk of living with HIV compared to the general population.[7]

This is the reason, Grace Banu, a Transgenders Rights Activist, demanded horizontal reservation. Senior Advocate Jayna Kothari represented the applicant.

Banu in the application noted the Supreme Court in its judgement in the NALSA case, directed the Central government to treat transgender persons as a socially and educationally backward class and provide them reservations in education and public employment. However, the Court did not state how the reservation should be implemented. Therefore, the applicant stated that many states are yet to implement such reservations.[8]

The applicant argued that the effective way of giving reservations for transgender and inter-sex persons is on the grounds of gender and disability, as has been done in the case of women and persons with disabilities. The application stated that the Ministry of Social Justice moved a cabinet note in

---

[7] The Transgender And Unemployment In India *available at* https://www.outlookindia.com/national/transgender-and-unemployment-in-india-news-182617 (last visited on September 30, 2023)

[8] SC rejected a plea sought clarification on NALSA Judgment, *available at* https://www.thelawadvice.com/news/sc-rejected-a-plea-sought-clarification-on-nalsa-judgement (last visited on September 30, /2023)

September 2021 to include transgender persons in the OBC category. The Tamil Nadu government has decided to include them in the Most Backward Class category. Karnataka is the only state where they have been given horizontal reservation to the extent of 1%. The applicant further prayed that reservations for transgender persons should include concessions in cut-off marks, and age. The following were the reliefs sought in the application :

1. Clarify/modify the judgement dated 15.04.2014 passed in Writ Petition (Civil) No. 400 of 2012 that the reservations meant for transgender persons are horizontal reservations:

2. Clarify/modify the judgement dated 15.04.2014 passed in Writ Petition (Civil) No. 400 of 2012 to the effect that reservations for transgender persons should also provide for concessions in age, cut-off marks and physical criteria, as provided to other reserved categories;

3. Clarify/modify the judgement dated 15.04.2014 passed in Writ Petition (Civil) No. 400 of 2012 to the effect that reservation should be provided for transgender persons in addition to public employment and public education also in allotment of housing sites, schemes and in local bodies.[9]

The Transgender Persons (Protection of Rights) Act, 2019 could not do anything regarding reservation and has disappointed the community.

---

[9]SC rejected a plea sought clarification on NALSA Judgment, *available at* https://www.thelawadvice.com/news/sc-rejected-a-plea-sought-clarification-on-nalsa-judgement (last visited on September 30, /2023)

The Act's long history traces back to the judgment in *NALSA v. Union of India* of April 2014, which directed the Centre and State to grant legal recognition for the third gender, ensure there is no discrimination against them, and construct specific social welfare programmes… The Act is progressive in that it allows self-perception of gender identity, but regresses by mandating that each person would have to be recognised as 'transgender' on the basis of a certificate of identity issued by a district magistrate, rejecting the recommendation from the 2016 Standing Committee to have a screening committee. There are no avenues open either for appeal in the event a magistrate refuses to hand out such a certificate. India's vocal LGBTQI community had problems with the Bill's basics — right from the nomenclature. Calling it a 'Transgender Persons' Bill would not give adequate play to the diversity the non-binaries included, it argued, instead calling for a more broad-based definition. Activists have slammed it for its 'narrow understanding' of gender identities and for offering woefully inadequate mainstreaming opportunities. They remain unhappy with the silence on unnecessary and non-consensual sex selective or reassignment surgeries, despite the plea that it be made an offence. Elaborate detailing of the anti-discriminatory clause in the Bill might have gone a long way in ensuring implementation and legal recourse, they argue. With the Bill becoming law, unaltered in any significant form, in the face of such strident opposition, the community is seething at being ignored. It's only hope is that the National Council for Transgender Persons, which is supposed to provide the institutional framework for implementing the Act, might allow more

latitude for incorporating genuine demands. Otherwise, this Act might well be a glove that ill fits the hand it was tailored for.[10]

The above report of The Hindu clearly shows that The Act, intended to safeguard the interests of Transgender has disappointed the community and has not played any role in securing reservation for the community.

CONCLUSION

Transgender Community has a strong historical presence in our country. Be it the era of Ramayana or Mahabharata; Transgenders played a pivotal role in society. If we leave aside these epics, the pre- independence era (before the arrival of the British) has testimony of this community's fairly dignified presence in our society. It was British law, which caused the deterioration of Transgenders.

When we achieved independence, we kind of continued the British legacy of not treating Transgenders as an equal. We did not even recognise their existence. It took us more than six decades to recognise that Transgenders are 'third gender' and their existence should be accepted in the society. These six decades of non- recognition made them backward. In my opinion, the SC is right in declaring them as socially and educationally backward classes of citizens and extending all kinds of reservation in cases of admission in educational institutions and for public appointments. In the wake of this declaration, The Transgender Persons (Protection of Rights) Act, 2019 was

---

[10] Caught in the Act: On Transgender Persons Act *Available at* https://www.thehindu.com/opinion/editorial/caught-in-the-act/article30099876.ece (last visited on September 30, 2023)

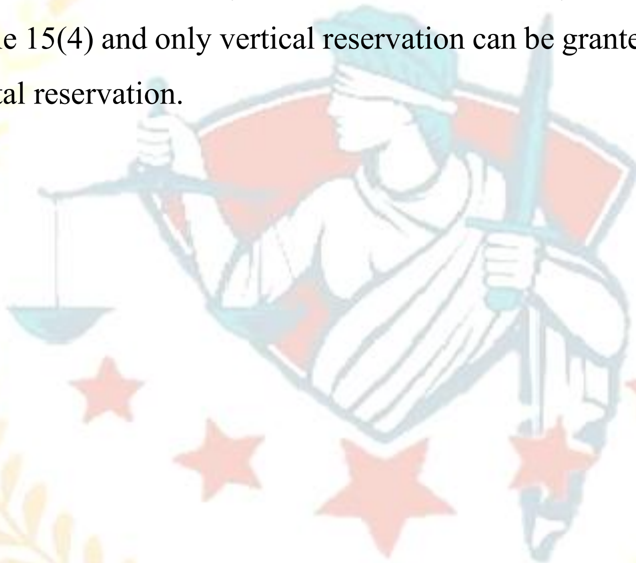
passed by the parliament. This Act received protests from the Transgender community itself because it obviously did not completely address their grievance. It did not make any provision for reservation which is the need of the hour. So far, Karnataka is the only state where they have been given horizontal reservation to the extent of 1%. The remark made by K.S. Radhakrishnan, J. best explains the need for reservation for Transgenders. The remark is as follows:-

"Seldom, our society realises or cares to realise the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change."[11]

Reservation, as we know, is a positive discrimination. We introduced the reservation system in our country in order to safeguard the interest of marginalised sections of society. Transgender Community indeed is a marginalised section of society and it deserves, without a doubt the benefit of reservation.

[11] *NALSA V. UOI*, AIR 2014 SC 1863

Coming to their demand for horizontal reservation; as we know Article 15(3) of the Constitution of India is the source of horizontal reservation in India. Beneficiaries of this Article are women and children so far. The term 'transgender' is not mentioned here. It means although horizontal reservation is desirable for the TG community, it is not possible in the current Indian reservation system. The SC has declared this community to be 'Socially and educationally backward'. It means they fall under the purview of Article 15(4) and only vertical reservation can be granted to them, not the horizontal reservation.



About the Publisher

Pragati Foundation is a not-for profit, public charitable trust working continuously since 2011 for the upliftment of socially, economically and educationally weaker segment of our society, working with the moto of तत्परिवर्तनम भव i.e., *"Be the change".* From organizing mass campaigns to providing easily accessible higher education in rural areas, they are making every effort within their capabilities.

Prayagraj Law Review with cumulative efforts of editorial team of PLR and Pragati Foundation, is one such step which dreams of providing quality content to the masses.