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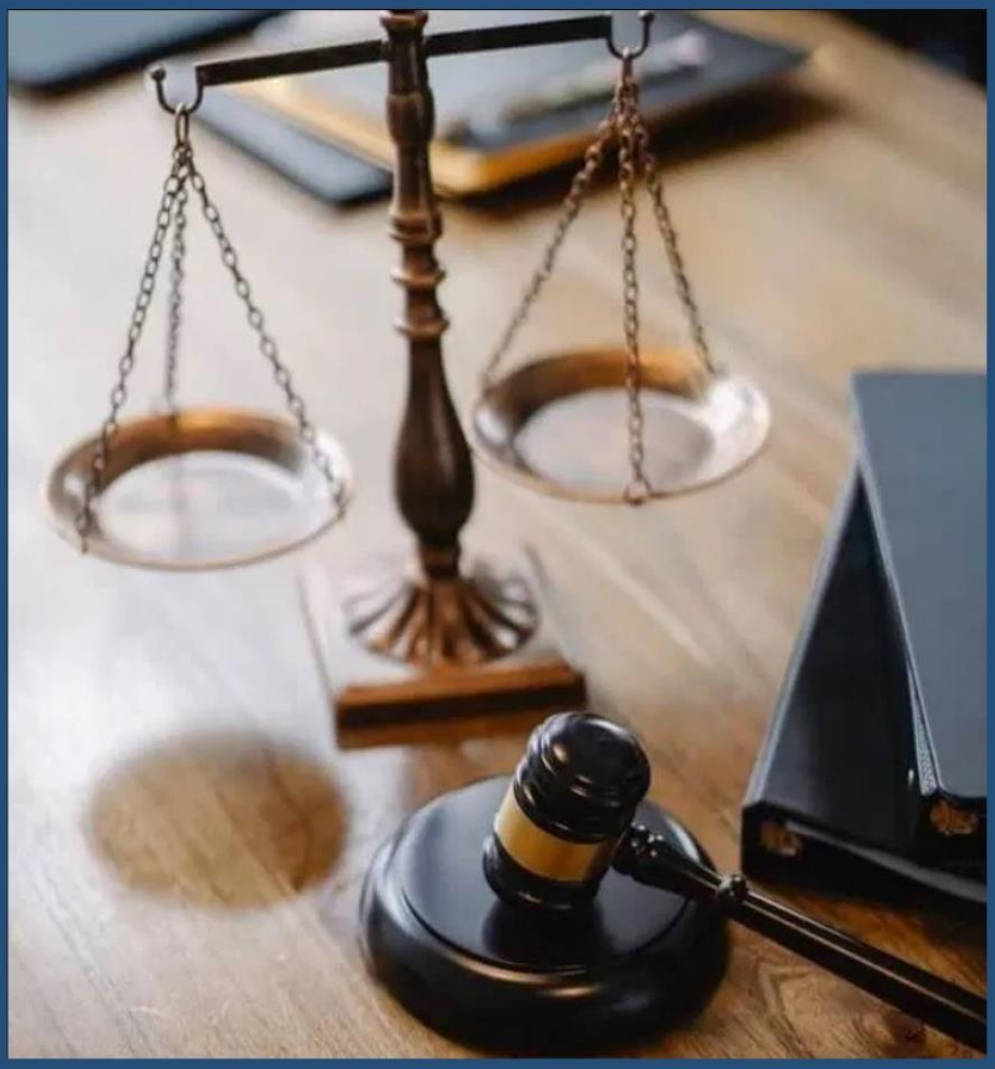

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Vishwakarma University, Pune (VU) is a natural offshoot of the Vishwakarma Group of Institutions' educational legacy spanning more than 35 years. The University has been established as a State Private

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The Vishwakarma University Law Journal is a faculty run, annual, blind peer reviewed journal of the Vishwakarma University Department of Law. The objective of this Journal is to contribute original, outstanding and socially relevant research to the Field of Law. It provides a platform for academicians, practitioners, researchers, scholars and students to share their views and make effective contribution to the legal academia. The Vishwakarma University Law Journal, launched in 2021, has established itself as a reputable publication in the legal academia. With three volumes and five issues to date, the journal has consistently featured insightful research articles, thought-provoking case comments, and in-depth book reviews. As the journal continues to grow, it remains committed to upholding the highest standards of academic excellence, providing a valuable resource for the legal community.

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FOREWORD

It is with great pleasure that I present the second issue of the third volume of the Vishwakarma University Law Journal. This edition, themed "Contemporary Legal Issues," showcases insightful analyses on pressing legal challenges, reflecting the dynamic and evolving nature of law.

The first article, "Analysis of the Discord Between Criminal Justice and Mental Healthcare with Reference to Drug Use," by Apurva T. Bhilare and Dr. Saleem M. Shaikh, examines the intersection of criminal justice and mental health, particularly in the context of drug use. The authors advocate for a more integrated approach that balances legal enforcement with mental healthcare needs.

In "An Analysis of International Tax Agreements in Preventing Double Taxation," Deepak B.D. explores the effectiveness of international tax treaties in mitigating the burden of double taxation. This article offers a clear overview of current agreements and their impact on cross-border economic activities.

Akhilesh Kumar's "India's Bankruptcy Law and Comparative Analysis with Other Countries" provides a concise comparison of India's insolvency framework with those of other nations. The article highlights key strengths and areas for improvement in India's bankruptcy laws.

Amisha Gupta, in her article "Nolo Contendere: Coercion or Speedy Remedy," investigates the implications of the nolo contendere plea. She critically examines whether it is a tool for coercion or an effective means of resolving legal disputes swiftly.

Lastly, Adv. Bhagyashree Bora's "South Africa's Application Against Israel" offers an insightful account of a notable international legal case, placing it within the broader context of global justice and international relations.

Each of these articles represents the dedication and intellectual rigor of our contributors. Their work not only advances legal scholarship but also provides valuable insights for students, academics, and practitioners.

As we present this issue, I extend my sincere gratitude to the authors, reviewers, and the editorial team for their contributions. The Vishwakarma University Law Journal remains committed to fostering meaningful dialogue on contemporary legal issues.

Dr. Sarika Sagar
Editor-in-Chief
Vishwakarma University Law Journal
Department of Law, Vishwakarma University, Pune

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ANALYSIS OF THE DISCORD BETWEEN CRIMINAL JUSTICE AND MENTAL HEALTHCARE WITH REFERENCE TO DRUG USE

Apurva T. Bhilare[*]

Dr. Saleem M. Shaikh[**]

ABSTRACT

In societal narratives, drug use has long been perceived as a menace, framed as a moral and social threat leading to its categorization as a criminal wrong. The Narcotic Drugs and Psychotropic Substances Act, 1985, encapsulates this perception by primarily criminalizing drug use and related activities. However, evolving perspectives recognize the complexities inherent in drug use, urging a shift beyond mere moral judgments.

A significant development in this discourse is the acknowledgment of drug use as a mental illness under the Mental Healthcare Act, 2017. This acknowledgment plants the first seed of discord, highlighting a fundamental incongruence between criminal justice perspectives and the mental health paradigm. These two cornerstone legislations in India, approach and address drug use through fundamentally different lenses.

This paper delves into the heart of these conflicting perspectives which raise concerns about the effectiveness of interventions in supporting individuals with drug use disorders. The paper discusses various statutory discords, aims to humanize the discourse around drug use, and emphasizes the importance of balance in legislative frameworks.

Keywords: Drug Use, Substance Use Disorder, Criminalization, Mental Illness, The Narcotic Drugs and Psychotropic Substances Act 1985 (NDPS Act), The Mental Healthcare Act 2017 (MHA)

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INTRODUCTION

The Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and the Mental Healthcare Act, 2017 (MHA) are pivotal legislative frameworks addressing substance use and mental health, respectively. The NDPS Act, is primarily punitive in nature, and criminalizes drug use. Conversely, the MHA adopts a rights-based approach, recognizing mental illness, including aspects related to drug use, as a healthcare concern deserving dignity and care.

Researcher in this critical and comparative analysis of these two enactments in context of drug use, has focussed on the contrasting definitions of mental illness, addiction, and consumption, the autonomy of persons with mental illness (including substance use disorder), the capacity of individuals to make treatment decisions, ethical issues surrounding compulsory treatment, and the acknowledgment of the other rights of individuals with mental illnesses or substance use disorders (SUDs). The research highlights the discord in approaches, and elucidates pathways for cohesive health-based and rights-based perspective within the existing legal framework.

BACKGROUND OF THE LEGISLATIVE FRAMEWORK

The roots of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act) stretch back to the 1800s when the British exported opium from India.[1] The ensuing concerns over drug use led to Indian legislations like the Opium Act, 1878 and the Dangerous Drugs Act in 1930. In the 1960s, the global "War on Drugs"[2] catalysed by initiatives from figures such as President Richard Nixon and President Ronald Reagan. However, this campaign bore political and racial undertones, particularly against Oriental and Black communities. Internationally, this era saw the consolidation of drug control treaties, culminating in the 1961 Single Convention on Narcotic Drugs, 1971 Convention on Psychotropic Substances and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

In India, Article 47 of the Constitution directs the state to take efforts for promoting public health and specifically endorses prohibition of drug use. However, the foundation of this

[1] Volume I, Neha Singhal, Arpita Mitra, Kaushiki Sanyal, From Addict to Convict – The working of the NDPS Act in Punjab 24 (Vidhi Centre for Legal Policy 2018)

[2] War on Drugs, https://www.history.com/topics/crime/the-war-on-drugs#section_4 (Last visited on Nov. 30, 2023)

prohibitive view does not lie in scientific data but on positive morality.[3] The NDPS Act thus emerged as a response to international treaties, global pressure, and constitutional mandates, shaping India's approach to the regulation and criminalization of narcotics and psychotropic substances.

Mental Healthcare legislations have witnessed development and transformation from 1912 to 1987 and then in 2017.[4] Highlights of this Act are defining mental illness, capacity to make decisions and give advanced directives for treatment, right to mental healthcare and so on.[5]

DEFINITIONS IN NDPS ACT AND MHA

In delving into the definitions surrounding mental health and substance use, a distinct shift is evident between the Mental Health Act of 1987 and its 2017 reformation. Initially, the MHA did not define mental illness but characterized a mentally ill person as someone in need of treatment due to a mental disorder excluding mental retardation.[6] The revised MHA in 2017 introduced a comprehensive definition of mental illness, encompassing conditions linked to alcohol and drug use. The 2017 Act defines mental illness as "substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person." [7] Thus, it can be understood that mental illness means a disorder relating to mood, behaviour etc. but also specifically includes disorder relating to use of alcohol and drugs. Further, the MHA outlinesa procedure for determining mental illness based on nationally or internationally accepted medical standards, including the International Classification of Disease (ICD-11).[8]

[3] Part IV Article 47, Constituent Assembly Debates, https://www.constitutionofindia.net/constitution-assemblydebates/ (Last visited on Nov. 28, 2023)

[4] Toolika Payak, *Our journey to Mental Healthcare Act, 2017,* Readers' Blog by The Times of India (Nov 29, 2023, 10 pm), https://timesofindia.indiatimes.com/readersblog/eccentricdimensionist/our-journey-to-mentalhealthcare-act-2017-24432/

[5] Richard M. Duffy, Brendan D. Kelly, *India's Mental Healthcare Act, 2017: Content, context, controversy,* 62 International Journal of Law and Psychiatry, Pages 169-178 (2019) https://doi.org/10.1016/j.ijlp.2018.08.002

[6] The Mental Healthcare Act, 2017, Section 2(l), No. 10, Acts of Parliament, 2017 (India)

[7] The Mental Healthcare Act, 2017, Section 2 (s), No. 10, Acts of Parliament, 2017 (India)

[8] The Mental Healthcare Act, 2017, Section 3, No. 10, Acts of Parliament, 2017 (India)

The International Classification of Diseases, 11th Revision (ICD-11), is a globally recognized and comprehensive classification system for various health conditions, including mental and behavioural disorders. Published by the World Health Organization (WHO)[9], the ICD-11 provides intricate classifications of various disorders, providing researchers, practitioners, and policymakers with a shared lexicon. It is an effort to harmonize the understanding, prevention and treatment of disorders at global scale.

The ICD-11 in its Chapter Six, gives the diagnostic criteria for the 'Disorders due to Substance Use' and by virtue of Section 3 of MHA, these come under the purview of 'mental illness'. This chapter deals with disorders caused due to fourteen types of substance enumerates thirteen categories or stages of substance use disorder. ICD-11 mentions the substance use andsubstance induced disorders as 'Episode of Harmful Psychoactive Substance Use, Harmful Pattern of Psychoactive Substance Use, Substance Dependence, Substance Intoxication,

Substance Withdrawal, Substance-Induced Delirium, Substance-Induced Psychotic Disorder, Substance-Induced Mood Disorder, Substance-Induced Anxiety Disorder, Substance-Induced Obsessive-Compulsive or Related Disorder, Substance-Induced Impulse Control Disorder,

Other Specified Disorder Due to Substance Use, Disorder Due to Substance Use,

Unspecified'.[10]

It is important to note that the MHA's definition of 'mental illness' given in Section 2(s) involves 'mental conditions associated with the abuse of alcohol and drugs.' An inconsistency surfaces with the use of the term 'abuse' as it is not reflected in ICD-11. The word 'abuse' generally implies continued use of substance despite of the knowledge of its social, psychological and physical harmful effects. But due to the ambiguity in the meaning and its non-medical usage, the use of the word 'abuse' is discouraged by WHO.[11] In the light of this discussion, it is clear that firstly, the MHA covers wide range of maladaptive pattern of

[9] WHO's new International Classification of Diseases (ICD-11) comes into effect, https://www.who.int/news/item/11-02-2022-who-s-new-international-classification-of-diseases-(icd-11)-comesinto-effect (last visited on Nov. 25, 2023)

[10] Disorders due to substance use or addictive behaviours, ICD-11 for Mortality and Morbidity Statistics, *http://id.who.int/icd/entity/590211325* (last visited on Nov. 25, 2023)

[11] Lexicon of alcohol and drug term, https://iris.who.int/bitstream/handle/10665/39461/9241544686_eng.pdf?sequence=1 (Last visited on Nov. 26, 2023)

substance use (from single episode of harmful use to severe substance induced disorder) under the ambit of mental illness. Secondly, as far as the definition section of section 2(s) of MHA is concerned, the word 'abuse' should be discouraged and word 'use' to be incorporated to align with the ICD-11 criteria.

The Narcotic Drugs and Psychotropic Substances Act (NDPS Act) of 1985 on the other hand takes an opposing view to drug use than the MHA. NDPA Act approaches substance use with a punitive stance and blanket criminalization. The NDPS Act aims to make stringent provisions and punishes whoever consumes any narcotic drug or psychotropic substances.[12] Further, the act wishes to divert persons using drugs to treatment mechanism by making provision for probation[13] and immunity[14]. However, the catch here is that, the persons who are eligible to avail these benefits are the 'addicts' and the Act gives a specific definition of the word 'addict. It is defined as 'a person who has dependence on any narcotic drug or psychotropic substances.'[15] WHO has also discouraged the usage[16] of the words like 'addiction' and 'addict' as these cannot be used as diagnostic terms from a health perspective and rather are terms with social connotations. The tend to be stigmatizing labels which have the potential to influence medical care and medical practitioner perceptions.[17] Instead these terms are now replaced with neutral terminologies like 'substance use disorder' and 'person who use substance'

Careful consideration of the above discrimination makes it clear that the two legislations have distinct views towards the substance use. MHA considers substance use as mental illness. Whereas, the NDPS Act, punishes the substance use and loosely defines and loosely stipulate the persons eligible for treatment without taking into consideration, the nuances of drug use as mentioned in ICD-11. This sharp contrast unfolds as the NDPS Act adopts a punishment-based stance, criminalizing consumption without acknowledging the diverse stages of drug use, while

[12] The Narcotic Drugs and Psychotropic Substances Act, 1985, Section 27, No. 61, Acts of Parliament, 1985 (India)

[13] The Narcotic Drugs and Psychotropic Substances Act, 1985, Section 39, No. 61, Acts of Parliament, 1985 (India)

[14] The Narcotic Drugs and Psychotropic Substances Act, 1985, Section 64A, No. 61, Acts of Parliament, 1985 (India)

[15] The Narcotic Drugs and Psychotropic Substances Act, 1985, Section 2(i), No. 61, Acts of Parliament, 1985 (India)

[16] Supra note 13

[17] Ashford RD, Brown AM, McDaniel J, Curtis B. Biased labels: An experimental study of language and stigma among individuals in recovery and health professionals. Subst Use Misuse. 2019;54(8):1376-1384. doi: 10.1080/10826084.2019.1581221.

the MHA embraces a rights-based approach, recognizing harmful use as a mental illness. The struggle between these approaches underscores the vital need for a refined understanding of mental health and substance use issues within the legal framework.

DECISION-MAKING CAPACITY OF PERSONS SUFFERING THROUGH SUBSTANCE USE DISORDER

In the context of bioethics, autonomy means that a patient has the ultimate decision-making responsibility for their own treatment, and treatment cannot be imposed on a patient. [18] It upholds an individual's right to self-determination, allowing them to actively participate in choices affecting their well-being. This empowerment fosters a sense of control, dignity, and personal agency. In mental health, particularly, autonomy ensures that treatments align with personal preferences, enhancing their efficacy.[19] Individual autonomy except in exceptional situations when the person is unable to make autonomous decisions, is considered paramount to promote a patient-centred approach for holistic and effective care.

In navigating the intricate terrain of mental healthcare decisions, the MHA promotes individual autonomy. Section 4 of the MHA places paramount importance on respecting the capacity of individuals grappling with mental illness to make decisions about their treatment. The provisions of the MHA entail that 'Every person, including a person with mental illness shall be deemed to have capacity to make decisions regarding his mental healthcare or treatment.'[20] This ability depends on a person's skill to grasp information, predict outcomes, and communicate decisions. The MHA reinforces this independence by explicitly stating that others' disapproval doesn't diminish an individual's capacity to decide on their mental health.[21] MHA goes ahead and empowers the person suffering through mental illness/ substance use disorder to give advanced directives wherein the person can make decisions regarding how they want to be treated, how they do not want to be treated or appoint a person on their behalf who

[18] Medical Ethics: Autonomy, https://www.themedicportal.com/application-guide/medical-schoolinterview/medical-ethics/medical-ethics-autonomy/ (last visited on Nov. 25, 2023)

[19] Varelius J. The value of autonomy in medical ethics. Med Health Care Philos. 2006;9(3):377-88. doi: 10.1007/s11019-006-9000-z. Epub 2006 Oct 11. PMID: 17033883; PMCID: PMC2780686.

[20] The Narcotic Drugs and Psychotropic Substances Act, 1985, Section 49(1), No. 61, Acts of Parliament, 1985 (India)

[21] The Narcotic Drugs and Psychotropic Substances Act, 1985, Section 4(3), No. 61, Acts of Parliament, 1985 (India)

would take these decisions for them.[22] The right to give 'Advanced Directives' is a unique feature of the Mental Healthcare Act, 2017.

Contrastingly, the Narcotic Drugs and Psychotropic Substances Act (NDPS Act) introduces a conflict in its approach to individuals' capacity for treatment decisions. Sections 39 and 64A of

the NDPS Act, while acknowledging the government's role in the identification and treatment of addicts, fall short in recognizing the rights of individuals using drugs to decide on treatment or create advance directives. Section 39 gives power to the court that, when a person is found guilty for offence of consumption or possession of small quantities, then having regard to the background of the convict, can release the convict on probation to seek treatment. And Section 64A provides immunity to the persons who are accused for consumption and possession of small quantities of drugs that, if they volunteer to undergo treatment, shall be released provided if they do not undergo treatment, shall have to face the punishment.

Conflict with regard to the autonomy in treatment raises ethical concerns. The Mental Healthcare Act (MHA) champions the importance of autonomy in treatment, acknowledging its pivotal role in fostering effective recovery. In contrast, the NDPS Act opts for a compulsory treatment approach undermining the capacity of individuals convicted for possession of small quantities of drugs to make treatment decisions. This method, primarily aimed at 'addicts,' overlooks the diverse treatment needs arising from distinct stages of drug use. Moreover, it introduces a coercive element by linking treatment compliance to the threat of punishment, disregarding the complexities of cases involving withdrawal and other factors that may impact an individual's decision-making capacity. The clash between autonomy-driven recovery under the MHA and the coercive treatment model of the NDPS Act highlights the need for a nuanced and empathetic approach to address the complexities of substance use disorders and mental health in the legal framework. Advocating for respect of autonomy promises a more positive response to treatment, challenging the ethical implications of compulsory treatment and reinforcing the principle of informed and voluntary decision-making in healthcare, as emphasized by the MHA.

[22] The Mental Healthcare Act, 2017, Section 5, No. 10, Acts of Parliament, 2017 (India)

COMPULSORY TREATMENT: ETHICAL DILEMMA

Compulsory treatments, a legal recourse for enforcing treatment on individuals with mental illnesses who resist therapeutic intervention, raise complex ethical questions. Some advocate for this strategy perceived usefulness in clinical practice, protection of patients, and duty to protect individuals with mental illness.[23] But those who take an opposing view argue that this approach implies that persons suffering through mental illness might lack the ability to judge, gain insight, or make decisions, making them incapable of independently deciding about their health.[24] In the delicate dance between ethics and treatment for those grappling with substance use disorders, two key legislations in India, the Mental Healthcare Act (MHA) and the Narcotic Drugs and Psychotropic Substances Act (NDPS Act), find themselves at odds.

The MHA states that "an independent patient shall not be given treatment without his informed consent." [25] Informed Consent according to MHA means "consent given for a specific intervention, without any force, undue influence, fraud, threat, mistake or misrepresentation, and obtained after disclosing to a person adequate information including risks and benefits of, and alternatives to, the specific intervention in a language and manner understood by the person."[26] Thus, the MHA hails the free will and individual autonomy of the persons suffering through mental illness and informed consent becomes the linchpin of providing mental healthcare.

On the other hand, NDPS Act, with provisions in Section 39 and Section 64A that veer towards compulsory treatment, introduce ethical complexities. Provisions underscoring the compulsory treatment may conflict with the objectives of MHA on the points such as the persons possessing small-quantity quantity of drugs may face compulsory treatment irrespective of need, persons with substance use disorder may not be given information of risks, benefits and alternatives about the treatment, absence of informed consent, threat of punishment may be form of coercion, disregard for individual treatment needs, lack of consideration that whether the chosen treatment method is the least restrictive.

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[23] Martinho, S.M., Santa-Rosa, B. & Silvestre, M. Where the public health principles meet the individual: a framework for the ethics of compulsory outpatient treatment in psychiatry. *BMC Med Ethics* **23**, 77 (2022). https://doi.org/10.1186/s12910-022-00814-8

[24] *Id.*

[25] The Mental Healthcare Act, 2017, Section 86, No. 10, Acts of Parliament, 2017 (India)

[26] The Mental Healthcare Act, 2017, Section 2(i), No. 10, Acts of Parliament, 2017 (India)

The United Nations Office on Drugs and Crime (UNODC), in their discussion paper titled

'From Coercion to Cohesion: Treating Drug Dependence through Health Care, Not Punishment,'[27] critically examines compulsory treatment. Their evaluation highlights potential breaches of UN conventions and urges justifiable use only in emergencies, with a short-term focus and withdrawal post-acute interventions. Long-term, non-consensual residential

treatment is likened to a form of low-security imprisonment, drawing ire for disputed therapeutic effects, high costs, and human rights violations.

In the tug-of-war between the MHA's emphasis on informed consent and the NDPS Act's nod to compulsory treatment, a call echoes for a right-based approach. Need-based and voluntary treatment is a step towards acknowledging the complexities of human experiences and fostering a compassionate response to those in need. This approach urges treatment ethics, patient-centric care and encourages participatory recovery of the persons who use drugs.

UPHOLDING RIGHTS IN THE FACE OF STIGMA: A HUMANCENTRIC EXAMINATION

The preamble of the NDPS Act, 1985, defines the objective of the act is to ‘to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances’[28] and sets a stern tone. This mission statement unmistakably reveals the punitive stance adopted by the NDPS Act. The criminalization of drug use, and ignorance of stages of drug use fuels stigma and negative attitude towards drug use and brings the person who uses drugs in the scope of punishment rather than treatment. Other provisions relating to presumption of guilt, punishment for attempt, abatement etc. further contribute to prejudice. Further, according to the provisions of the NDPS Act, the authority mentioned to divert the accused or the convict to the treatment is the judge or judicial officer and not a mental healthcare professional. Thus, the person responsible for diverting the accused to treatment might not be appropriately trained to ascertain the diagnosis of substance use disorder and

[27] Gilberto Gerra, Nicolas Clark, *From coercion to cohesion: Treating drug dependence through health care, not punishment*, Discussion paper based on a scientific workshop UNODC, Vienna October 28-30, 2009, https://www.unodc.org/docs/treatment/Coercion_Ebook.pdf

[28] The Narcotic Drugs and Psychotropic Substances Act, 1985, Preamble, No. 61, Acts of Parliament, 1985 (India)

respective treatment need of the person ultimately resulting in lack of proper care and protection of the person using drugs. Entry into treatment should be driven by medical indications rather than coercive measures, and treatment options must be tailor-made to suit the unique needs of each individual.[29] Thus, the provisions within the NDPS Act, as discussed above, can be deemed violative of the rights to health, which inherently encompass the rights to diagnosis and treatment.

MHA, endorses the rights of the persons suffering through mental illness or substance use disorder. Right to access evidence-based drug dependence treatment on a voluntary basis [30] is considered as a primary rather fundamental right within the realm of the MHA. MHA further extends its protective umbrella to encompass the right to community living,[31] protection from cruel, inhuman, and degrading treatment,[32] and the right to equality and non-discrimination.[33] Moreover, the MHA places an obligation on the government to actively take measures aimed at reducing the stigma associated with mental illness.

In essence, while the NDPS Act makes provisions for treatment but not as a right and punishment becomes primary objective. Treatment in the shadow of punishment will fail to be effective as the nuances of the drug use are seldom addressed in this approach. Whereas, in the MHA, as the substance use disorder comes under the purview of mental illness, the right to access healthcare, and protection from discrimination, demeaning treatment becomes primary objective which are in contrast with the effects of the provisions of the NDPS Act. NDPS Act leans towards exclusions rather MHA leans towards empathy and inclusion.

CONCLUSION

In conclusion, the discord between the NDPS Act and the Mental Healthcare Act illuminates a critical tension within the legal frameworks addressing substance use and mental health in India. The contrasting definitions of mental illness, the divergent approaches to treatment decisions, the ethical issues surrounding compulsory treatment, and the acknowledgment of the

[29] United Nations Office on Drugs and Crime, 2019, World Health Organization, 2019, *Treatment and care for people with drug use disorders in contact with the criminal justice system - Alternatives to Conviction or Punishment*,https://www.unodc.org/documents/UNODC_WHO_Alternatives_to_conviction_or_punishment_ENG.pdf (last visited on Nov. 25, 2023)

[30] The Mental Healthcare Act, 2017, Section 18, No. 10, Acts of Parliament, 2017 (India)

[31] The Mental Healthcare Act, 2017, Section 19, No. 10, Acts of Parliament, 2017 (India)

[32] The Mental Healthcare Act, 2017, Section 20, No. 10, Acts of Parliament, 2017 (India)

[33] The Mental Healthcare Act, 2017, Section 21, No. 10, Acts of Parliament, 2017 (India)

rights of individuals with mental illness or substance use disorders underscore the need for a nuanced and balanced approach. The NDPS Act, rooted in a punitive and criminalizing paradigm, stands in stark contrast to the rights-based approach adopted by the Mental Healthcare Act. The acknowledgment of drug use as a mental illness within the MHA challenges traditional moralistic views and encourages a shift toward understanding substance use within a mental health context. This research advocates few reformative changes that can be adopted to strike balance between these two crucial legislations. Adopting neutral terminology in legislative provisions, decriminalizing substance use, and recognizing substance use disorder as a health issue are crucial steps. Inclusive terminologies which are endorsed by WHO like 'substance use', 'persons who use drugs' and 'substance use disorder' can be incorporated in place of 'consumption', 'addict' and 'addiction' respectively. Introducing a diversion program that integrates clinical treatment with the criminal justice system, with authority vested in both the judiciary and mental healthcare professionals, is imperative. Screening processes should identify treatment needs, and individuals should be informed about the details and implications of treatment. Respecting the decision-making capacity of individuals who use drugs, providing autonomy for choosing the least restrictive practice, and avoiding compulsory treatment, except in exceptional situations, are paramount. Guidelines for these exceptional situations should be aligned with international human rights standards, specifically the Convention on the Rights of Persons with Disabilities and its Optional Protocol of 2006. This holistic approach aims to reconcile the conflicting legal frameworks, uphold individual rights, and foster a compassionate response to substance use disorders in India.

AN ANALYSIS OF INTERNATIONAL TAX AGREEMENTS IN PREVENTING DOUBLE TAXATION

Deepak B.D.[*]

ABSTRACT

Taxes are main source of revenue for governments, for spending on public welfare. Taxes are paid as voluntary contribution for which nothing comes in return, to say that "no quid pro". The taxes are extraction of money from the public, either with or without consent. International taxation is imposed upon the individual's whose income or transaction falls within the cross-borders territory of the foreign nation. International taxation is also called as the double taxation, because taxes are imposed more than once or double time, on the same individual. As, it creates burden on the individual to pay additional taxes, so the tax evasion occurs. To avoid paying taxes in two countries, the individual or the company will transfer its profits by investing in Tax Heaven countries, and where the taxes are very low. This kind of transfer of profits from the base and shifting to some other location is called as the "Base Erosion and Profit Shifting".

If the transaction is done internationally, then the place where, the income is generated is called the source country and the individual or company resides is the resident country. Both these countries have sovereign right to tax a particular transaction, and if they do so international double taxation occurs. To prevent the double taxation and fiscal evasion the OECD and the UN have come up with a model draft convention as a base. With this base convention, countries may either bi-laterally or multi-laterally sign the Double Taxation Avoidance Agreement (DTAA) to prevent tax evasion and exchange the tax information for the effective collection of taxes. These double taxation practices are prevented by the countries with their mutual cooperation, by way of international agreements.

Keywords: International taxation, cross-borders, double taxation, Tax Heaven, DTAA

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INTRODUCTION

'International Taxation' is otherwise called as International Tax, International Tax Law or International Taxation System. But taxes cannot be collected based on the international sovereignty, it is the nation's statutory law and the bilateral/ multilateral treaties signed by the nation will decide the issue of how much tax should be paid on the income earned by an 'assessee' by way of international transactions and to which government it should be paid. International incomes which are taxed, based on the residential status, are assessed by the municipal law of the country.

INTERNATIONAL LAW AND DOUBLE TAXATION

'International Tax Law' mainly consists of 2 components i.e., Taxation Agreements & Domestic Tax laws. These Agreements are signed between two or many states to avoid double taxation, in which the taxation of the same income on the same subject is prevented by taxing twice. These agreements also help in preventing the revenue loss by sharing information related to taxes and help in collect tax dues. The dual purposes of the agreement are prevention of double taxation and avoiding tax evasion. The Domestic Taxation laws are the nation's private law which determines the percentage and ratio of taxes to be collected from the subjects[1]

This double taxation can be prevented unilaterally or bilaterally by signing an agreement with the concerned countries. By the unilateral method, either a country of source or a country where the taxpayer is resident, unilaterally relinquishes the right to tax, to the other nation.

This bilateral method includes **'proportionate division'** method, which means dividing taxes between two nations according to the pre-decided formula and classification method by classifying the income according to its type and assigning primary right to tax.[2]

The rapid growth & development of Industrialization and the investment by the Multinational Companies, relaxation in the rules by governments relating to investment of capital, had numerously paved way for evasion of taxes. Some of these entities misuse the loopholes available in law and exploit the advantages, due to which their income is not taxed in any of

[1] UN, Department of Economic and Social Affairs, UN Model Double Taxation Convention (March 2011). 2
[2] League of Nations, Report on Double Taxation, (Doc. E.F.S. 73 F 19, p. 42).

the country, adopting a method of shifting their profits to the country's jurisdiction where tax rates are low. This problem has become worse, day-by-day due to the existence of tax haven countries and harmful tax competition. Preventing this menace is of vital importance, to the economic interests of the country and its development.

OBJECTIVES OF TAXATION

Every taxation system must define its distinctiveness, it is the basic framework for such taxation. **Value Added Taxes (VAT)** and **Service Tax** are the two major taxations prevailing in India as far as indirect taxes are concerned, and later replaced by a new taxation regime called as the **'GST'** (Goods and Service Tax Act, 2017). The basic and foremost idea behind the concept is that the single taxation system across the country. The motto is that the **"One Nation, One Taxation, One Slab"** and the primary objective is that the transparency in levying and collection of taxes. The exact slab rates and the percentage of taxes paid by the individual should be certain and should be known to the tax payers for the convenience in tax payment and collection.

Now the GST collection is very easy for the traders and also the tax department, and recently the CBIC had also submitted the report to the Ministry of Finance about the collection of GST. In that report the Board has confirmed that the collection of GST is increasing every year with good growth in tax collection. But this is not to be so, before the regime of GST because of the difficulties and complexity of the old taxation system. VAT which created a burden on the consumer and the price is also increased by way of cascading effect by way of the additional tax paid on the tax.

Like the principle stated above one nation one tax, international taxation should also be one. The income which is earned by the individual and the company should be taxed only at one jurisdiction or in one country. How the cascading effect had been removed by the introduction of GST, the dual or the multiple international taxes should be avoided. If this has happened the collection of taxes will increase and the free flow of capital and investment may accumulate the country and as a result the economy may be boosted.

SUBSTANCE AND FORM

The Word **'Substance and Form'** was used for the first time in the Common Law Countries, related to tax avoidance.[3] There is always a thin line drawn by the government of a particular country which classifies tax planning and tax evasion (i.e. in other words called as the walls of the prison). Once if this line has crossed, then the transaction may be valid under the Municipal law of one country as it appears in the *form*, but in *substance* it will not be considered as valid in the international law of the other country, then the tax liability arose. If*substance* prevails over *form* in a particular income tax, then the tax authorities can exclude the transaction entered by the tax payer which may appear to be valid in *form*, if there exists avalid double taxation avoidance agreement.

(For Example; if the trade done by way of international transaction and the municipal law contemplates valid provision, but absence of valid DTAA, then it is taxed in both countries, and the tax payer is liable to pay taxes for the intended cross-border transaction. In other case existence of valid DTAA and absence of exemption provisions in Municipal law, the tax authorities of that country will allow that transaction as a valid under the DTAA's and single taxation is imposed).

AVOIDANCE AND EVASION OF TAXES

'**Avoidance** & **Evasion of Taxes'** are totally a different concept, but both has a thin line of distinction within it (i.e., the Lakshman Rekha). In case of ***tax evasion***, the tax payer produces false/incomplete information to the I.T. authorities, but as far as ***tax avoidance*** is concerned, filing of returns and submitting accounts by availing privileges, under the valid sections of Income Tax Act, of that country. It is to be noted that, tax evasion takes place when, failure to strictly comply with law and paying lesser tax than the actual tax or no tax at all, but whereas tax avoidance occurs when certain lawful deductions and exemptions are claimed by the tax payer.

In today's world of globalization, the investment of capital by way of FDI, import and export of goods and services takes place through the borders of different countries, both by way of physically and electronically. The thin division between tax avoidance and tax evasion,

[3] Frederik Zimmer, "Substance and Form of International Taxation, Vol. 8, (2002 p. 26).

becomes even thinner, because of the international transaction made using of technology advancements, it is easy to evade tax in one country by taking advantage, not only by the provisions of his own country's tax law, but also of the transaction made in other country's tax laws.[4] Hence tax evasion and tax avoidance may occur in the same case in the same subject matter.

DOUBLE TAXATION

The Basic understanding of double taxation in legal context is, taxing the same subject/income more than once for the same purpose upon an individual during same taxing period. To constitute double taxation, the two or more taxes must have been:

i. *levied on the same subject matter;*
ii. *by the same government*
iii. *During the same taxing period; and*
iv. *for the same purpose.*[5]

International double taxation arises due to the overlap of two or more tax claims by two or more countries. It can be of two kinds namely, 'juridical double taxation' and 'economic double taxation'. The term **'juridical double taxation'** can be generally defined as the imposition of comparable taxes in two (or more) states on the same taxpayer in respect of the same subject matter and for the identical period.[6] E.g., Mr. 'X' who is resident of country 'USA' has a term deposit in country 'INDIA'. The country 'USA' levies tax as Mr. 'X' is the resident of that country and even the interest income earned on term deposit in other country can be taxed on grounds of *residential status*.

The Country 'INDIA' levies tax, as the source of earning of that income arises in their jurisdiction. i.e., the term deposit is situated in its country and can be taxed on ground of *source rule*. Thus, both country 'INDIA' (country of source) and country 'USA' (country of residence) levying tax on interest income of Mr. 'X' on grounds of source and residence principle respectively amounts to juridical/jurisdictional double taxation.

[4] M.B. Rao, Taxation of Foreign Income - India's Double Tax Treaties, (1997, p. 13).
[5] Krishna Das v. Town Area Committee, (1983) ITR 401 (SC).
[6] Report of the OECD Committee, Model Double Taxation Convention on Income and Capital gains, (Para 3, 1977).

The term **'Economic Double Taxation'** is opposite to juridical double taxation, which arises when the same economic transaction or asset is taxed in two or more states during the same period, in the hands of different taxpayers. Economic double taxation takes place if assets are attributed to different persons by the domestic law of the states involved. The contrary occurs when the tax law of one state, tax the asset to its legal owner while the tax law of the other state, tax the person who is in possession or control.

TYPES OF COMPANIES IN INTERNATIONAL TAXATION

'Company' means an **artificial legal person** created by virtue of law by registration of necessary documents with its regulations and having the distinct features of separate/independent legal entity, perpetual succession and common seal as per the relevant provisions of the statues. The different kinds of companies which involving in the international tax system are different from the companies under the company law. Company law discusses, kinds of company on the basis of ownership (public, private and government), control (holding and subsidiary) and incorporation (statutory, registered and charter). But contrarily, international taxation is more concerned about the structure of a company. Some of the company depending on the basis of structure are conduit companies, base companies and letter box companies.

CONDUIT COMPANIES

Conduit Companies are legal entity created in a particular country with an intention to avail the benefits of tax treaty, which are not available to the person who creates such company directly in that country. For example, a company 'X' in country USA creates a conduit company 'Y' in country UK to do business in country India. The main purpose of creating such company in country UK is to take benefit of the treaty between country UK and country India (say exemption from capital gains tax) which is not available under the treaty between country India and country USA.

BASE COMPANIES

Base Companies is also similar to that of the conduit companies, however, the only difference between them is the base companies are used as the ***accumulation centers,*** and the income is

not transferred or taken back to the country of the investing country, whereas in case of the conduit companies the income earned by them is transferred to the ultimate beneficial owner. The concept of base companies has been systematically analysed by 'William Gibbons' and he labelled the foreign bases/company incorporated in a *country having negligible or no taxes* at all as 'base companies' in the following words: "Companies/ Corporations or other limited liability companies organised in a base country for the purpose of conducting business operations in third country will be referred to as base companies." Business operations in third country is meant both business through agents or branches and holding companies. Thus, the essential element of base companies is holding of legal title by a person who resides outside the country where base company is formed.

P.G. Keller has further made a distinction between a **'**Typical' base company and **'**Atypical' base company. In case of a 'typical' base company, three countries are involved. An entity X in country one, incorporates a base company in country two, to invest in country three. In 'Atypical' base company, only two countries are involved and it is a case of reinvestment in country one by forming a base company in country two.

LETTER BOX COMPANIES

'Letter Box Companies' are those companies which exist only on papers and absence in actual performance by managing directors or other employees of manufacturing or commercial activities. The underlying activities like invoicing are performed elsewhere.

TAX HAVENS

There is a lack of understandings in the concept of 'Tax Havens'. [7]Tax haven refers to a jurisdiction with negligible or no tax rates, but, the Rotterdam Institute of Fiscal Studies has explained in detailed about the tax havens under three categories.[8] The First category includes those countries where there is no income tax on individuals or corporations, net wealth, inheritance or gift taxes. This includes the states like Bahamas, Bermuda and Cayman Island etc. The second category refers to those countries where taxes are levied at low rates which includes Cyprus, British Virgin Island and Isle of Man etc. Such countries give special

[7] M.J. Langer, "Tax Havens of the World," International Financial Documentation, Vol. 24, (1970, p. 424).
[8] Journal of the Rotterdam Institute of Financial Studies, (1979, p. 70).

exemptions to the foreign business/operations but levy a low rate of tax on local business/operations. The third category countries levy normal taxation, however, give some special advantage like Canada, Greece, Ireland and Luxembourg etc.

NEED FOR INTERNATIONAL TAX AGREEMENTS

The burden of double taxation caused on the individual can be avoided unilaterally, if any one of the states involving taxing jurisdiction withdraws its tax claim. Eg: India gives tax deduction to the assessee which is equivalent to the tax rates applicable in India.[9] (in other words the tax so collected is refunded fully to the assessee, if existence of valid double tax avoidance agreement while filing returns). In some countries double taxation is avoided unilaterally through exemptions and allowances. Switzerland exempts the tax on income, which arises from permanent establishments and property located abroad. Netherlands and Australia exempt the tax on income from foreign, if the income is taxed in source country.[10] The existing provisions of international tax law by way of unilateral measures are not enough, to avoid double taxation, because the available rules does not cover all situations which arises to double taxation. It is to be accepted that unilateral measures lack in curbing/preventing the menace of international tax evasion which ultimately require a coordinated action by different countries.

International tax agreements signed by the countries, provides relief for an assessee from tax claims made by both governments, where each having a legitimate interest in taxing that particular source of income. It can be done, either by assigning the whole claim to one of the two countries or by dividing the tax claims between them.[11] The objective of these agreements is to eliminate double taxation of certain income, where a ***resident*** of one country receives income from a ***source*** in another country which ensure the facilitation of international trade and commerce, flow of investments as equitable collection of revenue, if there is absence of these agreements the income so generated is redirected to tax free or low tax countries or nil tax heavens.[12]

[9]Income Tax Act, 1961, S. 91.
[10]Walter Ryser, Introduction au droit fiscal international de la Suisse, 1980, p. 35).
[11]Ostime (Inspector of Taxes) v. Australian Mutual Provident Society, (1960) 39 ITR 210 (HL).
[12]D.P. Mittal, Indian Double Taxation Agreements and Tax Laws, Vol. 1, Taxmann (2007, at p. 186).

The Agreements aim to achieve the objectives by:

i. Providing a Clarification, where a source country may tax non-resident in respect of certain types of income,
ii. Specifying the Limit on the rates of tax, as a source country may apply to certain types of income
iii. By giving foreign tax credits in the residence country against the taxes paid in the source country.

Based on the above classification, clarification and assignment of jurisdiction of tax rates agreed by the countries, prevents tax evasion by exchanging information which avoids double taxation. Another benefit to the taxpayers is that to some extent, a tax treaty contains non-discrimination related to foreign tax payers or the permanent establishments in the country of source as compared to domestic taxpayers, by which the resident citizen and foreign tax payer are treated only as tax payer. Usually, every treaty contains a 'nondiscrimination' article.[13] A provision to this effect was also added in the Indian *Income Tax Act, 1961* as amendment by the *Finance Act*, 2001.[14]

Tax treaties signed between the countries help a taxpayer to identify his tax liability in other country, and these treaties play an important role in promoting international investment i.e., foreign investment and transfer of technology. Until, a particular tax treaty is revoked or amended, the foreign taxpayer has a clarity about the percentage of tax liability in source country, which the domestic taxpayers of the residence country do not generally have because of the unilateral sovereignty of the domestic legislature to make amendments in tax laws. These tax agreements generally provide various kinds of administrative assistance, like assistance in recovery and collection of tax by sharing essential documents. Assistance is defined broadly by initiating action against one who is liable both directly and indirectly for non-payment of tax.[15] These provisions widen the applicability of domestic tax powers in another jurisdiction. Under this clause, the requested state recovers tax claim from the applicant as if they were his own taxing state.

[13]Article 24 of the Model Convention of OECD (22 July 2010).
[14]Income Tax Act, 1961, Explanation to section 91.
[15]Karen B. Brown, Brooklyn Journal of International Law, Vol. 15, (1989, at p. 66).

HISTORICAL DEVELOPMENT OF TAX TREATIES

The Knowledge of tax history is essential and also a basic foundation for understanding the current tax practice and the past tax system prevailed, for initiating the possibility of future tax reform. This includes some information on what has been practiced before, how these methods worked, why they were discarded, what are the historical developments occurred and why various tax relationships exist now and so on.[16]

It is to be specifically noted that, the problems in the international taxation are of not recent one. It exists even during the ancient and Middle Ages. During the Middle Ages theologians and canonists discussed the context of property taxes, the moral right of one city or kingdom to tax the wealth situated within its territory owned by a foreigner, or wealth owned by its own subjects situated in other kingdoms. These conflicting claims were settled by following '*situs rule'* in case of immovable property, however in the case of taxation of movable property the problem had continued. In May 1819, the Dutch introduced a law, which provided that foreign ships would be exempted from paying a license tax *(droit de patente)* where the country whose flag the ship flew granted a similar exemption to Dutch ships.[17]

Great Britain introduced a law in 1823, which declared that any country could export goods to the British colonies in its own as well as in English ships on the condition that the corresponding privileges were granted by the countries benefiting from that law.[18] In India, the problem came only when the income tax was first levied on 1860 by the provinces of princely states and also by the British Government at the centre.[19] It was decided that the lesser of the two taxes imposed on the same taxpayer will be refunded to the taxpayer by the Government of the British India and that the cost of the refund will be borne equally by the two taxing authorities. But in United States, the *Revenue Act of 1918* introduced adaptation of foreign tax credit.[20] Allowing a credit rather than a deduction for foreign taxes was a brave move that exposed the United States to significant revenue loss. All these happenings were unilateral in nature and have not contributed much towards the development of tax treaties.

[16] Paul Hewitt & Andrew Lymer, Lynne Oats, "History of International Business Taxation," (2002, at p. 43).
[17] J. Herndon, Relief from International Income Taxation, (1932, p. 11).
[18] J.L. Laughlin & H.P. Willis, Reciprocity, The Baker & Taylor Co, (1903, p. 5).
[19] C.L. Jenkins, "1860: India's First Income Tax," British Tax Review, Vol. 1, (2012, p. 87).
[20] Revenue Act of United States 1918, Sections 222(a) (1), 238 (a) and 240 (c).

Before the First World War there were only few tax treaties and only few countries participated in the conference on treaties. But there existed a doubt regarding the long-term validity of these treaties in modern international tax relations. The early treaties signed were shorter in contents than the present one, however the essential elements (reciprocity, residence and source) remain the same.[21] The earliest agreement specifically in the field of taxation was signed in 1843, was between France and Belgium regarding administrative cooperation between the two countries regarding tax matters. Under the agreement, officials incharge of the land register offices were required to share, documents and information which would assist the effective and regular collection of taxes imposed by the laws of the two countries, or estates in which these countries are alternatively interested. The first steps, which ultimately led to the formation of international tax regime after the First World War can be discussed under the following heads.

THE LEAGUE OF NATIONS

In Geneva Conference, 1921 the Economic and Finance Commission of the League of Nations recommended, that double taxation should be avoided by agreement between nations. To facilitate and proceed with this process two committees of experts, namely the Committee of Economic Experts (CEE) and Committee of Technical Experts (CTE) were constituted. The CEE submitted their report on double taxation in 1923 and the CTE submitted their report on double taxation and financial evasion in 1925. The enlarged CTE submitted its report in 1927. The reports submitted by the Committee of Technical Experts and enlarged committee of technical experts were then considered by a general meeting of Government experts. This general meeting of government experts consisted of representatives of 27 countries and gave their first draft in 1928.

After considering the new emerging problems and various improvements made in tax treaties the Fiscal Committee on 1939, recommended revised draft of 1928. This codification was made by a sub-committee, which came up with a model convention namely, **'Bilateral Convention on Preventing Double Taxation and Financial Evasion'** otherwise called as **'Mexico Model Tax Convention, 1943'**. On March 1946, the Tenth Session of the Fiscal Committee was held at London, which further reviewed the Mexico Model, and this review is popularly known as **'London Model Convention, 1946'**. Mexico Model gave exclusive

[21] Sunita Jogarajan, 1815-1914 Early Tax Treaties," Oxford Journal of Legal Studies, Vol. 31, (2011, at p. 684).

jurisdiction of taxation to source country, but London Model sought to encourage capital flow from industrialized countries to developing country by giving exclusive jurisdiction to the country of residence.

CONTRIBUTION OF THE OECD

Based upon the two model conventions developed by League of Nations, the Fiscal Committee of **"Organisation for Economic Cooperation and Development (OECD)"** felt to make some changes. This committee prepared four reports from 1958 to 1961 and came out with a final draft popularly called as "OECD Model Convention 1963". The 1963 Convention had small differences from London Model Convention given by the League of Nations. However, this convention has great impact upon the subsequent negotiations on tax treaties, as it was a reference material for bargaining tax claims.[22]

The Convention and its commentary had consistently elaborated and revised by the organisation based on the experience and developments faced by it. The organisation came out with its Second Model Convention along with commentary on 1977, and this was further improved in 1992. Subsequently, the Model Convention has been revised in the years 2000, 2003, 2005, 2008 2010, 2014 and 2017 respectively. The main approach which is followed by the OECD Convention is that the **"residence country"** will avoid dual taxation and the **"source country"** will reduce its jurisdiction to tax.

UNITED NATIONS

In 1965, Secretariat General of UN expressed concerned about existing tax conventions did not fulfil the needs of the developing countries due to which there is a need for appropriate treaty. Further, Economic Council also expressed their belief that there is a need for treaties on taxation with developing and developed countries, so these treaties could promote the flow of investment which would be helpful for economic development of developing countries.

Based on the request of Economic council, **"UN Adhoc Experts Group"** was set up on 1968 comprising eighteen people, ten from developing and eight from developed countries. Later, two more experts from different countries were added. The group organised a number of

[22] Report of the OECD Committee of Fiscal Affairs, (Chapter II Para 9, 1977).

meetings from 1968 to 1979 and prepared eight reports. It also formulated few guidelines which provide technical assistance for the formulation of future treaties. Based on these guidelines, a Draft Model Convention was prepared by the UN Secretariat. This Draft was reviewed by the group and final text of the convention was adopted at Geneva in December, 1979. This convention was reviewed and updated in 2001, 2011 and more recently in 2017.

CLASSIFICATION OF TAXATION AGREEMENTS

1. Double Taxation Avoidance Agreements
2. Agreement on Exchange of Tax Information
3. Agreements on Administrative Assistance

ANALYSIS OF DOUBLE TAXATION AND MODEL TAX AGREEMENTS

The model Tax convention developed by OECD and UN were applied in all taxation convention, which acts as genuine and transparent in 'International Taxation System'. In case of variation in these treaties, it is only the intention and financial policy of that particular country. India's bilateral tax treaties consists of **"Double Taxation Conventions and exchange of tax information"** both are essentially the need of the hour in preventing the tax evasion and increasing the nation's tax revenue for developments.

PREAMBLE

Preamble contains the aim and objectives for signing the agreement with two governments for avoiding dual taxation and preventing financial evasion. One cannot find any difference from this objective which is similar in all tax treaties.

TAXES COVERED

The word 'Tax' has neither been defined in "Model Conventions nor its commentaries". However, the terms 'Tax' and 'Taxation' are frequently used in tax treaties. They are not interchangeable and give different meanings. According to Webster's Dictionary and

Encyclopaedia 'Taxation' is defined as an act of collecting tax or a process of taxing, whereas 'Tax' is defined as a compulsory levy upon income or property.[23]

Generally, Article 2 of the Double Taxation Conventions define taxes covered. The article of OECD draft Convention is reproduced as unchanged in UN draft Convention. The main intention of this article is to know whether the treaty applies to the taxes in question. OECD has highlighted its intention of having this article as follows:[24]

i. By fixing the standard terms and conditions of taxation,

ii. By analysing the taxes covered by the convention,

iii. By incorporating the treaty provisions in the domestic laws,

iv. By preventing new treaty or amending the existing one in the event of changes in the municipal law,

v. By providing information about the changes in the taxation laws to member states.

RESIDENT

The advantages of tax convention applicable only to the individuals who are the **"resident"** of the member states. To claim the benefits of residence, the residential status of the individual is determined based on the municipal law of the member state. It is classified that, when an individual is a citizen in country X, and habitually residing over the period exceeding six months in country Y, then both the countries may claim him to be a resident under their domestic laws respectively. In such cases, the treaty proceeds to assign a single state of residence to such person.[25] Thus, the main idea of the concept **"residence of an individual"** can be highlighted as follows:

i. It determines application of personal scope of the individual,
ii. It resolves the conflicts between two residences,

[23] Webster's Unified Dictionary and Encyclopaedia, Webster's Unified Incorporation, New York, 1970, p. 1649.
[24] OECD, Commentary on Model Convention, (Article 2, Paragraph 1, 2010).
[25] C.I.T v. P.V.A.L. Kulandagan Chettiar, (2004) 267 ITR 654 (SC).

iii. It resolves the conflict between residence and source jurisdiction.

The phrases defined in, both OECD and UN draft Conventions are similarly worded, except in UN draft Convention 'place of incorporating' (setting up of the business or company) is expressly mentioned as a criterion for availing the advantages of the convention. In case of Indian treaties are concerned, some of them use a word '*Fiscal Domicile*' instead of *'Residence'* in the title. Domicile referred as civil rights.[26] It determines a person's personal status and the law applicable to him in the matters such as majority or minority, marriage, divorce or succession.[27] But on the other hand, 'citizenship' refers to a political status of an individual conferred usually by way of some law, and 'residence' refers to physical connection with a particular territory.[28]

PERMANENT ESTABLISHMENT

This article provides relevant taxable jurisdiction of Multinational Companies having physical existence in several jurisdictions by attaining profits.[29] In the event when a company having its branches at several countries, then each of the branch is defined as permanent establishment at that particular country, subject to be taxed with respect to the profits received by the branch at their particular jurisdiction. By doing so, the income earned by the principal company in other country is exempted from taxes as the taxes are paid in the source country. The other important functions of defining permanent establishment are:

i. An investor may invest his capital in other jurisdiction, in a deposit or an asset or in business. The investment income connected with permanent establishment (PE) is always treated as business income and not as royalty, interest, dividend or capital gains.

ii. The employment remuneration paid to the employees of PE is taxed in state of PE irrespective of the duration of stay.

[26] Shrivas Rajeshkumar Satyanarain v. The Chairman Selection Committee, AIR 1987 Guj 4.
[27] K. Radha Krishnan Nayyar v. Radha, AIR 1992 J & K 1.
[28] D.P. Mittal, International Agreements related to Taxes, (2007, at p. 379).
[29] OECD Model Convention, 2010 (Article 5).

ASSOCIATED ENTERPRISES

Associated enterprises are those which is the subject matter of, same centre of direction, control or management, or if an entity involves expressly or impliedly towards the administration and governance of other entity in the decision making. Due to their relationship and association with each other, they try to move the profits to a low tax country by altering or manipulating the financial transaction. For example, an associated enterprise in jurisdiction USA may overcharge its own subsidiary in Jurisdiction INDIA to shift the profits from jurisdiction INDIA to jurisdiction USA. The main motive being to lower the tax burden, as jurisdiction USA is having low tax rates. This is why this specific field of taxation has been labelled as 'transfer pricing'.

The Article 9, related to associated enterprises, allocates/transfers the overall profits derived by such enterprises, in accordance with functions actually performed and risks actually borne by them.[30] The first para of this article contemplates the general rule that, the tax authorities of one jurisdiction may increase the taxable income of an enterprise, if there is a variation in profits amongst two associated enterprises as compared with two non-associated enterprises. The second para deals with the financial adjustments in the other jurisdiction as an upward adjustment in one jurisdiction shall have a corresponding effect of downward adjustment in another jurisdiction. Which in turn creates a bogus records or transfer of profits to another jurisdiction and impacts the revenue loss to the particular jurisdiction. This is done to prevent dual taxes on the same value.

Indian double taxation conventions are following the Model Conventions in substance with some variations. Some treaties have given an overriding effect to the domestic law in place of treaty provisions (which means the domestic laws are superseding and prevailing over the treaties).[31] Therefore, the provisions under the domestic law of India shall apply in such cases.[32] Some treaties have omitted the provisions of second paragraph relating to financial adjustments.[33]

[30] OECD Model Convention, 2010, Article 9; UN Model Convention, 2011, Article 9.
[31] Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Malta, 1995, Article 9.
[32] Income Tax Act, 1961, Sections 92 to 92F.
[33] Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Singapore, 1994, Article 9.

NON-DISCRIMINATION

Article 24, of the treaty contains a non-discrimination clause which is similar in both the draft conventions and is divided as paras.[34] 1st para states, that similar relief to be provide to the residents of member states (irrespective of nationals and non-nationals). This treatment is extending to all individuals who are residents of member states. This similar relief does not permanent one and it is subject to the prevailing situations between the member states.

The second para deals with the persons who are stateless, but resident of a contracting country. Such persons can also claim the benefit of equal national treatment under this para. The third para provides equal treatment to permanent establishment of other contracting state, in relation to the taxes levied upon the entity of the state carrying same activities in that state.

EXCHANGE OF INFORMATION

Article 26, of both the draft conventions relates to exchanging information to the appropriate officials of the member states. Based on the commentaries provided in the OECD draft Treaty, this provision is incorporated to provide administration support in applying the relevant clause to the particular individual. The information shared by the officials of both the member state will helpful in the process of preventing tax evasion and assessing the tax returns filed by the individual.

All the information which are shared by the officers related to taxes are kept as secret and revealed or disclosed only in the court of law, and not to anyone else. The provisions in the Article are not restricted by Article 1 (persons covered). Therefore, the contracting countries can share information regarding residents of third countries available to them however subject to the secrecy provisions. The reference to Article 1 is not included in many of India's treaties. In that case, the obligation to supply information does not exist.

The Second para states that, the contracting state can refuse to share information on following cases:

i. *Where the contracting state has to implement the laws of other country?*

[34]OECD Model Convention, 2010, Article 24 & UN Model Convention, 2011, Article 24.

ii. *Where the information cannot obtained according to their country laws?*

iii. *Where the sharing of information will be prejudice the sovereignty and public policy of their country?*

Due to these limitations, as mentioned above in para 2, this article is an important tool for preventing international avoidance and evasion of taxes.

CONCLUSION

The International law, is always a law of cooperation, friendship, unity and recommendatory in nature. Each and every nation has its own sovereignty and integrity and it cannot be questioned or objected by the other nations in the international forums. The international community promised themselves, that they will not interfere with the internal affairs of the nation, even though it is a member. They will impose sanctions and other administration measures against the state who involve in inhuman act. Similarly, the international taxation law is also recommendary and obligatory in nature. Each and every country has its own foreign policy and internal administration it should not be compromised for the others. Taxation being the sovereign right of the state and describes their position to the world, so relinquishing or give away the tax claims in favour of other nations are unacceptable by the nations and they also not do it. The jurisdiction of the country to tax its resident and nonresident depending on their municipal law is their vested right.

If the country tax their resident and non-resident (resident of some other state) double taxation will be incidence on the individual. If the person is identified as resident in one country and non-resident in his country, he is subjected to tax on both countries. This creates double taxation and the individual will sometimes involve in tax evasion by hiding his income in other country or Tax Heavens, which not only reduce the revenue to both the government but also the funds may be used for illegal activity.

To avoid the double taxation by preventing tax evasion and exchange of information in collecting the taxes effectively, the OECD and UN drafted the model convention as Double Taxation Avoidance Agreement (DTAA). With this DTAA's country across the world can sign DTAA with other country, either bilaterally or multilaterally for preventing double taxation and exchange of information. India being the signatory of the DTAA's with more than 195

countries to avoid dual taxes. This has not only prevented dual taxation but also maintains a friendly relationship with the member country in administrative assistance on tax cases and mutual agreement procedure helps the assessee filing the returns.

These DTAA has played a significant role in preventing tax evasion and single tax is imposed on the assessee. In the event of non-payment of taxes in both the country, then exchange of information is used to collect the tax dues. The International Tax Agreements to some extent prevent the double taxation and determined the classification of the taxes to be collected by the source country and tax collected by the resident country. Which result in the harmony of tax claims and the individual is paid single tax and the nations taxing sovereignty is not compromised. In the event of tax collection is in foreign jurisdiction, the member country will provide all possible help in courts and judicial forums.

Now the current position of these DTAA's is to be taken in to consideration before concluding its effectiveness. These agreements play an important role in the smooth functioning of the government and in deciding the administrative matters and foreign policies relating tax disputes. The tax dues of the foreign entity and NRI's had been settled and adjudicated with the best support of the contracting states, even during the period of covid pandemic. The cooperation, assistance and support rendered by the contracting states towards India and India to others are highly remarkable, related to the taxation policy. The revenue generation and collection boosted the economy from bottom to top within few months of the covid normalcy. These all are best possible only with the help and support of the DTAA agreements and the organisations such as OECD and UN.

INDIA'S BANKRUPTCY LAW AND COMPARATIVE ANALYSIS WITH OTHER COUNTRIES

Akhilesh Kumar[*]

ABSTRACT

Bankruptcy is one of the few systems by which corporate control can be moved to additional effective proprietors in the event of market economies. Notwithstanding, monetary business sectors are in many cases viewed as in their outset in nations that are going through progress from midway wanted to showcase economy, where securities exchanges are still in their developmental stage and liable toward remain illiquid for some time. This study looks at a comparative connection of Indian then different nations like USA, Russia, indebtedness & bankruptcy regulations after distinct and corporate forthcoming and examination of the regulative system. This paper covers the critical changes and substitution complete in past connected Acts for carrying out the new amendment of the bankruptcy code with indebtedness goal and liquidation procedure with detailed history of bankruptcy. In this specific situation, the different regulations in economies like U.S.A., Canada, U.K., China and Russia are examined toward illuminate the issue of bankruptcy. The legitimate societies and the verifiable foundation engaged with these regulations are investigated.

Keywords: Insolvency, bankruptcy, IBC, US bankruptcy code

INTRODUCTION

The Indian bankruptcy system has gone through a memorable alteration through the approaching of the IBC 2016. When the arrangements of this Code connecting with corporate insolvency were advised, the main instances of bankruptcy began being conceded in the courts and the last requests on these cases turned into the principal openly available reports of India's new indebtedness and bankruptcy system. Insolvency systems in India as well as the whole way across the world have gone through a range of changes. An insolvency framework of a country not just affects the simplicity of working together positioning yet in addition thusly significantly affects the country.[1]

Bankruptcy implies the inability to reimburse obligations. It put on together toward disappointment of business association as well as distinctive individual bankruptcy, yet the Insolvency is typically indicated toward commercial or corporate bankruptcy. [2] Once more, bankruptcy orobligation suggests deficiency toward recompense commitments upon the date when they develop due in the standard progression of commercial; the condition of an individual whose possessions then assets are lacking toward deliver the singular's commitments. It is the condition of having additional commitments (liabilities) than hard and fast assets which might be open to pay them, whether or not the benefits were sold or sold. Corporate bankruptcies happen on the grounds that organizations become incredibly obliged. Bankruptcy is typically grouped into two, "income indebtedness and accounting report bankruptcy".

There is a contrast between two the restricted idea of income bankruptcy "not capacity get together with business commitments emerging from day today deal with outsiders; and the more extensive idea aimed at the subsequent one is somewhere the obligations of the organization more than the resources of the organization. The fundamental issue in that particular condition wouldn't remain the drawn-out practicality of the commercial however a transient defers the income, which can be right finished different Methods. In some cases, indebtedness and bankruptcy are utilized conversely. Be that as it may, the legitimately both are not having same significance internationally. Albeit these words basically convey similar significance in numerous frameworks. It is a lawful interaction for the recuperation of neglected obligations by leasers and furthermore It is a

[1] Javish Valecha & Ankita Anupriya Xalxo, "Overview of The Insolvency and Bankruptcy Code, 2016 & The Accompanying Regulations", (2017)
[2] Dr. Rupinder Katoch, "Insolvency and Bankruptcy Code,2016: Features, Mechanism and Challenges in implementation", 7, *INT. J IT &E (2017*

legitimately approved process by which a debt holder is ease of complete risk for its obligations by choice of court for their fractional instalment.

Liquidation permits people then business that can't pay their monetary commitments to be invulnerable from reimbursing some or the entirety of their neglected obligation. Bankruptcy has been in attendance subsequently outdated events. It additionally safeguards people who have develop overload through their obligations. Bankruptcy systems are corrective in wildlife and are to guarantee that people who can't pay their monetary commitments remain excluded from business, dynamic place and functioning by way of callings, with the exception of they are filling in as a worker. This is the justification behind the order of the Bankruptcy Laws and is the main reason for the organization of insolvency appeal. despite the abovementioned, the procedures can be favourably utilized.

The different market economies are portrayed by these two methodologies basically. In any case, contrasts creep as far as more significant level of security reached out to either the creditors' side or the debtors' side[3]. Its regulations in the United States and France stand at one limit of the range where moderately less weight is concurred to bank's privileges. Rebuilding or liquidation is started on a court choice under the solicitation of the indebted person or the leaser. The regulation pursues an arrangement for agreeing between the indebted person and the leaser inside the insolvency methodology or outside liquidation, through a wilful structure strategy.To recuperate obligations because of them by borrowers upon the consistence with specific circumstances point of reference and the commission of any of the demonstrations of liquidation gave under the Act.

HISTORICAL BACKGROUND

The word “bankruptcy” racked down its starting point in Italy during the archaic period. During that time, when a finance manager couldn't pay his obligations, the typical practice around then was to obliterate his "exchanging seat". From the expression "broken seat" or "banca rotta" started "bankruptcy". The notable tradition in the U.K and Continental Europe implied that bankrupts have customarily been treated with disdain. The essential centre has been to recuperate the interest of the loan boss and remain fairly hesitant towards the government assistance of the borrower or thoroughly overlook the indebted person, who was much of the time thought about a crook. In the

[3] Creditors under India's Insolvency and Bankruptcy Code, 2016: Issues and Solutions' *94 Am Banker LJ 123* (2020)

Middle Ages in England, for instance, punishments could be draconian and range from a spell in the debt holder's jail toward capital punishment.

The monetary disturbance of the Civil War in North America constrained the Congress to pass a regulation in 1867, which was revoked in 1878. These regulations contained some stipend for the release of neglected obligations. The initial two regulations, those of 1800 and 1841, permitted just insignificant release of obligation. The 1867 regulation was quick to incorporate security for the partnerships.

Notwithstanding, things have changed a great deal in the current situation. The disdain with which the borrowers we viewed with by the general public has changed a ton.

Subsequently, there has proactively happened a progress in the chapter 11 situation in the whole world economy and the cutting-edge regulations are a simple impression of this extreme change. Present day liquidation regulations and practices in the United States accentuate recovery or redesigning debt holders in trouble. The liquidation demonstration of 1898 gave corporates the choice of being safeguarded from leasers by means of a "value receivership."

The initial bankruptcy regulation in the US appeared in 1800. This regulation remained cancelled in 1803 and was trailed through the Act of 1841. The 1841 regulation was revoked in 1843 and was prevailed through the Act of 1867, which was revised in 1874 then was subsequently cancered in 1878. The Nelson Act of 1898 turned into the principal current Bankruptcy Act in country. The following current liquidation regulation was authorized in 1978 by the Bankruptcy Reform of 1978. The Bankruptcy Abuse Prevention and Consumer Protection Act (2005) is the latest revision to the 1978 law. [4]

The rearrangement arrangement was made substantially more formal and broader in the United Sates during the 1930s by means of the Bankruptcy Acts of 1933 and 1934 and the Chandler Act of 1938. These regulations laid out the significant mainstays of administrative structure in the United States until the last part of the 1970s when the Bankruptcy change Act of 1978 was passed on October 1, 1979. The 1978 Bankruptcy Reform Act considerably patched up practices, specifically with the production of a solid business redesign.

[4] Aghion, Phillipe, Oliver Hart and John Moore, 1992

There have been a couple of revisions from that point forward with the Bankruptcy Reform Act of 1994, for instance. Nonetheless, the abundance of regulation in the United States has established a climate and culture in which the center is obviously upon the rearrangement and restoration of the account holder.

Regarding the Tiwari Committee (Department of Company Affairs), the Sick Industrial Companies Act of 1985 was introduced in 1981. In light of the Narasimham Committee I (Reserve Bank of India), the Recovery of Debts Due to Banks and Financial Institutions Act of 1993 came into effect in 1991. In addition, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was introduced in 1998 with regard to the Narasimham Committee II (Reserve Bank of India). The Companies (Amendment) Act of 2002 was enacted as a result of the Justice Eradi Committee (Government of India)'s 1999 proposal to repay the Sick Industrial Companies Act of 1985. The L.N. Mitra Committee (RBI) then proposed a comprehensive insolvency code in 2001. The Irani Committee (RBI) considered the Enforcement of Securities Interest and Recovery of Debts Bill, 2011 in 2005 and proposed amendments to the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Recovery of Debts because of Banks and Financial Institutions Act, 1993.

In 2008, the Raghuram Ranjan Committee (Planning Commission) made specific advances that had the potential to improve the country's credit framework. In the end, in 2013, the Ministry of Finance's Financial Sector Reforms Commission considered the draft of the Indian Financial Code which truth be told accommodated a corporate-goal component for settling monetary issues of the troubled firms.

Directly following the accompanying ground real factors, in particular:

i. India being positioned 130 out of 189 nations such a long way as Doing Business (2015) is worried;
ii. India being positioned 136 out of 189 nations such a long way by way of Resolution Insolvency (2015) is concerned;
iii. The Provincial Insolvency Act of 1920 and the Presidency Towns Insolvency Act of 1909 are both old, with the former pertaining to extremely old regulations;
iv. Corporate bad debts, which account for roughly 56 percent of the total bad debts of the Nationalized Banks; The last report prepared by the BLRC, which suggested the section of the Insolvency and Bankruptcy Code, 2015, was presented by the BLRC (Bankruptcy Law

Reforms Committee), chaired by the Former Secretary General, Lok Sabha and Former Union Law Secretary, Mr. T.K. Viswanathan, on November 4, 2015.

LITERATURE REVIEW

Many creators accept that bankruptcy's expansion in US on account of American corporate avarice (Lou Dobbs, 12/04). As per Dobbs of CNN News[5], ravenous partnerships are trading American positions abroad. Eyewitnesses they have perspectives like Dobbs', claims that US enterprises just consideration for benefits and could do without the government assistance of their kin. Most large companies have laid out assembling plants in modest work nations like Mexico, China, Korea and Malaysia.

HP has re-appropriated its deals administration capacities toward India. To be sure, now, it is challenging to track down merchandise made in USA. Brazil, China and India have been a portion of the nation's decision with regards to Banking, mechanical, monetary administrations as well as assembling tasks for US organizations. However, at that point liquidations remain on the vertical pattern smooth in nations anywhere US out bases' tasks. Moreover, it ought to be noticed that smooth socialist before communist nations similar Ukraine, China and Russiaare encountering a flood in liquidations or bankruptcies as they are brought in European nations. [6]

U.S. bankruptcy framework was achieved through the country's industrialist framework which recompences entrepreneurialism upheld through incredible purchaser outlay. It appears to be sensible that such a framework ought to consolidate a generous framework to energize and support high buyer spending. A similar excusing bankruptcy framework would permit business revamping, energize risk taking and monetary development. Excusing bankrupt people and organizations keeps free enterprise alive and ready to recharge itself extra time and the idea of another beginning is integral to legitimate working of somewhat important bankruptcy framework (Martin). Insolvent people then organizations would stress fewer assuming they distinguish that assuming they reduction in monetary issues, they wouldn't be demolished from the financial guide. In any case, would have a change to begin all once more or redesign and endure the monetary disaster

[5] Dobbs, Lou and Joanne Myers. Exporting American Jobs Overseas, *CNN Money*, December 2, 2004
[6] Chung, Olivia. Bankruptcy Law to Protect China Investors, China Business, June 9, 2007. available at: http://www.atimes.com/atimes/China_Business/IF09Cb01.html (Last visited on June 10th 2022)

(Braucher, 2006).[7] As a matter of fact, insolvency may not remain all awful. This opinion is upheld by Matur (January, 2007) who referred to investigate which discovered that perhaps the most ideal way to urge individuals to begin organizations is to have permissive liquidation regulations.

A decent indebtedness system ought to restrain the untimely liquidation of economic organizations. It ought to likewise deter moneylenders from giving high-risk credits, and administrators and investors from taking rash advances and pursuing other foolish monetary choices. A firm experiencing unfortunate administration decisions or a transitory monetary slump can in any case be convoluted. At the point when this occurs, all partners benefit. Lenders can recuperate a bigger piece of their venture; more representatives keep their positions, and the organization of providers and clients is protected. Concentrates on show that viable changes of leaser freedoms are related with lower expenses of credit, expanded admittance to credit, further developed lender recuperation and reinforced work safeguarding. If toward the finish of bankruptcy procedures, loan bosses can recuperate the common of ventures, it can remain investing in companies then working on organizations' admittance to credit. Likewise, on the off chance that a liquidation system regards the outright need of cases, got leasers can keep loaning and trust in the bankruptcy framework is kept up with.[8]

The researcher analyses that Nonperforming resource is the significant worries for booked business banks in India which enormously affected the productivity and liquidity of the banks. An endeavor is complete toward comprehend idea of NPA, status of NPAs in Indian Scheduled business banks and recovery of NPAs through different significant channels. The creator firmly recommends that it is important to manage down the NPAs for working on the monetary soundness of banking framework. (Armour J.)[9]

This paper highlighted that it is important to present transformed in Insolvency and Bankruptcy code to make work effectively. The scientist has attempted to analyze the contrasts between current code and past systems and recommended that speedier activities would be needed in Collection of credit data about indebted individuals, Preparation of data update by goal capable ,Set up of data utilities which will lessen the difficulties to stay away from delay in forthcoming cases before

[7] http://ssrn.com/abstract=9125610, (last visited on June 10th 2022)

[8] Armour, J., Menezes, "*A., Uttamchandani, M., Zweiten, K. V, how creditor rights affect debt finance".* In Dahan, F. (Ed.), Research handbook on secured financing in commercial transactions (pp. 3–25). (Edward Elgar Publishing 2015).

[9] Dr. P.N. Hari Kumar & Dr. Susha D, "Recovery of Non-Performing Assets in SCBs in India",7, *720 INT.J* (2017):

NCLT seats because of non-accessibility of indebtedness experts Absence of Information Values , Non accessibility of skilled experts , Shortage of NCLT seats , Development and Monitoring of IP's ,No Consensus among Lenders .He likewise closed significant expense of Bankruptcy Resolution Process additionally amounts to the distress and challenges in the way of indebtedness measure.(Dr. Rupinder)[10]

(Javish Valecha)[11]The researcher recognized the way that the Code is a one of its sort enactments which will patch up the entire indebtedness and system in India. The scientist underscored on the way that the new law will give a period bound structure to settling bankruptcies. According to the scientist the new system is tantamount to global norms and is drafted in a manner that should improve simplicity of working together positioning and yet its prosperity relies upon its execution perspective with respect to how well it is being carried out. The analyst accepts that there will be parcel of common sense and lawful issues which might hinder the way in the effective execution of the code.

Nishith Desai (2019): [12] The influence of IBC arranged the Indian obligation market in its beginning phases was inspected by the specialist. As per the specialists, there are different snags to the Code's legitimate execution. As per the expert, valuable legal understanding, just as effective Code alterations, have supported the goal of numerous troublesome cases. The administrative and administrative position, "IBBI" as indicated by the scientist, has been making an admirable showing in proactively raising information Renuka Sane (2019):[13] The expert was of the opinion that administration had just informed business indebtedness share besides not the individual bankruptcy when it approved the IBC in 2016. The creator believes that the situation of Indian recognition marketplace requires the requirement for the individual bankruptcy law. The paper was a concise show of the arrangements on close to home indebtedness in the IBC. The creator brands ideas on inquiries of strategy which remain needed toward be talked before the significant execution of Regulation to guarantee legitimate plan of the subordinate enactment just as the advancement of the institutional substance. The originator is of the assessment that obligation to

[10] Dr. Rupinder Katoch, "Insolvency and Bankruptcy Code,2016: Features, Mechanism and Challenges in implementation", *7, INT. J IT &E (2017)*

[11] Javish Valecha & Ankita Anupriya Xalxo, "Overview of The Insolvency and Bankruptcy Code, 2016 & The Accompanying Regulations", (2017)

[12] Nishith Desai Associates, "Analyzing 2018 Through the Insolvency Code and Bankruptcy Hotline" (2019)

[13] Renuka Sane "The way forward for personal insolvency in the Indian Insolvency and Bankruptcy Code" 251, *NAT.L I. PUB. F. &P*, January (2019):

GDP proportion in India is a lot more modest when contrasted with other arising or created economies. According to the creator despite the fact that NPAs on close to home advances from the financial area are nearly more modest rather than the modern advances still their constantly rising nature calls for addressal of individual bankruptcy issues even.

OBJECTIVES, SCOPE AND SIGNIFICANCE OF THE STUDY

The object is to investigations the idea of IBC. In this paper the different examination works completed on IBC. To examination patterns in the bankruptcy change regulations around the world. To concentrate on types and paces of progress across various legitimate and social frameworks around the world. To merge and correct the regulations connecting with revamping and bankruptcy goal of corporate people, organization firms and people.

While the significance of a well-working indebtedness goal structure is very much perceived, various nations have moved toward it in an unexpected way, to such an extent that there is no single, globally acknowledged administrative system for sorting out a productive bankruptcy goal process. These distinctions originate from contrasts in the hidden monetary setting, lawful practices, institutional designs and political economy of a country. Besides, bankruptcy regulations have seen advancement oversignificant time frames in light of the changing necessities of the partners.[14]

METHODOLOGY

Data utilized in this similar review was gotten from distributed intelligences then sites of the nations considered then furthermore after the Net. The future research effort is Doctrinal Research. Hereafter, this idea is simply founded happening the assets after public library, online information bases, periodicals, paper, diaries, then different education capitals.

To delineate the idea that liquidation rehearses are formed by the way of life of every country, we will introduce similitudes and contrasts in those nations' legitimate change structures. The nations picked show variety regarding political and monetary frameworks. The nations are: the Canada, Russia, USA, the UK and China, and. The USA & the UK address Western financial & political

[14] Sharma, A., Sengupta, R. Corporate insolvency resolution in India: Lessons from a cross-country comparison (WP-2015-029*). IGIDR* (2015).

direction while China is after the distant east location of the world. It should call attention to, however, that each gathering of the nations picked part additional commons inside the situation then show significant contrasts through the additional meeting. The explanation being that these nations have different monetary and general sets of laws which have developed locally over the long run. Subsequently, they have been seeking after chapter 11 changes in light of their one-of-a-kind financial issue.

THE INSOLVENCY AND BANKRUPTCY CODE, 2016- KEYASPECTS:

"In One line we can say that in case of a default by the equity owners to meet their debt obligations, control is transferred to the creditors and equity owners take a back seat."

- The 2016 Code suggests a change in outlook after the current system 'Borrower in- Possession' to "Creditor-in-Control"
- The 2016 Code targets solidifying altogether the current indebtedness connected regulations because revising numerous regulations counting the Companies Act, 2013[15]
- The 2016 Code by ideals of Section 238 of the Code overriding touches somewhat residual rules linking with bankruptcy and liquidation.
- Part II of the 2016 Code manages bankruptcy goal and insolvency of corporate substances, through a large portion of the work concerning the indebtedness goal/insolvency been managed through the enlisted indebtedness experts underneath the oversight of the NCLT. When the business indebtedness process is started, the bankruptcy expert will be expected to shape a Committee of Creditors, and through their agreement endeavors determination be made to deliver an arrangement to resuscitate the corporate element.
- The corporate insolvency goal procedure is toward keep going for 180 days with additional greatest time of extendible season of 90 days more, by which endeavors determination be made to advance a goal intend to restore the debilitated element, nonetheless, in the event that the endeavors fizzle, the corporate individual will be sold in time-bound way. A 'Most optimized plan of attack Corporate Insolvency Resolution' determination be accessible to little corporate substances.
- Taking everything into account the NCLT is the arbitrating expert then NCLAT is the appellate expert.

[15] The 11 Schedules annexed with the 2016 Code

- The Code manages bankruptcy goal cycle and liquidation procedures qua the people and the organizations. There are two unmistakable cycles specifically, new beginning and indebtedness goal, aimed at the people then the organizations; these cycles are trailed by the 'chapter 11 request'. It is the DRT which will be the settling authority and DRAT which will be the re-appraising expert aimed at the people then the organizations such a long way as bankruptcy goal and liquidation procedures are concerned.
- The instrument of 'new beginning' is relevant just to those people whose pay is beneath Rs. 60,000/ - per annum and the obligation sum doesn't surpass Rs. 35,000/ -. Here the indebtedness goal will be taken care of by bankruptcy proficient with the DRT playing an administrative part.
- The 2016 Code isn't appropriate to the corporate elements in the monetary area, for example, the Asset Reconstruction Companies.
- Section 96(1) (f) engages the Insolvency and Bankruptcy Board of India to do assessments then examinations arranged indebtedness proficient organizations indebtedness experts and data utilities and from that point license such requests as might be expected for consistence of the arrangements of the 2016 Code and guidelines gave here underneath. Additional, Section 196(3) of the 2016 Code expresses the IBBI will have similar abilities by way of remain conferred in a common law court under the CP.C, 1908 while attempting a suit in regard's revelation and creation of books of records at such spot and such time as might be indicated by the Board; bringing and implementing the participation of people and analyzing them on pledge; review of books, registers and different reports of any individual at any spot; then ultimately, giving commands for the assessment of observers or archive.
- Arbitrating expert for business people most definitely is NCLT, though the investigative specialist is NCLAT. In contradiction of the sets of NCLAT an allure container remains linked to the SC of India in somewhere around 45 days of the receiving of the reviled request, the 2016 Code is exceptionally strong on this aspect. By prudence of the code, the ward of the common court is explicitly banished.
- Adjudicating authority for people and firms up until this point, a bankruptcy goal is concerned is DRT, while the investigative authority is DRAT. Against the sets of DRAT an allure can be linked to the Supreme Court of India in no less than 45 days of the receipt of the upbraided request, Section 182 of the 2016 Code is extremely clear scheduled this angle.

INTERMEDIARIES

IBC characterizes middle people in the bankruptcy cycle as indebtedness experts. For the incentives behind a goal cycle, indebtedness experts go about as:

i. Interim Resolution Professionals.
ii. Resolution Professional. Likewise, throughout a bankruptcy cycle, indebtedness proficient additionally assume the part of outlets of the corporate borrowers.

The interval goal proficient embraces the administration of the organization throughout the period among the initiation of the interaction besides the arrangement permanent goal proficient. This arrangement remains additionally expected toward remain supported through the NCLT and is dependent upon the affirmation of the planned goal proficient through the IBBI.

They controller aimed at directing bankruptcy procedures and elements like Insolvency Professional Agencies, Insolvency Professionals and Information Utilities in India.

The 2006 EBL sets out the managers as the mediators, assigned by individuals' court. As per it, a liquidation group is made out of people of the divisions or specialists concerned or a law office, an ensured public bookkeeper firm, a liquidation firm or some other public delegate office. Notwithstanding it, 2006 EBL states that a chairman may, upon endorsement by individuals' court, utilize the fundamental specialists. In any case, the said act doesn't characterize the capabilities and job of the specialists simultaneously, as it could jeopardize the nonpartisan and unbiased status of the manager towards the partners. Then again, the IBC lays out a channel of endorsement which keeps balanced governance and keeps up with the decency of the bankruptcy proficient.

In India, Insolvency proficient named by banks is mindful to deal with the business during redesign process. In China, court delegated executive is dependable to deal with the business during revamping process, accordingly this further includes trouble the piece of the court.

INSOLVENCY RESOLUTION PROCESS

The law makes an imperative take-off from the current goal by moving the charge on the lender to start the liquidation goal process against the organization debt holder. Under the current lawful blueprint, the essential commitment to start a goal cycle lies with the debt holder, and bank might follow separate activities for recapturing, security implementation and obligation reconstruction.

Bankruptcy Resolve then Insolvency Process for Corporates If the avoidance is overhead Rs.1 Lakh to Rs.1 Cr, the leaser whitethorn start indebtedness goal process. The Code suggests 2 autonomous stages:

i. Insolvency Resolution Process

This process has monetary leasers evaluate whether the account holder's commercial is feasible toward run then the choices aimed at its salvage then restoration ii. Liquidation

If the bankruptcy goal procedure comes up short before leaser decide toward close unhappy and allocate the resources of the account holder.

I. The Insolvency Resolution Process

The monetary leaser whitethorn starts business bankruptcy goal procedure on the off chance that a corporate debt holder default. "An application can be made to the "Public Company Law Tribunal" (hereinafter NCLT) for beginning the goal cycle. Functional loan bosses need to pull out of 10 days to corporate debt holder prior to moving toward the NCLT. On the off chance that corporate borrower neglects to reimburse levy, the functional leaser can move toward NCLT. This interaction will be achieved in somewhere around 180 days of getting of use by NCLT. After getting of use by NCLT, Creditors' cases will be frozen for 180 days, during this time NCLT will hear recommendations for recovery. In this manner, no coercive procedures can be sent off against the corporate borrower in some other under some other regulation, until endorsement of goal plan or until commencement of liquidation process. NCLT delegates an interval "Indebtedness Professional" (IP) upon affirmation by the Insolvency and Bankruptcy Board (hereinafter, "the Board") in the span of 14 days of acknowledgment of utilization. Break IP holds office for 30 days as it were. In-between time IP assumes command over the account holder's resources and company's activities, gather monetary data of the debt holder from data utilities. NCLT makes public notification be made of the inception of corporate indebtedness cycle and calls for accommodation of cases by some other banks."[16]

II. Liquidation

[16] Available at: www.ibbi.go.in, (Last visited on June 11th 2022)

The start of liquidation procedure happen inability toward present the goal plan toward the NCLT inside the assumed historical, before dismissal of goal strategy for rebelliousness through the prerequisites of the Code, or else choice of loan bosses' panel in light of vote of larger part, or contradiction of goal plan by the account holder. During this interaction, no different procedures will be founded by or against the borrower; besides through the outlet for corporate debt holder with consent of NCLT. The Resolution Professional resolve go about as vendor. Bank can interest the judge inside the hour of 14 days.

III. Fast Track Insolvency Resolution Process

The Code has arrangement of quick track bankruptcy goal procedure for business debt holders. The cycle will remain finished in 90 days it might extensible through 45 days.

IV. Voluntary Liquidation of Corporate Person

The Code proposals for intentional insolvency procedures through corporate who plans toward exchange through individual then not complete any avoidance and container recompence altogether obligations from continuing of liquidation. When the debt holder is totally twisted and resources exchanged, the NCLT passes a request for its dissolution.

INSOLVENCY RESOLUTION FOR INDIVIDUALS & PARTNERSHIP FIRMS

There is no particular compulsory dated indicated inside which the goal choice must be finished. Assuming the default is above Rs. 1,000 then up to Rs.1 lakh, the Code smears. The Code has following unmistakable cycles: Automatic new beginning interaction: The Code permits release of passing obligations consequently assisting the debt holder with beginning over again. Indebtedness goal process: during the cycle leasers survey whether the debt holder's commercial is attainable to proceed and the choices aimed at its salvage and recovery Bankruptcy: It is identical as insolvency continuing. At the point when bankruptcy process fizzles, loan bosses might apply to disperse borrower's resources for reimbursement of obligations.[17]

i. Fresh Start Process

[17] https://www.ibbi.gov.in/legal-framework/act(Last visited on June 12th 2022)

The interaction, qualified borrowers can put on to the Debt Recovery Tribunal (DRT) aimed at release from specific obligations not in excess of a predefined limit, allowing them toward begin once more. The new beginning cycle is simply accessible toward then non accessible for corporates. An expert designated through the DRT who will look at the request, gets claims from banks, acknowledges or dismisses the request and gifts a report with motivations to the DRT.

Based on the report, the DRT will take choice of acknowledges or dismisses the request.

ii. Insolvency Resolution Process

This process comprises the readiness of reimbursement strategy through the debt holder, aimed at endorsement of lenders. Whenever endorsed, "the DRT passes a request restricting the indebted person and loan bosses to the reimbursement plan. In the event that the arrangement is dismissed or comes up short, the debt holder or leasers might apply for a liquidation request. DRT will name goal proficient upon affirmation got from the Board. The goal proficient will look at bankruptcy application and present his report to DRT with hissuggestion to concede or dismiss it. DRT will in something like 14 days concede or dismiss the application. DRT will give public notification welcoming cases from all banks in the span of 21 days of such notification. Banks will enlist claims with goal proficient. Goal proficient will set up a rundown of lenders. The goal proficient will bring a gathering of loan bosses to endorse, change or reject the reimbursement plan by a larger part of over

75% votes. The goal proficient readies a report of the gathering and submits to DRT."[18]

iii. Bankruptcy

This interaction remains like liquidation of corporate. "At the point once, request aimed at bankruptcies dismissed through the DRT or the reimbursement strategy isn't succumbed in period before the reimbursement strategy comes up short before doesn't satisfy prerequisites of the Code, before the reimbursement strategy is negated, the lender before the account holder himself might put on to DRT for chapter 11 of the debt holder. The request can't remain removed besides through

[18] Sharma, Nakul and Vyas, Rahul, The Insolvency and Bankruptcy Code, 2016: Insolvency Professional Agency 3, *International Journal of Law, (*December 2, 2017)

the permission of the court. The DRT determination permit a request, consequently showing initiation of insolvency continuing.[19]

BANKRUPTCY LAWS IN DIFFERENT MARKET ECONOMICS

Bankruptcy regulations in market economies are described by two strategies to be specific liquidation and rearrangement. In many nations, these two systems are viewed as very unmistakable. At the point when an organization is viewed as experiencing intense bankruptcy condition, the leasers or the debt holders are in a place of petitioning for liquidation before some power. The prompt errand of the redrafting authority then, at that point, is to choose a leading body of legal administrator. The later takes full ownership of the account holder's resources. It is additionally the obligation of this legal administrator to make sure that none of the banks of the organization benefits from special reimbursement. This leading group of legal administrators at last sorts out for selling of the resources of the organization and the whole sells continues are circulated among the different classes of lenders following some foreordained need model. Be that as it may, this course of liquidation remains in sharp differentiation to the next option of redesign. At the point when revamping of an organization is intended to be completed, the debt holder is given adequate time during which he is permittedfull control of his business. Simultaneously, he is likewise given an impermanent security from the reimbursement commitments of the lenders. During the time frame gave, the debt holder can go for a full rebuilding of its units, which thusly ought to get the endorsement of most of the leasers. Such rebuilding plan frequently includes obligation help and rescheduling of obligations, instalment by portions, and augmentation of the reimbursement time frame. In any case, in the event that the arrangement doesn't get the endorsement of the leasers, then the organization gets sold

Both the two previously mentioned systems utilize a few legitimate instruments that safeguard the borrower's resources. When any of the systems is started, a supposed programmed stay request produces results on most cases against the borrower for a given timeframe. Besides, the legal administrator is entitled with "evasion abilities" that permit him, bury alia, to hinder false exchanges of an indebted person's property.

[19] Omer Kimhi, “Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem,” *Yale Journal on Regulation*, Vol. 27

The different market economies are portrayed by these two methodologies basically. In any case, contrasts creep as far as more significant level of security reached out to either the lenders' side or the borrowers' side. Its regulations in the United States and France stand at one limit of the range where moderately less weight is concurred to bank's privileges. Be that as it may, German regulation on insolvency is basically portrayed by liquidation of the firm. French regulation gives need to the proceeded with activity and work of the organization's comparative with the insurance of the leaser's freedoms. Rebuilding or liquidation is started on a court choice under the solicitation of the indebted person or the leaser. The court chooses either to rebuild the firm as per a continuation plan or to execute a removal plan under which resources or portions of the resources are offered to outsiders with the obligation to proceed with the business action. Assuming the court sees none of these plans reasonable, the firm is sold. Conversely, with the US and the French regulation, German chapter 11 regulation visualizes liquidation as the fundamental result of bankruptcy. The borrower or the leaser may start liquidation, with the previous being obligated to common and criminal punishments in the event of postpone in recording a request. The chief of any firm is actually at risk to common and criminal punishments in the event that he doesn't seek financial protection in something like three weeks of the organization failing. A significant component of the German regulation is that the got lenders need to state their privileges outside the liquidation procedures; this further diminishes the probability that a redesign understanding will be reached. The regulation pursues an arrangement for agreeing between the indebted person and the leaser inside the insolvency methodology or outside liquidation, through a willful structure strategy.

CASE OF RUSSIA: BANKRUPTCY AS A POLITICAL WEAPON

Regardless of obvious accomplishments, change progress in Russia has been dialing back, mirroring the still delicate overall influence among reformists and corporatist halls (protection, agrarian, energy makers).

The mass privatization process sent off in mid-1992 mirrored the basic political unsteadiness: its point was to accomplish the "depolarisation" of Russian undertakings inside the briefest conceivable timeframe, a point which made it important to purchase the help of big business insiders (chiefs and the work aggregate) by giving them a large portion of the proprietorship control of their ventures. Nonetheless, the public authority knew about the way that an insider-overwhelmed corporate design wouldn't work on the proficiency of the Russian endeavors. In

outcome, during the last option phases of privatization, there have been persistent endeavors to open undertaking proprietorship to outside financial backers.

The development of bankruptcy methods in Russia mirrors these propensities and the way that the Russian Government would have rather not applied areas of strength for an on recently privatized ventures, in the beginning phases of privatization. The primary endeavor to manage indebtedness well after the course of privatization had started when The Act "Concerning corporate indebtedness (liquidation)" came into force in March 1983. The actual law is somewhat straightforward It concerns any enterprising elements and conceives that either a debt holder or a leaser may apply to an Arbitration (Artibrazh business) court when an installment is late. The court concludes whether there is proof of insolvency.

Assuming the court decides that the dissolvability of the organization can't be reestablished, the organization is set under receivership (liquidation) and necessarily twisted up. On the other hand, the court might suspend the chapter 11 procedures and complete redesign systems. The Act makes arrangement for two revamping strategies. One is the outside organization through which the executives of the organization is moved for a time of something like eighteen months to a court selected overseer whose job is to re-establish the dissolvability of the firm as per a rearrangement plan endorsed by the leasers. On the other hand, the bankrupt organization might profit from a corporate salvage plot which comprise of monetary help being given to the debt holder by the owner of the organization, the lenders or others upon the endorsement of an understanding indicating the extent of cases to be met (something like 40%) inside a given time span (something like a year). Furthermore, the law accommodates the likelihood to arrive at awillful settlement with a certified greater part of the non-special loan bosses at any phase of the liquidation technique.

CASE OF USA: BANKRUPTCY REFORM ACT, 1978

The issue of chapter 11 (a topic of government regulation) has been taken up 11 of the United States Code. The government regulation, it rules over any clashing state regulation by reason of the matchless quality proviso of the constitution. Government insolvency Code - Title 11 of the U.S. Code is as of now partitioned into eight sections:[20]

[20] USA, Bankruptcy Reform Act, 1978

- Chapter 1 - General Provisions, Definitions and Rules of Construction
- Chapter 3 - Case of Administration
- Chapter5 - Creditors, the Debtors and the Estate
- Chapter 7 - Liquidation (the most common type of bankruptcy proceeding)
- Chapter 9 - Adjustments of the Debts of Municipality
- Chapter 11 - Reorganization
- Chapter 12 - Adjustment of the Debts of a Family Farmer with regular income
- Chapter 13 - Adjustment of the Debts of an Individual with regular income

This liquidation regulation in the United States gives the borrower somewhat huge impact and privileges. There are four sorts of insolvency procedures. They are alluded to as Chapter 7, Chapter 11, Chapter 12 and Chapter 13.[21]

Chapter 7 is the normal type of chapter 11. It is a liquidation strategy wherein the borrower's non-excluded resources, in the event that any are sold by the Chapter 7 legal administrator and the returns disseminated to the lenders as per the needs among the banks laid out in the Code. Section 7 is accessible to people, wedded couples, companies and associations. Individual borrowers get a release inside 4-6 months of documenting the case. On the off chance that there are resources, which are not excluded, legal administrators assume command over those resources, sells them and pay banks however much the returns license. Any wages the account holder procures after the case is started are the borrower's, past the scope of loan bosses who had claims on the date of recording. Request for liquidation (Chapter 7) might be started by the indebted person (intentional appeal) or by the lenders (compulsory appeal). Be that as it may, in the last option case, it is occupant to the bank to demonstrate the borrower's indebtedness.

However long indebtedness isn't demonstrated, the borrower stays the proprietor of the resources. The US bankruptcy regulation is extraordinary among the significant market economies in that it determines no circumstances under which the borrower is obliged to petition for liquidation. The appropriation of liquidation continues submits to the accompanying need rule: got claims, authoritative costs, wage claims, charge claims and, at long last, unstable cases.

[21] University of Melbourne website: Australian journal of Asian Law

Chapter 11 is s a revamping continuing, commonly for companies or organizations. People particularly those whose obligations surpass the constraints of Chapter 13, may document Chapter 11. In Chapter 11, the borrower for the most part stays possessing his resources and keeps on working any business, dependent upon the oversight of the court and the leaser's board. What makes the revamping technique (Chapter 11) such an alluring option in the United States is as a matter of fact that, as a rule, the debt holder might keep on working in business ("borrower under lock and key") while partaking in the security of programmed stay and applying a large portion of the powers of the legal administrator, (for example, "evasion abilities", which keep the debt holder's resources from being rashly destroyed through moves made to the detriment of certain classes of banks). The borrower has one twenty (120) days (potentially stretched out to 180 days) to set up a redesign plan. The borrower proposes an arrangement of revamping, which, upon acknowledgment by a larger part of the banks, is affirmed by the court and ties both the indebted person and the lenders to its terms of reimbursement. Plans can call for reimbursement out of future benefits, deals of some or the entirety of the resources, or a consolidation or recapitalization. To be substantial, the arrangement should meet a few prerequisites: it should be practical and fulfil the "wellbeing of lender's condition which gives banks a return more noteworthy or possibly equivalent to that reachable under liquidation. The arrangement must be supported by a certified greater part of banks. The proficiency of Chapter 11 is currently under a microscope.

The pace of effective Chapter 11 redesigns is depressingly low, now and again assessed at 10% or less. A specific worry in ventures, for example, the telecom and carriers is that bankrupt firms get back with sensible obligations and rival better opponents and in the end compel them to go for liquidation security. One more analysis of Chapter 11 set forth is the standard that permits the borrower in charge of liquidation process. This basically implies that chiefs who are mindful in bankrupting a firm will have something to do with rebuilding it to keep it alive. Leaving occupant directors responsible for a bankrupt firm has brought about the recuperation of the organizations from liquidation to look for insurance under exactly the same. Part 11gives borrowers the option to propose a rebuilding plan in 120 days or less. Be that as it may, as seen by and large appointed authorities regularly expand this cutoff time. Chiefs at organizations like Polaroid and Enron were permitted to sell resources before drafting a rebuilding plan, subsequently staying away from the endorsement banks. Subsequent to declaring financial insolvency under Chapter11, Enron has sold a breeze ranch, its energy- exchanging arm and a development organization, among different organizations. One more annoying concern is the significant expenses related with rebuilding. Organizations looking for security under Chapter 11 commitment long periods of devouring for

the attorneys, bookkeepers, monetary guides, advertising firms and advisors who work in the 'rebuilding' business.

Taking a gander at the unfortunate achievement pace of organizations that redesigned themselves under Chapter 11, the vast majority of the times the insolvency code is acting against the unregulated economy effectiveness. The fittest alone get by, however they need to battle with organizations that (mis) utilize the assurance under chapter 11 code and decline to bite the dust. The code permits organizations to remain in business with an unjustifiable benefit over contenders who need to pay their obligations alongside the interest on those obligations.

Despite the fact that Chapter 11 is expected to assist with sicking organizations in their endeavors to endure one needs to uncertainty whether the code is being mishandled. Section 12 is an improved-on redesign for family ranchers, displayed after Chapter 13, where the indebted person holds his property and pays leasers out of future pay.

Part 13 is a reimbursement plan for people with normal pay and uncollateralized debt under

$290,525 and got obligation under $871,550. The indebted person keeps his property and makes standard installments to the Chapter 13 legal administrator out of future pay to pay loan bosses after some time (3-5 years). Reimbursement in Chapter 13 can go from 10% to 100 percent relying upon the debt holder's pay and the make-up of the obligation. Certain obligations, which can't be released in Chapter 7, can be released in Chapter 13.

Chapter 13 likewise gives a system to people to forestall dispossessions and repossessions, while making up for lost time with their got obligations. Sections 11,12, and 13 include the recovery of the borrower to permit that person to utilize future income to take care of loan bosses. At the point when a Chapter 11 liquidation request is recorded, the court doesn't typically choose a Trustee. All things being equal, the solicitor is for the most part alluded to as a "Debt holder in Possession." This assignment implies that the borrower has the freedomsand abilities of a Trustee and is supposed to play out similar obligations. A significant peculiarity that surfaced in Corporate America toward the start of the 21st century was corporate liquidation. Year 2002 saw liquidation and left financial backers and investors frightened. The year got going with the breakdown of fat cats like Kmart, Global Crossing, Adelphia Communications, WorldCom and UAL. Corporate America has seen half of the 10 biggest corporate disappointments ever, as estimated by resources in 2002. At first, liquidation started as a leaser's cure and ultimately developed into a wellspring of

help for indebted individuals from monetary trouble. The pattern is that American organizations lean toward assurance under Chapter 11 instead of going for Chapter 7. Section 11 gives a firm impermanent security from its leasers, as they figure out on its worth and settle on the proportionate offer that each closely involved individual will hold in the organization that in the long run arises as chapter 11 insurance. This is not normal for in numerous different nations where an organization will be exchanged on the off chance that it can't meet its commitments to creditors.[22]

CASE OF CANADA: CANADIAN BANKRUPTCY IS DISTINCTLY CANADIAN

Bankruptcy is Distinctly Canadian

Chapter 11 has likewise caused significant damage in Canada. The extraordinary liabilities because of liquidations of organizations have expanded by 203% from December 2003 to December 2004. The primary revamping rules that can be used by ruined organizations in Canada are the CCAA and the Bankruptcy and Insolvency Act. The CCAA's job in corporate restorations has been depicted in the accompanying manner. The CCAA has a wide medicinal reason offering a debt holder a chance to find an exit from monetary challenges shy of liquidation, dispossession or the capture of resources through receivership procedures. It permits the borrower to find an arrangement that will empower him to satisfy the needs of his banks for renegotiating with new loaning, value - funding or the offer of the business by way of a successful anxiety. This option might well give the banks of all classes a bigger return and safeguard the positions of the organization's workers. The CCAA procedures will quite often be more limited normally enduring between nine months and a year, and more affordable than practically equivalent to cases in the US.

CCAA, an organization looking for a split the difference or plan with its banks should be ruined. For reasons for the CCAA, an organization is wiped out when its complete liabilities surpass the worth of its resources or when paying its debts can't. Wiped out borrowers may likewise look to rebuild their issues under the BIA. The fundamental distinction between a formal corporate rebuilding under the CCAA and one led under the BIA is that a BIA method is principally a legal cycle while a CCAA continuing is judicially determined. Albeit the BIA accommodates a stay of

[22] http://www.uscourts.gov/bankruptcycourts.html(last visited on June 12th 2022)

procedures against got lenders, the CCAA stays the resolution of decision for restructurings of any intricacy. Indebted person organizations and other key partners that might uphold the rebuilding system favor the adaptability managed by CCAA over the more unbending system accommodated by the BIA.

CASE OF UK: BANKS ARE THE KINGS IN UK INSOLVENCY

The 1982 survey Committee, Insolvency Laws and Practice (normally recognized by way of "the Cork Report") suggested the reception in the UK of Unified Insolvency regulation. At last, the Insolvency Act, 1986 (UK) was established then this envelops the two kinds of indebtedness organizations, including corporate rebuilding. The current UK bankruptcy structure is characterized through the Insolvency Act 1986. As per the Act, bombing organizations are moreover sold or acquiesced toward a bankruptcy interaction that might permit them toward be protected as successful worries.

The Insolvency Act, 1986 arrangements through the bankruptcy of people then organizations. The Act is separated interested in three gatherings and 14 Schedules as follows: Group 1 arrangements with Company Insolvency Group 2 arrangements with Insolvency of Individuals and Group 3 arrangements with Miscellaneous Matters bearing on both Company and Individual Insolvency Basically, an organization in monetary challenges might remain complete theme to somewhat of 5 legal techniques.

i. Administration
ii. company voluntary arrangement
iii. scheme of arrangement
iv. receivership (including administrative receivership); and
v. liquidation (winding-up).

Except for plans of course of action, which fall inside the domain of the Companies Act, 2006, these are official indebtedness techniques represented through the Insolvency Act, 1986.

In UK chapter 11 thinks about liquidation as a first retreat. Salvage choices include the accompanying:

- Company Voluntary Arrangements (CVA)

- Administration
- Administrative receivership

For the upset firms that fail, the bank appears to reassess when the worth of the firm has weakened so it generally approaches the worth of the insurance — when other, more junior cases have been dissolved. The bank wouldn't fret the firm playing with the upsides of others' cases, the length of it can reassess when its own cases are at serious risk.

The scope of systems and instruments portrayed above structure a system that gives UK bankruptcy regulation a specific predisposition as between the interests and privileges of leasers and borrowers. Proof will in general propose that UK system is more (got) leaser amicable than the systems of other major industrialized nations.

There were 2,900 liquidations in England the main quarter of 2005 scheduled an occasionally changed premise. This was a decline of 1.30 % on the past quarter and a lessening of 7.40 % on a similar period a year prior. This was comprised of 1,064 mandatory liquidations, a decline of 5.9% on the past quarter and a reduction of 9.2% on the comparing quarter of last year, and 1,835 loan bosses' intentional liquidations, an increment of 1.5% on the past quarter and a lessening of 6.3% on the relating quarter of the year before. 0.7% of dynamic organizations went into liquidation in a year finished Q1 2005, equivalent to the past quarter and a reduction on the relating quarter of 2004. [23]

CASE OF CHINESE AND VIETNAMESE BANKRUPTCY REFORM, 2007

China's package of financial change, which understands the nation making the situation ways for the rest of the world, its recently approved chapter 11 regulation has double importance: toward help its acknowledge market by way of it bounces occupied admittance to unfamiliar loan specialists, and to bargain a last catastrophe for the "iron rice bowl" business framework at its state-possessed endeavors (SOEs).[24] Following its obligation to increase to the WTO, Chinaopened its financial area to unfamiliar banks, which will formerly contend through their Chinese adversaries happening neutral ground. This will most likely lift the advancement of China's praise market. In

[23] http://www.statistics.gov.uk/(Last visited on June 12th 2022)

[24] Zhou, Scott, Foreign credit racks China's iron rice bowl. Asian Times, 2006).
Available at :http://www.atimes.com/atimes/China_Business/HI02Cb02.html. (Last visited on June 13th 2022)

any case, such improvement necessitates a legitimate premise, then that is anywhere the new liquidation regulation becomes possibly the most important factor. The law, which developed compelling on June 1, 2007, stretches leasers' cases main concern when the borrowers attempt the course of bankruptcy, which is additional in accordance with the worldwide rehearsal. This would absolutely give unfamiliar banks some lawful confirmation while giving yuan credits, especially to SOEs.[25] Chiefs of homegrown loan specialists, especially the 4 major state- possessed sets

- the Trade and Marketable Bank of China, Bank of China, China Construction Bank and the Agricultural Bank of China
- it will likewise cheer the new regulation.

The groups have needed towards message "strategy advances" scheduled administration orders to SOEs, and they endure gravely when their indebted individuals developed insolvent.

Comparative with other countries

Details	**India**	**UK**	**US**
Law governing Insolvency	IBC, 2016	UK Insolvency Act, 1986	Chapter 11 of US Bankruptcy code
Who can start proceeding	Creditors corporate debtors	Creditors debtors, holder of qualifying floating Charges	Debtor company
Moratorium	Yes	Yes	Yes

[25] Internet Bankruptcy Library (IBL). Law on Enterprise Bankruptcy – China. Retrieved from: http://www.bankrupt.com/ about_ibl.html, December 2, 1986. (Last visited on June13th 2022)

Management Control	Board of director are suspended with the appt, of IP	Insolvency Practitioner but daily operation remains with the directors	Management continues. Debtor in possessions (DIP)
Approval of Resolution Plan	Approved by Coc 66% votes	By simple majority in value of creditors	By majority 2/3 in amount actually voting
Insolvency	Whoever initiates	Born by debtors	Born by debtors
Proceeding costs	the process		
Cross border Insolvency	Sec 234 & 235 of the code UNCITRAL	– EU Inside EU insolvency resolution	UNCITRAL modellaw has substantially adopted

LIMITATION OF THE STUDY

The study within its limited scope has tried to portray the chapter 11 standards and guidelines existing in some chosen market economies to be specific, Russia, USA, Canada and UK. These standards in certain economies endeavour to safeguard the interest of the leasers while in different economies they attempt to safeguard the interest of the debt holders.

FINDINGS, RECOMMENDATION & CONCLUSION

The 2016 Code is a significant stage steered in the correct course toward give umbrella regulation to the regulations connecting with bankruptcy, liquidation and bankruptcy goal, concerning the two people/companies and business elements. The thought in arrears the 2016 Code is toward support unfamiliar direct interest in India through working on India's score then positioning in the Ease of Doing Business Index. The trouble through the Code anyway is all accounts overaggressive aimed at on one pointer this Code is expecting towards reason significant changes in more than 11 resolutions then then again it plans to lay out organizations in any semblance of the NCLT, NCLAT and the IBBI irrespective of the way that India is confronting a monstrous framework emergency. This way they need consideration in this setting is that every single economy is wanting to configuration a few principles on bankruptcy assuming it is something absolutely non-existent inside their region, and other people who as of now have a few standards on this front are attempting to develop the guidelines. A few different nations, whose names have been alluded to in this study in regards to the idea of bankruptcy regulation present there, have not been examined in more prominent subtleties, which will be taken up later in some review.

In China, the bankruptcy regulations have been presented 10 years prior, while in India, the regulation is unmoving in the situation carrying out phase. By way of organizations takes advanced toward incorporate remote, unfamiliar welfares and organizations. The requirement aimed at individual indebtedness regulations takes increased. UK, Germany, France, Japan then additional created nations, individual indebtedness framework is a significant piece of insolvency regulation. The significant downside of the 2006 EBL is the shortfall of individual bankruptcy regulations. Be that as it may Reform Commission, gave the Improvement Strategy for Hastening the Development of the pull-out Scheme of Marketplace Object, which suggests toward lay out a insolvency framework aimed at people then spotlights scheduled taking care of the issue of joint responsibility of regular people emerging after insolvency of an endeavor.

In India, compensation paid to the vendor could be chosen by the lenders and would be chosen in light of the size of acknowledgment and dissemination. Notwithstanding, in UK system’s compensation is secure on agreement of banks and the bankruptcy proficient delegated, in default the court might mediate to fix the compensation. This critical toward letter here that outlet in India is expected toward exchange the resources inside a time of 2 years, though no such prerequisite in the UK aimed at the vendor.

The UK system has impacts in forming the IBC in India, yet the Bankruptcy Law Reforms Committee has put forth admirable attempts in altering it to Indian Situation. The change is supposed toward assist India with climbing after its ongoing position of 130 in the World Bank's simplicity of carrying on with work list.

The normal impetus for the noticed changes in liquidation regulations, being started around the world, is the vulnerability of financial slump being capable universally. Considering the overall

change's patterns, it ought to be noticed that “UN Cross Border Model Bankruptcy Reform

Law” instituted toward direct worldwide insolvency the board, will undoubtedly be simpler to be useful.

NOLO CONTENDERE: COERCION OR SPEEDY REMEDY

Amisha Gupta[*]

ABSTRACT

Plea bargaining is constituted by the two terms which are the plea and bargaining, both having the distinct meaning and when combined they indicates the negotiation between the accused and the prosecution. In other words, when there is negotiation between accused and prosecution regarding the offence committed by the accused and accused accepted his fault than by pleading guilty he can claim commutation or alternative punishment. In this paper, there will be proper understanding of such terms and conditions for valid acceptance of guilt.

After understanding the term of the plea bargaining and getting it in conformity with the criminal sense, it is necessary to understand the need for the same. It is clarified from the historical data that this practice was not present at the time of making of criminal procedure code 1973 and it was added later on by the amendment, hence there is proper history behind the amendment which brought the plea-bargaining concept in India.

It is necessary to highlight why it is placed under criminal procedure code 1973 and where it is placed. Criminal procedure code explains the procedure for claim the plea bargaining and no one can go outside the boundary of the stated procedure. Case laws generally states how the law can be interpreted pr what can be the decision in the different scenario and it is obvious that there is no need of such clarification under the procedural but case laws can help to clarify the objective of the judiciary and hence for the reference some case laws will be stated in this paper which involves plea bargaining.

Plea bargaining have different types where some are allowed and some are not allowed i.e., which does not support the judiciary or doesn't serve the justice, all those types will be discussed in this paper. Apart from supporting the plea bargaining and stating the current procedure followed under plea bargaining, there are arguments against the plea bargaining which will be analyzed by the research. The paper will be concluded with the conclusion and analysis.

Key Words: Plea Bargaining, CrPC 1973, Prosecution, Accused, Judiciary and Negotiation

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INTRODUCTION

Plea-bargaining is constituted of two words which is the plea and second is the bargaining. Plea means the formal statement given by the accused where he accepts his guilt and states about the offence he commits and the term bargaining means the negotiation which is like settlement between the accused and the victim.

Plea bargaining was introduced to reduce the burden of the court and to serve the justice. It is known that law shouldn't be too rigid nor too flexible, it has to serve the just. So, when the accused is himself pleading guilty and he realized the offence which he committed, obviously the offence must not be too heinous, then he must get the benefit and his punishment should be reduced. It is like the settlement between the victim and the accused where on the mutual settlement they agree to serve the punishment and the victim who is the effected party here does mercy on the accused on his pleading.

In other simple terms, plea bargaining is the process where the accused accepted his crime and plead guilty and on the same pleading, the victim shows mercy and reduces the sentence or imprisonment of the accused. This whole process is regulated by the law so as to bring the uniformity and avoid the chances of conflicts.

For example: X committed the offence which is punishable by imprisonment but he accepts his crime and, on his acceptance, his punishment got reduced at the request of the victim.

The origination of this concept was in the United States but now it is followed by many countries. In many foreign countries, this concept is used irrespective of the type of the offence committed but in India it is not absolutely used and has restriction for usage. Criminal procedure code 1098 guides the procedure for using the plea bargaining where it cannot be used for every type of offence. India is still restricted in using such kind of defense.

In united states 90% of the cases are dispose off on the plea bargaining. The concept of the plea bargaining is originated from the principles of 'Nolo Contendere' which is the Latin term, meaning I do not wish to contest which means that accused/ offender accepts the punishment.

Moreover, the principle 'justice delayed justice denied' has the direct relation with the concept of plea bargaining.

JUSTICE OR ABUSE OF POWER

Origination

Plea bargaining is borrowed from US and added with some modifications in the CrPC under section 265A to 265L which is introduced with the aim to protect the interest of the accused but by the fade of time it was observed that right of the accused is violated even under these provisions. This is based on the restorative principle where the interest of the victim is also prevented as he can seek the relief by negotiating with the accused.

Under criminal law, the term 'victim' has the wider effect where it includes the society hence whenever some criminal offences are committed it is believed that it is committed against the society or the state. The real victim is always considered as the informant of the people who are dangerous for the society.

Article 4 of the declaration of basic principle of justice for victims of crimes & abuse of power 1985 directs that victim must be treated with dignity and got the preference to opt for any possible method for seeking relief. On the basis of this direction, article 5 further stated that there will be judicial and administrative mechanism for providing the justice to the victim. The two-fold statements were made where firstly it was stated that victim must be compensated in lieu of the wrong which is committed against him and secondly the offender must be punished for his sins. On this observation, article 8 implicitly states for development measure which include the plea bargaining for restituting the victim.

Human Rights

The right to fair trial which includes fair opportunity of hearing is the basic human right which every person has secured under the international human rights law. Criminal justice supports the plea-bargaining system where the accused himself waive his right to have fair trial on the account of faster disposal of case and resolving the dispute by efficient negotiation between the parties.

The human rights can be waived only on few standards which are like voluntarily decision by both the parties, informed and unequivocal fact-based negotiation.

Human rights are regulated by the UDHR[1] where article 10-11 talks about right of the fair hearing in the case. This right is supported by the ICCPR[2] and other regional human rights instruments. This right includes the faster disposal of case and preventing the accused against any discrimination until he is proved guilty. Plea bargaining protects the right of fair trial but it may cause the circumstance where the other rights can violate like right to hear both the parties or producing evidence. The main concern arises when it is alleged that the bargaining was summed up without the consent of the accused or prosecutor.

The main focus for investigation is turned when there are chances of coercion in the plea bargaining or when the agreement is entered involuntary. In State V. Hinners[3], the honorable court held that plea bargaining is constitutionally valid and any settlement through that process will not violate human rights.

Another right which is involved into the judicial proceeding is to get the pleader of his choice and right to defend. If it was contended that no pleader advice was sought or no pleader defended the accused that the assumption will arise that there is violation of human right. The reason after this assumption that lawyers have the better insight regarding the whole process and they can guide the parties between by making them aware about the consequences of the plea bargaining. It is very important to understand the type of action which the parties opt for because there is no right to appeal under the plea bargaining.

HOW PLEA BARGAINING IS DIFFERENT FROM CONFESSION

Confession is not defined anywhere but its inference is stated under Indian evidence act where under section 24 the concept of confession begins. Confession is the statement made by the accused during the trial which is used in evidence against him. Proper guidelines are constituted for

[1] The Universal Declaration of Human Rights (UDHR), 1948
[2] International Covenant on Civil and Political Rights
[3] State v. Hinners, 1991, p. 843

securing and using the statement made by the accused, to prevent the involuntarily influence from the accused.

It is often confused that plea bargaining and confessions are the same, which is not at all same because the confession is made during the trial whereas there is no trial in plea bargaining and the statement made under the plea bargaining are on the condition that there will be no trial for that case. Moreover, the statement made by the accused during the trial will be used as evidence which means that the charges will be proved or disproved on the basis of the statement made by accused and will be used solely in evidence. In plea bargaining there is no usage or formation of evidence as the statement is not made for the purpose of evidence but on the condition that some leniency will be shown to him.

Also, there is condition in plea bargaining that whatever statement is made during the plea bargaining or whatever guilt is accepted during the settlement, will not use again in future and in any other proceeding. This rule prevents the right of the accused and encourages him to accept all his guilt and make the true statement whereas confessions are legally and judicially recorded which can be used as evidence in the trial.

Confessions are always with other kind of evidence whereas the plea bargaining is itself a process which doesn't require to be collaborate with some other process or evidence.

It was found that 70% of the confessions are false confessions or based on coercion and accused generally avoid to confess their guilt whereas plea bargaining is preferred by the accused because of its faster disposal of case and less punishment imposed by it.

The one factor which is common in both the concept is that the innocent people are the one who are tied up the most in this process. In other words, it was noted that most of the innocent people easily pleads guilty or make false confession on the basis of promises and assumption that there are less chances of their winning whereas the person who commits the crime didn't even think about it. Coercion and unfair practice affect this procedure at most which is even way difficult to prove and prevent the innocent person from false allegations

COMPOUNDABLE OFFENCES V. PLEA BARGAINING

The term 'compound' means the settlement which may be done by the money payment or any other method, in lieu of some liability. This process is referred from the point of criminal law where the parties settle their disputes with or without the court. Under this process, the parties involved in the case settles or compromise the matter by exchanging any consideration, regulated by court. This is not an absolute right of the parties but regulated by the statutory where it is laid that not all the cases can be compounded by the parties hence some restrictions are there for compounding the offences.

There are two kinds of offences i.e., compoundable, and non-compoundable offences. Section 320 of criminal procedure code 1973 talks about the compoundable offence and as per section 320(9) every offence will be compoundable under this provision only. Compoundable offence is those offences which are less serious and involves the personal interest of the parties rather than leaving the impact on the society[4]. It is concerned by the statute that even though the offence is covered under the definition of the compoundable offence, it still needs the consent of the court which means that no offence can be compounded without the consent of the court. The reason of leaving the matter on to the court is to verify if any interest is hampered and the offence for which the case is compounded does not involve any public interest.

Section 320 lays down restrictions and the process for compounding the offence. It further divides the offences into two categories, first which doesn't need permission of the court [5] for compounding, for example adultery, causing hurt or defamation criminal trespass and the second which needs permission for compounding the offences[6] which includes serious offence like theft, assault on woman, voluntarily grievous hurt. In one of the cases[7], the Supreme Court stated that court has the discretion to reject the plea of compounding offences but that rejection must be supported by the observation of the court on which the plea was rejected.

[4] Gian Singh v state of Punjab 2012 SC

[5] Section 320 states the offences which are compoundable without the consent of court and the sections which are compoundable offences are section 298, 323, 334, 341, 342, 352, 355, 358, 426, 427, 447, 448 of Indian penal code 1860.

[6] Section 320 states the offences which are compounded only after getting the consent of the court and these sections are section 325, 335, 337, 338, 343, 344, 346,

[7] Bhagyan Das vs The State of Uttarakhand & anr 2019 SC

The object of the section 320 IPC is like the object of the plea bargaining which is stated under section 265A- 265L of CrPC, which is to promote the friendliness between the parties and to dispose off the case quickly by reducing the burden of the court. The concept of compounding of offences is very old which is followed since 1974 whereas plea barraging was enacted from the year 2006 only which means that the applicability of plea bargaining is less than the compounding of offences.

Under compounding of offences, the accused will be seemed to be acquitted from that offence because the charges are taken back by the complainant or the prosecutor but the situation is opposite in plea bargaining where the accused is punished with some imprisonment or fine or both and known to be convicted. In plea bargaining the charges are not absolutely extinguishes or taken back but the offence is accepted by the accused with the condition that he will receive some favor from the accused in regards to his acceptance. By this statement it can be mentioned that the essence of the result of both the concepts are completely opposite to each other.

The other point which differentiates between both the concepts is that the plea bargaining doesn't permit to plead guilty when the offence is committed against the woman or child whereas under the compounding of offences, the offence can be compounded if the woman against who the offence has been committed agrees to compromise the same and this will be done by the consent of the court.

Looking from the international perspectives, the plea bargaining is originated from the US and has applicability is almost every country with high usage rate whereas compounding of offence is considered as felony by some foreign countries. Under the common law of England, the compounding of offences is termed as illegal process and whoever caught indulging in this practice will be punished under the offence of felony as misdemeanor. They stated that every agreement which talks about the agreement mentioning about not to prosecute the offence will be an unenforceable agreement as this is against the public policy, also will an offence as long as they don't involve the settlement regarding the return of stolen property by the accused on the compromise by the victim. Compounding of criminal offences is pervasive in America whereas it is abolished in Wales and England. The idea of plea bargaining is accepted in all these states which abolishes the compounding of offences.

Though both are concepts are different from each other, though they follow few common characteristics. One of the basic similarities between both the concept is that they are in favor of accused where the accused in punished less or not at all. Section 320(7) states that no offences can be compounded under section 320 if the same offence has been committed and the accused is charge with increase punishment or different kind of punishment on committal of subsequent offence. The similar kind of statement is also applicable under plea bargaining where the accused cannot claim benefit by pleading guilty if he committing subsequent offence of the same kind or he commits that offence on the habitual basis. The object of this limitation is to prevent he habitual offenders to get the benefit of this section.

COMPARISON WITH DIFFERENT COUNTRIES

Other countries:

The concept of plea bargaining was regulated by the principles which was highlighted by the court of appeal at turner. In their statement, the honorable court mentioned that discussion about the case must be between the judge and counsel. The judge should never indicate the biasness in scenario when there is plea bargaining or if those bargaining fails. This statement was made in reference to the England and Wales.

In Australia, the judicial review regarding the plea bargaining is different. In one of their judgments[8], honorable Supreme Court of Victoria highlighted that no one can ask the trial judge regarding the punishment when the matter is going for the plea bargaining or using the advice as the negotiation during the bargaining. The practice of using the judge intelligence in the negotiation is totally wrong.

USA:

The concept of plea bargaining was originated from the United States in 19th century where this practice was commonly used. US also didn't have the concept of plea barraging in its bills of right but it was the sixth amendment which brought the plea bargaining into consideration and stated it

[8] Marshall: www.manupatra.com/roundup/326/Articles/Plea%20bargaining.pdf

as the constitutional practice. It can be very easily mentioned that only 10% of the total cases goes to court for trial and others are resolved through the plea bargaining. Being the developed country means having best technology and better management, it can be said that people opt for the smart decision and saves their time and energy by not putting their shoes into long trial procedure when the matter can be resolved between the parties itself. It doesn't mean that we don't need courts or judicial procedure but it reflects that there is other method by which the issue can be resolved without wasting the time of judiciary who is already busy in resolving the heinous or more serious offences.

The system of plea bargaining was officially introduced after the passing of amendment in 1974 in the federal rules of criminal procedure. The only requirement before implementing the process is that the accused must plead guilty voluntarily, without any reference and he should satisfy the rule 1149 before the court.

In Bordenkircher v. Hayes[9] case which states the landmark judgment given by the US court that accused cannot be punished when he is going for plea bargaining and this contention will be constitutionally backed up. In this case, the accused James earl ray got life imprisonment because he didn't accept the order which was given as the result of plea bargaining. In the case, the Supreme Court also observed that the burden always lies on the party to choose whatever they desire. As in this case, the accused didn't accept the plea bargaining and hence convicted for the original punishment which was the life imprisonment. The same reasoning and observation were made in the torts case also where the burden of punishment lays on the party of the case itself.

In one of the other cases[10], the supreme court of US clearly mentioned that plea barraging is very important for administration of justice and serving the faster remedy by saving cost. The court directed that the process must be properly managed and regulated so as to prevent the inner crimes and other possible conflicts.

In Bardy V. United States Case[11], the landmark judgment was given by the US court where it was stated that the if the settlement is reached between the party where one of the parties is in fear that

[9] Victimology and compensatory jurisprudence, Randhwa .G.S., Central Law Publications, Allahabad (2011)
[10] jurip.org/wp-content/uploads/2017/03/Rajat-Bawaniwal.pdf
[11] 397 US 742 (1970)

the trial will surely result in death penalty than the process of plea bargaining will not become illegitimate because of the mere existence of fear of death penalty. The process will remain legitimate if conducted as per the regulation and voluntarily by the parties.

In US there are different types of pleas i.e., Guilty, *nolo contendere* and not guilty. In *nolo contendere* which is also known as the '*Plea Of Nolvut*'[12], there is implied indication that the accused wants to accept its guilt or the court will give its decision on the basis of the guilt.

In case Fox v. Schedit and State Exrel Clark v. Adam[13], plea bargaining was termed as quasi confession which means that it is not absolute confession but kind of confession given by the accused where he accepts his guilt.

Moreover, this is not an inherent right but the court of US has the discretionary power to either accept the plea or reject it, which should not be arbitrary but must be based on the facts and circumstances of the cases. The main reason for introducing the concept of plea bargaining was due to the overcrowding of the jails and burden on the judiciary.

One of the common features shared by India and US is that under both the country regulations, the accused who is pleading guilty will get the benefit of secrecy which means that the information given during the mutual depository satisfaction, will be kept secret and that information or any evidence (if given) will not be used anywhere else apart from that proceeding.

Though the scenario is much different in India where offences which are punishable with life imprisonment cannot go for plea barraging and the process is properly regulated with many restrictions. In Indian law, the victim has the upper hand in the proceedings where he has the right to refuse the unsatisfactory resolution. The practice of plea bargaining is very liberal in US as compare to India which has restrictions and narrower scope.

In US, the application for the plea bargaining is filed or the intention of going with the negotiation is informed to the court after the negotiation is done between the party whereas in India the burden

[12] State exrel clark adams 363 US 807
[13] Section 265B (2) of CrPC 1973.

of pleading the guilt is on defendant who is under obligation to file for plea bargaining and then the mutual satisfactory disposition takes place.

Further, the Indian law has given authority to the judges to verify the application if they are made voluntarily or if the accused has really committed any offence or not. Also, the power extends to check if the offence for which the guilt is pleaded does not commit against the Socio economy condition or if the accused is running away from the severe punishment which he really deserves.

INFLUENCE ON PLEA BARGAINING

Trial is the constitutional right for every accused ad no person can be convicted without going for trial but this principle has the exception, where the person an undergo punishment even without trial. When the parties themselves settle the issue and agree on the same point of punishment than the court can impose that punishment on the accused.

This process is like the private procedure which took place among the parties hence having the chances of manipulation or other conflicts which need to be regulated. It is very difficult to prove that the process was completely fair.

It is known that the prosecutor has various remedies with him to such as monetary compensation, imprisonment, compensation in other form, damages, etc. and these remedies can be sought by various sources like going for private settlement, mediation, trial, plea bargaining, claiming through documents etc. By these references, it can be said that prosecutor has the heavy side and he is the one who choose for the resort as per his convenience and in every situation, he is on the win situation, it's the accused who has to follow the direction and play as per the desire of the prosecutor (not always, but generally). These wide powers of the prosecutor are not legally checked and there may be instance when the prosecutor can use these powers where the interest or right of the defendant gets violated which means that there is no proper regulation for checking these wide powers given to prosecutor. Hence these powers can cause unfair practice[14] or coercive practice[15]

[14] This is a wider area which covers other aspects like undue influence etc.
[15] Section 15 of Indian contract act

on the accused which may cause him to accept his charges involuntarily [16] or the chance of arbitrariness and inequality. The term arbitrariness indicates that there may be situation when the discrimination is practiced on the pleading of the accused, in other words, there is no uniformity in the procedure of plea bargaining as every case differs from facts and the negotiation is conducted as per the demand of the party itself hence the discrimination can be caused against specific accused as the process has not fixed procedure to follow.

As per the stated reason behind lack of regulation and non-uniformity, there is need for preventing the innocent accused person who got hunted under this process and charged for the heinous crime even under the plea bargaining. For example, In US black people are punished for more heinous crime than the white people and the term of imprisonment of black people is usually higher than the white people[17] . This practice clearly indicates the unfair practice of plea bargaining and discrimination on the specified class of people.

There are various factors which influence the decision which is taken after the plea-bargaining process. These factors are:

• ***COERCIVE FACTOR***

The term coercion means the persuasion to someone by the means of force or threats. When the offence is punished by heinous punishment i.e., imprisonment of 7 years or less as per Indian law[18] or it may be death penalty as per the US law than the accused prefers to go for plea bargaining to get less imprisonment and the threat of more punishment causes him to go for plea bargaining. Another circumstance may be, where the accused is already under detention before the trial than there can be threat on him to plead guilty and accept the plea bargaining. These are the major areas with respect to coercion and the guilty pleaded by the accused will be valid only when it is free from coercion or other unfair practice.

[16] Defined by Indian penal code under section 39 and various other statues as well.
[17] Criminalizing Race: Racial Disparities in Plea-Bargaining," Boston College Law Review 59, no. 4 (2018), 1187,
[18] Ibid.

It was analyzed that plea bargaining is the uneven playing field where prosecutor has the more tools which increases their leverage in negotiation and the rate of coercion is increased in case the accused is detained in prison without being convicted which is the pretrial detention.

'Every person is assumed to be innocent until found guilty[19] but the person who is under detention leaves the negative impact on the court regarding his crime which usually results in conviction, longer sentences or future involvement. To prevent the long imprisonment or harsh punishment, the accused prefers the plea bargaining where there is likelihood of his interest violation as the victim is already aware about the behavior of accused when he under pretrial detention and he didn't have any benefit. This increases the chances of coercion on the accused and using unfair practice on the accused.

It was believed that there exists a direct relation between pre-trial detention and plea bargaining and this contention was supported by the data of US where it was surveyed that 634 criminal cases of New York jersey courts in 2012[20] was released faster than the cases where the accused is released on bail or already out of jail and the reason behind it is that the accused wants to get out of the bar faster hence opts for possible recourse. Coming to recent data, In Delaware nearly 76,000 arrests were resolved through the plea bargaining[21]. It was observed from the data of Philadephia that 331,971 criminal cases where the accused was under the pretrial detention resulted into conviction where the experts observed that they could result into acquittal or dropping of the charges but the fear in the accused made me to plead guilty and made them suffer from conviction which is the worst outcome of the criminal justice.

Moreover, it was observed that the people who have less knowledge regarding the criminal legal system or who is detained for the first time are likely to have strong incentives in pleading guilty which is less painful method of proceeding, as they are eager to get out of the jail or dispose of their case quicker.

[19] International Journal of Law Management & Humanities ISSN: 2581 – 5369

[20] Report mentioned for 27680 cases which were not even entertained.

[21] "The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges." American Economic Review 108, no. 2 (2018), 201-240

- ***CHARACTERISTICS OF LEGAL CASE***

Another factor that influences the decision after the plea bargaining is the severity of the offences and the prior records of the accused. The prior records of the accused are checked while negotiating the claim here the prior records are other than of the same crime as it is not allowed under Indian law to go for plea bargaining if the subsequent offence has been committed but this limitation is restricted to the same kind of offence only where the plea bargaining can be claim if the different kind of offence has been committed by the accused.

The past records are often used to decide the quantum of punishment and frequently stated in guidelines dealing with plea bargaining. A jury trial provides the opportunity to the defense pleader to prove that criminal history of accused is not serious or less serious than appears on paper and by that they will try to prove the innocence of accused. This will be referred in plea bargaining where the accused can plea as first-time offender and prevent himself from heinous crime. It is very significant to state that person with longer criminal history receives less lenient plea deals in negotiation. It may be inferred from the research that past records may lead in increase in the charges but absence of past records doesn't lead in decrease in charges.

Apart from the severity and prior records of the accused, the concern is also turned towards the evidence. The strength of the evidence available against the accused plays a vital role in the proceeding on the plea barraging where the victim or the prosecutor plays his card by keeping in mind the kind of evidence, he has with him for proving his claim against the accused. As already stated, that prosecutor got the upper hand in any kind of the proceeding which they opts for, the prosecutor will be ready for trial if he has the stronger evidence against the accused and can prove his claim successful and in this situation he will throw harsh offers to the accused in the plea barraging and vice a versa.

- ***INEQUITIES***

It has been indicated that existence of deliberate or unconscious biasness towards the gender, race, and caste causes the inequality and termed the process as biased. It is analyzed that to remove the shadow on inequality from the plea bargaining there is need of transparency where the process will

be legally checked at every step and the proper safeguards will be introduced for protecting the people who are getting influenced under the same.

In US it was found that discrimination based on race is at peak where the black was prevented to enter guilty pleas. Black people receive less favor of guilty plea agreement than white people. Also, the statically data showed that the rate of conviction of black is way more than the conviction rate of white people.

Apart from discriminating based on race, the people are frequently discriminated based on gender. Generally, Woman are arrested less than the man and for less violent offences for which they are treated less harsh and receive more lenient behavior than man. It was found by the study[22] that the rate of reduction of charges or dropping of charges against the women is higher than the man and in case no prior conviction is proved the chances of nullifying the charged get increases.

It is believed that women are less risky for the society and they hold less sever criminal thoughts which made them seek sympathy among the court actors but this whole assumption is not correct as the woman can also be equally riskier for the society. Rather than focusing on the less lenient behavior of the woman, the focus should be on the reason behind the harsher treatment in respect of the men.

Another aspect of inequity is the age factor where the way of approaching for plea bargaining is different from young to old age. It was noted that young age people know about their right to trial and they voluntarily give up their right without thinking about the future consequences as they think it from the short-term perspective.

Inequality, discrimination is interrelated concept with the pre detention trial stage, under both the scenario the accused is prevented from the neutral behavior and been discriminated on the certain circumstances.

[22] Ibid.

- ***PLEA DISCOUNT*** [23]

This is also known as the trial penalty which is the difference between the actual imprisonment as per the statute and the imprisonment which he undergoes when he pleads guilty. This factor states that higher the plea discount, higher the chances of pleading guilty. It was observed that the judges or the other court servants imposes less serious punishment and serve more lenient behavior to the people who accept their liability. Apart from this contention, it is believed that people who hired private attorney having vast resources and good money value have the more winning chances and they prefer to go for trial where they are acquitted hence prevented from serving any punishment which maybe announced under the plea bargaining.

- ***INNOCENCE***

This factor highlights the aspect, when some innocent person has been falsely induced into some crime which is punishable with severe punishment; in this case the innocent person who has not committed any offence at first place accepts the plea bargaining because he wants to save himself from the harsher punishment at conviction or if the person is under detention than to get out of the prison.

It was studied that more than 37% people plead guilty even though they are innocent just because to stop the questioning on them and to go home[24]. By looking from the other perspective, most of the cases get turn in the court when there is discovery of new evidence or generally when the results of DNA are out which gives the conclusive evidence to the court.

The major limitation in this situation is that once the person pleads guilty it became very difficult to prove his innocence and give the evidence against his pleading. Also, after pleading guilty, the person loses all the possible resorts to be acquitted as there is no process for appeal under plea bargaining neither due process which will rebut the same.

[23] Ri, S., Cheng, K.Ky. Plea Discount Deviations: a Mechanism for Gender Disparities in Hong Kong. Asian J Criminol 17, 237–261 (2022).
[24] Redlich, Summers, and Hoover, "Self-Reported False Confessions," (2010), 79-90, 89.

Research proved that eager to get out of the jail and dropping the charges made the person or effectually coerce the person to plead guilty and accept the facts which was not even committed by him.

CONCLUSION

The court has the various options to conclude the process of plea bargaining, it can award the compensation to the victim which will be in consonance to the settlement i.e., the mutual satisfactory disposition between the parties. Apart from this straight jacket process, the court if feels safe for the society, an also release the accused on the probation[25]. If there is ambiguity in the settlement or the settlement is not legally valid than the court can order the punishment for the half term of the punishment which is stated under the law. It is highlighted that the decision of the court is final which is settled through the participation of the parties where there is no provision for appeal except the special leave petition[26] and appeal to high court under article 226 and 227 of

Indian constitution. This provision doesn't bother about the bail, trail of offence and directly jump for the settlement of the case.

Silver lining of plea bargaining: the major reason behind calling the plea bargaining as the silver lining as this prevents the parties to cross the burning woods i.e., the long procedure of trail where there is no fixed time period for disposing of case which can last over years. Apart from the punishment which is ordered by the court after the whole trial, the accused bears the mental torture and several other tortures on the daily basis which does not even count at the time of announcement of his punishment for the crime which he committed.

Court also feels relived from too much cases and exceptional workloads[27]which eventually reduces the congestion in the detention room and saves much resources, time and efforts. It is believed that US being the high developed country, follow the plea bargaining for resolving most of their cases which helped them to save their resources and indulge in some other productive work. It was

[25] Section 360 of CrPC.
[26] Article 136 of Indian constitution 1950
[27] https://www.manupatrafast.com/articles/

highlighted by the 142nd law commission report[28] that most of the prosecutors take back their complaint or omits to report the crime because of the long committal to the trial and long procedure which is the black stain on our Indian judiciary system. Also, it was highlighted that in court, rich party plays the show by throwing money and poor party weeps in the darkness. It can be said that plea bargaining is the ray of light where both the parties can bargain the dispute by avoiding long procedure and saving lot of litigation expenses.

Where in trial there is win- losing situation, in the plea bargaining it is the win- win situation for both the parties.

Plea bargaining is compromised mockery: as every coin has two faces, so the plea bargaining has the two-sided effect. It is said that where most of the innocent are convicted for the crime which was not even committed by them. In U.P v. Chandrika[29], it was stated by the honorable supreme court that the court should not completely rely on the mutual satisfactory disposition took between the parties but the court should announce the judgment on the merits of the case by checking the circumstances and verify if it doesn't violate any interest.

In 142nd amendment, it was explained that because of the low literacy rate in India this practice of plea bargaining cannot be absolutely followed which is the common practice in US. It was clearly mentioned that the US has the high literacy rate which prevents the misuse of the benefit. The high rate of corruption and political influence cannot make this practice free from unfair practices.Police and other public servants play vital role in plea bargaining and, in the country, where the custom of bribing is very common, it is very difficult completely rely on any specific person regarding the serving of justice.

IPC is well drafted which states the separate punishment as per the nature of offence whereas under plea bargaining the punishment is imposed on the discretion of the parties by which the objective of the IPC will be disrupted. Apart from the infringement of rights stated under IPC, the defendant also waives his fundamental and constitutional right such as right to fair trial and right against self incrimination.

[28] http://www .bareactslive.com/LCR/LC142.HTM on August 22, 1991.
[29] AIR 2000 SC 164

It can be inferred that though this is the easiest model for disposing off the case and serving benefits but it should not be absolutely followed onset of it increasing the crime rate where criminals are not afraid of punishment. By keeping all the factors in mind, it is difficult to state the applicability of plea bargaining in India. Also, the condition of Indian society cannot be compares with the United States where the literacy rate is much higher and people are aware about their rights and obligation whereas in India, we are still struggling for providing compulsory education to children.

Plea bargaining may not be a perfect tool for current situation but maybe someday it will be applicable absolutely like the practice of United States.

SOUTH AFRICA'S APPLICATION AGAINST ISRAEL

Adv. Bhagyashree Bora[*]

ABSTRACT

This paper attempts to throw light on the Application made by South Africa against Israel before the ICJ (ICJ) and the Judgement passed by the ICJ. It further, attempts to explain, how the ICJ has the jurisdiction to decide the Application filed by South Africa and also the interim reliefs granted by the ICJ on 26th January, 2024.

The ongoing conflict between Israel and Palestine, compounded by the attack on Israel by Hamas on October 7, 2023, and subsequent reprisals, has garnered significant international attention. On December 29, 2023, South Africa filed an application before the International Court of Justice (ICJ), alleging that Israel's actions in Gaza constitute genocide. Citing Article 92 of the United Nations Charter, which designates the ICJ as the principal judicial organ of the UN, the ICJ issued an order on January 26, 2024, in response to South Africa's application directing Israel to prevent genocidal acts in Gaza, pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide.

Keywords: ICJ, UN, genocide, military.

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INTRODUCTION

The conflict between Israel and Palestine and the attack on Israel by Hamas on 7th October, 2023 and the reprisal by Israel are the most talked about international current affairs. On 29th December, 2023, an Application was filed by South Africa before the ICJ, claiming that the activities of Israel on Gaza amounted to Genocide and further, requesting the ICJ for grant of interim reliefs, stopping Israel from continuing with its military actions in and against Gaza, till the pendency of the proceedings.

According to Article 92 of the Charter of the United Nations[1] (UN), the ICJ is the 'principal judicial organ' of the UN. The ICJ has by virtue of its order dated 26th January, 2024, in the matter of the application on the Convention on the Prevention and Punishment of the Crime of Genocide[2] in the Gaza Strip, filed by South Africa against the military operations in and against Gaza, has ordered Israel to prevent genocidal acts in and against Gaza.

South Africa invoked the jurisdiction of the ICJ under Article 36, Paragraph 1[3] of the Statute of the ICJ and Article IX of the Genocide Convention.

JURISDICTION OF THE ICJ

The ICJ exercises two kinds of jurisdictions:

1. Contentious Jurisdiction

   Where the ICJ decides legal disputes, according to the international law, which are brought before the ICJ by the States.

2. Advisory Jurisdiction

[1] Article 92 of the United Nations Charter, https://www.un.org/en/about-us/un-charter/chapter-14
[2] Convention on Prevention and Punishment of the Crime of Genocide, 1948, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf
[3] Article 36, Statute of the ICJ, https://www.icj-cij.org/statute

In Advisory Jurisdiction, advisory opinions can be sought by the organs of the United Nations, specialized agencies or one related organization authorized to make such a request, from the ICJ, on legal questions.

It is the fundamental principle of International Law that 'no State can, without its consent be compelled to submit its dispute with other States either to mediation or to arbitration, or to any kind of pacific settlement'. The Contentious jurisdiction[4] of the ICJ can be invoked only by States in the following manner:

1. By consenting to the jurisdiction of the ICJ in treaties or conventions;
2. By executing a Special Agreement, consenting to the invocation of the jurisdiction of the ICJ;
3. By declarations of the States, where they choose the Compulsory jurisdiction of the ICJ in case of International Disputes.

THE GENOCIDE CONVENTION

The Convention on the Prevention and Punishment of the Crime of Genocide, 1948 defines Genocide under Article II[5] as follows:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: a. Killing members of the group;

b. Causing serious bodily or mental harm to members of the group;

c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

d. Imposing measures intended to prevent births within the group;

e. Forcibly transferring children of the group to another group.

[4] Article 36, Statute of the ICJ, https://www.icj-cij.org/statute

[5] Article II, Convention on Prevention and Punishment of the Crime of Genocide, 1948, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

Further, Article IX[6] of the Convention gives the jurisdiction to the ICJ for matters relating to the interpretation of the application and the State responsibility to prevent acts amounting to Genocide as defined in the Convention. According to the said Article the matter can be referred by the State parties to the Genocide Convention to the ICJ.

APPLICATION BY SOUTH AFRICA

South Africa instituted a proceeding against Israel by filing an Application before the Registry of the ICJ. According to the Application, South Africa invoked the jurisdiction of the ICJ under Article 36, Para 1 of the Statute of the ICJ. Article 36 Para 1 states the voluntary jurisdiction of the States where the States have accepted the jurisdiction of the ICJ in the treaties or convention.

South Africa articulated in its Application; "concerns acts threatened, adopted, condoned, taken and being taken by the Government and military of Israel against the Palestinian people, a distinct national, racial and ethnical group, in the wake of the attacks in Israel on 7 October 2023. South Africa contends that the acts and omissions by Israel of which it complains are genocidal in character because "they are intended to bring about the destruction of a substantial part of the Palestinian national, racial and ethnical group, that being the part of the Palestinian group in the Gaza Strip". South Africa asserts that the relevant acts are attributable to Israel, which has failed to prevent genocide and is committing genocide, and which has also violated and continues to violate other fundamental obligations under the Genocide Convention."[7]

Further, South Africa in its Application also stated that it had applied the ICJ for the grant of interim relief. South Africa further submits, "In light of the extraordinary urgency of the situation, South Africa seeks an expedited hearing for its request for the indication of provisional measures. In addition, pursuant to Article 74(4) of the Rules of Court, South Africa requests the President of the Court to protect the Palestinian people in Gaza by calling upon Israel immediately to halt all military attacks that constitute or give rise to violations of the Genocide Convention pending the

[6] Article IX, Convention on Prevention and Punishment of the Crime of Genocide, 1948, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

[7] https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf

holding of such hearing, so as to enable any order the Court may make on the request for the indication of provisional measures to have its appropriate effects. To that end, the Court should order Israel to cease killing and causing serious mental and bodily harm to Palestinian people in Gaza, to cease the deliberate infliction of conditions of life calculated to bring about their physical destruction as a group, to prevent and punish direct and public incitement to genocide, and to rescind related policies and practices, including regarding the restriction on aid and the issuing of evacuation directives."[8]

DEFENCE BY ISRAEL

Israel has contented in the said proceedings that according to Article 41 of the ICJ Statute, for the grant of interim reliefs, the party requesting interim reliefs shall prove prima-facie case. Israel further, contented that the acts of Israel cannot fall within the purview of the Genocide Convention as the necessary specific intent required, to destroy, in whole or in part, the
Palestinian people of Israel has not been proved by South Africa, even on the prima-facie basis.
Further, Israel also contented that South Africa had conveniently ignored the attack by Hamas on Israel on 7th October, 2023. It was also contented that the attack on Israel by Hamas from Gaza and the open pledge of Hamas to repeat the attacks had given Israel the inherent right to take all lawful actions to defend its citizens and to secure the release of the Hostages, who are still in captivity.

ORDER PASSED BY THE COURT

The Court passed an order on 26th January, 2024 on the application for provisional measures made by South Africa.
The Court did not decide on whether the acts committed by Israel, amounted to Genocide. The Court also did not order a cease-fire as per South Africa's primary request. However, the Court did state in its order that Israel has the obligation not to commit acts amounting to Genocide.
"The Court considers that, with regard to the situation described above, Israel must, in accordance with its obligations under the Genocide Convention, in relation to Palestinians in Gaza, take all

[8] https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf

measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group. The Court recalls that these acts fall within the scope of Article II of the Convention when they are committed with the intent to destroy in whole or in part a group as such (see paragraph 44 above). The Court further considers that Israel must ensure with immediate effect that its military forces do not commit any of the above-described acts."[9]

Further, the Court also mentioned the hostages abducted during the 7th October attack by Hamas, even though the ICJ exercise jurisdiction only over States and not over Militant Groups like Hamas and stated, "The Court deems it necessary to emphasize that all parties to the conflict in the Gaza Strip are bound by international humanitarian law. It is gravely concerned about the fate of the hostages abducted during the attack in Israel on 7 October 2023 and held since then by Hamas and other armed groups, and calls for their immediate and unconditional release."[10]

ANALYSIS OF THE JUDGEMENT

It can be observed from the order of the Court that no cease – fire was ordered as was requested by South Africa. However, the Court did order Israel to not commit acts which amounted to Genocide.

The Court encouraged the efforts taken by South Africa and further also made references to humanitarian situation in Gaza and ordered that Israel must take "immediate and effective measures" to ensure humanitarian assistance is provided to the people in Gaza.

CONCLUSION

As is evident from the order passed by the ICJ to the Application made by South Africa, it has positives for both South Africa and Israel. The Court has identified the Palestinian people as a

[9] https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf
[10] https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf

distinct group and has ordered Israel to stop all actions amounting to Genocide as per the Genocide Convention. Further, no cease-fire was ordered by the Court, which in a way allows Israel to continue its Military operations in Gaza.

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