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Legal Framework of Law Relating to Retrenchment in India

Bushan Tilak Kaul*

Abstract

The Constitution of India guarantees to every citizen the right to carry on any trade, business or profession of his choice. He also has the right to retrench and even to close down his business if it turns out to be non-viable. This right, however, is not absolute and is subject to reasonable restrictions. The Supreme Court has given literal interpretation to the term 'retrenchment' defined in section 2(oo) of the Industrial Disputes Act, 1947 which goes beyond its ordinary meaning of 'labour surplusage.' The retrenchment compensation, thus, ensures some economic security to the working class between the period of job lost and job found, even in cases which go beyond the situation of labour surplusage. In the absence of a meaningful social security system in India, the court has held that the provisions relating to payment of retrenchment compensation are a measure of social security provided by the employer to his workers as a part of his social responsibility. The considerations that have informed the decision of the court in upholding restrictions envisaged under sections 25N and 25O in Chapter VB of the Act as reasonable restrictions on the right of the employer to carry on his business are concern for protecting existing employment, checking growth of unemployment, and maintaining high tempo of production and productivity by preserving industrial peace and harmony. Here an attempt has been made to present the approach of the court while dealing with the retrenchment provisions under the Act as a step forward to give effect to the constitutional values of the right to work and security in the event of unemployment.

An attempt has also been made to show that the pro-active approach of the court has unfortunately taken a back seat with the dawn of the era of privatization and globalization. The

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decisions rendered during the post-globalization era have had the effect of diluting the rights of the labour including denial of normal relief where retrenchments have been made in utter violation of the mandatory provisions of the Act. The normal relief of reinstatement and back wages is now, generally, substituted by the relief of compensation. One may not have serious objection to this alternate relief so being granted but surely the compensation cannot be illusory. The relief of quantum of compensation cannot be left to be decided on the basis of personal predilection of the judge. It must be decided on well settled and pragmatic norms so that the relief granted to the worker works as a deterrent on the employers.

Keywords: Constitution, Compensation, Employers, Globalization, Industrial Disputes, Legal, Privatization, Retrenchment

I. Introduction

This paper deliberates upon the legal framework related to retrenchment in India. Part I of the paper sheds light on the constitutional and statutory provisions which have a bearing upon the labour class. Part II of the paper provides a conceptual analysis of retrenchment in light of the various judicial pronouncements. Part III of the paper dwells upon the incorporation of Chapter VB within the Industrial Disputes Act. Part IV of the paper sheds light on the well-recognized principle of 'Last in, first out'. Part V of the paper provides the summation of the study.

Article 19(1) (g) of the Constitution of India guarantees to every citizen the right to carry on any trade, business or profession of his choice. He also has the right to close down his business if it turns out to be non-viable, though the right is not absolute.[1] When faced

1. In *Excel Wear* v. *UOI* (1978) 4 SCC 224, the Supreme Court held that the fundamental right to carry on business under Article 19(1)(g) of the Constitution includes right to close down or relinquish or sell the business. The State can under Article 19(6) of the Constitution impose, in the interest of general public, reasonable restrictions on the exercise of the right conferred under Article 19(1)(g). Section 25 O of the Industrial Disputes Act as originally enacted imposing restrictions on the employer's right to close business employing 300(now 100) or more workers was struck down by the Supreme Court on the ground that the restrictions imposed were not reasonable.

with difficult situations such as recurring losses, financial difficulties, non-availability of essential raw materials, unsatisfactory state of industrial relations making it difficult to sustain production, it may become imperative for the employer to resort to layoff or retrenchment of his employees or ultimately closure of his business. The decision of the employer to close down his business, whether temporarily or permanently, entails loss of production, unemployment of workers and inconvenience to the society.

The Industrial Disputes Act, 1947, as originally enacted, had no provision for the payment of compensation to the workmen who were laid off or retrenched in certain contingencies. This was probably due to the recognition of the inherent right of the employer to close down the business to save losses. But loss of wages has a telling effect on the workers. Probably because of this reason some progressive employers used to pay, and industrial tribunals, when disputes were referred to them, used to award compensation to the workers; yet the situation was far from satisfactory. In the absence of any norms laid down by the law, the resulting adjudication relating to quantum of compensation was neither certain nor uniform.[2]

The need for statutory provision became particularly obvious in 1953 when, as a result of accumulated stocks in the textile industry, textile mills were threatened with closure of one or more shifts entailing layoff or retrenchment of a large number of workers employed in that industry. In order, therefore, to avoid industrial unrest in the country, the President of India promulgated the

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Subsequently the Amendment Act, 1984 substituted 25 O by a new provision and the restrictions imposed thereunder were upheld by the Supreme Court in *Orissa Textile & Steel Limited* v. *State of Orissa* (2002) 2 SCC 578; also see, *Hathising Manufacturing Co. Ltd.* v. *Union of India*, (1960) 3 SCR 528.

2. O.P. Malhotra, *The Law of Industrial Disputes* vol. 2 (Butterworths, 2004) at 1897.

Industrial Disputes (Amendment) Ordinance, 1953 with effect from October 24, 1953, making provision for compensation for lay-off or retrenchment, setting a uniform standard for all employers. The Ordinance was replaced by the Industrial Disputes (Amendment) Act, 1953. These provisions for layoff and retrenchment compensation were also greatly necessitated by the coming into force of the Constitution of India on 26th January 1950 wherein in Part IV, entitled Directive Principles of State Policy, goals and values to be secured by the Republic of India as a welfare state had been incorporated.[3]

Section 3 of the Industrial Disputes (Amendment) Act, 1953 has engrafted chapter VA (provisions dealing with retrenchment and layoff) in the Industrial Disputes Act, 1947. This chapter contains sections 25A to 25J. Section 25F lays down that no workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by the employer until he complies with the conditions laid down in section 25F of the Act.[4]

In other words, section 25F lays down conditions precedent for valid retrenchment of a workman. However, the Supreme Court

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3. Part IV of the Constitution, in Articles 36 to 51, obligates the State, among other things, to make provisions for right to work, humane conditions of work, adequate means of livelihood, living wage, ensuring decent standard of life and enjoyment of leisure, participation of labour in management and public assistance in the event of unemployment.
4. 25F. Conditions precedent to retrenchment of workmen. — No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—
   (a) the workman has been given one month’s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
   (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
   (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.

has held that only Clauses (a) and (b) of section 25F are conditions precedent for effecting a valid retrenchment.[5] An employer can, therefore, send notice of retrenchment in the prescribed manner to the appropriate government as required under Clause (c) even after effecting retrenchment but sending the notice to the appropriate government is mandatory.[6] Where an employer retrenches his workman without complying with the requirements of clauses (a) and (b) of section 25F, the retrenchment will be ineffective in law and the workman would normally be entitled to reinstatement, back wages and continuity of service with all consequential benefits.[7] However, after the announcement of the new economic policy by the Government of India in 1991, the Supreme Court also adopted a new approach in the matter of grant of reliefs in case of violation of retrenchment laws. It preferred ordering compensations in lieu of reinstatement with back wages in many a case on the premise that reinstatement with back wages may not be the proper relief in view of the fact that the worker does not work during the intervening period and such reliefs may not be conducive for the efficient running of industry.[8] The court has laid down in a *catena*

5. *Bombay Union of Journalists* v. *State of Bombay*, (1964) 6 SCR 22.
6. *Raj Kumar* v. *Director of Education*, (2016) 6 SCC 541; *Mackinnon Mackenzie & Co. Ltd.* v. *Mackinnon Employees Union,* (2015) 4 SCC 544 (in short *Mackinnon Mackenzie*). Also see, Bushan Tilak Kaul, "Labour Management Relations" Vol. LII *Annual Survey of Indian Laws* 733 (2016) at 740-743.
7. *Mohanlal* v. *Management of Bharat Electronics Ltd*. (1981) 3 SCC 225; The Court held that if the termination of service is void and inoperative *ab initio,* there is no question of granting reinstatement. There is no cessation of service *and* mere declaration follows that the workman continues in service with all consequential benefits. The industrial adjudication has generally stated that it is granting relief of reinstatement of workers with continuity of service and back wages. In a few cases reasonable compensation in lieu of, reinstatement has been granted by way of relief; See *Gujarat Steel Tubes* v. *Gujarat Steel Tubes Mazdoor Sabha* (1980) 2 SCC 593.
8. *Allahabad Jal Sansthan* v. *Daya Shankar Rai*, (2005) 5 SCC 124. Also see, *U.P. State Brassware Corpn. Ltd.* v. *Uday Narain Pandey* (2006) 1 SCC 479. For a critique of new judicial approach in the matter of grant of relief of compensation in lieu of reinstatement, see Bushan Tilak Kaul, "Labour Management Relations" Vol. XLII *Annual Survey of Indian Laws* 480 (2006) at

of cases that in the matter of daily rated workers, compensation is the appropriate remedy in cases of breach of retrenchment law by the employers.[9] However the court has made it clear that where a daily rated worker has worked in that capacity for long years and thereafter his services have been terminated which he has challenged on the ground that it was an unfair labour practice and in violation of retrenchment law, in such a case the industrial tribunal can be justified in awarding reinstatement with back wages or regularization.[10] This relief will be also justified where his juniors have been granted regularization under a policy of regularization.[11]

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501. In *Dhampur Sugar Mills Ltd.* v. *Bhola Singh*, (2005) 2 SCC 470, the court held that reinstatement cannot be ordered where the project was co-terminus with the termination but without following section 25F, in such a case compensation will be the appropriate relief. In *Central P&D Institute Ltd.* v. *Union of India*, (2005) 9 SCC 171, the court held that where there is no direction for payment of increments and continuity of service, the same cannot be read into the award. For further discussion, see Bushan Tilak Kaul, "Labour Management Relations" Vol. XLI *Annual Survey of Indian Laws* 433 (2005) at 465. *Mahboob Deepak* v. *Nagar Panchayat, Gajraula*, (2008) 1 SCC 575; *M.P. Admn.* v. *Tribhuban*, (2007) 9 SCC 748; *Sita Ram* v. *Moti Lal Nehru Farmers Training Institute*, (2008) 5 SCC 75; *Jaipur Development Authority* v. *Ramsahai*, (2006) 11 SCC 684; *Uttaranchal Forest Development Corpn.* v. *M.C. Joshi*, (2007) 9 SCC 353 and *Ghaziabad Development Authority* v. *Ashok Kumar*, (2008) 4 SCC 261. *Rashtrasant Tukdoji Maharaj Technical Education Sanstha, Nagpur* v. *Prashant Manikrao Kubitkar*. For further discussion, see Bushan Tilak Kaul, "Labour Management Relations" Vol. XLIV *Annual Survey of Indian Laws* 499 (2008) at 518-520.

9. *Bharat Sanchar Nigam Limited* v. *Man Singh,* (2012) 1 SCC 558; *M.P. Admn.* v. *Tribhuban*, (2007) 9 SCC 748; State *of Madhya Pradesh* v. *Vinod Kumar Tiwari*, (2016) 16 SCC 610; *Ranbir Singh* v. *The Executive Engineer*, 2011 (1) SCR 587; *Bharat Sanchar Nigam Limited* v. *Bhurumal,* (2014) 7 SCC 177; *State of UP and Others* v. *Vinod Kumar*, (2016) 11 SCC 279; *Raju Chand* v. *Zonal Director Nehru Yuva Kendra Sangathan, Chandigarh*, (2016) 14 SCC 534; *Bharat Sanchar Nigram Limited* v. *Pawan Kumar Shukla,* (2016) 14 SCC 665; *B. Gope* v. *Aldor Welding Limited,* (2016) 14 SCC 702; *District Development Officer* v. *Satish Kantilal Amrelia*; *Dharamraj Nivrutti Kasture* v. *Chief Executive Officer*, (2019) 11 SCC 289; *State of Uttarakhand* v. *Raj Kumar*, (2019) 14 SCC 353 and *Deputy Executive Engineer* v. *Kuberbhai Kanjbhai*, (2019) 4 SCC 307.
10. *Hari Nandan Prasad* v. *Food Corporation of India*, (2014) 7 SCC 190
11. *Bharat Sanchar Nigam Limited* v. *Bhurumal,* (2014) 7 SCC 177.

It is submitted that the compensation as an alternative relief to reinstatement with back wages may be justified in some cases provided the compensation is reasonable, just and based upon well laid down workable principles. But it cannot be justified in absence of proper guidelines and relevant factors. The approach of the courts in granting compensation as the relief has been *ad hoc* and inconsistent.[12]

This approach of the court has come under criticism in some of the judgments of the court itself. In *Harjinder Singh* v. *Punjab State Warehousing Corpn.*,[13] the court observed:[14]

> Of late, there has been a visible shift in the courts' approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalization and liberalization are fast becoming the *raison d'etre* of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganized workers. In large number of cases like the present one, relief has been denied to the employees falling in the category of workmen, who are illegally retrenched from service by creating by-lanes and side lanes in the jurisprudence developed by this Court in three decades.

Subsequently, the court in *Asstt. Engineer, Rajasthan Development Corp.* v. *Gitam Singh*,[15] observed that decisions in *Harjinder*

12. *Senior Superintendent Telegraph (Traffic) Bhopal v. Santosh Kumar Seal*, (2010) 6 SCC 773; *Faridan* v. *State of U.P.,* (2010) 1 SCC 497 and *Vice Chancellor Lucknow University* v. *Akhilesh Kumar Khare*, (2016) 1 SCC 521
13. (2010) 3 SCC 192, in short *Harjinder Singh.* For detailed discussion, see Bushan Tilak Kaul, "Labour Management Relations" Vol. XLVI *Annual Survey of Indian Laws* 499 (2010) at 501-504.
14. (2010) 3 SCC at 209-10.
15. (2013) 5 SCC 136

Singh[16] and *Devinder Singh* v. *Municipal Council Somaur*,[17]should not be read to lay down the proposition that in all cases of wrongful termination reinstatement must follow. These two cases lay down the legal principle that judicial discretion exercised by the labour court cannot be disturbed by the high court on wrong assumptions like the initial employment of the employee was illegal.

The court in *Harjinder Singh* observed that it needs to be emphasised that if a man is deprived of his livelihood, he is deprived of his fundamental and constitutional rights. For him, the goals of social and economic justice, equality of status and of opportunity enshrined in the Constitution remain illusory. The judiciary at all levels needs to be sensitive towards the constitutional values and must ensure social justice to the workman by giving appropriate relief including reinstatement with back

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16. *Supra* note 13
17. (2011) 6 SCC 584 (In this case the workman was working as a clerk on consolidated salary. His services were terminated by the employer after two years when the competent authority did not approve his appointment to the said post. He challenged his termination being violative of section 25F. The labour court ordered his reinstatement without back wages which relief was set aside by the high court in the writ petition preferred by the management against the award of the labour court on the ground that his appointment was *de hors* the recruitment rules and also violative of article 14 and 16 of the Constitution. The high court held that the termination was illegal and awarded relief by way of grant of back wages under section 17B of the Act. The Supreme Court observed that the high court had not considered the entire facts leading to his appointment. His appointment was made as there was ban on public appointment/engagement by the state government and therefore no applications were invited. The court observed that the high court was not in assuming that he did not fulfill the eligibility conditions for appointment to the post of clerk. In these circumstances, it set aside the order of the high court on the ground that the high court exercised limited power of judicial review under article 226 and 227 of the Constitution in respect of the awards of labour court and industrial tribunal. It restored the award of reinstatement passed by the labour court. The court further directed that workman was also entitled to back wages for the period between the date of the award and the date of reinstatement. It is a case where court finds no reason to interfere with the award of reinstatement passed by the labour court and prefers to grant the said relief by the labour court over the alternate relief of compensation granted by the high court.)

wages and continuity of service in appropriate cases. The need for access to justice and free quality legal aid to enforce the rights under labour law is also a critical issue, availability of which could have made substantial difference in the reliefs to which the workers were entitled.[18]

Section 25G prescribes the procedure for retrenchment and gives legislative recognition to the well-recognized principle of retrenchment in industrial law, i.e., 'last come, first go.' Section 25H casts a duty on the employer who has retrenched a certain workman and subsequently has occasion to employ any person, to give an opportunity to the retrenched workman to offer himself for re-employment. In *Regional Manager, SBI* v. *Rakesh Kumar Tewari*[19] the Supreme Court has laid down that Section 25G predicates the following conditions:

1. The workman retrenched belongs to a particular category;
2. there was no agreement contrary to this rule of last come first go; and
3. the employer has not recorded any reasons for departing from it.

Further, for attracting application of Section 25H the condition of one year of continuous service of the retrenched workman is not a requirement.[20]

Section 25J makes the provisions of chapter VA override any other law, including Standing Orders made under the Industrial Employment (Standing Orders) Act, 1946.

18. *Santuram Yadav* v. *Krishi Upaj Mandi Samiti*, (2010) 3 SCC 189.
19. (2006) 1 SCC 530. For detailed discussion, see Bushan Tilak Kaul, "Labour Management Relations" Vol. XLII *Annual Survey of Indian Laws* 480 (2006) at 502. Also see, *Ajay Pal Singh* v. *Haryana Warehousing Corporation*, (2015) 6 SCC 321.
20. *Central Bank of India* v. *S. Satyam*, (1996) 5 SCC 419. Also see, Bushan Tilak Kaul, "Industrial Relations Law" Vol. XXXII *Annual Survey of Indian Laws* 301 (1996) at 321

In *Hari Prasad Shivankar Shukla* v. *A.D. Dewalkar,*[21] a constitution bench of the Supreme Court held, *inter alia*, that the term 'retrenchment' under the section 2(oo) of the Act did not include termination of service of all workmen in a *bona fide* closure of the industry or on the change of ownership or management of the industry. Resultantly, the Industrial Disputes Act was amended in order to provide for situations which the Supreme Court had held were not covered by the term 'retrenchment' in the Act. Parliament stepped in and inserted sections 25FF and 25FFF providing for payment of compensation to the workmen in the case of 'closure' and 'transfer of undertakings' as if the workman had been retrenched.[22] The effect was that the termination of the services of a workman on the 'transfer' or 'closure' of an undertaking was treated by Parliament as 'deemed retrenchment' for the purposes of notice and compensation, though by virtue of the Supreme Court decisions such cases did not fall within the definition of 'retrenchment' in section 2(oo) of the Act.

Any decision of the employer without adequate notice under law to close down his business had the effect of taking the workmen by surprise and sudden unemployment of workers. The magnitude of the problems resulting from closures without notice gained alarming proportions in various states. The Central Government intervened on the subject. Section 25FFA was incorporated in the Industrial Disputes Act, 1947 which came into effect from 14th June 1972.[23] Section 25FFA requires the employer to give 60 days'

21. 1957 SCR 121 (hereinafter referred to as *Shukla*). This case is the same as *Barsi Light Railway Co. Ltd.* v. *K.N. Joglekar*, 1957 SCR 121. In fact, both the cases were taken together by the Court as both involved common question of law and were decided by a common judgement; also see *Banaras Ice Factory Ltd.* v. *Workmen*, 1957 SCR 143.
22. The Industrial Disputes (Amendment) Act, 1957, (w.e.f. 28.11.1956).
23. Section 25FFA. Sixty days' notice to be given of intention to close down any undertaking. — (1) An employer who intends to close down an undertaking

notice to the government of his intention to close down his undertaking. The right to close down an industrial establishment employing fifty or more industrial workers has to fulfil the requirement of sixty days' notice before its closure under section 25FFA, the breach of which entails penal consequences under section 30A (1) of the Act. In *Mackinnon Mackenzie*,[24] the court held that the notice under section 25FFA is mandatory and non-compliance of it would vitiate the order of closure.

This was done with the object to prevent sudden closures and to give an opportunity to the government to consider whether it should take any measure in respect of such intended closure in accordance with the provisions of the Act such as making a reference to the Labour Court or Industrial Tribunal.[25] There was, however, no provision in the Act for prior scrutiny of the reasons for such closure. In view of the large-scale layoff, retrenchment and closure resorted to by big establishments, the central and the

shall serve, at least sixty days before the date on which the intended closure is to become effective, a notice, in the prescribed manner, on the appropriate Government stating clearly the reasons for the intended closure of the undertaking:

Provided that nothing in this section shall apply to—

(a) an undertaking in which—

(i) less than fifty workmen are employed, or

(ii) less than fifty workmen were employed on an average per working day in the preceding
twelve months,

(b) an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work or project.

(2) Notwithstanding anything contained in sub-section (1), the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like it is necessary so to do, by order, direct that provisions of sub-section (1) shall not apply in relation to such undertaking for such period as may be specified in the order

24. *Supra* note 6. Also see, Bushan Tilak Kaul, "Labour Management Relations" Vol. LI *Annual Survey of Indian Laws* 817 (2015) at 841-843.

25. *Mackinnon Mackenzie & Co. Ltd.* v. *Mackinnon Employees Union,* (2015) 4 SCC 544. Also see, *Walford Transport Ltd.* v. *State of West Bengal*, 1978 SCC OnLine Cal 568, per Mookerjee J; *Management of Town Bidi Factory* v. *Presiding Officer, Labour Court,* 1989 SCC OnLine Ori 233, per AK Padhi J.

state governments felt the need to impose some restrictions on the employer's right to layoff, retrenchment and closure. This was with a view to promote unavoidable hardships to the employees and to maintain high tempo of production and productivity.[26]

With the aforesaid object in view, the Act was amended by the Industrial Disputes (Amendment) Act, 1976, which engrafted Chapter VB containing sections 25K to 25S in the Act. Besides section 25A was amended to make it clear that sections 25C to 25E will not apply to the industrial establishments to which Chapter VB applies. This chapter and the restrictions contained therein applied to industrial establishments defined in section 25L employing three hundred or more workmen on an average per working day for the preceding twelve months and no lay-off, retrenchment or closure could be affected without seeking prior permission of the authority envisaged in this chapter. Stringent penalties are provided for contravening these provisions. The Amending Act and the rules framed there under came into force w.e.f. 05.03.1976. The Amending Act 46 of 1982 and the Amending Act 49 of 1984 have brought about substantial changes in some provisions of the Amending Act of 1976. Section 25K has been amended to make the provisions of this chapter applicable to industrial establishments employing 100 or more workmen, instead of 300 or more workmen as prescribed before this amendment. Section 25M has been substantially amended while sections 25N and 25O have been substituted by new amendments. Consequential changes have also been made in section 25R.

The Industrial Relations Code, 2020 subsumes within it the three central legislations namely, the Trade Unions Act, 1926, the Industrial Employment (Standing Orders) Act, 1946 and the

26. *Supra* note 2 at 2043.

Industrial Disputes Act, 1947 but is yet to come into force.[27] It was enacted in pursuance of the new economic policy of the Government of India to reform the industrial relations law of the country. Under the said Code, the limit of workers has been again raised to 300 as was provided in the original Industrial Disputes (Amendment) Act of 1976.

Some of the provisions of the chapters VA and VB of the Industrial Disputes Act, as was natural, came up for judicial scrutiny before the high courts and the Supreme Court in exercise of their powers of judicial review over the awards of industrial adjudicators; so also was there challenge to the vires to some of the provisions in these chapters.[28] Therefore, it is necessary to examine the decisions of the Supreme Court giving conceptual meaning to 'retrenchment' and examine the approach of the courts towards the challenge to the vires of the provisions imposing curbs on the right of employer to order retrenchment and closure of the industrial undertakings covered by Chapter VB which will be examined in the light of constitutional framework.

II. Concept of Retrenchment

Retrenchment in its ordinary sense connotes discharge of surplus workforce.[29] Workmen may become surplus due to a variety of

27. The Lok Sabha passed the Industrial Relations Code Bill, 2020 on 22.09.20; Rajya Sabha passed the Industrial Relations Code Bill, 2020 on 23.09.20 and it was assented by the President on 28.09.20.
28. The constitutional validity of section 25FFA was unsuccessfully challenged before the Calcutta High Court in *Walford Transport Ltd.* v. *State of West Bengal*, 1978 SCC OnLine Cal 568. The constitutional validity of section 25O as originally enacted was challenged successfully in *Excel Wear* v. *UOI* (1978) 4 SCC 224. However, the constitutional validity of the amended section 25O of the Act was upheld in *Orissa Textile & Steel Limited* v. *State of Orissa* (2002) 2 SCC 578. Further, the constitutional validity of section 25N which imposes certain restrictions on the right of the employer employing 100 or more workmen in the establishments covered by chapter VB of the Act to retrench workmen was upheld in *Workmen* v. *Meenakshi Mills Ltd.* (1992) 3 SCC 336.
29. In *Pipraich Sugar Mills Ltd.* v. *Pipraich Sugar Mills Mazdoor Union*, 1956 SCR 872 (hereinafter referred to as *Pipraich Sugar Mills*), the Court observed:

reasons, e.g., economy, rationalization of the industry, or installation of new labour - saving devices. If the statute provides a definition, one must look into the words used in the statutory definition first for its interpretation. The statutory definition may give a wider meaning than what is understood in its ordinary parlance. 'Retrenchment' under the Industrial Disputes Act, 1947 was defined in Section 2(oo) of the Act,[30] as it originally stood, and which consisted of the following four requirements:

(i) there should be 'termination' of the services of a workman;
(ii) such termination should be by the employer;
(iii) it may be for 'any reason whatsoever' otherwise than as a punishment inflicted by way of disciplinary action.;
(iv) it should not be covered by any of the exceptions contained in section 2(oo).

The key words 'termination…for any reason whatsoever', looked at unaided and unhampered by precedents are remarkably wide.

In the beginning, the landmark cases[31] that came for consideration of the Supreme Court did not call upon the court to consider the true ambit of the definition of 'retrenchment' under the Act, but were concerned with the question whether termination of the

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"[R]etrenchment connotes in its ordinary acceptance that business itself is continued but that a portion of the staff or the labour force is discharged as surplusage…"

30. "Retrenchment" means the termination by the employer of the services of a workman for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action, but does not include:-
(a) voluntary retirement of the workman; or
(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or
(c) termination of the service of a workman on the ground of continued ill-health

31. *Supra* note 21.

services of the workman as a result of transfer of undertaking, or change of management, or as a result of closure, were acts of retrenchment within the meaning of section 2(oo) of the Act. Further, in the earlier years, the court was called upon to decide the consequence that would follow in law in the event the employer failed to comply with the provisions of section 25F while retrenching his employees. The question as to whether the definition of 'retrenchment' in section 2(oo) was confined only to the cases of labour surplusage or whether its ambit was wider to include cases of other forms of termination of service came up for consideration of the court at the time when the court had adopted a liberal and activist approach in interpreting the Constitution of India and the welfare legislations. Such opportunities came before the court starting with *State Bank of India* v. *N. Sundra Money,*[32] *Hindustan Steel Ltd.* v. *Presiding Officer, Labour Court, Orissa* [33] & *Santosh Gupta* v. *State Bank of Patiala*.[34]

The earliest case of the Supreme Court on the subject is *Hariprasad Shivashankar Shukla* v. *A.D. Divelkar*.[35] The question for decision in these batch of cases was whether 'retrenchment' in the Act included the termination of the services of all workmen in an industry, when the industry itself ceased to exist on a *bona fide* closure or discontinuance of his business by the employer. The question was answered by the Court in the following words:[36]

> In the absence of any compelling words to indicate that the intention was even to include a bona fide closure of the whole business, it would, we think, be divorcing the expression altogether from the context to give it such a wide

32. (1976) 1 SCC 822. (in short *N. Sundra Money*)
33. (1976) 4 SCC 222. (in short *Hindustan Steel*)
34. (1980) 3 SCC 340. (in short *Santosh Gupta*)
35. *Supra* note 21.
36. *Id.* at 127.

> meaning…. [I]t would be against the entire scheme of the Act to give the definition Clause relating to retrenchment such a meaning as would include within the definition termination of service of all workmen by the employer when the business ceases to exist.

True there are some observations in *Shukla* (the same as in *Barsi Light Railway Co. Ltd.*) which, if not properly understood with reference to the question at issue, seemingly support the view that termination of service "for any reason whatsoever" has been held to mean nothing more or nothing less than the discharge of surplus labour. This view fails to appreciate the context in which those observations were made.

In *Shukla* the issue before the court was whether the termination of the services of workmen because of closure or transfer of undertaking was included in the definition of retrenchment under section 2(oo) of the Act. The court held that retrenchment in the ordinary sense of the term occurs because of labour surplusage in a continuing business. The court examined as to how far the ordinary meaning of retrenchment fits in with the language used in section 2(oo) and observed:[37]

> We have referred earlier to the four essential requirements of the definition, and *the question is, does the ordinary meaning of retrenchment fulfil those requirements? In our opinion it does*. When a portion of staff or labour force is discharged as surplusage in a continuing business there are (a) termination of the services of a workman; (b) by the employer; (c) for any reason whatsoever; and (d) otherwise than by way of disciplinary action. (emphasis supplied).

It is thus manifestly clear that the court in *Shukla* did not determine the ambit of the definition in section 2(oo), but was content to find

37. *Id.* at 126-27.

that retrenchment as defined in the Act included the ordinary meaning of retrenchment. The true scope of the term in section 2(oo) was thus left open.

Soon after the decisions of the Supreme Court in *Shukla* and other similar cases, the Industrial Disputes Act, 1947 was amended to provide for the situations which the Supreme Court had held were not covered by the term 'retrenchment' in the Act. Parliament, thus, stepped in and inserted sections 25FF and 25FFF providing for payment of compensation to the workmen in the case of 'closure' and 'transfer of undertakings', as if the workman had been retrenched. The effect was that the termination of the services of a workman on the transfer or closure of an undertaking was treated by Parliament as 'deemed retrenchment' for the purposes of notice and compensation, though by virtue of the Supreme Court decisions such cases did not fall within the definition of retrenchment in section 2(oo) of the Act.

In *Santosh Gupta*, the court ruled that the definition of 'retrenchment' in section 2(oo) was not confined to the ordinary meaning of the term, i.e., termination by the employer of the services of a workman on account of labour surplusage, but embraced every kind of termination other than those specifically excluded. This approach of the court in this case was by no means surprising. It was, in some measure, foreshadowed by some earlier pronouncements of the court in *N. Sundra Money* and *Hindustan Steel*. Even before the decision of the court in *Santosh Gupta*, the correctness of the court's approach in *N. Sundra Money* and *Hindustan Steel* towards the definition of retrenchment in the Act came to be questioned and criticized as "neither practical nor teleological".[38] Writings questioning the correctness of the court's

38. Anand Prakash "Definition of Retrenchment under the Industrial Disputes Act: Recent pronouncement of the Supreme Court", 19 *JILI* 84 (1979). The learned

approach increased[39] after the decision in *Santosh Gupta*. The approach of the court in these cases in general, and in *Santosh Gupta*, in particular, has been criticized on the ground that the concept of labour surplusage is implicit in the scheme of the Act relating to retrenchment and that after these decisions the application of certain provisions of the Act may lead to absurd consequences.[40] Pathak J. in *Surendra Kumar Verma* v. *Central Government Industrial Tribunal-cum-Labour Court*[41] candidly remarked: [42]

> I should not be taken to have agreed with the interpretation of section 2(oo) in *Santosh Gupta* v. *State Bank of Patiala*.

The critics of the court's approach admitted that, if a literal meaning is given to the definition, every case of termination, not expressly excluded by section 2(oo), would amount to retrenchment. They, however, argued that the court in the past had cut down the amplitude of the definition to harmonize it with the scheme of the Act. The question is whether the court had in the past really done so?

In order to appreciate the issues of conflict arising out of competing interpretations, it is appropriate to consider the decision in *Santosh Gupta* vis-à-vis the criticism levelled against it. It is unfortunate that the court in *Santosh Gupta* made no attempt to refer to the context of the decision in *Shukla* and left scope for its critics to use the isolated observations in *Shukla* to buttress their argument that *Shukla* had not been adhered to in the later set of cases starting with the *N. Sundra Money*. It is submitted that the

author has opined that. *N. Sundra Money* and *Hindustan Steel* have created complete uncertainty and indefiniteness in the field of labour law.

39. O. P. Malhotra, *The Law of Industrial Disputes*, *Supra* note 2 at 426; see also S. C. Srivastava "Labour Law I" XVI *ASIL* 104 at 116 (1980).
40. *Ibid.*
41. (1980) 4 SCC 443.
42. *Id.* at 450.

observations in *Shukla* that "retrenchment as defined in section 2(oo) and as used in section 25F has no wider meaning than the ordinary accepted connotation of word"[43] was with reference to the issue whether termination of the service of workmen on the closure or transfer of an undertaking was retrenchment under the Act, though it was not so under the ordinary meaning of the term. As stated earlier, in *Shukla* and other cases, the Court was not directly asked to pronounce on the scope of retrenchment as defined in section 2(oo) and this issue was left open. Such an opportunity presented itself only in the subsequent cases starting with *N. Sundra Money*.

In *N. Sundra Money*, the court considered the question whether the provision relating to retrenchment compensation, namely, section 25F, was attracted to a case where the order of appointment carried a term of automatic cessation of work, or the period of employment working itself out by efflux of time and not by active steps on the part of the employer. Would such a case still be covered by the definition of retrenchment under the Act? The court had to answer this issue in the absence of a statutory definition of "termination of service". To these questions, the answer of the court was:[44]

> Termination embraces not merely the act of termination by the employer, but the fact of termination, howsoever produced….[A]n employer terminates employment not merely by passing an order as the service runs. He can do so by writing a composite order, one giving employment, and the other ending or limiting it. A separate, subsequent determination is not the sole magnetic pull of the provision. A pre-emptive provision to terminate is struck by the same vice as the post-appointment termination. Dexterity of

43. *Supra* note 37.
44. *Supra* note 32 at 827.

> diction cannot defeat the articulated conscience of the provision.

Further, the court proceeded to explain the definition of 'retrenchment' in section 2(oo) of the Act thus:[45]

> A breakdown of section 2(oo) unmistakably expands the semantics of retrenchment. 'Termination…. for any reason whatsoever' are the key words. Whatever the reason, every termination spells retrenchment.

According to the court, section 2(oo) was "the master of the situation and the court could not truncate its amplitude." It further added that words of multiple import had to be winnowed judicially to suit the social philosophy of the statute which is to protect the weak against the strong. Thus, the following two propositions of law emerge from *N. Sundra Money*:

(i) that termination under section 2(oo) was not confined to cases where an employer by his active step terminated the service by passing an order as the service ran, but such termination could result even on an automatic cessation of service, the period of employment working itself out by efflux of time; and

(ii) termination for any reason whatsoever (not confined to labour surplusage) was also retrenchment.

So far as proposition (i) above is concerned, it has already been annulled by Parliament through the Industrial Disputes (Amendment) Act, 1984 by adding clause (bb) in the list of exceptions in section 2(oo), thus taking out cases brought within the ambit of termination by *N. Sundra Money*.[46] Therefore, to that

45. *Id.* at 826-27.
46. Section 2(oo) "Retrenchment" means…but does not include–
…

extent, *N. Sundra Money* is not the good law and has been undone by the said amendment. It is submitted that this was a retrograde step and a clear case where Parliament had succumbed to the pressures of the employers.

On the question of the scope of 'any reason whatsoever', *N. Sundra Money* is good law and to that extent proposition number (ii) formulated above is correct statement of law even after the 1984 amendment.

The definition of 'retrenchment' again came up for consideration before the court in *Hindustan Steel*. The question was whether termination of service by efflux of time was termination of service within section 2(oo) of the Act. The employer here frankly admitted that this case was covered by the decision of the court in *N. Sundra Money*. The employer, however, submitted that *N. Sundra Money*, which was decided by three judges, was in apparent conflict with an earlier decision of the Court in *Shukla*, which was decided by a Bench of five judges, and that *N. Sundra Money*, therefore, required reconsideration. A Bench of three judges of the court, consisting of Chandrachud, Goswami and Gupta JJ. held, and rightly so, that there was nothing in *Shukla* which was inconsistent with the decision in *N. Sundra Money*. It interpreted *Shukla* as deciding that termination of services of all workmen on the closure of an undertaking would not amount to retrenchment. The court fully endorsed the findings arrived at in *N. Sundra Money* and further observed that on the facts before it, to give effect to the words 'for any reason whatsoever' would be consistent with the scope and purpose of section 25F of the Act and not contrary to the scheme of the Act. Thus, in this case, too, the

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;

court restated the two propositions of law laid down in *N. Sundra Money*. However, the first proposition, that 'termination' under section 2(oo) includes termination by efflux of time, has now been annulled by the 1984 amendment and, therefore, like *N. Sundra Money*, *Hindustan Steels* too stands to that extent overruled. But on the second proposition that retrenchment was not confined to labour surplusage only, this case, like *N. Sundra Money*, continues to hold the field.

With regard to proposition (ii) formulated above, it is submitted that it is fallacious to contend that *N. Sundra Money* is not in conformity with the *ratio decidendi* of the five judges Bench decision in *Shukla*. The fact is that in *N. Sundra Money* the quest, through 'judicial navigation', for discovering the areas unexplored by *Shukla* began. Therefore, the question of going beyond credible limits of *Shukla* did not arise. *Gujarat Steel Tubes* v. *Gujarat Steel Tubes Mazdoor Sabha*,[47] and *Santosh Gupta*[48] provided opportunities for taking this interpretation to its logical conclusion.

In *Gujarat Steel Tubes* the scope of 'retrenchment' was not the core question before the Court. The main issue was whether the discharge of the workmen was punitive in nature and, therefore, liable to be voided even though draped in such silken phrases as 'termination *simpliciter*'. After dealing with the anatomy of the order, which the majority opinion treated as dismissal, the Court (majority opinion) turned to the concept of retrenchment, holding:[49]

> We are disposed to stand by the view that discharge, even where it is not occasioned by a surplus of hands, will be

47. (1980) 2 SCC 593. (in short *Gujarat Steel Tubes*).
48. *Supra* note 34.
49. *Id.* at 650.

> retrenchment, having regard to the breadth of the definition and its annotation…

The court in this case did in fact order payment of retrenchment compensation and one month's notice pay to some of the discharged employees whom it deemed to be in continuous service of the employer till August 3, 1979, the day when the arguments in the instant appeals were concluded in the court. The court also directed that they be paid all terminal benefits plus 75% of the back wages till that date.

In *Santosh Gupta*, the issue before the court was whether the termination of services of an employee from a bank on the ground that she failed to pass the test which would have confirmed her in her service fell within the definition of 'retrenchment' under the Act. According to the workman, the termination of her services was retrenchment within the meaning of that expression in section 2(oo). It was further contended that since it was retrenchment, it was bad for non-compliance with the provisions of section 25F of the Act. The management stressed its customary and age-old argument that, notwithstanding the comprehensive language of the definition of retrenchment in section 2(oo), the expression continues to retain its original meaning which was discharge from service on account of surplusage. Since the termination of service in the instant case was not due to 'labour surplusage', but due to failure of the workman to pass the test which would have enabled her to be confirmed in the service, this was not 'retrenchment' within the meaning of section 2(oo). The Court approached the definition of retrenchment in the following manner:[50]

> If the definition of retrenchment is looked at unaided and unhampered by precedents, one is at once struck by the

50. *Supra* note 34 at 342.

> remarkably wide language employed and particularly by the use of words termination… for any reason whatsoever.

The court further observed that due weightage should be given to the words 'for any reason whatsoever' and added:[51]

> …if the words 'for any reason whatsoever' are understood to mean what they plainly say, it is difficult to escape the conclusion that the expression retrenchment must include every termination of the service of a workman by the act of employer. The underlying assumption, of course, is that the undertaking is running as an undertaking and the employer continues as an employer….

Rejecting the argument of the employer, the court held that if the submission of the employer were treated as correct, then there was no need to define the expression 'retrenchment' in such wide terms. It could not be that "Parliament was undertaking an exercise in futility to give a long-worded definition merely to say that the expression means what it always meant."[52]

The court in *Santosh Gupta* observed that reference to discharge on account of surplusage in *Shukla* and *Barsi Light* was "illustrative and not exhaustive and by way of contrast with discharge on account of transfer or closure of business."[53]

In giving broader connotation to the term retrenchment, the court also took into account the manifest object of retrenchment compensation which is to so compensate the workman for the loss of employment as to provide him with some wherewithal to subsist until he finds fresh employment.[54] The court in the instant case held that the discharge of an employee from a bank even on the

51. *Ibid.*
52. *Id.* at 343.
53. *Supra* note 34 at 344.
54. *Id* at 342.

ground that the employee failed to pass the test as required was retrenchment under the Act. Accordingly, the discharge of Santosh Gupta after putting one year of continuous service ('continuous service' as defined in section 25B means 240 days) in the bank on the ground of her failure to pass the confirmation test, without notice and retrenchment compensation, was set aside and her reinstatement ordered with full back wages. The position of law as it emerges from these decisions was summarized by the court thus:[55]

> …the expression termination of service for any reason whatsoever now covers every kind of termination of service except those not expressly included in section 25F, or not expressly provided for by other provisions of the Act such as section 25FF and section 25FFF.

In other words, *Santosh Gupta* put the Court's seal on the changing concept of retrenchment from 'labour surplusage' to every termination of service of an employee except those expressly excluded. It may be recalled here that by virtue of the 1984 amendment, termination does not include cases where termination resulted by efflux of time. However, the amendment of 1984 has not in any way diluted the main principle laid down by *Santosh Gupta* that the scope of section 2(oo) is not restricted to labour surplusage, but extended much beyond the ordinary meaning of the term.

Subsequently, in *Punjab Land Development and Reclamation Corporation* v. *Presiding Officer, Labour Court*[56] a Constitution Bench of five judges of the Court was constituted to examine the true interpretation of the definition of retrenchment in section 2(oo): whether 'retrenchment' under the Act meant termination of

55. *Ibid*.
56. (1990) 3 SCC 682 (hereinafter referred to *Punjab Land Development*).

the services of the workmen as surplus labour for any reason whatsoever; or it meant termination by the employer of the services of the workmen for any reason whatsoever otherwise, than as a punishment inflicted by way of disciplinary action and those expressly excluded by the definition.

Saikia J, who delivered the judgment in *Punjab Land Development* for the court, put the question to be considered thus:[57]

> the question to be decided was whether the word retrenchment in the definition has to be understood in its narrow, natural and contextual meaning or in its wider literal meaning.

The court reviewed its earlier decisions to find out whether the oft-repeated argument by the management that the Division Benches of the court in cases starting from *N. Sundra Money* had gone against the judicial interpretation of the term 'retrenchment' by a Constitution Bench of the court in *Shukla*. It was argued in the instant case by different managements that the Constitution Bench in *Shukla* had held that 'retrenchment' in section 2(oo) includes only the cases of termination of workmen as labour surplusage which may result from any reason whatsoever and that the smaller benches had not only failed to apply the law as declared in *Shukla*, but had also ignored the scheme underlying sections 25G and 25H of the Act. It was further contended by them that the decisions in *N. Sundra Money* and the subsequent cases in the line were, therefore, *per incuriam*.

The court, therefore, examined whether the ratio of *N. Sundra Money* and other subsequent cases was in conflict with the ratio in *Shukla*.

57. *Id* at 691.

On a careful analysis of the *ratio* of *Shukla*, the Court held that the *ratio* in that case did not extend beyond holding that termination on the ground of 'closure' did not fall within the definition of retrenchment in section 2(oo). The court held that *Shukla* was no authority for the proposition that section 2(oo) covers only cases of labour surplusage.[58] Although *Shukla* appears not to have been brought to the notice of the Division Bench of the Court in *N. Sundra Money*, yet to hold that the subsequent decisions have ignored a binding precedent would not be correct given the fact that the Division Benches in *Hindustan Steel Ltd.* and *Santosh Gupta* have not only referred to *Shukla* and *N. Sundra Money*, but have considered the *ratio* of *Shukla* threadbare. The court held that the Division Benches in *Hindustan Steel* and *Santosh Gupta* were right in holding that *Shukla* only decided that the words 'for any reason whatsoever' used in the definition of retrenchment in section 2(oo) do not include termination on *bona fide* closure of the whole business, as it would affect the scheme of the Act which pre-supposes that retrenchment can take place only in a continuous business. Saikia J, speaking for the Court held:[59]

> In fact the question whether retrenchment did or did not include other termination was never required to be decided in *Shukla* and could not, therefore, have been or taken to have been decided by this court.

The court did not find anything in *Shukla* which was inconsistent with the decision in *N. Sundra Money* and subsequent decisions in the line on the definition of retrenchment. It quoted with approval the following observations of Ranganath Misra J in *Karnataka S.R.T. Corpn.* v. *Boraiah*:[60]

58. For similar views see Bushan Tilak Kaul, "Law of Retrenchment in India" 12 *Delhi Law Review* 141 at 144-52 (1990).
59. *Supra* note 56 at 710.
60. (1984) 1 SCC 244 at 254.

> We are inclined to hold that the stage has come when the view indicated in *N. Sundra Money* case has been 'absorbed into the consensus' and there is no scope for putting the clock back or for an anti-clockwise operation.

On an analysis of the mental process involved in drafting the definition of retrenchment the court observed that had Parliament "envisaged only the question of termination of surplus labour alone in mind," there would be no question of excluding cases falling in sub-clauses (a), (b) and (c) of the definition. The same mental process was evident when section 2(oo) was amended inserting another exclusion clause (bb) by the amending Act of 1984 with effect from August 18, 1984.

In *General Manager, Haryana Roadways* v. *Rudhan Singh*,[61] the court has made it very clear that the management cannot be allowed to raise the plea for the first time before the Supreme Court that the case of the workman was of fixed term appointment if the management has not raised such a plea either before the labour court/ industrial tribunal or before the high court where it would have to discharge the burden of proof that it was a case covered by sub-clause (bb) of section 2(oo) of the Act. This was to ensure that such an afterthought plea was not allowed to be raised before the apex court for the first time. Similarly, if the management is required to produce documents on which reliance is sought by the workmen and it fails to produce the documents, the industrial adjudicator is within its powers to draw an adverse inference against the management.[62]

However, in some cases the court has failed to appreciate the ingenuity of the employers in resorting to various camouflages to

61. (2005) 5 SCC 591
62. *Bhavnagar Municipal Corporation* v. *Jadeja Govubha Chhanubha*, (2014) 16 SCC 130

bring their cases in the exclusionary clause of section 2(oo)(bb) of the Act.[63] The court has taken pedantic view and has not applied the corporate law principle of lifting the veil behind the action of the employers. It has not referred to the principles laid down in its earlier judgment in such situations in *S.M. Nilajkar* v. *Telecom District Manager*,[64] and has allowed the employers to escape the consequences which follow for violation of section 25F. Such an approach of the court needs correction.

On the question whether the literal meaning of section 2(oo) is inconsistent with the scheme under sections 25G and 25H, the court pointed out that the definitions in section 2, which include the definition of 'retrenchment', are subject to anything repugnant in the subject matter or context. The court, therefore, preferred to adopt the rule of harmonious construction in reading sections 25G, 25H and 2(oo) and held that in view of the extended meaning given to retrenchment under section 2(oo) the rule laid down in sections 25G and 25H could have no application to cases of termination on closure, or transfer of undertaking, or retrenchments other than those on account of labour surplusage. In other words, the court held that sections 25G and 25H apply only to retrenchments which occur on account of labour surplusage. This view, it is submitted, is correct because even in cases of retrenchment on account of labour surplusage, no inflexible rule is laid down under section 25G. Section 25G, while enacting the rule of last come-first go, provides that the rule be followed "ordinarily".

The court held that section 2(oo) read with section 25G does not affect or take away the rights of the employer under the Standing Orders or under the contract of employment, but these two

63. *Kishore Chandra Samal* v. *Orissa State Cashew Development Corpn. Ltd.*, (2006) 1 SCC 253; *Punjab SEB* v. *Darbara Singh*, (2006) 1 SCC 121 and *Municipal Council, Samrala* v. *Raj Kumar*, (2006) 3 SCC 81.
64. (2003) 4 SCC 27.

provisions only put an additional social obligation on the employer to give retrenchment benefit to the affected workmen for immediate tiding over of their financial difficulty caused by such retrenchment. The court observed:[65]

> Looked at from this angle, there is implicit social obligation. As the maxim goes-*stat pro ratione voluntas populi*; the Will of the people stands in place of a reason.

To sum up, the court held that retrenchment as defined in section 2(oo) means termination for any reason whatsoever, except those excluded in the section, and disposed of seventeen appeals. The court further held that the following cases[66] fell within the definition of retrenchment:

i) Termination on the ground that the chairman had no power to make appointments, or that work of the workmen was found to be unsatisfactory during the period of probation.

ii) Termination on the ground of lack of confidence by paying three months wages.

iii) Termination for having abandoned his services by the worker.

iv) Termination pursuant to disciplinary proceedings by giving one month's notice.

v) Termination under the contract, service rule or Standing Orders, as the case may be.

vi) Termination on striking the name of the workmen off from the rolls of the company.

65. *Supra* note 56 at 720.
66. *Id.* at 722.

In *Anand Bihari* v. *Rajasthan SRTC*,[67] the Supreme Court held that where the services of drivers working in the state transport corporation were terminated on the ground that they had developed defective eye-sight and did not have the required vision for driving heavy motor vehicles like buses for which they were engaged by the corporation, such termination would be covered by sub-clause (c) of section 2(oo) and thus termination in such cases would not amount to 'retrenchment'. The court ruled that the phrase 'ill health' within the meaning of sub-clause (c) of section 2(oo) included any disorder in health which incapacitates an individual from discharging the duties entrusted to him or affects his work adversely or comes in the way of his normal and effective functioning. The court held that the phrase 'ill health' has also to be looked at from the point of view of the consumers of the concerned products and services. If on account of a worker's disease or incapacity or disability in functioning, the resultant product or the services is likely to be affected prejudicially in any way, or to become a risk to the health, life or property of the consumer, the disease or incapacity has to be categorized as 'ill health' for the purpose of sub-clause (c) of section 2(oo). Otherwise, the production for which the services of the workman are engaged will be frustrated; worse still in cases such as providing transport services to the public, the lives and property of the consumers will be endangered. Hence a realistic and not a technical or pedantic meaning has to be placed on that phrase. The court, therefore, ruled that the termination of the services of the drivers concerned did not amount to 'retrenchment' and they were not entitled to retrenchment compensation.

The court, however, took notice of the fact that the drivers whose service were terminated and were excluded from the definition of

67. (1991) 1 SCC 731 (in short, *Anand Bihari*).

retrenchment by virtue of sub-clause (c) of section 2(oo) had put in long years of service. They were about 40 years of age, when their age of retirement was 58. The impairment in their vision was probably caused by occupational hazards, as they had to drive the vehicle in sun, rain, dust, and dark hours of night and were exposed to the glaring and blazing sunlight and beaming and blinding lights of the vehicles coming from the opposite direction, etc. Yet the corporation had treated their case in the same manner and fashion as it treats the case of other workers, who on account of reasons not connected with the employment suffer from ill-health or continued ill-health. The court held that termination of services of such drivers was not justified as the corporation ought to have provided them with alternative employment, even though it was under no legal compulsion to do so. These drivers had to face premature termination of service on account of disabilities contracted from their jobs, whereas the other employees continued to serve till the date of their superannuation and this by itself was discriminatory against drivers. No special provision was made and no compensatory relief was provided in the service conditions for the drivers for such premature incapacities. The court held that such termination of service was unjustified, inequitable and discriminatory, though not amounting to retrenchment within the meaning of section 2(oo) of the Act. The court observed that the injustice, inequity and discrimination writ large in such cases was indefensible and that their service conditions must, therefore, provide for adequate safeguards to remedy the situation by compensating them in some form for the all-round loss they suffer for no fault of theirs. The workmen were fit to do work other than that of a driver with the eyesight they possessed. The court held that a provision for compensatory relief for such workmen suffering work related disability was the need of the day. Accordingly, the Supreme Court proposed a scheme for the

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purpose. The scheme, an exercise in judicial activism, is summarized below:[68]

(i) The corporation shall, in addition to giving each of the retired workmen his retirement benefits, offer him any other alternative job which may be available and for which he is fit.

(ii) In case no such alternative job is available, each of the workmen shall be paid, along with his retirement benefits, an additional compensatory amount as follows:

(a) where the employee has put in less than 5 years' service, the amount of compensation shall be equivalent to 7 days' salary per year of the balance of his service;

(b) where the employee has put in more than 5 years' but less than 10 years' service, the amount of compensation shall be equivalent to 15 days' salary per year of the balance of his service;

(c) where the employee has put in more than 10 years' but less than 15 years' service, the amount of compensation shall be equivalent to 21 days' salary per year of the balance of his service;

(d) where the employee has put in more than 15 years' service but less than 20 years' service, the amount of compensation shall be equivalent to one month's salary per year of the balance of his service;

(e) where the employee has put in more than 20 years' service, the amount of compensation shall be equivalent to two month's salary per year of the balance of service.

68. *Id.* at 743.

The salary will mean the total monthly emoluments that the workman was drawing on the date of retirement.

(iii) If no alternative job is available immediately, but becomes available at a later date, the corporation may offer it to the workman, provided he refunds a proportionate part of compensatory amount, received by him.

(iv) The option to accept either of the two reliefs, if an alternative job is offered by the corporation, shall be that of the workman.

In evolving the above scheme, the court was influenced by three factors; namely (i) the workmen concerned were incapacitated to work only as drivers and were not rendered incapable to take any other job, either in the corporation or outside, (ii) the workmen were at an advanced stage of their life and it would be difficult for them to get a suitable alternative employment outside; and (iii) the relief available under the scheme should not be such as would induce the workmen to feign disablement, which, in the case of a disability such as the development of a defective eyesight, may be easy to do.[69]

In *Rameshwar Das* v. *State of Haryana*,[70] the Supreme Court held that *Anand Bihari* is to be read in its proper context and spirit and, when so read, the Court had impressed on the state corporation to first provide for alternate jobs to such drivers who had become medically unfit for heavy vehicles. A direction for payment of additional compensation was given only when it was not possible at all in the existing circumstances to provide alternative jobs to such drivers. The court made it very clear that the authorities of the corporation could not take recourse only to the payment of the

69. *Supra* note 2 at 464.
70. (1995) 3 SCC 285.

additional compensation without first examining whether such drivers could be put on alternate jobs.

It is submitted that the approach of Sawant J. in *Anand Bihari* in formulating the scheme is a case of judicial activism. Here the court has risen to the occasion to meet the needs of the members of the working class who because of occupational hazards contract incapacities, where no legislative provision exists to provide a wherewithal to these employees.

III. Position Subsequent to Incorporation of Chapter VB

By virtue of chapter VB of the Act, industrial establishments falling within the purview of section 25L, employing 300(now 100) or more workmen were, apart from 90 days' notice of closure, are further subjected to prior approval (now prior permission) of the appropriate government by section 25O of the Act by the 1976 Amendment. The constitutional validity of that Amendment was the subject-matter of challenge before the Supreme Court in *Excel Wear* v. *UOI.*[71] The court held that right to close down business is not a right appurtenant to the ownership of the property, but is an integral part of the right to carry on the business under Article 19(1)(g). The Supreme Court struck down section 25O and section 25R insofar as it prohibited closure without the prior approval (now prior permission) of the appropriate government as unconstitutional, being unreasonable *inter alia* for not giving reasons for refusal, for not prescribing time limit for communicating such decision and not for making a provision for appeal against the order of refusal to grant permission.[72]

71. (1978) 4 SCC 224.
72. The reasons given by the Supreme Court for striking down Section 25O and 25R in *Excel Wear* were mainly the following:
    i. Section 25O did not require reasons to be given in the order for refusal of permission and had left it to the whims and caprice of the

The court, however, upheld the constitutional validity of chapter VB as it deals with comparatively bigger undertakings and of a few types only, being reasonable classification for the purposes of Article 14 of the Constitution.[73]The court, however, did not hold the restrictions on the right to carry on trade or business reasonable within the meaning of Article 19(6).

The court on balancing of interest found that the employer was not sufficiently protected against possible abuse of power by the appropriate government and that there were no sufficient checks and balances on the wide discretion of the appropriate government. Further, there was no timeframe prescribed within which the decision was to be communicated to the employer. It is submitted that this approach of the court was reasonable and balanced.

Subsequently, section 25O was recast. The Amendment Act 46 of 1982 incorporated amended section 25O. The constitutional validity of the amended section 25O was impugned before the Supreme Court in *Orissa Textile & Steel Limited* v. *State of Orissa*.[74] The Court this time upheld the constitutional validity of

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authority to decide one way or the other. Thus the order could be whimsical and capricious.

ii. No time limit was fixed for refusal of permission.

iii. That there was no provision of deeming approval in the section. The result would be that if the government order was not communicated to the employer within 90 days, though, strictly speaking, no criminal liability under Section 25R would arise, if on the expiry of that period the undertaking is closed. But same would not be true of civil liability under Section 25O(5) which would come into play on the expiry of the period of 90 days.

iv. The order passed by the authority was not subject to any scrutiny by any higher authority or tribunal either in appeal or revision and the order could not be reviewed even after sometime.

v. The restriction imposed was more excessive than was necessary for the achievement of the object and thus highly unreasonable. It was suggested that there could be several other methods

vi. to regulate and restrict the right of closure, e.g., by providing for additional compensation besides retrenchment compensation.

73. *Supra* note 71 at 249.

74. (2002) 2 SCC 578.

the section 25O in the amended form which was necessitated by the judgment of the Court in the *Excel Wear* case.

It will be appropriate now to refer to the decision of the Supreme Court in *Workmen* v. *Meenakshi Mills Ltd.*[75] where the constitutional validity of section 25N imposing restrictions on the right of employers of industrial establishments employing 100 or more workmen to retrench their workmen was impugned as violative of Article 19(1)(g). The main ground of the challenge was that the fundamental right to carry on trade and business guaranteed by Article 19(1)(g) includes not only right to close the business but also the right to retrench the employees and that the restrictions imposed under section 25N were unreasonable and not protected under Article 19(6). A Constitution Bench of the court

75. (1992) 3 SCC 336. The employers had raised the following contentions to assail the reasonableness of the restriction imposed by section 25N on their right to carry on business:

i. Adjudication by a judicial body has been substituted by an administrative order and thereby the function of determining validity of retrenchment action under section 25F which was traditionally performed by industrial tribunal has been conferred on an executive authority;

ii. No guidelines have been prescribed for the exercise of the powers by the appropriate government or the authority under sub-section (2) of section 25N and it would be permissible for the authority to pass its order on policy considerations which may have nothing to do with the individual employer's legitimate need to reorganize its business. "The interests of workmen", under sub-section (3), as substituted by the Amendment Act, 1984, would result in impermissible elements in the matter of exercise of powers and permission for retrenchment will never be granted;

iii. There is no provision for appeal or revision against the order passed by the appropriate government or authority refusing to grant permission to retrench under sub-section (2) of section 25N. Judicial review under article 226 is not an adequate remedy;

iv. The provisions are ex-facie arbitrary and discriminatory inasmuch as, while the workers have the right to challenge, on facts, the correctness of the order passed under sub-section (2) granting permission for retrenchment, by seeking a reference under section 10, the management does not have similar rights to challenge the validity of an order passed under sub-section (2) refusing to grant permission for retrenchment.

finally settled the question of constitutionality of section 25N as originally enacted, i.e. before the Amendment Act of 1984 substituted it with amended provision.

Two main questions that came up for consideration of the Court were:

(i) Is the right to retrench his workmen an integral part of the right of the employer to carry on his business guaranteed under article 19(1)(g) of the Constitution?

(ii) If so, are the restrictions imposed by section 25N on the said right of workmen saved under Clause (6) of article 19 as reasonable restrictions in public interest?

The employers argued that right to retrench workmen stood on a higher footing than the right to close the business which was recognised by the court in *Excel Wear* as an integral part of the right to carry on business under article 19(1)(g). In retrenchment situation the business is continuing and only a part of the labour is dispensed with in the interests of organising business in a way that is most beneficial for the employer. The workmen, on the other hand, contended that right to retrench the workmen can only be regarded as a peripheral or concomitant right which facilitates the exercise of the right to carry on business, but it cannot be treated as an integral part of the right to carry on the business. They also assailed the correctness of the view in *Excel Wear* that right to close the business is an integral part of the right to carry on business and that the decision of the Court in *Excel Wear* is in conflict with the earlier decision in *Ch. Tika Ramji* v. *State of U.P.*[76] The workmen also argued that the employers in this group of cases before the Supreme Court, being companies registered

76. 1956 SCR 393

under the Companies Act, cannot claim the fundamental rights guaranteed to citizens under article 19(1)(g).

The court without going into the merits of rival contentions, however, proceeded on the assumption that the right to retrench the workmen is an integral part of the fundamental right of the employer to carry on business under article 19(1)(g) for the following reasons:[77]

> In view of the fact that some of the grounds for challenging the validity of section 25N on the ground of violation of Article 19 can also be made the basis for challenging the ground of violation of Article 14, we do not consider it necessary to go into the question whether the right to retrench the workmen is an integral part of the right of the employer to carry on the business or it is only a peripheral or concomitant right which facilitates the exercise of the said fundamental right to carry on the business and we will proceed on the assumption that the right to retrench the workman is an integral part of the fundamental right of the employee to carry on the business under Article 19(1)(g). For the same reason we are not inclined to rule out the challenge to the validity of section 25N on the ground that a company, incorporated under the Companies Act, being not a citizen, cannot invoke the fundamental right under Article 19 and shareholders of the companies seeking to challenge the validity of section 25N in this group of cases cannot complain of infringement of their fundamental right under Article 19.

The court, therefore, addressed itself only to the question as to whether the restrictions imposed by section 25N can be regarded as reasonable and in public interest and as such permissible under

77. *Supra* note 75 at 357-58.

Clause (6) of article 19. The court, however, at the very outset noticed that the considerations, which weighed with it to strike down section 25O in *Excel Wear* could not be applied for judging the validity of section 25N. A comparison of the provisions of section 25N and section 25O, as originally enacted, which came up for consideration before this court in *Excel Wear* case revealed noticeable distinguishing features.[78]

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78. *Id.* at 354-55. The distinguishing features noticed by the Court were as under:

    i. Under sub-section (2) of Section 25O, the appropriate government could direct the employer not to close down the undertaking on receipt of notice under Clause (1) of sub-section (1) if the appropriate Government was "satisfied that the reasons for the intended closure of the undertaking are not adequate and sufficient or such closure was prejudicial to public interest", whereas sub-section (2) of Section 25N, required that the appropriate Government or the authority may grant or refuse permission for retrenchment "after making enquiry as such Government or authority thinks fit."

    ii. Under sub-section (2) of section 25N the appropriate Government or the authority was required to record in writing the reasons for its order granting or refusing permission for retrenchment. There was no such requirement to record reasons for refusal to grant permission to close down the undertaking in Section 25O.

    iii. In sub-section (3) of section 25N it was provided that when the Government or authority does not communicate the permission or refusal to grant the permission to the employer within three months of the date of service of the notice under Clause (c) of sub-section (1), the Government or authority shall be deemed to have granted permission for such retrenchment on the expiration of the said period of three months. In Section 25O there was no such requirement except in respect of cases covered by sub-section (3), viz. where a notice had been served on the appropriate government by an employer under sub-section (1) of section 25FFA and the period of notice had not expired at the commencement of the 1976 Act. In such cases, the employer was required to apply to the appropriate Government for permission to close down the undertaking within a period of fifteen days from commencement of the 1976 Act and in sub-section (4) it was provided that where an application for permission had been made under sub-section (3) and the appropriate Government does not communicate the permission or the refusal to grant the permission to the employer within a period for two months from the date on which the application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of two months. This provision was similar to that contained in sub-section (4) and (5) of Section 25N. There was,

The court observed that validity of section 25N has to be examined in the light of the particular provisions contained therein. To test the reasonableness of the restrictions under section 25N, the court analysed the object behind them and found that it is the prevention of avoidable hardship to the employees by protecting existing employment. It is also intended to maintain high tempo of production and productivity by preserving industrial peace and harmony, besides giving effect to the mandate contained in the directive principles of the Constitution, viz. articles 38, 39, 41 and 43.[79] The court held that ordinarily any restriction imposed which has the effect of promoting and effectuating a directive principle can be presumed to be a reasonable restriction in public interest. It reasoned that a restriction imposed on the employer's right to terminate the service of the employee is not *alien* to the constitutional scheme which indicated that the employer's right is not absolute. The amendments introduced by the 1953 Act were the first step in this direction in relation to industrial employees.

The Supreme Court repelled all the contentions of the employers[80] and observed that the power to grant or refuse permission for retrenchment conferred under sub-section (2) on the executive is not arbitrary. It has to be exercised on an objective consideration of

however, no provision in Section 25O similar to that contained in sub-section (3) of section 25N.

79. Article 38 enjoins the state to secure a social order for the promotion of welfare of the people.
Article 39 enjoins the state to ensure, *inter alia*, equality among men and women, provide adequate means of livelihood, ensure that the ownership and control of the material resources of the community are so distributed as best to sub-serve a common good, ensure equal pay for equal work for both men and women and provide measures for health and safety of workers, men and women and children etc.
Article 41 enjoins the state to provide right to work, education and public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want.
Article 43 requires the state to take steps to secure to all workers, *inter alia*, a living wage and decent standard of life.
80. For details of the contentions of the employers, see *Supra* note 75.

the relevant facts after affording the opportunities to the parties having an interest in the matter. Further, the government or authority has to record the reasons in the order. The appropriate government or the authority is required to examine information supplied by the employer under rule 76A of the Industrial Disputes (Central) Rules and Form PA and other material furnished by the employer as well as the workmen. In view of the time-limit prescribed by sub-section (3), the disposal has to be expeditious which may not be feasible if the proceedings are conducted before a judicial officer accustomed to the judicial process. Moreover, it may involve interaction between various departments of the government which can be achieved by an executive officer in a better manner. Therefore, conferment of power on the executive instead of an industrial tribunal or labour court will not in any way lead to the arbitrary exercise of power.

Secondly, orders under sub-section (2) of section 25N have to be speaking orders. They have to be passed after objective consideration of relevant facts, and after affording an opportunity of being heard to the concerned parties. It cannot be said that no guidance is given for exercise of such powers. Such powers have to be exercised keeping in view the provision of the Act and the object underlying 1976 Act, which introduced section 25N in the Act. The Court held that the interests of the workers in the industry have to be recognised and cannot be ignored.[81]

Thirdly, the remedy of judicial review under article 226 is an adequate protection against arbitrary action in the exercise of powers by the appropriate government or the authority under sub-section (2) of section 25N. More so, when the authority has to record reasons for refusing permission.

81. See *National Textile Workers Union* v. *P.R. Ramakrishnan* (1983) 1 SCC 228.

Finally, the court held that since the expression 'industrial dispute' as defined in section 2(k) covers dispute connected with non-employment of any person and section 10 empowers the appropriate government to make a reference in case where an industrial dispute is apprehended, an employer proposing retrenchment of workmen, who feels aggrieved by an order refusing permission, can also move for reference of such a dispute for adjudication under section 10. The employer and the employee in this situation stand on the same footing. It is permissible for both to raise an industrial dispute which may be referred for adjudication by the appropriate government. Therefore, it cannot be said that, as compared to the workmen, the employer suffers from a disadvantage in the matter of raising an industrial dispute and having it referred for adjudication.

In the result, the court had no hesitation in holding that the restrictions imposed under section 25N on the right of the employers to retrench employees are reasonable within the meaning of clause (6) of Article 19.

Thereafter, a Constitutional Bench of the Supreme Court in *M/s. Orissa Textile & Steel Co. Ltd.*,[82] upheld the validity of section 25O as amended by the Amendment Act 46 of 1982. The court after analyzing the amended section 25O held that the changes brought in section 25O had taken care of the deficiencies found by the Court in the original Section 25O and pointed out in *Excel wear* and had no hesitation to declare that the entire provision was sustainable in law in view of the changes made therein by the Amendment Act 46 of 1982.[83]

82. *Supra* note 74.
83. The Court took cognizance of the following noticeable changes brought about in Section 25O while upholding the constitutional validity of the amended Section 25O of the Act:

i. The amended section 25O is in substance akin to section 25N (as it then stood). It contains many new provisions and substantially amends/alters the other provisions and takes care of the defects pointed out in *Excel Wear* case.
ii. Though Meenakshi Mills which upheld validity of section 25N dealt with retrenchment, the principles laid down therein would apply to a closure as well, as closure like retrenchment also has the effect of termination of service, though of all the workmen. The object and reasons for enacting sections 25N and 25O are the same and have to be kept in mind while considering the constitutional validity of the amended section 25O.
iii. Further, section 25O has been enacted to give effect to the directive principles of state policy contained in the Constitution, an aspect not noted in Excel Wear but rightly emphasized in Meenakshi Mills. Such provisions, as held in Meenakshi Mills, must be regarded as being in the interest of general public.
iv. It will not be correct to say that the principles laid down in Meenakshi Mills have no relevance in deciding the constitutional validity of amended section 25O.
v. Unlike the position under section 25O as it originally stood, now under the amended section 25O the reasons for the order granting or refusing permission have to be given in writing.
vi. The employer is required to furnish detailed information in respect of the working of the industrial undertaking so as to enable the appropriate government or authority to make up its mind whether to grant or refuse permission to order closure.
vii. The appropriate government is bound to make an enquiry before passing an order. As in the case of retrenchment, so also in case of closure, the employer has to give a notice in a prescribed form giving precise details and information. The relevant provision postulates an enquiry into the correctness of the facts stated by the employer in the notice served by him and also all other relevant facts and circumstances including the bona fides of the employer.
viii. An opportunity to be heard would have to be afforded to the employer, workmen and all persons interested.
ix. Conducting of such an enquiry where opportunity is afforded to all the stakeholders of their right to be heard, followed by a written speaking order, stating therein the reasons for the decision, makes exercise of such functions quasi-judicial in nature and not administrative in character.
x. Unlike the earlier position, now a time frame has been fixed for refusing permission to close down. Section 25O(4) provides that the order of the appropriate government shall remain in force for one year from the date of such order. Thus it is always open to the employer to apply again at the end of the year for permission to close. If applied, the appropriate government would necessarily have to make a fresh enquiry with all the attendant rights to the parties to be heard followed by a speaking order. The court held that by providing a time period of one year makes the restrictions reasonable.
xi. Further, section 25O(3) provides that if the appropriate government does not communicate the order within a period of 60 days from the date on

IV. Retrenchment: 'Last Come First Go'

Section 25G of the Act prescribes the procedure for retrenchment. It provides that where any workman in an establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, then, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless, for reasons to be recorded, the employer retrenches any other workman.

In other words, this section makes adherence to the well-recognized principle of retrenchment in industrial law, i.e. 'last in, first out'. As submitted earlier, this provision is applicable only to one form of retrenchment, namely, where retrenchment is because of labour surplusage.[84]The employer is 'ordinarily' expected to adhere to the procedure of 'last come first go'.

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which the application is made, the permission applied for shall be deemed to have been granted. This cures the defect which existed in the original section 25O.

xii. Section 25O makes a provision for review of the order by the appropriate government either on its own motion or on an application made by the employer or any workman. There is provision as well for reference of the matter to a tribunal for adjudication. If a reference is made, the tribunal has to pass its award within a period of 30 days from the date of such reference. The court made it very clear that a proper reading of sub-section 5 of the amended section 25O shows that, in the context in which it is used, the word 'may' necessarily have to be treated as 'shall'. Thus the appropriate government shall review the order if an application in that behalf is made by the employer or the workmen. Similarly, if so, required by the employer or the workmen, it shall refer the matter to a tribunal for adjudication. The order on review would have to be in writing giving reasons. The court held that a period of thirty days prescribed for disposal of the review or reference would be a reasonable period. This review and/or reference under the amended section 25O would be in addition to the judicial review under Article 226 or Article 32. It is important to mention here that in Meenakshi Mills the court has held that the exercise of power by the appropriate government being quasi- judicial in nature, the remedy of judicial review under Article 226 or under Article 32 was

The legislature has taken caution not to make compliance with the procedure a cast-iron requirement, as in the course of industrial relations myriad of contingencies arise in different situations. The

an adequate protection against the arbitrary exercise of the power by the appropriate government. The Court expressed complete agreement with this legal position laid down in Meenakshi Mills.

xiii. The amended section 25O(8) has dropped the requirement of giving three months' notice. All that is now required is to pay compensation which is equivalent to 15 days average pay for every completed year of continuous service.

xiv. The court also did not find any substance in the submissions of the appellant that the amended section deals only with the procedural defects pointed out in Excel Wear and does not deal with the substantive grounds set out in Excel Wear.

xv. The court held that section 25O(7) takes into account exceptional circumstances, like accident, in the undertaking, or the death of the employer, or the like in which circumstances the application of the provision of section 25O can be exempted. The court, however, made it clear that some difficulty or financial hardship in running the establishment will not be sufficient to claim exemption. The employer must show that it has become impossible to continue to run the establishment. Looking at the matter from this point of view, the Court held that the restrictions imposed are reasonable and in the interest of the general public.

xvi. The court also did not find any substance in the submission that the phrase 'in the interest of general public' is of very wide amplitude or that it is vague or uncertain. The court referred to the observations in Maneka Gandhi v. UOI that the words 'in the interest of general public' have a clearly well-defined meaning and the courts have often been called upon to decide whether a particular action is in the 'interest of general public' or 'public interest' and no difficulty has been experienced by the courts in carrying out this exercise. The court also referred to the decision in Premium Granites v. State of TN where it has been held that the phrase 'public interest' finds place in the Constitution and in many enactments and has since been considered by the court in various decisions. It has been held that the expression is of a definite concept and that there is nothing vague about it.

xvii. The court held that section 25O is neither vague nor ambiguous. The power to grant or refuse permission will depend upon different contingencies and situations which may arise in actual practice and it is not possible to enumerate or set out every such situation in section 25O. Each case has to be decided on its own facts and on the basis of the circumstances prevailing at the relevant time. All that has been set out in the section are guidelines which are neither vague nor ambiguous.

xviii. The court held that the classification under section 25O is reasonable and the amended section 25O is saved by Article 19(6) of the Constitution.

84. *Supra* note 56 at 717.

use of the word 'ordinarily' indicates that though the procedure of 'last in, first out' enacted by section 25G should ordinarily be adhered to, where the exigencies of an industry so demand, the procedure can be departed from. The only requirement that the section prescribes in case of departure from this procedure is that the employer should record reasons in writing for the departure. In *Workmen of Sudder Workshop of Jorehaut Tea Co. Ltd.* v. *Management of Jorehaut Tea Co. Ltd.*,[85] the Supreme Court held that departure from this rule was permissible only on valid and justifiable reason to be proved by the management. In this case, the management retrenched 23 workmen. Out of these, the services of seven were terminated without following the rule of 'last in, first out'. The industrial tribunal, therefore, set aside the management's order of termination of the seven workmen and directed their reinstatement with some back wages. The Supreme Court, in appeal, affirmed the finding of the tribunal and observed:[86]

> The rule is that the employer shall retrench the workman who came last first, popularly known as "last come, first go". Of course, it is not an inflexible rule and extraordinary situation may justify variation…. There must be a valid reason for this deviation.

Further, the court added:[87]

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85. (1980) 3 SCC 406. The Supreme Court in *Maruti Udyog Ltd.* v. *Ram Lal* (2005) 2 SCC 638 has held that Section 25H cannot be invoked in the situations contemplated in sections 25FF and 25FFF of the Act merely because these are treated as 'deemed retrenchment' for the purpose of notice and compensation under section 25F only. The court held that section 25H has no application where an employer revives his business after declaring a *bona fide* closure or the transferee employer engages fresh hands. In this case ex-workmen of the transferor employer, who had been retrenched by him even before the date he transferred the undertaking to the transferee, unsuccessfully sought re-engagement by the transferee of the undertaking relying on section 25H.
86. *Id.* at 409.
87. *Id.* at 409-10.

> There is none here, nor even alleged, except only plea that the retrenchment was done in compliance with section 25G grade-wise…Affirmatively, some valid and justifiable ground must be proved by the management to be exonerated from the 'last come, first go' principle.

A departure from this principle by the employer, the reasons for such departure not being valid and justifiable reason, would make the retrenchment invalid.[88]

Once it is found that retrenchment is unjustified or improper for not following the rule laid down in section 25G, it is for the tribunal to consider what relief the retrenched workmen are entitled to. Ordinarily, if a workman has been improperly and illegally retrenched, he is entitled to claim reinstatement, and the fact that in the meanwhile the employer has engaged other workers would not necessarily defeat the claim for reinstatement of the retrenched workmen, nor can the fact that protracted litigation in regard to the dispute has inevitably meant delay defeat such a claim for reinstatement.[89]

V. Conclusion

The Supreme Court has given a new dimension to the concept of 'retrenchment' in an attempt to translate into reality the constitutional values of security of employment and some economic security to working class in the event of unemployment caused by retrenchment. The court has interpreted the remarkably wide language employed in the definition of 'retrenchment' in the social welfare legislation with a view to promote economic justice. In the absence of a meaningful social security system in India, the court has, by delivering justice based on pragmatic humanism to the worker and his family, followed the right canons of statutory

88. *Id.* at 410.
89. *Swadesamitran Ltd.* v. *Workmen*, (1960) 3 SCR 144

construction. Considerations of concern for protecting existing employment, checking growth of unemployment, and maintaining high tempo of production and productivity by preserving industrial peace and harmony, have informed the decisions of court in upholding restrictions envisaged under sections 25N and 25O of the Act as reasonable restrictions on the right of the employer to carry on his business. The court has had no hesitation in holding that sections 25N and 25O seek to give effect to the mandate contained in the directive principles of the Constitution, viz., articles 38, 39, 41 and 43. This approach is a step forward insofar as the court has read in the retrenchment provisions constitutional values of the right to work and security in the event of unemployment.

Even when the legislature steps in with amendments to the provisions in the statute, the judiciary finds its way to secure social security to the weaker class, i.e., workmen, while making a choice between competing interpretations available to it. This becomes abundantly evident from decisions like *Anand Bihari*,[90] but it is apprehended that such decisions may be short-lived inasmuch as subsequent benches in the age of globalization might undo the edifice of social justice so carefully constructed. It is hoped that the court will continue to ingrain the constitutional philosophy in various welfare legislations through purposive judicial interpretations so that the foundations of labour jurisprudence of the land is strengthened rather than diluted even in the era of globalization. It is high time that the legislature steps in and contributes its part with a strong determination to provide a robust and comprehensive legislation spelling out the context of each concept, drawing strength from the case law, and laying down principles for the effective and efficient implementation of the

90. *Supra* note 67.

welfare legislation enacted for the toiling masses against the onslaught of global capitalism. Let us all hope that the Social Security Code, 2020 which subsumes almost all central legislations on social security and labour welfare and is supposed to be robust, comprehensive and inclusive covering within its ambit organized, unorganized and gig and platform workers is enforced and operationalized without any further delay.

Domestic Violence Act, 2005: The Response of Judiciary in India

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Abstract

Women constitute about one half of the global population, but they are placed at various disadvantageous positions due to gender bias. They have been the victims of violence all over the world. Violence against women continues to be a global epidemic that kills, tortures, and maims – physically, psychologically, sexually and economically. It is one of the most pervasive of human rights violations, denying honor, dignity and security to women.

Of all the forms of violence against women 'Domestic Violence' is the most serious as it entails a violation of all basic rights and fundamental freedoms, that a woman suffers in her own home, at the hands of members within her own family. The Protection of Women from Domestic Violence Act 2005 seems to be a comprehensive legislation to protect women from all forms of domestic violence. The Act covers women who have been/are in a relationship with the abuser and are subject to violence of any kind-physical, sexual, mental, verbal or emotional and provides for relief that she is entitled to in cases of violation and lays down a mechanism to facilitate her access to justice and other support services. This law is a first step towards bringing women's rights into the home. Although, the Constitution of India and several other legislative enactments are in existence for the protection of women's rights, yet the burden of highlighting and enforcing laws against domestic violence falls on the Courts. This paper focuses on various judgments of the Supreme and High Courts in India, and tries to analyze the manner in which the courts have dealt with the case of domestic violence in India. The paper also aims at evaluating how far the judiciary has been successful in protecting the victims of domestic violence?

Keywords: Domestic Violence, Dowry, Family, Intervention Judicial, Protection, Welfare

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I. Introduction

For individuals all over the world, home is a safe haven, yet it is at home that many people, all over the world, are subjected to heinous crimes of terror and violence and even death at the hands of family members who are supposed to love and protect them. They are victimized physically, sexually and psychologically. To quote Sydney Brandon, British Psychiatrist and Educator, "it is safer to be on streets, statistically speaking, after dark with a stranger than at home in the bosom of one's family, for it is there that evidently murder and violence are likely to occur".[1] Brandon holds the view that in the domestic sphere, violence is usually perpetrated by males who are, or who have been, in positions of trust and intimacy and power –husbands, boyfriends, fathers, fathers-in-law, stepfathers, brothers, uncles, sons, or other relative. Domestic violence is when one adult in a relationship misuse power to control, and create fear, in a relationship through violence and other forms of abuse. The violence may involve physical abuse, sexual abuse and threats. Sometimes the violence may be more subtle, like making someone feel worthless, not letting them have any money, or not allowing them to leave the home. The expression of domestic violence can be seen in the form of wife battering, demand for more dowry, divorce, bride burning and conflicts in family life[2]. Domestic violence is a burden on numerous sectors of the social system and quietly, yet dramatically affects the development of nation.[3] In context with India, like in other South Asian countries[4], domestic violence is one of the many forms of gender based violence. It needs to be eliminated as it is extremely detrimental to the physical and mental health of women.

[1] Sydney Brandon in Boreland, M.Ed Violence in Family, J (1976).p76
[2] Ibid.
[3] Zimmermann C. Plates in a Basket will Rattle: Domestic violence in Combodia, Phnom Pehn, Combodia. The Asia Foundation, 1994.p82
[4] Including Afghanistan, Bangladesh, Pakistan, Nepal, and Sri-Lanka

Part I of the paper aims to look at the concept of domestic violence. Part II of the paper deliberates upon domestic violence as a universal phenomenon highlighting the physical, sexual and psychological abuse of women in the privacy of their homes. Part III of the paper sheds light on the various forms of domestic violence. Part IV of the paper dwells upon the causes of domestic violence; specifically outlining the various causative factors like cultural, physical and political. Part V of the paper highlights the salient features of the Protection of Women against Domestic Violence Act, 2005. Part VI of the paper provides an overview of the rights recognized under the Act of 2005. Part VII of the paper provides an insight on the remedies provided under the Act. Part VIII provides a detailed account of the role of the judiciary in giving widest interpretation to the Domestic Violence Act leaning in favour of the victims of domestic violence. Part IX of the paper provides the summation of the study setting out in brief its analysis of the working of the Act of 2005 and the way forward.

II. Domestic Violence: A Universal Phenomenon

The physical, sexual and psychological abuse of women in the privacy of their homes seems to be widely tolerated by the State and the community. Those who commit these abuses include husbands, in-laws and other family members. A large section of victims live in family settings that are deeply entrenched in patriarchal and customary practices that, often than not, are harmful to women. The perpetual socioeconomic dependency of women makes them bound to their husbands and other family members. The ever present threat of social exclusion and marginalization, and the lack of substantial responses to violence, keeps them in a condition of continuous violence and intimidation.[5]

[5] Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo United Nations A/HRC/26/38/Add.1 General Assembly Distr.: General 1 April 2014 https://evaw-global-database.unwomen.org/-

Killings and other violent acts linked to dowry demands are painfully high across the country. The National Crime Records Bureau records an increasing trend of crimes reported under the Dowry Prohibition Act since 2008, and a significant increase in such crimes since 2010.[6] A union through marriage is commonly used by the husband and/or his family to obtain property and other assets from the wife and/or her family, sometimes directly and sometimes indirectly. Though the practice has evolved through time, the payment of dowry, essentially, is based on the idea that women are a burden. Dowry is also usually considered to be paramount to ensure the safety of the bride, especially within poor communities. Despite the payment of dowry, many women find themselves forced into a life of servitude and experience repeated acts of harassment, intimidation, sexual abuse and violence by their husbands and other family members as part of demands for more dowry. Traditional practices in the family and within the community point to a pattern of daughter aversion and son preference. There has been documented a trend of declining girl-child sex ratio from 962 per 1,000 males in 1981, to 945 in 1991, to 927 in 2001, to 914 in 2011.[7] There is good reason to believe that patriarchal norms and socioeconomic factors have fuelled the decline. The preference for sons has resulted in "policing" of pregnancies by spouses and families through prenatal monitoring systems. This often leads to sex-selective abortions, which are, in the majority of cases, forced on women in violation of their sexual and reproductive rights. These are all faces of domestic violence.

Domestic violence is a universal phenomenon prevailing everywhere in the world, developed and developing countries

/media/files/un%20women/vaw/country%20report/asia/india/india%20srvaw.pdf?vs=4342

[6] India, National Crime Records Bureau, Crime in India 2012: Statistics (2013), p. 81, table 5(A).

[7] United Nations Children's Fund (UNICEF), The Situation of Children in India: A Profile (2011), p. 36.

alike. Gender based violence is present in every country, though there are variations to the patterns of violence. It cuts across boundaries of territory, class, caste, age, education, income, ethnicity and culture. Even though most countries have criminalized violence against women, domestic violence against women is still prevalent and sanctioned under the disguise of cultural practices or through the misinterpretation of religious texts. Also, it is not a very new phenomenon; domestic violence is as old as the origin of the family, though its nature changes according to place and period of time.

For long, the United Nations has been pitching for an end to violence against women, within homes and outside. Pursuant to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which came into force in the year 1966, the Declaration on the Elimination of All Forms of Discrimination against Women, was promulgated in 1967, advocating the principle of non-discrimination. The state parties have been directed to make provisions for civil and criminal law to combat all forms of exploitation of women, under article 6 of the Declaration. However, this convention did not in unequivocal terms include domestic violence. In 1979, the Convention on Elimination of All Kinds of Discrimination against Women (the Women's Convention or CEDAW) was passed by the United Nations. This Convention is often described as an International Bill Of Rights for women as it not only defines what constitutes discrimination against women but also sets up an agenda for national action to end such discrimination. In 1992, the United Nations' promulgated document A/47/38, and also the Committee on the Elimination of Discrimination against Women was put together. Radhika Coomaraswamy, the Special Rapporteur on Violence against Women, submitted her report, which addressed domestic violence at length, in 1994. The topic of domestic violence and

responsibility for domestic violence was taken up, again, in 1995, at the Fourth World Conference on Women in Beijing, China. In 2000, a Special Session on Women was conveyed by the United Nations known as Beijing +5 which dealt with the topic of domestic violence as the focal point. These mandates from the United Nations have time and again, directed the States to take reasonable steps to prevent violence on women and to ensure that the victim was given adequate compensation.

One often relates family with sanctuary– a place where love, safety, security, and shelter is offered to an individual. However one cannot deny that home, sometimes, happens to be the place where lives are put at risk, and where, sometimes, the worst forms of violence are perpetrated against women. In most cases Domestic violence is perpetrated by men against women. Women, rarely, also are violent. Their actions, however, account for a minuscule percentage of domestic violence. Domestic violence is a breach of one's right to live safely. It infringes on ones basic right to feel comfortable within the privacy and confines of one's own house.

III. Domestic Violence Can Take A Number of Forms:

Physical abuse (slapping, punching, pulling have or showing);

Forced or coerced sexual acts or behavior (un-wanted) founding or intercourse or sexual jokes and insults;

Threats (threatening to hit, harm or use a weapon);

Psychological abuse / emotional abuse (attack on self esteem, attempt to control or limit another person's behavior, repeated insults or interrogation);

Verbal abuse (constant put-downs, name calling, making harassing or threatening comments)

Economic abuse where abuser has complete control over the victims money and other economic resources (preventing from

having access to money, preventing the victim from finishing education or obtaining employment)[8]

IV. Causes of Domestic Violence:

Cultural:

Gender specific socialization.

Cultural definition of appropriate sex roles.

Expectations of roles within relationships.

Customs that give men proprietary rights over women.

Norms of marriage (bride price / dowry)

Acknowledgement of violence as a means to resolve conflict.

Economic:

Women's economic dependence on men.

Limited access to cash and credit.

Lack of access to employment in formal and informal sectors.

Lack of widespread access to education and training for women.

Legal:

Diminished legal status of women either by written law and / or by practice.

Discriminatory Laws regarding divorce, child custody, maintenance and inheritance.

Low levels of legal literacy among women.

Political:

Severe under representation of women in power, politics, the media and in the legal and medical professions.

8 http//www.Nolo.Com,What is Domestic Violence? page visited on 13/11/2020

Domestic violence not taken seriously.

False ideas of family being private and beyond control of the state.

Lack of organization of women as a political force.

Acute dearth of participation of women in organized political system.[9]

Domestic violence has long term effects on victim who have been abused. The effects of repeated and prolonged violence on women can be divided into physical, psychological, social and economical. Domestic violence can also be seen as a violation of the fundamental right to live with dignity and of the right to equality and equal protection of the law guaranteed under the Indian Constitution.[10] Domestic Violence, one should remember, is not limited to any social class. The men who are violent towards women come from all socio-economic classes.

V. Salient Features of The Protection of Women against Domestic Violence Act 2005 (PWDVA)

Domestic Violence: the definition of 'domestic violence has been provided for in Section 3 of the PWDVA. The section states as under:

For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

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9 Source: Heise 1994, UNICEF's, Domestic Violence against Women and Girls, 6 Innocenti Digest 1, 7 (2000).

10 Jaising, Indira, Law of Domestic Violence, 2000, pp v, vi, ix.

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person……[11]

As per section 3, domestic violence includes all acts of omission and commission that result in injury or harm or threats to cause injury or harm, as well as harassment to meet unlawful demands (such as dowry). Injury, as has been defined in the Act, may be physical or mental in nature. Conduct includes physical abuse, verbal and emotional abuse, sexual abuse and economic abuse. The definition of domestic violence as provided in the Act of 2005, is based on the 1996 UN Framework for Model Legislation on Domestic Violence.[12]

Domestic Relationship: The term 'domestic relationship'[13] has been broadly defined to include all women who 'live or have lived together in a shared household' with the respondent and are related to the respondent by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Respondent'[14] has been defined to include adult male perpetrators of violence and in cases

[11] The protection of Women Against Domestic Violence Act 2005,p.4
[12] The objective of this Model Law is said to be: "to serve as a drafting guide to legislatures and orginisations committed …..for comprehensive legislation on domestic violence."
[13] Section 2(f)
[14] Section 2(q).

of married women (or women living in the nature of marriages); relatives of the husband or the male partner.

Aggrieved Person: According to the Act[15] an "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. So, a woman who is or ever has been in a domestic relationship is entitled to make a complaint invoking provisions of the Act.

VI. Rights Recognized under the Act

The PWDVA 2005 recognizes a woman's right to live in a violence free home. The right to reside has been given statutory recognition under the law.[16] This guards against the illegal dispossession of women from the shared household. A woman who has faced domestic violence from the respondent is entitled to relief under this law.

VII. Remedies Provided under the Act

Protection Order (Section 18) - protection orders or stop violence orders can be passed to restrain the respondent from committing any further acts of violence, as well as committing any other acts that detrimentally affect the rights of the aggrieved woman.

Residence Order (Section 19) - Orders under this provision give effect to the right to residence recognized in Section 17.Orders may be passed to prevent dispossession or disturb possession or to restore possession, directions to the respondent to remove himself from the share household (though female respondents cannot not dispossessed), or provide alternate accommodation if the woman so desires.

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[15] Section 2(a)
[16] Section 17.

Monetary Relief (Section 20) - Orders for monetary relief can be passed to meet actual expenses incurred due to medical expenditure, loss of earnings, etc and includes maintenance.

Custody Order (Section 21) - Orders for temporary custody may be passed in favor of the aggrieved person in pending applications for protection orders. The nature of custody provided is temporary and has no effect on personal/civil laws governing issues of permanent custody. The issue of custody is to be decided keeping the welfare of the children in mind.

Compensation Order (Section 22) – This provision empowers a magistrate to order additional relief for mental torture and emotional distress.

Ex parte and Interim Orders (Section 23) – The magistrate is empowered to pass ex parte and interim orders if a prima facie case is made out under this law. This Section is important in providing immediate and emergency relief to women in situations of violence.

VIII. Role of the Judiciary

Courts play a pivotal role in the legal system's response to domestic violence. Courts are generally the final authority in civil and criminal matters involving domestic abuse, and therefore hold substantial power to sanction perpetrators, protect victims of domestic abuse, and send messages to the community, the victim, and the perpetrator alike that domestic violence will not be tolerated. Effective judicial responses to domestic violence can further victim safety and offender accountability in many ways.

Following is a list of cases that go to prove that the courts in India try to give the widest interpretation to the Domestic Violence Act so the victims of domestic violence are benefitted from the provisions of this Act.

Savita Bhanot v. *Lt. Col. V.D. Bhanot*,[17] is one example out of various cases where the courts gave the Act of 2005 a retrospective effect. The court emphasized that a person will be deemed to be in a domestic relationship even if he had lived together with the respondent at a point of time prior to coming into force of the Act. The court observed that had that not been the legislative intent, the words "or have at any point of time lived" would have not found place in s 2(f)". Petition is maintainable even if the acts of domestic violence have been committed prior to coming into force of the Act or despite the woman no longer living with him.

In *Juveria Abdul Majid* v. *Atif Iqbal Mansoori*[18] the question before the apex court was whether a divorced woman can seek relief against her ex-husband under sections 18-23 of the Act of 2005. The court laid down that a subsequent decree of divorce will not absolve the liability of the husband for an act of domestic violence once committed, nor can the decree be used to deny the benefits to which an aggrieved person is entitled under this Act.

In *Krishna Bhattacharjee* v. *Sarathi Choudhury*[19] the Supreme Court Court has held that the 2005 Act has been legislated, as its Preamble would reflect, to provide for more effective protection of the rights of the women, who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. The 2005 Act is a detailed Act. The definition clause of the 2005 Act is of a broader spectrum. The Supreme Court further observed that judicial separation does not change the status of the wife as an "aggrieved person" under Section 2(a) read with Section 12 and does not end the "domestic relationship" under Section 2(f). The court observed that judicial separation is mere

[17] 2010(118)DRJ391
[18] (2015)2 SCC 299
[19] (2016) 2 SCC 705

suspension of husband-wife relationship and not a complete severance of relationship as happens in divorce.

The Domestic Violence Act, 2005 was enacted to protect the women from acts of domestic violence. This was again emphasized by the Supreme Court of India in the case of *Indra Sarma* v. *V.K.V Sarma*,[20] wherein it was stated that the Domestic Violence Act has been enacted to provide a remedy in civil law for the protection of women, from being victims of such relationship, and to prevent the occurrence of domestic violence in the society.

It was, in fact, in *Indra Sarma's*[21] case that the Supreme Court took the landmark step of including live-in relationships within the ambit of a domestic relationship for the purpose of this Act. The court observed that according to Section 2(*f*) of Domestic Violence Act, "domestic relationship" means a relationship between two persons living in a shared household. A domestic relationship can arise through marriage such as wives, daughters-in-law, sisters-in-law, widows and any other members of the family; or blood relationship such as mothers, sisters or daughters; and other domestic relationships including through adoption, live-in relationships, and women in bigamous relationship or victims of legally invalid marriages. The law aims to redress the concerns of women of all ages irrespective of their marital status. The definition of "domestic relationship" under the Act is exhaustive. The Court observed that the word domestic relationship means a relationship that has some inherent or essential characteristics of marriage though not a marriage that is legally recognized. The term "relationship in the nature of marriage" cannot be construed in the abstract. It is to be taken in the context in which it appears and to be applied bearing in mind the purpose and object of the Act as well as meaning of the expression "in the nature of marriage".

[20] (2013) 15 SCC 755
[21] Ibid.

The Supreme Court in *Hiral P. Harsora* v. *Kusum Narottamdas Harsora*[22] struck down adult male from the definition of "respondent" stating that it is not based on any intelligible differentia having rational nexus with object sought to be achieved. The Supreme Court also explained in the said case that the categories of persons against whom remedies under the Domestic Violence Act are available include women and non-adults. Expression "respondent" in Section 2(q) or persons who can be treated as perpetrators of violence against women/against whom remedies under the Domestic Violence Act are actionable cannot be restricted to expression "adult male person" in Section 2(q). Thus, remedies under the Domestic Violence Act are available even against a female member and also against non-adults.

In *Ishpal Singh Kahai* v. *Ramanjeet Kahai*,[23] the Supreme Court reiterated that the object of the Domestic Violence Act is to grant statutory protection to victims of violence in the domestic sector who had no proprietary rights. The Act aims to provide security and protection to a wife irrespective of her proprietary rights in her residence. The Act aims at protecting the wife against violence and at the prevention of recurrence of acts of violence.

In *Deoki Panjhiyara* v. *Shashi Bhushan Narayan Azad*[24] the Supreme Court has interpreted and defined the object of the Protection of Women from Domestic Violence Act, 2005, Section 12 vis-a-vis Hindu Marriage Act, 1955, Section 11. Here, on application, interim maintenance was granted by Trial Court, affirmed by Sessions Judge and against which, writ was filed by husband before High Court and also revision application by husband that the marriage between the appellant and the respondent was null and void. The Court was of the opined that the

[22] (2016) 10 SCC 165
[23] 2011 SCC Online Bom 412
[24] (2013) 2 SCC 137,

appellant was not the legally wedded wife of the respondent and she was not entitled to maintenance granted by the learned lower courts. The Apex Court, on appeal by the wife, ruled that in the present case until the invalidation of the marriage between the appellant and the respondent is made by a competent court, it would only be correct to proceed on the basis that the appellant continues to be the wife of the respondent so as to entitle her to claim all the benefits and protection available under the Domestic Violence Act, 2005. The court made clear that it is only upon a declaration of nullity or annulment of the marriage between the parties by a competent court that any consideration of the question whether the parties had lived in a "relationship in the nature of marriage" would be justified. The court held that In the absence of any valid decree of nullity or the necessary declaration, the Court will have to proceed on the footing that the relationship between the parties is one of marriage and not in the nature of marriage.

The Supreme Court in *Shyamlal Devda* v. *Parimala*[25] held that petition under Domestic Violence Act can be filed in a court where "person aggrieved" permanently or temporarily resides or carries on business or is employed.

The Supreme Court in *S.R. Batra* v. *Taruna Batra*[26] held the house which exclusively belonged to the mother in law of the woman, wherein she only lived with her husband in the past, was not a shared household within the meaning of S 2(s) and hence the aggrieved wife could not claim her right to live their u/S 17, and in order to claim such a right, the property should belong to her husband or it should have been taken on rent by her husband, or it should have been a joint family property in which her husband was a member…

[25] (2020) 3 SCC 14.
[26] 2007 3 SCC 169

This decision was reconsidered and overturned by the Supreme Court in *Satish Chander Ahuja* v. *Sneha Ahuja*[27]. The Apex Court overruled its own decision in *S.R. Batra* and reinterpreted the term 'shared household' under Section 2(s) of the Domestic Violence Act. Siding with the respondent, the Court held that the definition of the term 'shared household' is exhaustive and not enumerative and for a property to be considered as a 'shared household', it has to be proved that it is either owned/co-owned or rented by a 'respondent' in a complaint under the Act and that the aggrieved person has resided in the said house at any stage of her domestic relationship. The Court observed that an aggrieved person is not required to own or rent the premises, either by themselves or jointly with the family. Further, a 'shared household' is one that may also belong to a joint family of which the aggrieved person is a member irrespective of whether they have any right, title or interest in the shared household [28]

In *S.Vanitha* v. *Deputy Commissioner, Bengaluru Urban District and Others*,[29] section 3 of The Maintenance and Welfare of Parents and Senior Citizens Act,2007, which provides that the Act shall have an overriding effect over other enactments/Acts came in conflict with section 17 of the Domestic Violence Act, 2005, which provides a woman the right to live in a shared household. In the present case, an Application was filed by the parents of a person who sought to evict his estranged wife and children from a residential house belonging to the parents (mother).

The Supreme Court observed that both the Senior Citizens Act, 2007 and the Domestic Violence Act 2005 are welfare legislations and there is a need to harmoniously construe them. It was further observed that a shared household would have to be interpreted to

[27] 2020 SCC Online SC 841
[28] Ibid.
[29] 2020 SCC Online SC 1023

include the residence where the woman/wife had been jointly residing with her husband. Merely because the ownership of the property does not vest with the husband or that the estranged spouse is living separately, is no ground to deprive the wife/woman of the protection that was envisaged under the Domestic Violence Act[30].

The Court held that a claim that the suit premises constitutes a 'shared household' within the meaning of the Domestic Violence cannot simply be obviated by evicting the wife in exercise of the summary powers entrusted by the Senior Citizens Act 2007. The Court ordered that the wife shall not be forcibly dispossessed from the suit premises for a period of one year, to enable the wife to pursue her remedies in accordance with law. Even the parents were given the liberty to move a subsequent Application under the Senior Citizens Act, 2007.

IX. Conclusion

The genesis of the Domestic Violence Act, 2005 was necessitated by the harassment which is faced by women within their homes. The main aim of the Act has been to give protection to the aggrieved woman from domestic violence. The legislation aims to achieve equality before law and equal protection of laws regardless of religion, caste, community and faith. This Act works in addition to other laws and recognizes the need for relief to be granted as a basic minimum to provide women with a violence-free space from which they can negotiate their future from a position of equality. The role of the Judiciary in this regard becomes very important so as to see that the family does not suffer what can be said to be irretrievable breakdown of marriage. In that spirit, the Act has been harmoniously interpreted by the courts so as to provide for more effective protection of the rights of the women, who are victims of

[30] Ibid.

violence of various kinds, occurring within the family. This, in no way means that the menace of domestic violence has been abated. For every single case of domestic violence reported, dozens go unreported. Domestic violence, in all its ugly forms continues to be a part of our society and the efforts of the Judiciary alone, will not be enough to eradicate this evil. It demands a structured attack by various sectors of our society, starting in our homes, our families, where we raise our children, especially our sons and the molding of their world view and the place of women in it. As has been said by Justice Mandisa Maya[31], "The questions which we must ask ourselves are extremely difficult to answer. Why is this happening? what is the cause? Why are the extensive measures that have been put in place so far not effective? What must we do to fight the scourge effectively?

[31] President: Supreme Court of Appeal, at the Gender Violence and Femicide Summit, 2018, Pretoria South Africa. https://www.judiciary.org.za/ images/ speeches_ from_the_judiciary/Gender_Based_Violence_and_Femicide_Summit_Speech.pdf

The Problem of Music Piracy- A Case Study of District Srinagar

Heena Basharat*

Abstract

The widespread nature of piracy in music, despite numerous attempts to eliminate it through legal, technological and corporate measures has been a cause for concern for all the stakeholders. This paper seeks to explore and understand what is the *raison d'être* of piracy, its extent and the reasons for its persistence despite attempts to eradicate it. The paper investigates the issue of piracy through a legal /ethical/lens in District Srinagar. It identifies the main offenders of this illegal activity and examines the underlying factors that underpin the commitment of such violations, to help us devise an effective alternative legal strategy to combat the menace of piracy.

Keywords: Copyright, Ethics, Infringement, Model, Music, Piracy, Remedies.

I. Introduction

The study has been divided into three parts. In the first part, the determinants of piracy are analysed using Binary Logistic Regression Model'[1] (or logit Model). Ratio based analysis is used in the second part, to show the association between various variables relating to piracy. Percentile method has also been used to study the socio-economic indicators of piracy. The third part is based on interviews with various stakeholders involved such as singers, music composers, retailers so as to draw inferences from them.

Piracy refers to the unauthorized duplication of copyrighted content that is then sold at substantially lower prices in the 'grey'

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[1] Binary logistic regression estimates the probability that a characteristic is present, given the values of explanatory variables.

market. In the context of economic development, piracy may be viewed as an inevitable and tolerable problem for the developed world and not a problem at all for the developing world. The counter arguments to piracy are usually presented in relation to lost revenues (assuming that every pirated good purchase corresponds to a loss purchase of the original product), or that pirated products do serious harm to the consumer.

The widespread nature of piracy despite numerous attempts to eliminate it through legal, technological and corporate measures has been a cause for concern for all the stakeholders. This paper seeks to explore and understand what is the *raison d'être* of piracy, its extent and the reasons for its persistence despite attempts to eradicate it.

The paper investigates the issue of piracy through a legal/ ethical/lens in District Srinagar. It identifies the main offenders of this illegal activity and examines the underlying factors that underpin the commitment of such violations, to help us devise an effective alternative legal strategy to combat the menace of piracy.

i. Research Problem

Despite the widespread magnitude of piracy in India, very little research has been carried out to explore the demographic, social, ethical and legal dimensions of the problem. Pertinently, no such study has been carried out in the District Srinagar so far where, crimes like music piracy are put on the back burner. to combat the menace of piracy. Srinagar city, the capital of the Union territory of J&K, the northernmost state of India has a population of 1269751[2]. Jammu and Kashmir has 11912082[3] mobile subscribers. It has 8.36million internet subscribers out of which 4.72 million

[2] Census of India 2011
[3] For detailed statistics access the website of TRAI..

belong to the urban areas[4].

In order to arrive at a broad understanding of the nature and extent of piracy in Srinagar, the study focused on the key components of the population that comprise the music ecosystem: the consumers, producers, retailers and singers.

The consumers were administered a questionnaire, whereas interviews were conducted with the producers, retailers and singers. The objectives of the study are:

1. To find out the determinants of musical piracy and to trace out the individual respondent's factors responsible for increasing the probability of being a pirate.
2. To determine the impact of awareness of copyright law on piracy.
3. To determine the association between ethics and piracy.
4. To determine the impact of file sharing on purchase of CDs.
5. To ascertain the incentives which attract people towards unauthorized downloading.
6. To ascertain the association between the role of enforcement agencies and piracy.

At this juncture, it would be pertinent to review some of the studies conducted on music piracy.

ii. Literature Review

Liebowitz[5] concluded that file sharing has brought significant harm to the recording industry in the US. The birth of online file sharing mid-1999 and the very large decline in CD album sales that immediately followed provide powerful evidence on their

[4] Available at www.trai.gov.in, Visited on 6th Jan, 2020

[5] S. Liebowitz, "File Sharing: Creative Destruction Or Just Plain Destruction?" XLIX *Journal of Law and Economics*, (2006).

own. Notably, Liebowitz also found that the two music genres that are less likely to be downloaded in file-sharing systems, classical and jazz, did not participate in the sales decline up to 2004, whereas other genres, more likely to be affected by file sharing (hard rock, rap, alternative, R&B) generally did participate. Liebowitz investigated key alternative explanations for the observed impact on recorded music sales other than file sharing including album prices, income, music quality, markets for substitutes and complements, portability and librarying. He concluded that none of these explanations individually hold much weight.

According to **Zentner**[6] countries with higher internet and broadband penetration have experienced larger reductions in music sales, which supports the correlation between the rise in digital piracy and the fall of music industry sales. He also found evidence that file sharing may explain a change in the composition of legitimate sales by repertoire, with a higher reduction of sales of types of music that are shared more heavily. His analysis, based on data from 1997 to 2002,suggests that, at the average level of internet usage, a country is likely to have experienced a decline in legitimate music sales of up to 24%.

Rob and Waldfogel[7] used individual-level data on album downloads and purchases by 500 college students in the US. They found evidence that each album download reduces purchases by about 0.2 in their sample (a displacement rate of approximately 1 in 5), although possibly by much more. Their data also suggests that downloading reduces the per capita expenditure of the sample

[6] A. Zentner, "File Sharing and International Sales of Copyrighted Music: An Empirical Analysis with a Panel of Countries" *Topics in Economic Analysis and Policy* 1-15(2005).

[7] R.Rob and Waldfogel: "Joel. Piracy on the High C's: Music Downloading, Sales Displacement and Social Welfare in a Sample of College Students".49(1) *Journal of Law and Economics* 29-62 (2006).

(on hit albums released between 1999-2003) from $126 to $101 (approx. 20%).

Lysonski and Durvasula, examined "the present state of downloading and how ethical orientation and attitudes towards MP3 piracy impact such activities". One thing in which the researchers were interested was the issue of whether fear of punishment has a negative impact on the intention to commit downloading. Findings showed that the intention of downloading was not highly associated with the statement "not paying recording artists their rightful profits is unethical". This result shows the gap between one's declared ethics and likely actions, and is further evidence that downloading is not, therefore, seen as an ethical activity.The results also suggested that even those who consider themselves to have a strong ethical ideal and would not steal a music CD from a shop are not similarly reticent about downloading music.[8]

Hinduja and Ingram have developed an ordinary least squares regression model indicating that a combination of electronically developed peer networks, gender, Internet skill, and access to high-speed Internet account for 26% of the variation in respondents' level of music piracy.[9] Research by Higgins and Makin (2004) has also contributed to this model; the authors found that engagement in music piracy is negatively correlated with age and females, and that SES and participation in copyrighted video piracy positively correlate with music piracy.[10]

A study by **Kwong** et al. examined Chinese consumers' attitudes

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8 Steven Lysonski, Srinivas Durvasula, "Digital Piracy of MP3s: Consumer and Ethical Predispositions", 25(3) *Journal of Consumer Marketing* 167-178 (2008).

9 S.Hinduja & J.R.Ingram, "Social Learning Theory and Music Piracy: The Differential Role of Online and Offline Peer Influences" 22(4) *Criminal Justice Studies* 405–420, (2009).

10 G. E.Higgins and D.A.Makin, "Self Control Deviant Peers and Software Piracy" 95 *Psychological Reports* 921-931(2004).

towards intentions to buy pirated CDs.They found that social benefit of dissemination and anti-big business attitude were positively related to intention to buy pirated CDs while social cost of piracy and ethical belief werenegatively related to intention to buy such CDs. In addition to these findings, demographics such as gender and age also were associated with intention to buy pirated CDs.[11]

One study tracking how the number of files shared by users changed after the news of lawsuits found some decrease for those sharing a large number of files, but no effects for others (Bhattacharjee et al.).[12]

A study by **Chiou et al.,** surveyed 361 high-school students to test various hypotheses regarding digital piracy, including whether "perceived magnitude of consequences" had a (negative) impact on their attitude toward music piracy. Those, whose responses suggested a higher magnitude of consequences (in other words, were cognizant of possible negative consequences and therefore that there may be "victims" even in a corporate environment) did, indeed, tend to adopt a negative attitude towards music piracy.[13]

iii. Methodology Employed for the Present Study

a. Sample

Individuals in the age group of 15-39 were used as the sample. The focus on this age group was based on the premise that this age group generally has greater interest in music. This age group also

[11] K.Kwong, Yau, O., Lee, J., Sin, L. and Tse, A., "The Effect of Attitudinal and Demographic Factors on Intention to Buy Pirated CDs: the Case of Chinese Consumers" 47(3) *Journal of Business Ethics* 223-35 (2003).

[12] S.Bhattacharjee, et al., "Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions".49(1) *The Journal of Law and Economics* 91–114 (2006).

[13] Jyh-Shen Chiou, Chien-yi Huang and Hsin-hui Lee, "The Antecedents of Music Piracy Attitudes and Intentions" 57(2) *Journal of Business Ethics*, 161-174 (2005).

tends to be technology savvy and spends considerable amount of time in using the internet and other digital technologies.

b. Sample Size Calculation

As per the census of India, Sample Registration System (SRS) report, 2010 published in 2012, the total population of Srinagar is 1269751. 47% of the population constitutes the age group of 15-39. So our total study population consists of 596, 783 individuals. The literacy rate as per the Census of India (2011) of Srinagar City is 71.45%. On the basis of this literacy rate, the rough estimate of literates in the reference age group comes out to be 426, 401.In order to obtain a sample size for the study, a pilot survey was conducted and questionnaire administered to 100 individuals and an estimate of proportion of individuals downloading/buying unauthorized music was found to be 0.5.

Using this proportion with 95% confidence level and 1.5% design effect, a sample size of 877 was chosen. Proportional allocation was used to allocate the sample size of 687 to different educational institutes.[14] 200 additional samples were chosen from the self employed and employed class.[15]Within each group, stratified random sampling technique was employed.

[14] There are a total of 42 Higher Secondary Schools in Srinagar (20- Government, 22-Private) as per the All India School Education Survey, *available at*: www.aises.nic.in (Visited on Mar.1,2013) There are 2 Universities, 10 affiliated, 5 constituent, 17 Professional and19 B.Ed colleges in Srinagar *available at*: www.jkhighereducation.nic.in.and www.kashmiruniversity.net (Visited on Mar.1,2013). Out of these 11 private and 10 Govt. Higher Secondary schools were randomly chosen for the survey. Besides this, the survey covered 2 Private Professional and 3 Govt. Professional Colleges. 8 Degree Colleges and 6 B.Ed Colleges were also a part of the Survey. The reason for lesser number of B.Ed Colleges is that many of the colleges listed on the website have been shifted to places outside Srinagar City.

[15] As the number of self employed individuals is greater than employed individuals, the sample (of 200) was distributed in the ratio of 3:1. Again, in order to obtain a representative sample among the employed group, individuals were chosen from the Govt. and the private sector in the ratio of 1:2.

Again, in order to obtain a representative sample, the self employed class was divided into different strata viz. Top, middle, small and very small levels of self employment.

The pattern was also followed in the employed class as well, with the exception that this class was divided into 3 categories only i.e. higher, middle and small income groups.

After screening incomplete or partially filled questionnaires from the selected sample only 828 were used for analysis.

c. Instruments

The relevant research was conducted by means of a 36 item questionnaire, which tested the respondents attitude towards music, unauthorized down loading/buying of CDS.

The questionnaire consisted of several parts as discussed below: there were two items measuring the social benefit of dissemination (i.e., making music available to people who would not be otherwise able to buy it).Two items measured the anti big business attitude (i.e. resentment against big music companies overcharging their customers). One item measured the respondents ethical belief (i.e. the ethical belief regarding buying or downloading unauthorized music).Two items measured the social cost of piracy (i.e. unauthorized buying/downloading causing losses to singers).Three items were related to the role of enforcement agencies in combating piracy. Also, two items measured the respondents awareness and perception of copyright law. In addition, two items measured the respondents' value consciousness.

The responses were measured on a 5 point Likert scale (1 = Strongly Disagree, 5 = Strongly Agree). Two items measured the influence of peers in the decision to download unauthorized music.

The responses were evaluated on a 5 point scale.(1 = Extremely unlikely, 5 = Extremely likely)

One item measured the impact of file sharing on purchase of CDS. Again, there was one item which measured the factors which attracted the respondents towards unauthorized buying/downloading of music.

d. Binary Logistic Regression Model

In order to find out the determinants of music piracy and to trace out the individual respondent's factors responsible for increasing the probability of being a pirate, a 'Binary Logistic Regression Model' (or logit Model) was employed. This Binary Logistic Regression Model' is used when the dependent variable attains only two values. To explain the behaviour of a dichotomous dependent variable we chose a suitable cumulative distribution function (CDF). The probability that a respondent has ever been indulged in piracy can be explained by:

$$P(Pirate) = F\eta\,(\Delta V) = 1/\{1 + exp\,(-\Delta V)\}$$
$$= 1/\{1 + exp\,(-(\alpha + \beta_1 S + \beta_2 P + e))\} \quad (1)$$

Where, $P_i$is the probability of being a pirate (that is P(1) or p(yes), $F_\eta(.)$is the Cumulative Distribution Function (CDF) of a standard logistic variate, 'S' represents the vector of socio-economic and personal characteristics and 'P' represents a vector of respondents perceptions about copy right law. α, β_1, β_2, are unknown coefficients to be estimated. Signs of coefficients of 'S' will depend on the exact variable and generally differs from context to context. The logit Model is estimated by employing 'Maximum Likelihood Estimation Method' using SPSS 18.

Empirical Specification:A cause and effect type relationship between the probability of being a pirate and its possible determinants was estimated using the regression analysis. The

assumed determinants of piracy are: Age, education, gender, income, awareness of copy right law and certain perceptions of the respondents like whether they think that piracy is unethical? should the free downloading of music be allowed? whether pirates need to be punished? Are the law enforcement agencies lenient and is conflict responsible for increased piracy? The empirical equation to be estimated along with the dependent and independent variables was specified as:

P(Pirate) *=* *f [**Age**, Education (**Edu**), Gender (**Sex**), Income (**INC**), Copy Right Law Awareness(**CRLA**), Piracy Unethical (**PU**), Free Downloading Allowed (**FDA**), Punish Pirates (**PP**), Lenient law Enforcement(**LLE**), Conflict (**CONF**)]*

Where,

P(Pirate) = is the probability of being a pirate. The variable is a binary number which attains the value of '1' if the respondent has ever been involved in the piracy. It attains the value of 'zero' if the respondent has never been a pirate.

Age: is the age of the respondent measured in years.

Edu: represents the level of education and is classified into three categories. It attains its values from 1 to 3 where 1 = Undergraduate, 2= Graduate and 3= Post graduate.

Sex: represents the gender of the respondent. It attains the value of '1' if the respondent is male and 'zero' for females.

INC: represents the respondent's household monthly income and has been divided into four slabs. The ordered variable attains four values from 1 to 4

where 1 represents the households whose income is below Rs. 5000. If the respondent falls in the income slab of Rs. 5000 to Rs. 10,000 the variable attains the value of '2' and '3' for Rs. 10,000 to 15,000. For those respondents whose income is above Rs. 20000 the variable attains the value of 4.

CRLA: represents the '*Awareness of the respondent about Copy Right Law*'. It is a binary number which attains the value of '1' if the respondent is aware about the Copy Right Law, otherwise it attains the value of zero.

PU: represents that '*piracy is unethical*'. Respondent's perceptions about piracyare captured by ordered five-point scale variable. If the respondent strongly disagrees with the statement the variable attains the value of 1 and accordingly 2 for disagree, 3 for neutral, 4 for agree and 5 for strongly agree.

FDA: The variable represents that '*Free downloading of music should be allowed*'. The perception based close-ended question seeks answers from the respondents again on five-point ordered scale. If the respondent strongly disagrees with the statement the variable attains the value of 1 and accordingly 2 for disagree, 3 for neutral, 4 for agree and 5 for strongly agree.

PP: the variable represents that '*pirates need to be punished*' and is also captured by the five-point ordered scale. If the respondent strongly disagrees with the statement the variable attains the value of 1 and accordingly 2 for disagree, 3 for neutral, 4 for agree and 5 for strongly agree.

LLE The variable represents that '*Leniency by law Enforcement Agencies has led to an increase in Piracy'*.It is also captured by the five-point ordered scale. If the respondent strongly disagrees with the statement the variable attains the value of 1 and accordingly 2 for disagree, 3 for neutral, 4 for agree and 5 for strongly agree.

CONF: The variable represents that '*Conflict has led to an increase in Piracy*'. The responses are again captured by the five-point ordered scale. If the respondent strongly disagrees with the statement the variable attains the value of 1 and accordingly 2 for disagree, 3 for neutral, 4 for agree and 5 for strongly agree.

1. Estimated Results from Binary Logistic Regression Model

Descriptive Statistics: Based on the sample of 828 respondents, descriptive statistics revealing minimum, maximum, mean and standard deviation of the variables included in the Binary Logistic Regression Model are shown below in Table No. 1. The mean value of variable P(Pirate) is 0.8865. It indicates that 88.65% of respondents are pirates. The average age of the respondents is 21.80 years with minimum age of the respondent as 15 years and maximum age as 39 years. It shows that the sample respondents are mainly of younger age. The mean education years are 1.09 which shows that major respondents are undergraduates. The mean value of income is 2.03. It reveals that the sample respondents mostly fall category of Rs. 5000 to Rs.10000 income group. The mean value of sex is 0.5942 which shows that 59.42% respondents are males. The mean value of CRAL is 0.6123 which shows that 61.23% of the respondents are aware about the copy right law. All the mean values of the variables assumed to be the determinants of

piracy like, PU (piracy is unethical), FDA (Free downloading should be allowed), PP (pirates need to be punished, LLE (lenient law enforcement) and CONF (conflict), lies above 3 and below 4. It shows that the majority of the respondents agree with these statements. (The details of the variables have been reported in cross tabs documented in the succeeding text).

Table 1: Descriptive Statistics

	Number	Minimum	Maximum	Mean	Std. Deviation
P(Pirate)	828	.00	1.00	.8865	.31743
Age	828	15	39	21.80	5.617
Edu	828	0	3	1.09	.978
INC	828	1	4	2.03	1.124
SEX	828	.00	1.00	.5942	.49134
CRAL	828	.00	1.00	.6123	.48752
PU	828	1	5	3.51	1.260
FDA	828	1	5	3.90	1.186
PP	828	1	5	3.62	1.160
LLE	828	1	5	3.85	.910
CONF	828	1	5	3.29	1.226

*Estimated Results:*The estimated results from Binary Logistic Regression Model are reported in Table No.2,showing coefficients (B), standard error (S.E) and significance level (P Values) of the variables. The coefficients of Binary Logistic model are not marginal effects rather showing the impact of independent variables on the loglikelihood of being a pirate. The usual practice is to explain the sign and significance of the variables.

The results show that the coefficient of the variable ‘age’ has negative sign and is significant at 5% level. It indicates that with the increase in age the loglikelihood (say probability) of being a pirate decreases or piracy is high among younger people.

The variable Education (Edu) has positive sign which indicates that with the increase in the educational level the probability of being a pirate increases. However, the relationship is not statistically significant. The possible reason may be that all the respondents have higher qualifications and being an undergraduate, graduate or postgraduate has no impact on piracy.

The coefficient of the variable income has negative sign showing that with the increase in the level of income the probability of being a pirate decreases. However, the relationship is not statistically significant.

The coefficient of the variable sex (being Male = 1 and female = 0) has negative sign which reveals that the probability of being a pirate is low among males. Alternatively it shows that piracy is more prevalent among the women and the relationship is statistically significant at 5% level.

The coefficient of the variable CRAL has positive sign which indicates that the probability of being a pirate is high among the respondents who are aware about the Copyright Act. The relationship is statistically significant at 1% level. This is most striking finding of the study with high level of significance. It clearly reveals that Copyright Act awareness may not lead to reduction of piracy however its effective implementation, punishment in case of infringement etc may be more prioritized areas for curbing piracy.

The coefficient of the variable PU has positive sign. It shows that as we move from respondents who strongly disagree (=1) to those who strongly agree (=5) with the statement that 'piracy is unethical', the probability of being a pirate increases. Alternatively, it shows that those who strongly agree that piracy is unethical tend to be more involved in piracy but the relationship is statistically insignificant.

The coefficient of the variable FDA has positive sign and is highly significant (at 1% level). It reveals that as we move from respondents who strongly disagree (=1) to those who strongly agree (=5) with the statement that 'free downloading should be allowed' the probability of piracy increases. Alternatively, it reveals that pirates strongly agree that free downloading should be allowed.

The coefficient of the variable PP has negative sign and is statistically significant at 10% level. It shows that as we move from the respondents who strongly disagree (=1) to those who strongly agree (=5) with the statement that 'pirates should be punished', the probability of being a pirate decreases. Alternatively, those who agree that pirates need to be punished tend to be less involved in piracy. This finding is somewhat related with strong implementation of copy right act and justifies that for reducing the rate of piracy, pirates need to be punished and substantiates the earlier finding that mere awareness of Copyright Law will not ipso facto bring down the incidence of piracy.

The coefficient of the variable LLE has positive sign. It indicates that as we move from the respondents who strongly disagree (=1) to those who strongly agree (=5) with the statement that 'Lenient Law Enforcement has increased the piracy', the probability of being a pirate increases. In other words, it means pirates are aware about lenient law enforcement and this leniency (of enforcement agencies) is major cause leading to increase in the rate of piracy. However, the statistical relationship is insignificant.

The coefficient of the variable CONF is positive which shows that as we move from the respondents who strongly disagree (=1) to those who strongly agree (=5) with the statement that 'conflict increases the rate of piracy', the probability of being a pirate increases. Alternatively, piracy is high among those who agree (or

strongly agree) that 'conflict increases the rate of piracy'. However, the relationship is statistically insignificant.

Table 2: Estimated Results from Binary Logistic Regression Model Dependent Variable: P(Pirate)

	B	S.E.	Sig. (p values)
Age	-.054	.023	.019
Edu	.133	.148	.368
INC	-.009	.114	.938
SEX	-.645	.280	.021
CRAL	1.11	.244	.000
PU	.079	.100	.426
FDA	.524	.089	.000
PP	-.192	.115	.094
LLE	.052	.139	.706
CONF	.094	.096	.324
Constant	1.06	.814	.190
-2 Log likelihood = 496.804			
Cox & Snell R Square = .102, Nagelkerke R Square = .201			
Percentage Correct = 89.2			

The overall model-fit statistics shown in Table No. 2, reveal that model is robust. Although there is no close analogous statistic in logistic regression to the coefficient of determination R^2, however some approximations are used. The Cox & Snell Square (a measure of R-square) was found to be over 0.102 with a Nagelkerke R-Square, which is equivalent to adjusted version of the Cox & Snell R-square and the maximum value can reach upto one, 0.201. It implies that over 20% of the variation in the dependent variable was explained by the independent variables included in the model.Another very important indicator of the model is the percentage correct or the 'sensitivity of prediction'. The Binary Logistic Regression Model showed that about 89.2 % of the occurrences were correctly predicted by the model.

e. Tabular Analysis

Table1: Incentives which attract towards unauthorized Downloading

Incentives which attract towards unauthorized Downloading	Total	
	No.	**%**
It is cheap and convenient	296	35.7%
There is a huge variety of music available	156	18.8%
Rare songs are available	160	19.3%
It gives a feeling of being a part of a group.	216	26.1%
Total	**828**	**100.0%**

On being asked the reasons for sharing unauthorized music, majority of the respondents (35.7%) revealed that it was the low price and convenience that attracted them.The second most predominant factor responsible for sharing of unauthorized music was found in collectivism. 26.1% of the respondents said that they like to share unauthorized music because it gave them a feeling of being a part of a group. Predictably this feeling was the highest in the age group of 15-25 years and progressively decreased with increasing age. The other reasons given were availability of rare songs (19.3%) followed by availability of huge variety of songs (18.8%).

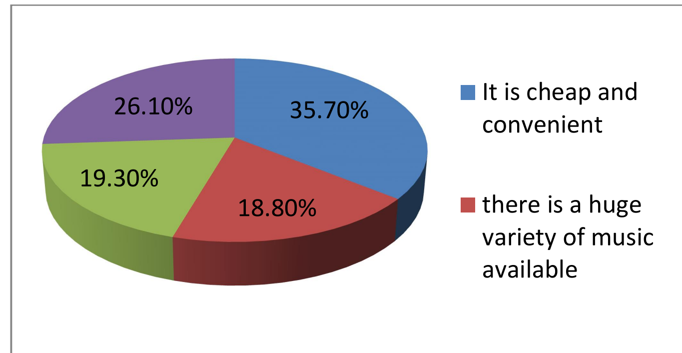

Fig. 1

Table 2: Age wise classification of reasons for unauthorized downloading

Incentives for unauthorized downloading	Age						Total	
	15 -25 yrs		25- 35 yrs		35 yrs and above		No.	%
	No.	%	No.	%	No.	%		
It is cheap and convenient	220	33.4%	61	45.9%	15	40.5%	296	35.7%
There is a huge variety of music available	123	18.7%	26	19.5%	7	18.9%	156	18.8%
Rare songs are available	123	18.7%	27	20.3%	10	27.0%	160	19.3%
It gives a feeling of being a part of a group.	192	29.2%	19	14.3%	5	13.5%	216	26.1%
Total	**658**	**100.0%**	**133**	**100.0%**	**37**	**100.0%**	**828**	**100.0%**

Interestingly, the age wise classification of the respondents revealed that price was the most important attractive features of unauthorized downloading for those in the age group of 25-35 years of age (45.9%). It was the least attractive feature for those in the age group of 15-25 years of age (33.4%).

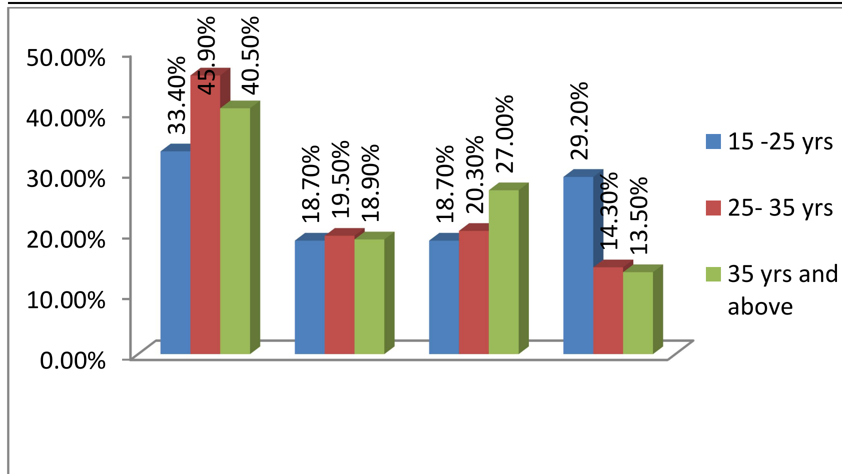

Fig. 2

Table 3: Gender wise classification of reasons for unauthorized downloading

Incentives for unauthorized downloading	Gender				Total	
	Male		Female		No.	%
	No.	%	No.	%		
It is cheap and convenient	198	40.2%	98	29.2%	296	35.7%
There is a huge variety of music available	92	18.7%	64	19.0%	156	18.8%
Rare songs are available	102	20.7%	58	17.3%	160	19.3%
It gives a feeling of being a part of a group.	100	20.3%	116	34.5%	216	26.1%
Total	492	100.0%	336	100.0%	828	100.0%

Again the gender wise classification revealed that low prices and convenience were a major attractive feature of males (40-2%) rather than for females (29.2%).Surprisingly, being a part of the peer group was an attractive feature in unauthorized downloading more for females (34.5%) than for males(20.3%).

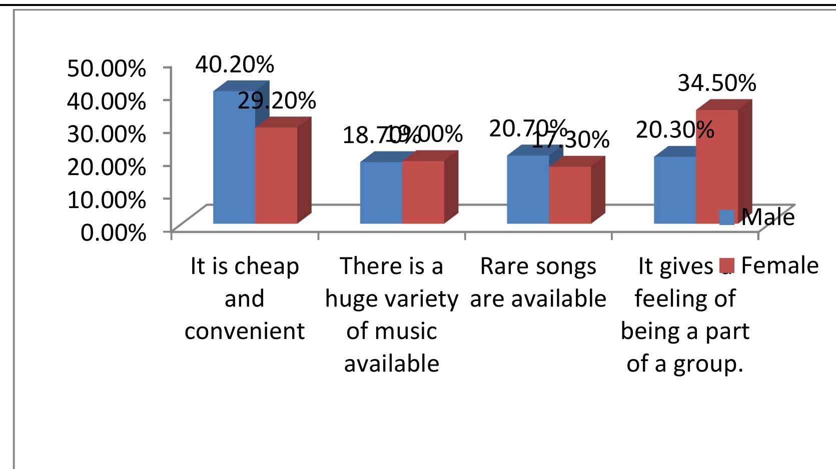

Fig. 3

Table 4: Occupation wise classification of reasons for unauthorized downloading

Incentives for unauthorized downloading	Occupation								Total	
	Business		Service		Unemployed		Student		No.	%
	No.	%	No.	%	No.	%	No.	%		
It is cheap and convenient	68	44.2%	27	48.2%	2	18.2%	199	32.8%	296	35.7%
There is a huge variety of music available	26	16.9%	8	14.3%	3	27.3%	119	19.6%	156	18.8%
Rare songs are available	30	19.5%	17	30.4%	4	36.4%	109	18.0%	160	19.3%
It gives a feeling of being a part of a group.	30	19.5%	4	7.1%	2	18.2%	180	29.7%	216	26.1%
Total	**154**	**100.0%**	**56**	**100.0 %**	**11**	**100.0 %**	**607**	**100.0%**	**828**	**100.0%**

The occupation wise classification brought to fore the fact that low prices attracted those in the service classes (48.2%) followed by the self employed class (44.2%). Ironically, low prices were the least attractive feature for those who are most hard pressed for

money i.e. the unemployed class (18.2%), followed by the students (32.8%). Peer group mentality was the highest among students (29.7%) and lowest amongst the service class (7.1%).

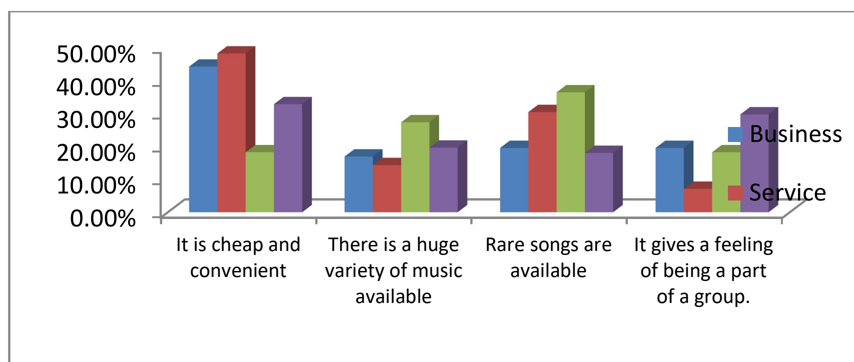

Fig. 4

Table 5: Education wise classification of reasons for unauthorized downloading

Incentives for unauthorized downloading	Education								Total	
	Hr Secondary		Under Graduate		Graduate		Post Graduate.		Count	Col %
	Count	Col %	Count	Col %	Count	Col %	Count	Col %		
It is cheap and convenient	88	30.3%	102	41.0%	77	35.6%	29	39.7%	296	35.7%
There is a huge variety of music available	65	22.4%	40	16.1%	41	19.0%	10	13.7%	156	18.8%
Rare songs are available	65	22.4%	45	18.1%	36	16.7%	14	19.2%	160	19.3%
It gives a feeling of being a part of a group.	72	24.8%	62	24.9%	62	28.7%	20	27.4%	216	26.1%
Total	290	100.0%	249	100.0%	216	100.0%	73	100.0%	828	100.0%

The education wise classification revealed that price and convenience attracted mostly under graduates (41.0%) followed by post graduates (39.7%) who were followed by graduates (35.6%). It was the least attractive feature for those in the Higher Secondary category (30.3%).

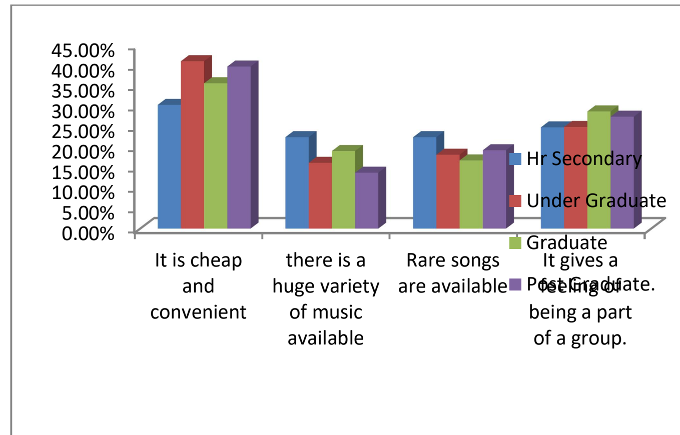

Fig. 5

Table 6: Income wise classification of reasons for unauthorized downloading

Incentives for unauthorized downloading	Income								Total	
	Below Rs.5000		Rs.5000- 10, 000		Rs.10000- 20000		Above Rs.20000		Count	Col %
	Count	Col %	Count	Col %	Count	Col %	Count	Col %		
It is cheap and convenient	114	30.7%	90	45.2%	44	37.0%	48	34.5%	296	35.7%
There is a huge variety of music available	77	20.8%	28	14.1%	22	18.5%	29	20.9%	156	18.8%
Rare songs are available	66	17.8%	33	16.6%	27	22.7%	34	24.5%	160	19.3%
It gives a feeling of being a part of a group.	114	30.7%	48	24.1%	26	21.8%	28	20.1%	216	26.1%
Total	371	100.0 %	199	100.0 %	119	100.0 %	139	100.0 %	828	100.0 %

A very interesting point to note is that low prices and convenience was a major draw for those in the middle income groups [(Rs.

5000-1000, →45.2%) and (Rs 10000-20000, →37%)]. Ironically, amongst the various income groups the low income group viewed low prices and convenience as the least important attractive feature of unauthorized downloading (30.7%).

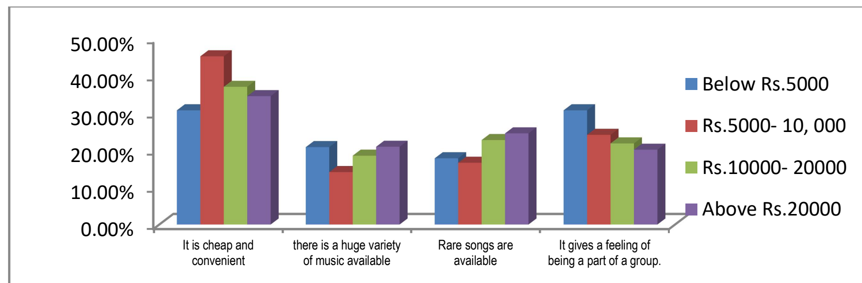

Fig. 6

Ethics of buying or downloading pirated music

Table 7: Ethics of buying or downloading pirated music

Buying or downloading pirated music is un ethical (it is wrong)	Total	
	Count	Col %
Strongly disagree	68	8.2%
Disagree	134	16.2%
Neutral	147	17.8%
Agree	264	31.9%
Strongly agree	215	26.0%
Total	828	100.0%

Regarding the ethics of buying or downloading pirated music, majority [57.9%, with 31.9% agreeing and 26% agreeing strongly] of the respondents were of the view that buying or downloading of pirated music was unethical. 17.8% of the respondents were neutral, while only a small minority of24.4% (with 8.2% disagreeing strongly and 16.2% disagreeing) were of the opinion that buying/downloading pirated music was not unethical. This is contrary to a number of western studies on the point which reveal

that piracy is not viewed as an unethical activity.[16] Having said that, it is important to remember that there are certain studies to the contrary.[17]

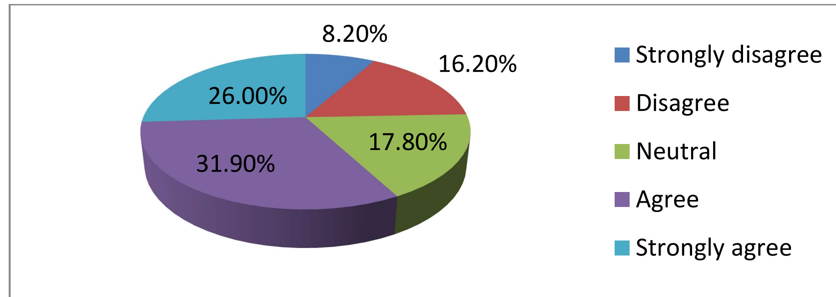

Fig. 7

Table 8: Age wise classification of ethics of buying or downloading pirated music

Buying or downloading pirated music is un ethical (it is wrong)	Age						Total	
	15 -25 yrs		25- 35 yrs		35 yrs and above		Count	Col %
	Count	Col %	Count	Col %	Count	Col %		
Strongly disagree	63	9.6%	5	3.8%	0	.0%	68	8.2%
Disagree	113	17.2%	15	11.3%	6	16.2%	134	16.2%
Neutral	100	15.2%	39	29.3%	8	21.6%	147	17.8%
Agree	210	31.9%	39	29.3%	15	40.5%	264	31.9%
Strongly agree	172	26.1%	35	26.3%	8	21.6%	215	26.0%
Total	658	100.0%	133	100.0%	37	100.0 %	828	100.0 %

Age wise classification reveals that 62.1% [40.5% agreeing and 21.6% agreeing strongly] of those in the older-age group of 35 years and above believe piracy to be an unethical activity, followed by 58% [31.9% agreeing and 26.1% agreeing strongly] in the age

[16] S.Glass and A.Wood, "Situational Determinants of Software Piracy: An Equity Theory Perspective" 15(11) *Journal of Business Ethics* 1189-98(1996).

[17] T.P.Cronan and S.Al.Rafee,"Factors that Influence the Intention to Pirate Software and Media" 78(4) *Journal of Business Ethics 527-45(2007)*

group of 15-25 years and 55.6% [29.3% agreeing and 26.3% agreeing strongly] in the age group of 25-35 years of age.

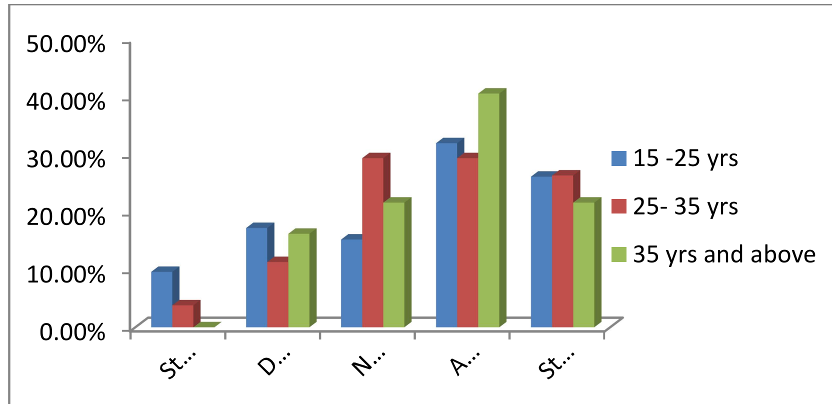

Fig. 8

Table 9: Gender wise classification of ethics of buying or downloading pirated music

Buying or downloading pirated music is un ethical (it is wrong)	Gender				Total	
	Male		Female		Count	Col %
	Count	Col %	Count	Col %		
Strongly disagree	45	9.1%	23	6.8%	68	8.2%
Disagree	79	16.1%	55	16.4%	134	16.2%
Neutral	105	21.3%	42	12.5%	147	17.8%
Agree	148	30.1%	116	34.5%	264	31.9%
Strongly agree	115	23.4%	100	29.8%	215	26.0%
Total	492	100.0%	336	100.0%	828	100.0%

The gender wise classification reveals that more females [(64.3%) 34.5% agreeing and 29.8% agreeing strongly] than males [(53.5%) 30.1% agreeing and 23.4% agreeing strongly] view piracy as unethical behavior.

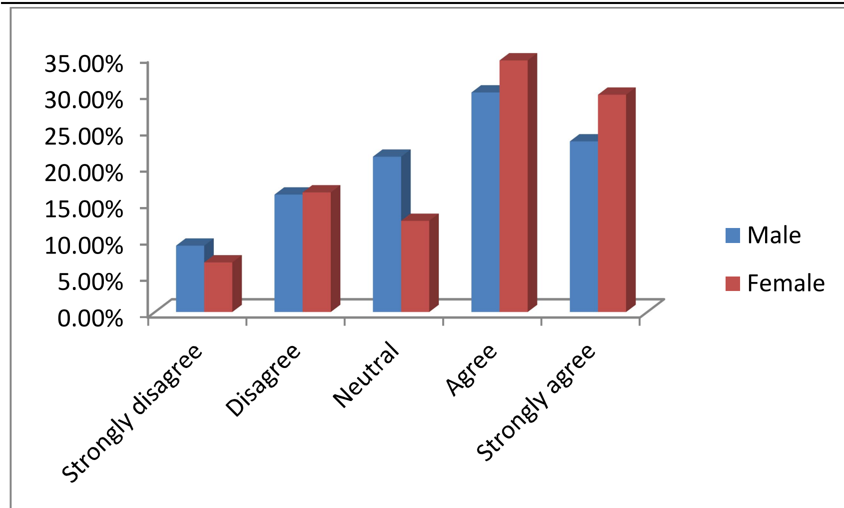

Fig. 9

Table 10: Occupation wise classification of ethics of buying or downloading pirated music

Buying or downloading pirated music is un ethical (it is wrong)	Occupation								Total	
	Business		Service		Unemployed		Student		Count	Col %
	Count	Col %	Count	Col %	Count	Col %	Count	Col %		
Strongly disagree	3	1.9%	1	1.8%	0	.0%	64	10.5%	68	8.2%
Disagree	20	13.0%	7	12.5%	1	9.1%	106	17.5%	134	16.2%
Neutral	43	27.9%	12	21.4%	2	18.2%	90	14.8%	147	17.8%
Agree	55	35.7%	16	28.6%	5	45.5%	188	31.0%	264	31.9%
Strongly agree	33	21.4%	20	35.7%	3	27.3%	159	26.2%	215	26.0%
Total	154	100.0 %	56	100.0%	11	100.0%	607	100.0%	828	100.0 %

The occupation wise classification reveals that the unemployed class considers piracy as the most unethical (72.8%) while approximately 57% of students and business men view piracy as unethical. This trend reveals that though piracy may be viewed as

unethical, yet people still engage in it. This reveals a negative correlation between ethical orientation and piracy.

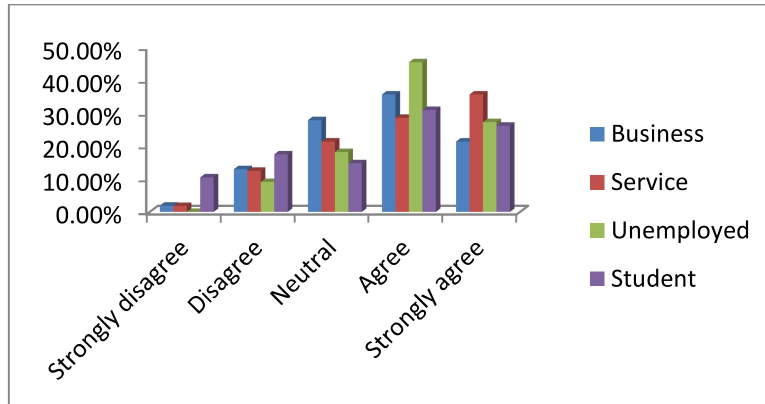

Fig. 10

Table 11: Education wise classification of ethics of buying or downloading pirated music

Buying or downloading pirated music is un ethical (it is wrong)	**Education**								**Total**	
	Hr Secondary		**Under Graduate**		**Graduate**		**Post Graduate.**			
	Count	**Col %**	**Count**	**Col %**	**Count**	**Col %**	**Count**	**Col %**	**Count**	**Col %**
Strongly disagree	36	12.4%	15	6.0%	12	5.6%	5	6.8%	68	8.2%
Disagree	50	17.2%	41	16.5%	36	16.7%	7	9.6%	134	16.2%
Neutral	40	13.8%	58	23.3%	35	16.2%	14	19.2%	147	17.8%
Agree	80	27.6%	71	28.5%	88	40.7%	25	34.2%	264	31.9%
Strongly agree	84	29.0%	64	25.7%	45	20.8%	22	30.1%	215	26.0%
Total	290	100.0 %	249	100.0%	216	100.0 %	73	100.0%	828	100.0%

Interestingly, the greatest percentage of those who do not view piracy as unethical are from the students community (28%).

Interestingly, those with higher educational background (Graduate and above) were more inclined to view piracy as unethical [Graduates → 61.5%, Postgraduates → 64.3%]

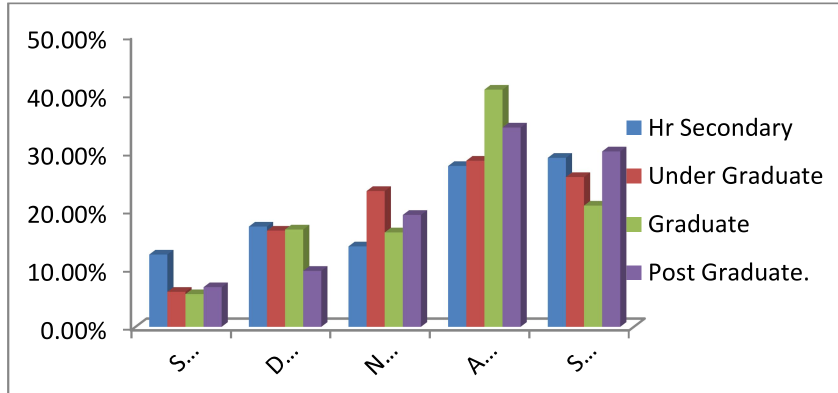

Fig. 11

Table 12: Income wise classification of ethics of buying or downloading pirated music

Buying or downloading pirated music is un ethical (it is wrong)	Income								Total	
	Below Rs.5000		Rs.5000- 10, 000		Rs.10000- 20000		AboveRs.20 000			
	Count	Col %	Count	Col %	Count	Col %	Count	Col %	Count	Col %
Strongly disagree	38	10.2%	11	5.5%	8	6.7%	11	7.9%	68	8.2%
Disagree	68	18.3%	32	16.1%	13	10.9%	21	15.1%	134	16.2%
Neutral	60	16.2%	38	19.1%	28	23.5%	21	15.1%	147	17.8%
Agree	122	32.9%	61	30.7%	41	34.5%	40	28.8%	264	31.9%
Strongly agree	83	22.4%	57	28.6%	29	24.4%	46	33.1%	215	26.0%
Total	371	100.0%	199	100.0%	119	100.0%	139	100.0%	828	100.0%

In the income wise classification, the highest percentage of those who viewed piracy as unethical was from the highest income

bracket (61.9%), while lowest percentage of those who viewed piracy as unethical was from the lowest income group (55.3%).

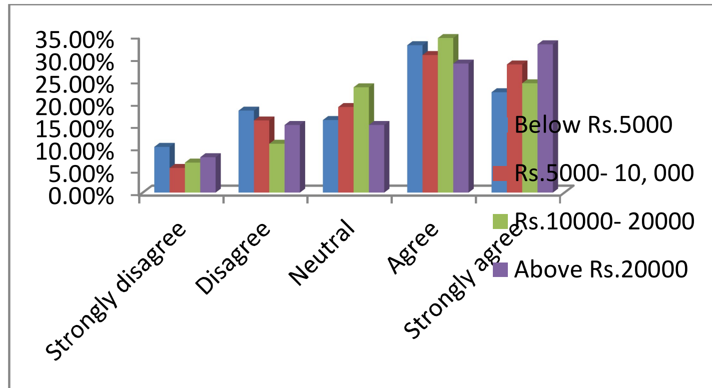

Fig. 12

Awareness and Efficacy of Copyright Law to Control Piracy

Table 13: Awareness of Copyright Law

Awareness of copy right law	Total	
	Count	Col %
To some extent	125	15.1%
To a large extent	103	12.4%
To little extent	279	33.7%
Not at all	321	38.8%
Total	828	100.0%

Majority of the respondents (61.2%), though in varying degrees revealed that they were aware of copyright law. 33.7% rated their knowledge of copyright law as little, whereas 15.1% of the respondents pegged their knowledge of copyright law at a moderate level. Only 12.4% of the respondents said that they were aware of copyright law to a large extent. 38.8% revealed that they were not at all aware of copyright law.

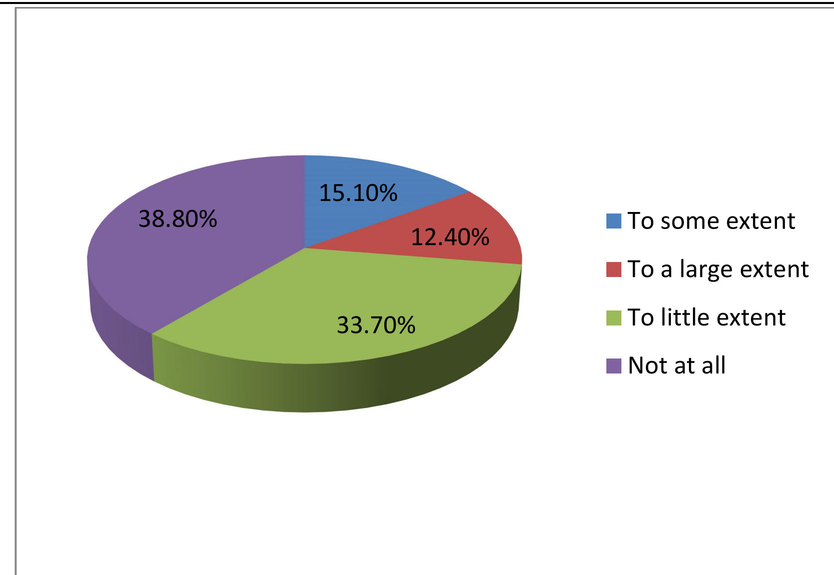

Fig. 13

Table 14: Age wise classification of awareness of Copyright Law

Awareness of copy right law	Age						Total	
	15 -25 yrs		25- 35 yrs		35 yrs and above		Count	Col %
	Count	Col %	Count	Col %	Count	Col %		
To some extent	107	16.3%	17	12.8%	1	2.7%	125	15.1%
To a large extent	80	12.2%	16	12.0%	7	18.9%	103	12.4%
To little extent	227	34.5%	42	31.6%	10	27.0%	279	33.7%
Not at all	244	37.1%	58	43.6%	19	51.4%	321	38.8%
Total	658	100.0 %	133	100.0%	37	100.0%	828	100.0%

Surprisingly, in the age-wise classification of awareness of copyright law, increase in the age group was accompanied by an increase in the ignorance of copyright law. 37.1% of the respondents in the age group of 15-20 years said they were not at all aware of Copyright Law, whereas this figure was at 43.6% and

51.4% for those in the age group of 25-35 years and 35 years and above respectively.

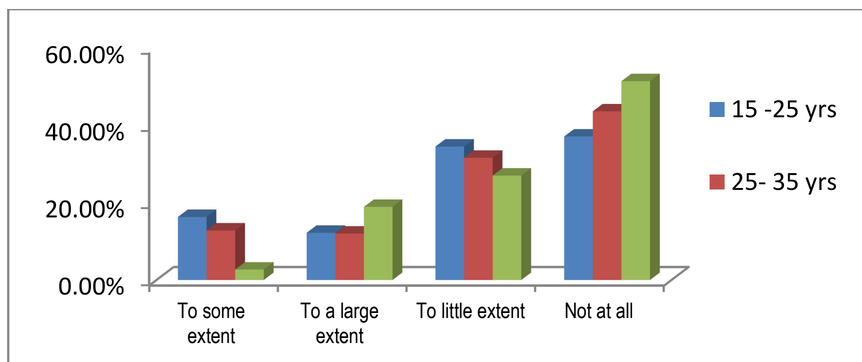

Fig. 14

Table 14: Gender wise classification of awareness of Copyright Law

Awareness of copy right law	Gender				Total	
	Male		Female		Count	Col %
	Count	Col %	Count	Col %		
To some extent	76	15.4%	49	14.6%	125	15.1%
To a large extent	61	12.4%	42	12.5%	103	12.4%
To a little extent	140	28.5%	139	41.4%	279	33.7%
Not at all	215	43.7%	106	31.5%	321	38.8%
Total	492	100.0%	336	100.0 %	828	100.0%

Ignorance of copyrightlaw was more pronounced in male (43.7%) than in females (31.5%).

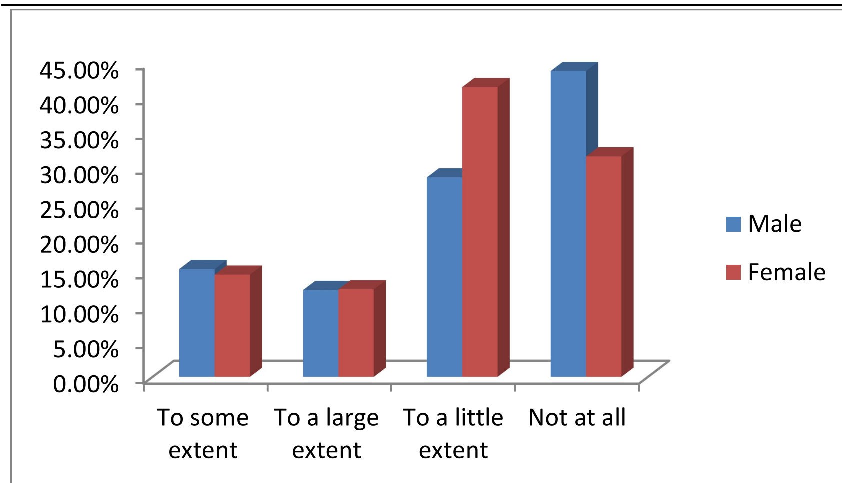

Fig. 14

Table 15: Occupation wise classification of awareness of Copyright Law

Awareness of copy right law	Occupation								Total	
	Business		Service		Unemployed		Student		Count	Col %
	Count	Col %	Count	Col %	Count	Col %	Count	Col %		
To some extent	20	13.0 %	7	12.5%			98	16.1%	125	15.1%
To a large extent	14	9.1%	10	17.9%	3	27.3%	76	12.5%	103	12.4%
To little extent	45	29.2 %	12	21.4%	3	27.3%	219	36.1%	279	33.7%
Not at all	75	48.7 %	27	48.2%	5	45.5%	214	35.3%	321	38.8%
Total	154	100.0 %	56	100.0 %	11	100.0 %	607	100.0%	828	100.0 %

The table reveals that ignorance of copyright law was found to be the highest in the self employed category (48.7%) and the employed category (48.2%). It was found to be the least in the students community (35.3%).

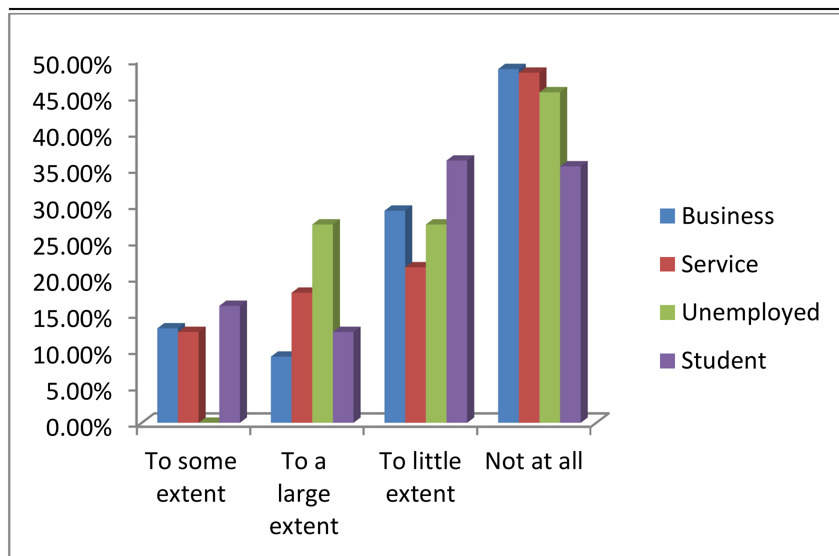

Fig. 15

Table 16: Education wise classification of awareness of Copyright Law

Awareness of copy right law	Education								Total	
	Hr Secondary		Under Graduate		Graduate		Post Graduate.		Count	Col %
	Count	Col %	Count	Col %	Count	Col %	Count	Col %		
To some extent	50	17.2 %	31	12.4%	36	16.7%	8	11.0%	125	15.1%
To a large extent	37	12.8 %	28	11.2%	33	15.3%	5	6.8%	103	12.4%
To little extent	95	32.8 %	74	29.7%	79	36.6%	31	42.5%	279	33.7%
Not at all	108	37.2 %	116	46.6%	68	31.5%	29	39.7%	321	38.8%
Total	290	100.0 %	249	100.0 %	216	100.0 %	73	100.0 %	828	100.0%

In the education wise classification, ignorance of copyright law was found to be the highest in the undergraduates (46.6%), followed by the post graduates (39.7%). Awareness was found to be the highest in graduates.

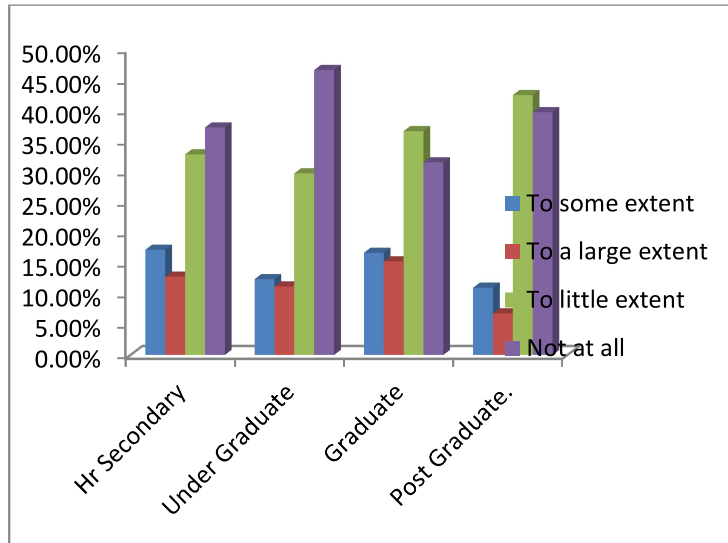

Fig. 16

Table 17: Income wise classification of awareness of Copyright Law

Awareness of copy right law	Income								Total	
	Below Rs.5000		Rs.5000- 10, 000		Rs.10000- 20000		AboveRs.20 000		Count	Col %
	Count	Col %	Count	Col %	Count	Col %	Count	Col %		
To some extent	59	15.9 %	25	12.6%	20	16.8%	21	15.1 %	125	15.1%
To a large extent	46	12.4 %	19	9.5%	16	13.4%	22	15.8 %	103	12.4%
To little extent	124	33.4 %	55	27.6%	45	37.8%	55	39.6 %	279	33.7%
Not at all	142	38.3 %	100	50.3%	38	31.9%	41	29.5 %	321	38.8%
Total	371	100.0 %	199	100.0 %	119	100.0 %	139	100.0 %	828	100.0%

Awareness of copyright law was found to be the highest in the income slab of Rs. 20,000 and above (70.5%) and least in the income group of Rs. 5000-1000, (50.3%).

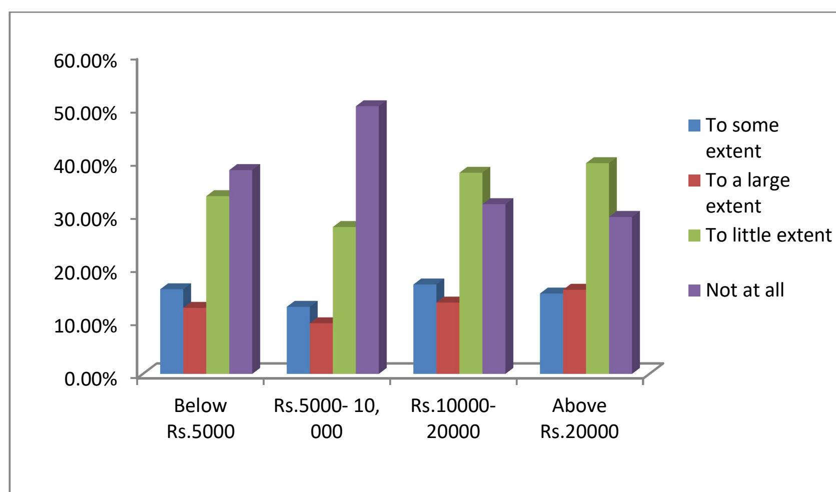

Fig. 17

Table 18: Efficacy of Copyright Law to control Piracy

Copy right law is enough to control digital piracy of music	Total	
	Count	Col %
Strongly disagree	66	8.0%
Disagree	188	22.7%
Neutral	188	22.7%
Agree	300	36.2%
Strongly agree	86	10.4%
Total	828	100.0%

Regarding the efficacy of Copyright law to control digital piracy, 46.8% [36.25% agreeing and 10.4% agreeing strongly]of the respondents were of the opinion that copyright law was enough to control piracy whereas 22.7% were neutral. 30.7% [8% disagreeing and 22.7% disagreeing strongly] felt that Copyright law was not sufficient to control digital piracy.

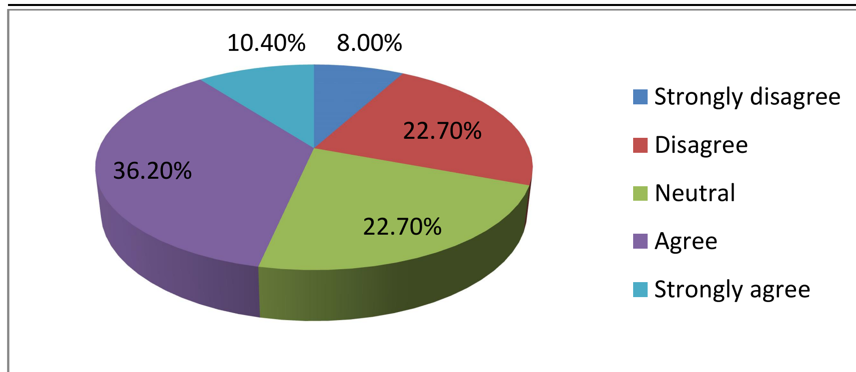

Fig. 18

Role of enforcement agencies

Table 19: Role of enforcement agencies

Leniency by the law enforcement agencies has led to an increase in piracy	Total	
	Count	Col %
Strongly disagree	9	1.1%
Disagree	64	7.7%
Neutral	170	20.5%
Agree	388	46.9%
Strongly agree	197	23.8%
Total	828	100.0%

An overwhelming majority i.e. 70.7% (46.9% agreeing and 23.8% agreeing strongly) were of the opinion that leniency by law enforcement agencies has led toan increase in piracy. 20.5% were neutral in their response, while 8.8% (7.7% disagreeing and 1.1% disagreeing strongly) disagreed with the statement that leniency by law enforcement agencies had led to an increase in piracy.

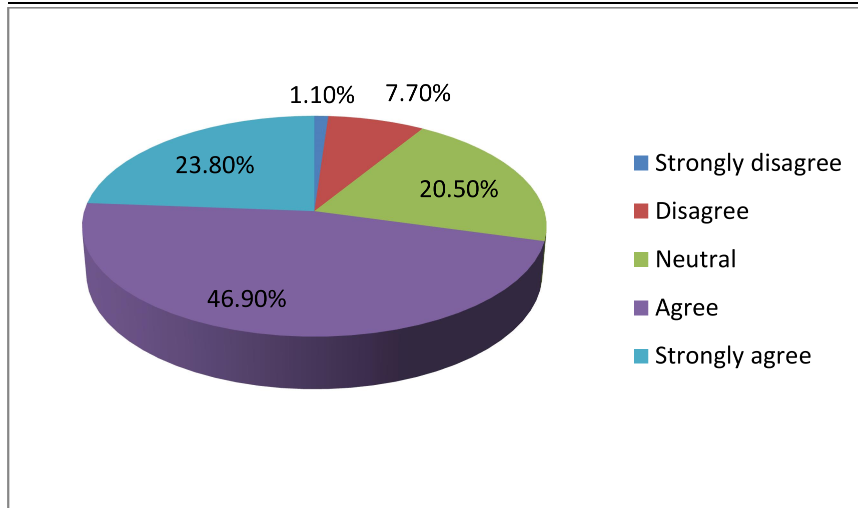

Fig. 19

Table 20: Cross classification between role of enforcement agencies and age

Leniency by the law enforcement agencies has led to an increase in piracy	Age						Total		Pearson Chi – square χ^2	P Value
	15 -25 yrs		25- 35 yrs		35 yrs and above					
	No.	%	No.	%	No.	%	No.	%		
Strongly disagree	7	1.1%	2	1.5%	0	.0%	9	1.1%	16.258(a)	.039
Disagree	57	8.7%	7	5.3%	0	.0%	64	7.7%		
Neutral	125	19.0 %	31	23.3%	14	37.8 %	170	20.5%		
Agree	303	46.0 %	66	49.6%	19	51.4 %	388	46.9%		
Strongly agree	166	25.2 %	27	20.3%	4	10.8 %	197	23.8%		
Total	658	100.0 %	133	100.0 %	37	100.0 %	828	100.0%		

The cross classification between the lax role of the enforcement agencies leading to piracy and age revealed that there is significant association between the two($\chi 2$ - 16.25 and p value .03).

Other factors such as gender, income, education, occupation were found not to have a significant association with the implementation of Copyright Law leading to increase in piracy.

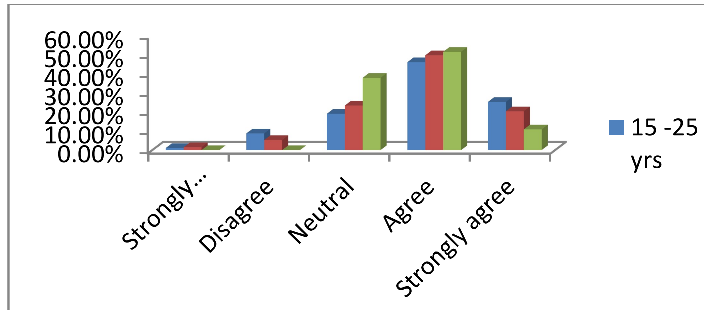

Fig. 20

Anti-big Business Attitude

Table 21: Anti-big Business Attitude

Music company over charge consumers for their copy righted works, leading to piracy.	Total	
	Count	**Col %**
Strongly disagree	35	4.2%
Disagree	96	11.6%
Neutral	126	15.2%
Agree	369	44.6%
Strongly agree	202	24.4%
Total	828	100.0%

Anti big business Attitude 69%, (44.6% agreeing and 24.4% strongly agreeing) of the respondents were of the opinion that music companies overcharge their customers leading to piracy, 15.2% were neutral in the response and only 15.8% (4.2% strongly disagreeing and 11.6%disagreeing) disagreed.

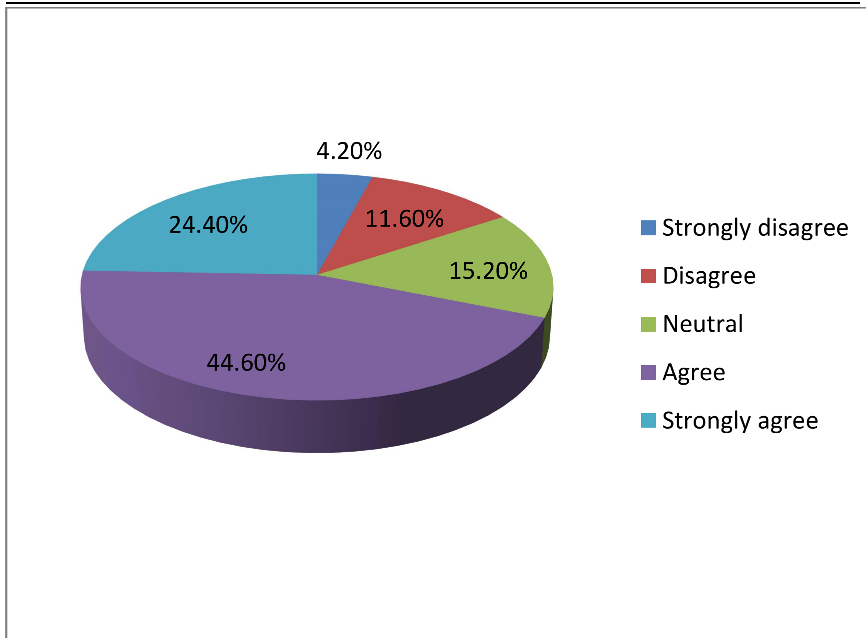

Fig. 21

Table 22: Age wise classification of Anti-big Business Attitude

Music company over charge consumers for their copy righted works, leading to piracy.	Age						Total	
	15 -25 yrs		25- 35 yrs		35 yrs and above			
	No.	%	No.	%	No.	%	No.	%
Strongly disagree	29	4.4%	5	3.8%	1	2.7%	35	4.2%
Disagree	88	13.4%	6	4.5%	2	5.4%	96	11.6%
Neutral	100	15.2%	20	15.0%	6	16.2%	126	15.2%
Agree	292	44.4%	63	47.4%	14	37.8%	369	44.6%
Strongly agree	149	22.6%	39	29.3%	14	37.8%	202	24.4%
Total	658	100.0%	133	100.0%	37	100.0%	828	100.0%

Surprisingly, those in the age group of 15-25 years had the lowest percentage [(67%) i.e., 44.4% agreeing and 22.6% agreeing strongly)] of respondents who were in agreement with the statement that music companies overcharge their customers. The

majority of the respondents [76.7% (47.4% agreeing and 29.3% agreeing strongly)] who agreed with the statement that music companies overcharge their customers were found to be in the age group of 25-35 years.

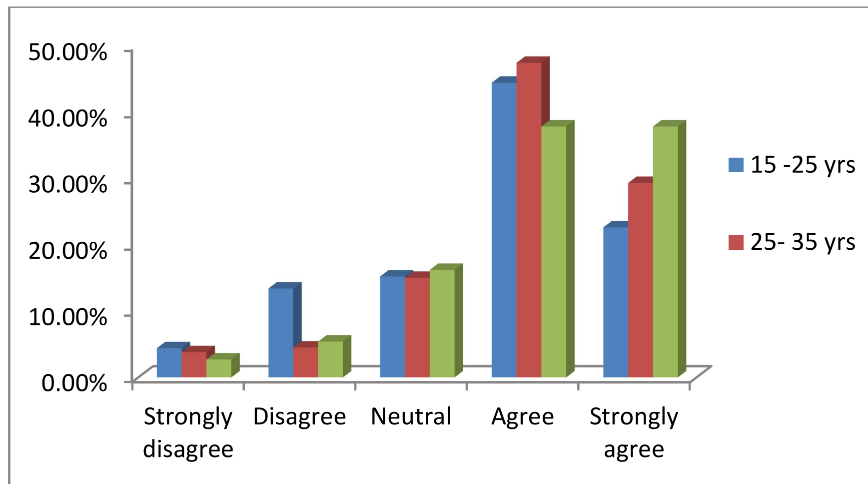

Fig. 22

Table 23: Gender wise classification of Anti-big Business Attitude

Music company over charge consumers for their copy righted works, leading to piracy.	Gender				Total	
	Male		Female		No.	%
	No.	%	No.	%		
Strongly disagree	26	5.3%	9	2.7%	35	4.2%
Disagree	61	12.4%	35	10.4%	96	11.6%
Neutral	86	17.5%	40	11.9%	126	15.2%
Agree	196	39.8%	173	51.5%	369	44.6%
Strongly agree	123	25.0%	79	23.5%	202	24.4%
Total	492	100.0%	336	100.0%	828	100.0%

In the gender-wise classification, more females (75% i., 51.5% + 23.5%) than males (64.8% i.e., 39.8 + 25.0%) were of the opinion that music companies overcharge their customers.

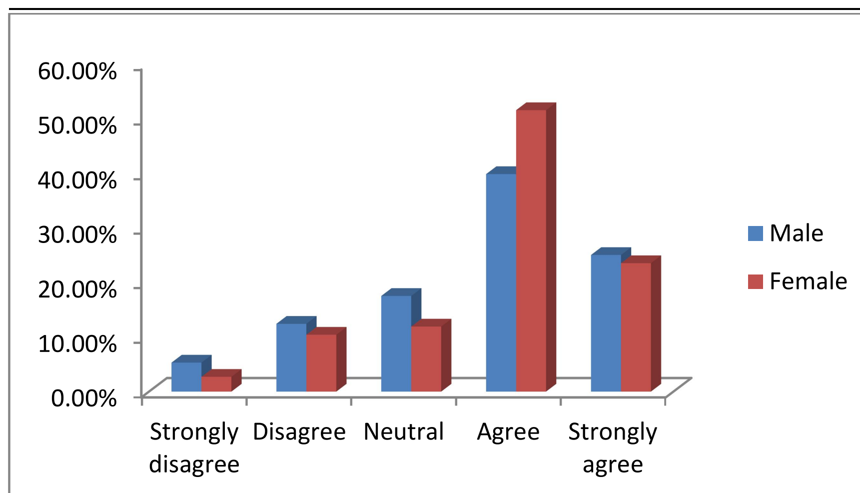

Fig. 23

Table 24: Income wise classification of Anti-big Business Attitude

Music company over charge consumers for their copy righted works, leading to piracy.	Income								Total	
	Below Rs.5000		Rs.5000- 10, 000		Rs.10000- 20000		Above Rs.20000			
	No.	%	No.	%	No.	%	No.	%	No.	%
Strongly disagree	13	3.5%	13	6.5%	6	5.0%	3	2.2%	35	4.2%
Disagree	55	14.8 %	21	10.6%	11	9.2%	9	6.5%	96	11.6 %
Neutral	55	14.8 %	36	18.1%	18	15.1%	17	12.2%	126	15.2 %
Agree	161	43.4 %	87	43.7%	56	47.1%	65	46.8%	369	44.6 %
Strongly agree	87	23.5 %	42	21.1%	28	23.5%	45	32.4%	202	24.4 %
Total	371	100.0 %	199	100.0 %	119	100.0 %	139	100.0 %	828	100.0 %

In the income wise classification, those in the highest income group (Above Rs., 20000) were found to be the most in agreement

(79.2% →46.81% +32.4%) with the statement that music companies overcharge their customers which leads to piracy.

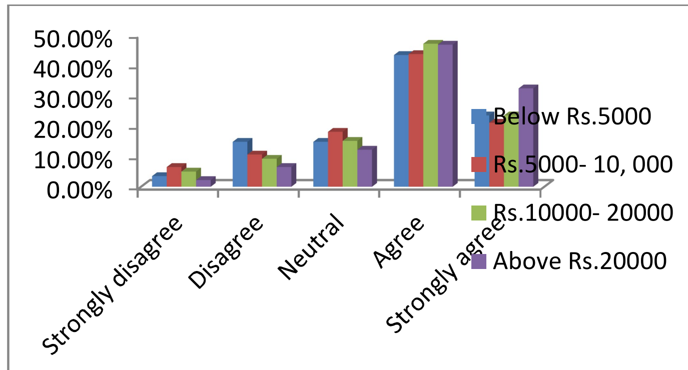

Fig. 24

Table 25: Occupation wise classification of Anti-big Business Attitude

Music company over charge consumers for their copy righted works, leading to piracy.	Occupation								Total	
	Business		Service		Unemployed		Student		No.	%
	No.	%	No.	%	No.	%	No.	%		
Strongly disagree	6	3.9%	1	1.8%	0	.0%	28	4.6%	35	4.2%
Disagree	15	9.7%	1	1.8%	0	.0%	80	13.2%	96	11.6%
Neutral	24	15.6 %	10	17.9%	2	18.2%	90	14.8%	126	15.2%
Agree	74	48.1 %	23	41.1%	5	45.5%	267	44.0%	369	44.6%
Strongly agree	35	22.7 %	21	37.5%	4	36.4%	142	23.4%	202	24.4%
Total	154	100.0 %	56	100.0 %	11	100.0 %	607	100.0 %	828	100.0%

In the occupation wise classification students (67.4%→44%+23.4%) were found to be least in agreement with the statement that music companies overcharge their customers.

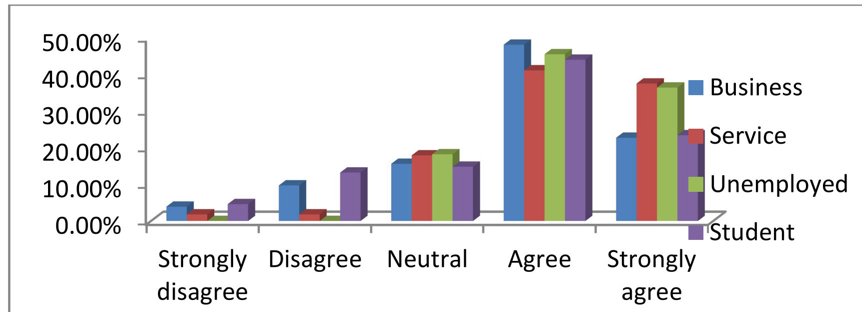

Fig. 25

II. Interviews

During the course of the study ten singers were also interviewed. These included top level singers like Wahid Jeelani, Ajaz Rah etc. and middle level singers such as Muneer Mujeeb. All the singers interviewed were unanimous in their renunciation of Copyright Law. They accepted piracy as an inevitable part of their profession. Any reliance on the police for the enforcement of their copyright claims was viewed by them as an exercise in futility. Speaking from their experience, a number of singers revealed that the law enforcement agencies were not receptive to copyright enforcement claims and viewed them as trivial in nature. Therefore, the singers preferred not to report the violation of copyright to the police and instead tracked them on their personal level. These singers believed in self help and regularly checked out shops selling CD's to ensure that pirated CD's of their works are not sold. Surprisingly, the singers viewed downloading of their works on the internet as a positive development. They believed that it added to their popularity and were happy about the same.

Interviews were also conducted with some CD shop owners (selling mostly pirated CDs). Mainly the interviews were conducted with CD shop owners in Lalchowk area of Srinagar city. The shopkeepers revealed that their business was on the verge of

extinction, courtesy free downloading via the Internet. They also revealed that the number of shop had dwindled from 40 to about 10, in the past ten years. According to them, mobile shops have now become the new havens of piracy. Downloading songs from the Internet and transferring them onto mobiles, pen-drives, memory cards etc. is the latest form in which piracy is thriving.

III. Findings of the Study

The study establishes, that the pirate in Srinagar city is most likely to be young, female, and aware about copyright law. The pirate knows that law enforcement agencies are lenient in enforcing the copyright law. The pirate also believes piracy to be unethical and still indulges in it. The major factors which attract him/her towards unauthorized downloading are low prices and convenience of downloading. The findings of the study suggest that awareness of copyright law does not deter people from indulging in piracy. This, in turn would mean that campaigns aimed at creating awareness of Copyright law would not yield the desired results. Further, the study reveals a negative correlation between ethical orientation and piracy. A natural corollary of this is that, anti piracy campaigns focusing on appeals to ethics (such as a pirate is a thief) would prove infructuous in the efforts to curb piracy. The study also confirms that a sizeable chunk of the population is routinely engaged in unauthorized downloading. The study clearly points to the leniency of law enforcement agencies as a contributory factor in increasing piracy. This shows that popular practice and law are out of sync. The issue can be resolved by either stronger enforcement to make reality conform to the law or changing the law in order to adapt it to reality. It is submitted that the latter would be a more pragmatic solution. Therefore legalizing non commercial file sharing would be an effective solution to combat the menace of unauthorized downloading. It would decriminalize P2P users remunerate artists, and relieve the judicial system and the ISP from mass scale prosecution.

A Conceptual Analysis of the Notion of Subnational Constitutionalism

Mir Mubashir Altaf*
Nazia Nisar**

Abstract

Within a federal polity, there are myriad modes of distributing the powers between the general and regional governments. The schemes of delineation of contours of state power vary amongst the federal states keeping in view their peculiar conditions. As such, it is natural that each federal state is characteristically different from any other state. Subnational constitutionalism as a phenomenon finds its place in federal polities wherein the regional governments are afforded greater autonomy to safeguard their residual sovereignty. This arrangement is ordinarily found within those countries where the federal state has come about by a solemn compact between erstwhile sovereign units. This paper is an attempt at undertaking a conceptual analysis of the notion of subnational constitutionalism and highlighting its contemporary relevance in an era of centralization.

Keywords: Asymmetry, Centralisation, Constitution, Constitutionalism, Federal, Sovereign, Subnational.

I. Introduction

This paper has been written to develop an understanding of the impact of over-centralization upon the phenomenon of subnational constitutionalism as it manifests itself in certain federal states. Part I of the paper sheds light on the concept of federalism and its various manifestations across nation-states, especially in the United States of America. Part II focuses upon the notion of subnational

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constitutionalism drawing upon the writings of Gardner, Ginsburg, Posner, and Marshfield. In Part III of the Article, an attempt has been made to make out a distinction between the concept of federalism and subnational constitutionalism. Part IV draws out linkages between the phenomenon of asymmetric federalism and subnational constitutionalism focusing upon developing an understanding as to how substate constitutions not only provide a facilitative ecosystem for subnational constitutionalism but also lend a characteristic asymmetric tilt to certain federal states. Part V addresses the question as to why federalism works by highlighting the various factors which work out for subnational constitutionalism; especially for federal countries having diverse communities with different political aspirations. In the concluding part, an attempt has been made, to sum up, the discussion by offering an insight into the contemporary relevance of the notion of subnational constitutionalism and the challenges to its continued relevance in the face of over-centralizing tendencies in certain federal states.

II. Federalism: A Conceptual Understanding

Federalism as a politico-legal construct has engaged the attention of political and legal theorists; over the years voluminous literature has been developed on the understanding of the concept of federalism in its various manifestations. From the classical underpinnings of the idea of federalism to its modern-day variants like cooperative federalism; collaborative federalism; pragmatic federalism, and coercive federalism; the debate about the changing dynamics of federalism has spanned over a century enriching our understanding of the various ways in which this conception thrives in modern nation-states. The well-known British jurist, A.V.Dicey has laid down two preconditions for the creation of a federation:

(1) existence of a body of countries "so closely connected by locality, by history, by race, or the like, as to be capable of bearing, in the eyes of their inhabitants an impress of common nationality" and (2) the inhabitants of these countries "must desire union and must not desire unity."[1] K.C Wheare, in his *magnum opus*, the Federal Government famously found the essence of federalism in the "federal principle" which he defined as "the method of dividing powers [between the general and the regional governments] so that the general and the regional governments are each, within a sphere, co-ordinate and independent."[2] According to Kachcheri, the distinguishing characteristic of the federal government is in the general and regional governments being 'coordinate' and 'independent' of each other. Wheare in his book cites the example of the United States of America (hereinafter referred to as the US) as the best example of if nation which has religiously applied the federal principle in its Constitution. He dwells in detail on the reasons, which led the founders of the U.S Constitution to shift from a confederate to a federal model. He goes on to state "that after the experience from 1781[3] of a Constitution based upon one principle the practical men who were working the American government drew up in 1787 a Constitution based upon another principle". They thought that the difference between the two principles was the difference between an inadequate, ineffective, and unpractical government and a government capable of regulating the common concerns and preserving the general tranquillity of the United States[4]. It would be fair to surmise that the academic literature concerning federalism drew largely from the experience of working the federal principle in the US.

[1] A.V Dicey*, An Introduction to the Study of the Law of the Constitution* 141. (The Macmillan. Company Ltd, New York, 10th edn., 1959).
[2] K.C. Wheare, *Federal Government* 10 (Oxford University Press, 4th edn., 1963).
[3] It was in this year that the Articles of Confederation came into effect.
[4] This statement contextualizes the shift from the Confederate model in 1781 to a federal form of government in 1787.

III. Subnational Constitutionalism

In contemporary times, several countries have adopted the federal principle with some variations in their normative framework. Countries like the US, Australia, Canada, South Africa, and India have shown the success of the federal framework. A significant feature of some of these nation-states was the fact that they facilitated an ecosystem in which the constitution-making exercise was simultaneously carried out both at the central and state level. Thus, in countries like USA and Australia the citizens were subject to two constitutions; the national constitution and the constitutions of the constituent units. As such the normative framework of these countries was characterized by two basic norms operating concurrently giving rise to the phenomenon of subnational constitutionalism. Subnational constitutionalism is best described as a series of rules (both formal and informal) that protect and define the authority of sub-national units within a federal system to exercise some degree of independence in structuring and/or limiting the political power reserved to them by the federation. In the opinion of James. A Gardner, "subnational constitutionalism is nothing more than the application of principles of constitutionalism at the subnational level"[5]. However, Gardner proffers the view that subnational constitutions need not imply the presence of subnational constitutionalism[6]. He further elucidates his assertion by stating that a subnational constitution that neither embodies the values of the populace that framed and adopted it nor establishes for the subnational government any significant role in the direct or indirect protection of subnational citizens is not likely to be a

[5] James A Gardner, "In Search of Subnational Constitutionalism" Bufallo Legal Studies Research Paper Series 6 (2007).
[6] *Supra* Note 4.

document that draws upon an underlying popular ideology of constitutionalism[7].

According to Ginsburg and Posner, "many nation-states have a two-tiered constitutional structure that establishes a superior state and a group of subordinate states that exercise overlapping control of a single population. The superior state (which they call the 'super state') has a constitution and subordinate states (which they refer to as substates) have their constitutions"[8].

Both these authors proffer the view that there are at least three coherent justifications for sub-national constitutionalism; first, it can deepen a federal system's ability to accommodate multiple political communities within a single constitutional regime. Second, it can uniquely contribute to federalism's liberty-protecting, check-and-balances function. Third, the possibility that sub-national constitutionalism can improve the deliberative quality of democracy within sub-national units and the federal system as a whole[9]

IV. Distinction between Federalism and Subnational Constitutionalism

Federalism can accurately be described as a set of rules (both formal and informal) that maintain a political system that divides power between various levels of government.[10] This theoretical paradigm also suggests a coherent description of subnational constitutionalism. It is best described as a set of rules (both formal and informal) that protect and define the authority of sub-national units within a federal system to exercise some degree of

[7] *Ibid.*
[8] Tom Ginsburg and Eric Posner, "Subconstitutionalism" 62 *Stanford Law Review* 1584 (2010).
[9] *Ibid.*
[10] Jonathan L. Marshfield, Models of Subnational Constitutionalism, Penn State Law Review (Vol.115:4) P.1157.

independence in structuring and/or limiting the political power reserved to them by the federation.[11] As a political institution, federalism concerns the rules that divide power between levels of government. Subnational constitutionalism, on the other hand, concerns those particular rules that relate to the sub-national units' ability to structure and limit their power.[12] Subnational constitutionalism is therefore derivative of federalism because it cannot exist without a federal division of political power. It is nevertheless institutionally distinct from federalism because it concerns a separate set of rules directed to a different set of political choices[13].

V. Asymmetric Federalism and Subnational Constitutionalism

"Asymmetric federalism" is understood to mean federalism based on unequal powers and relationships in political, administrative, and fiscal arrangements spheres between the units constituting a federation[14]. According to Louis Tillin, asymmetry implies "the granting of differential rights to certain federal sub-units, and the recognition thereby imparted for distinct, territorially concentrated 'ethnic' or 'national' groups-is a common feature of federalism in pluri-ethnic or plurinational settings"[15]. Tillin further states that by providing some federal sub-units with greater power of self-governance, asymmetrical devices allow territorially concentrated cultural groups of nationalities to achieve a degree of self-determination within a federal set-up. Some scholars go as far as to

[11] *Supra* note 10.
[12] *Supra* note 12 at P.1157
[13] *Ibid.*
[14] M. Govinda Rao and Nirvikar Singh, "Asymmetric Federalism in India" 2 available at https://people.ucsc.edu/~boxjenk/wp/Asymmetric_Federalism.pdf. (Last visited 13th July 2020).
[15] Louise Tillin, "Asymmetric Federalism" Sujit Chaudhary, Madhav Khosla et.al (eds), *The Oxford Handbook of The Indian Constitution* 529 (Oxford University Press, New Delhi, 1st edn., 2016).

argue that almost all successful multinational federations are asymmetrical.[16] Asymmetrical federal arrangements can tailor sub-national constitutional space to particular sub-national units.[17] Subnational constitutional space must permit sub-national units some discretion regarding fundamental content.[18] A federal system that establishes sub-national government institutions and does not permit sub-national units to alter or limit those institutions in any way does not provide for sub-national constitutionalism[19]. Of the fourteen federal systems that currently permit sub-national units to adopt constitutions,[20] all of those systems give some degree of discretion to their sub-national units regarding fundamental content.[21] Marshfield is of the view that some form of entrenchment is necessary to distinguish sub-national constitutions from the legislation[22]. According to him, this feature is implicit in the use of a written instrument to structure and limit government authority.[23] A definitional component of constitutionalism is that sovereignty resides with the people and that government representatives are agents subject to the trust agreement created by the people.[24] Subnational constitutions must be entrenched beyond

[16] *Ibid.*

[17] India provided a classic example of an asymmetrical sub national constitutional federal system because it permitted only one state, Jammu and Kashmir, to adopt a written constitution.

[18]See, Thomas M. Cooley, *A Treatise on the Constitutional Limitations which rest upon the legislative power of the states of the American Union* 91, 96 (Little Brown and Company, Boston 8th edn. 1927).

[19] *Supra* note 10 at P.1158.

[20] Those fourteen systems are Argentina, Australia, Austria, Brazil, Ethiopia, Germany, Iraq, Malaysia, Mexico, Russia, South Africa, Switzerland, the United States, and Venezuela.

[21] Some systems, such as South Africa, permit sub national units only minimal “space” regarding sub national constitutions. Other systems, such as the United States and Germany, provide sub national units with a great degree of discretion regarding constitutional issues.

[22] *Supra* note 10.

[23] *Ibid* at P.1161.

[24] Philip Bobbitt, *Constitutional Interpretation* 3-5 (Blackwell Publishing Company, New Jersey, 1991).

the ordinary authority of the government officials and institutions that they constitute. If sub-national constitutions are not entrenchable and supreme, they cease to be effective restraints on sub-national authority, and, consequently, cease to be constitutions. Again, mechanisms for entrenchment may vary. Some federal regimes impose universal top-down entrenchment standards[25]. The countries like Germany, Australia, Austria, Argentina, Brazil, Ethiopia, Switzerland, Mexico, Russia, Venezuela, Malaysia, and Canada have a two-tier constitutional arrangement in the form of a Superstate Constitution and Substate Constitutions at the national and state level respectively.

VI. Why Subnational Constitutionalism Works?

According to Marshfield, the most intuitive justification for sub-national constitutionalism is that it can allow for consolidated sub-national communities to achieve a degree of political self-determination.[26] This model is most applicable to federal systems that are made up of geographically clustered sub-national political communities, each of which is characterized by tractable political demos. Subnational constitutions ensure that although these diverse federal communities are united under one national constitution, they are still able to exercise "the most basic political right . . . the right to self-determination."[27] In the opinion of Marshfield, the right to self-determination includes "the power to determine the fundamental character, membership, and future course of [the community's] political society." Subnational constitutionalism

[25] *Supra* note 10 at P.1162

[26] Craig R. Ducat, *Constitutional Interpretation* 269 (Wadsworth Publishing Company, California, 9th edn., 2009). According to Professor Tarr the basic political right, particularly for internal nations within multi-national countries, is the right of self-determination—the power to determine the fundamental character, membership, and future course of their political society."

[27] *Ibid.,* According to Professor Tarr, the use of sub national constitutionalism to promote group self-determination is simply one of many instrumental functions that sub national constitutionalism can perform.

ensures that although the right to self-determination is "inevitably limited when nations are constituent members of a larger political entity . . . it is not effaced."[28]. From the standpoint of positive political theory, sub-national constitutionalism may be a valuable tool in maintaining that delicate balance because it can reduce the costs to self-determination that sub-national polities must pay when joining a federal system. A federal system that allows for sub-national constitutionalism provides an additional layer of independence for sub-national polities, which can provide additional incentives for those communities to embrace a federal system.[29] The 'Agency Cost Theory' elucidated by Tom Ginsburg and Eric Posner explains the rationale behind establishing a sub constitutional framework.[30] These writers advance the argument that since sub constitutionalism creates a multilevel governance structure it reduces the agency costs.[31] Apart from the justifications advanced by Ginsburg and Posner, sub constitutionalism is favored based on twin considerations: Firstly, its role in fostering a competitive spirit amongst the various governments in multiple level governance structures. Secondly, about its utility in providing a mechanism of 'checks and balances' wherein one government is

[28] *Supra* note 10 at P.1170.
[29] *Supra* note 8.
[30] *Ibid* at P. 1588.
[31] According to Ginsburg and Posner, "Constitutions facilitate the hiring of representatives, a government to make decisions about public goods on behalf of the people or other principals. This creates a problem of agency, in which the people must ensure that government acts in accordance with its instructions. Agency costs may arise whenever a principal hires an agent to perform a given specialized task. Because the principal does not have the same level of information as the agent, there is a risk that the agent might not perform actions in accordance with the interest of the principal. This might be because the agent is acting on behalf of her own interest, or else is captured by (that is, acting on behalf of) a third party. A central task of institutional design is to ameliorate agency costs by aligning the incentives of the agent with those of the principal. Mechanisms for reducing agency costs include devices to screen agents before hiring, to monitor their performance, and to discipline those who do not follow the principal's instructions."

kept in check by the other governments in its working within the constitutional framework.

VII. Subnational Constitutionalism In India

In India, the two-tier constitutional arrangement that epitomizes sub constitutionalism was characteristically evident in respect of the erstwhile State of J&K. The erstwhile State of J&K had the unique distinction of being the only state in India, which had a separate constitution. The State Constitution was the product of a sovereign State Constituent Assembly established on November 5, 1951, to frame the constitution for the erstwhile State. The Constitution of J&K was adopted on 17 November 1956 and came into force on 26 January 1957. The Constitution of J&K consisted of 158 sections and 6 schedules setting out elaborate machinery for the governance of the structure at the three tiers of executive, legislature, and judiciary. According to A.S.Anand, the Constitution of the erstwhile State of J&K was in no way repugnant to the Constitution of India but complementary to it.[32] The State Constitution allowed the erstwhile State to exercise some degree of independence in structuring and/or limiting the political power reserved to it under the auspices of the constitutional framework of Article 370.

Concerning India, the abrogation of the Constitution of J&K marks a watershed moment transitioning from sub natural constitutionalism to unitary constitutionalism. This development is akin to the Nigerian experience wherein previously the constituent units of the federation had their constitutions. Later on, constitutional changes were introduced depriving the states of their right to have separate constitutions. This change was premised on the argument that the sub-state constitutions promoted divisive tendencies among the

[32] A.S.Anand, *The Constitution of J&K-its development and comments* 166 (Universal Law Publishing Company, New Delhi, 8th edn., 2016).

constituent units[33]. A similar argument has been advanced concerning J&K to account for the constitutional changes in the form of abrogation of its constitution, abrogation of Article 35-A, and amendment of Article 370. It is adverted that these constitutional measures would promote the full integration of Jammu and Kashmir with the Union of India. Indian federalism has undergone a paradigm shift with the abrogation of the Constitution of Jammu and Kashmir. This move towards centralization at the cost of the subnational constitution is seen as a reaction to the very idea of federalism which according to some writers fosters conflict and secessionist tendencies.

With the demise of the J&K Constitution, India has arguably exited from the list of states that provided an ecosystem for subnational constitutionalism. This state of affairs is markedly different from the developments in countries like Mexico, the United Kingdom, and Spain, which have witnessed the transition from centralization to devolutionary sub constitutionalism[34]. The primary mover of this development has been the device of decentralization, especially in Italy where since 2011 all the regions have been given independent legislative power within the Constitution while the regions do not yet have sub constitutions they seem to be moving in that direction.[35]

VIII. Conclusion

Subnational constitutions provide several advantages from the standpoint of a federal state as it caters to the tendencies of divisive groups/units within the country. Subnational constitutions offer such groups the option of retaining a greater measure of autonomy within the system. As such, the sub-national constitutions would serve as a device to strengthen the unity of the state. Secondly, the

[33] See *Supra* note 8 at 1152.
[34] *Supra* note 8 at 1626.
35 *Ibid.*

liberty-protecting role of sub-national constitutionalism is very valuable because the protection of civil liberties is a vital constitutional ideal. Moreover, the fact that subnational constitutionalism promotes a deliberative democracy is an alluring factor for any thriving democracy, especially in India where 'democracy' has been heralded to the status of a basic feature of the constitution. In the context of the erstwhile state of J&K, the paradigm shift marked by the sweeping constitutional changes is indicative of a trend towards a pronounced shift from an asymmetric to a 'symmetric' trend. Perhaps the government of the day has maneuvered in this direction on the lines of the Nigerian experience thus preferring centralization to devolutionary sub constitutionalism. In contemporary times, the phenomenon of subnational constitutionalism continues to thrive in many common law jurisdictions however; it is a fact that it is facing a formidable challenge in the face of a growing trend towards over-centralization in some of the leading common law jurisdictions.

BOOK REVIEW

NANI PALKHIVALA-THE COURTROOM GENIUS (2012)
By Soli Sorabjee and Arvind.P.Datar, Lexis Nexis, New Delhi
ISBN: 9788180387548

The book titled 'Nani Palkhivala- The Courtroom Genius' highlights the legal journey of Nani Ardeshir Palkhivala. Nani Palkhivala has been one of the most celebrated advocates of India by the sheer dint of his unparalleled legal acumen and oratory skills. Palkhivala has played a seminal role in shaping the constitutional jurisprudence of India. His profound contribution to the ideal of constitutionalism in India is acknowledged the world over owing to his efforts in influencing the introduction of the doctrine of basic structure within the Indian constitutional jurisprudence. This book covers some of the classical cases argued by Palkhivala in the realm of constitutional law, taxation law, and labour law. The book provides an interesting account of some of the important cases in constitutional law argued by Palkhivala like I.C.Golaknath v State of Punjab; Kesavananda Bharti v State of Kerala and Indra Sawhney v Union of India. At the outset, the book chronicles the life journey of Palkhivala highlighting his childhood craving for book reading. It shares an interesting account of Palkhivala going to a bookshop to read books owing to a kind gesture of the bookseller who allows the little boy to read books in his shop. The book provides an account of the unique traits possessed by Palkhivala like his time management skills; speed reading; ability to concentrate; continuous self-improvement; clear and persuasive style of advocacy.

The book highlights the meteoric rise to legal stardom of Palkhivala from his humble beginnings in the chambers of Sir Jamshedji Kanga the doyen of the Indian Bar to the zenith of his stardom. The book also cites certain opportunities that came his

way which catapulted his rise like the chance to teach the Government Law College, Bombay, the establishment of the Income Tax Appellate Tribunal which allowed Palkhivala to showcase his talent. Palkhivala's treatise "The law and Practice of Income Tax' co-authored with Jameshedji Kanga contributed immensely in bolstering his reputation as one of the greatest lawyers of India. In the next section of the book, the authors have given an account of a peculiar case in which Palkhivala was himself a defendant along with Sir Jamshedji Kanga and N.M.Tripathi Ltd. In this case A.C.Sampath Ayengar, an advocate practicing in the Madras High Court had filed a copyright suit alleging that the book written by Kanga and Palkhivala had substantially reproduced the content from his commentary on the Income Tax. Palkhivala is made to appear in the witness box to face a cross-examination which he ably withstands to the detriment of the Plaintiff.

One of the hallmarks of the book is an account of the constitutional law cases argued by Palkhivala. The books provides an account of Palkhivala's role in Golaknath's case which he only argued for a day given his engagements at Geneva. The book brings to fore the impassioned plea of Palkhivala for reconsideration of the Sajjan Singh'case wherein the court recognized an unfettered right in the Parliament to amend the Constitution. The book then cites the role played by Palkhivala in the Bank Nationalisation case which according to the authors marked a "turning point in the interpretation of fundamental rights". The book offers a peek into the arguments advanced by Palkhivala which played an important role in the court overruling the "mutual exclusivity theory". On the privy purses case, the book provides a detailed background of the privy purses offered to the rulers of the princely states as "quid pro quo" for integrating with the Union of India. Palkhivala is approached by the erstwhile rulers of the princely states to

challenge the Presidential order derecognizing them as rulers in a move to deprive them of benefits promised under the Constitution in the form of privy purses. Before the Supreme Court, Palkhivala on the strength of his legal arguments is able to convince the Constitution Bench to declare the Presidential order as unconstitutional. At the end of this section, the authors shed light on the abolition of the Privy Purses by the Parliament by amending the Constitution and the outrage that followed it. The book also presents an interesting account of the Bank Nationalisation case where a battery of lawyers led by Palkhivala were able to convince the Supreme Court to invalidate the 'Newsprint Control Policy' as being violative of Article 19(1)(a) of the Constitution.

A substantial portion of the book is devoted to the 13 member Constitution Bench's judgment in the celebrated case of Kesavananda Bharti v State of Kerala. The book recounts the stellar efforts of Palkhivala and his team of lawyers in securing a "wafer-thin" majority in support of their contention that there are "implied limitations" on the Parliament's power to amend the Constitution. It presents a summary of the arguments advanced by H.M.Seervai and Niren De (at that time the Attorney General of India) in support of the argument that the Parliament's power to amend the Constitution is absolute. The book recounts interesting anecdotes surrounding the case, like the discord between Niren De and Seervai; lead petitioner Kesavananda Bharti being oblivious of the proceedings going on before the Court. Palkhivala's contribution in the incorporation of the doctrine of basic structure, in this case, has been highlighted by the authors and subsequent appreciation by Seervai of the importance of this doctrine in his classical treatise 'The Constitutional Law of India'. Besides it, the attempt to review the Kesavananda verdict by the Supreme Court has been discussed and the role played by Palkhivala in convincing the then Chief Justice to dissolve the review bench. The authors

have heaped praises on Palkhivala for his sheer brilliance in convincing the bench to drop the exercise of reviewing the judgment. In fact, the authors go on to state that the "Palkhivala's two-day arguments before the Constitution Bench represented the finest hour of Palkhivala's advocacy". The book also provides an illuminating account of Palkhivala's exploits before the International Court of Justice and International Tribunals in the Rann of Kutch's case and defending the ban on the flying of Pakistani aircrafts over the Indian air space. In the last section of the book, the authors have reproduced some of the selected opinions given by Palkhivala as part of his opinion work. The opinions given by Palkhivala throw light on his legal acumen and ability to canvas an opinion lucidly and with brevity.

This book is highly insightful and deserves to be kept in every law library so that budding law students could learn about the tallest legal luminary of India. Besides law students, the books offer a fascinating account of some of the leading constitutional laws cases which can prove highly frugal to legal academicians as well as members of the Bench and the Bar.

Mir Mubashir Altaf

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Before submitting the manuscript, the author should have his/her paper thoroughly proofread for grammatical and spelling corrections, as well as, the readability of the paper. Each manuscript would be reviewed by the editor for general suitability and if judged suitable, shall be processed for blind review. Based on the recommendations of the reviewer, the editors would decide the volume and place of the reviewed paper in the journal.

Paper Format

The manuscript must be single-spaced with 1 inch (or 2.54 cm) margins on all four sides in A4 (21.0*29.7cm) format. The entire paper must be in Calibri font in 11 points having 1.15 line spacing with the exception of the main title, which must be in 14 points and bold. The paper should begin with title followed by the "abstract" (Calibri 10 point font) each of which must be centered.

There should be six key words at the end of the abstract. The abstract should introduce the problem which the researcher undertakes to analyze and discuss in the paper followed by an introduction expounding the research problem and how the paper is structured.

The sub-headings should be numbered in capital Roman numbers and sub-sub- headings should be numbered in small Roman numbers clearly indicating that it is sub part of a sub-heading. The references should be in footnotes. At the end of the paper should be well drawn conclusion based on the discussion in the paper.

Any paper that does not comply with the above instructions will not be sent to the referee for review.

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The editors would like to thank all the referees who have reviewed the papers published in this volume of the Journal. The papers included in this volume have been recommended by the referees through blind review process.

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