MRS' LAW REVIEW

MANAV RACHNA STUDENTS' LAW REVIEW

VOLUME II ISSUE 1

FOOD AND HEALTH LAWS

HUMAN RIGHTS

MANAV RACHNA
vidyanatariksha
SCHOOL OF LAW

FOOD AND HEALTH LAWS

MANAV RACHA UNIVERSITY

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FOOD AND HEALTH LAWS

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FOREWORD

Where can law be found? The time has passed where it was nestled within treatises and precedents. Today, Law is found in science and human actions. A multidisciplinary approach to legal studies and research is the need of the hour. Law cannot be studied in solace but is found in the silos of the society. As the society changes, law changes; as perception evolves, law evolves; as technology upgrades, law upgrades and hence the need to search and research law.

The Manav Rachna Students' Law Review has been established with the objective of providing a platform to legal practitioners, academicians and students to deliberate on various facets of law. It promotes legal research along the lines of sustainable development goals and presents a much needed forum for legal dialogue. The Law Review seeks to achieve the mission of Manav Rachna University i.e. to disseminate education in frontier areas.

An initiative of the students of the School of Law, Manav Rachna University, the Law Review invites empirical and doctrinal articles, essays on contemporary issues, book reviews, case comments and legislative reviews on the confluence of law and other subjects with the hope to allow healthy and continual discussions on societal needs and suggestions on legal reforms.

The present issue focuses on Food and Health Laws. The interface of Food and Health Law is relevant not only in India but several other jurisdictions. While developing countries are blighted with the issue of malnourishment amongst vulnerable classes, developed countries are fighting the prominence of non-communicable diseases associated with food. The discussion hence creates intersectional opportunities for adoption of rights based laws and policy interventions. The present issue received several well researched papers on the interface of Food and Health Laws, out of which the most innovative and practical suggestions have been published.

I congratulate the authors, board of advisors, faculty and student editors for their contribution to the present issue of the Law Review. I wish the best for the initiative and hope that it keeps on receiving priced contributions for its upcoming issues. Hoping for an enriching experience for the readers, I am proud to present Volume II Issue I of the Manav Rachna Students' Law Review. May the quest for legal knowledge and research continue!

Dr D S Sengar
Dean and Director, School of Law
& PVC, Manav Rachna University

EDITOR'S NOTE

The Manav Rachna Students' Law Review is a student-run organization whose primary purpose is to publish a journal of legal scholarship. It shall be published twice a year. All the editorial and organizational decisions are taken by the students.

The idea behind this law review was to provide students with opportunities to be involved in editing legal material, practicing critical thinking, writing in a wide array of legal fields, and being a member of the latitudinarian community of students who are publishing high-quality legal research and reviews devoted to specific substantive areas of the law.

This Law Review accepts contributions on all areas of law, and even issues in social sciences that bear a legal slant. Undergraduate and postgraduate students of any discipline are invited to contribute. Submissions from full-time doctoral students may also be considered for publication, All publications are at the sole discretion of the editorial board.

Priyanka Walter
B.A.LL.B. (Batch 2019)

FOOD AND HEALTH LAWS

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FOOD AND HEALTH LAWS

TABLE OF CONTENT

RESEARCH ARTICLES

Misleading claims and advertisements: Food and Health **1**
Dr. Shraddha Pandey

A Legal Perspective on Clinical Trials in India **9**
Sanjana Shikhar

A Critical Study on the Issues and Challenges of Surrogacy in the Indian Legal System **22**
Sourav Banerjee

ESSAYS

Misleading advertisement **38**
Ankita Gupta

Judicial support for consumers **44**
K. Komal

False Advertisement: Fact, factoid and fiction **49**
Ojaswi Ishani

CASE/LEGISLATIVE COMMENTARIES

Study of Consumer Protection Act, 2019: In Context of e-Consumers **57**
Arshita Agarwal

Aruna Ramchandra Shanbaug v. Union of India & Ors. **70**
Balaj Iqbal

OPINIONS

Copyright in Food Recipes: A Dilemma **76**
Raj Shah

MISLEADING CLAIMS AND ADVERTISEMENTS: FOOD AND HEALTH

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ABSTRACT

To mislead, is to do wrong to another person. In the world centered on making profit,misleading proves to be an easy way of fattening the pockets. This is not true for individuals but for the organizations as well. This is the reason we often see that the companies indulge in misleading advertisements and make false claims to sell their products. This includes instances of unhealthy products being marketed as healthy ones, false claims regardingimmunity and other such fads that make the consumers pick the product off the shelves. The impact of such actions is grave for the consumers. This article presents a discussion on the manner in which the misleading claims and advertisements are used in food and healthrelated matters by the companies.

INTRODUCTION

The consumer is said to be the king in a general sense. Yet, it is often noted that attempts are made by people to dupe their king. This can easily be stated in context of the misleading claims and advertisements that are put in front of these very kings. The simple reason of restoring to these measures is the need to earn profits by selling products, using whatever means possible. One can easily notice a number of claims being made in the advertisements that are sometimes not serious in nature, but other times, do have the capacity of causing harm to the consumers. This is particularly evident in health claims and food fads that are circulated in media and social media platforms. An advertisement can claim to make a person immune, which does catch the consumer's eye in the pandemic world[1], and another one couldclaim to be a health snack for kids, even when it has high contents of MSG. During the pandemic, a quintessential example of companies resorting to individual consumerism could be seen in immunity boosting products, as it reflected the way the capitalistic society was dependent on this individual consumerism[2] . A few years back, there was a lot of hue cry surrounding MSG in Maggi noodles, making it unhealthy for kids; yet, it continues tobe marketed as

[1] Shruti Menon, "Coronavirus: The Misleading Claims About An Indian Remedy", *BBC News*, 2021 <https://www.bbc.com/news/56172784> [Accessed 18 March 2022].

[2] Sandhya Ramesh and Mohana Basu, "Immunity Boosters Are A Myth — Why You Shouldn't Believe Claims That Promise To Fight Covid", *The Print*, 2020 <https://theprint.in/health/immunity-boosters-are-a-myth-why-you-shouldn't-believe-claims-that-promise-to-fight-covid/470202/> [Accessed 18 March 2022].

a tasty and healthy food for the kids[3].

The attempt of the present discussion is to explore the manner in which the consumers are misled in India, despite the consumer laws in place, particularly in context of the food and health products, by making reference to examples like the one discussed now. The goal is to highlight the need for the government of India to take strict measures to ensure that such issues are actually tackled in an effective manner.

MISLEADING CONSUMERS

Understanding Misleading Advertisement

A misleading advertisement is deemed as one, which is promoted or spread through the use of different modes like radio, television, electronic media, banners, posters, newspapers and so forth. The very aim is to mislead the consumer regarding the quality, features, nature or the geographic origin of goods, along with that of commercial activities or services[4]. In the society we live in, the advertisers have resorted to such practices only, particularly in contest of the health claims that are made for the services or products offered by them. In addition, the possibilities for further manipulations in this regard are also high. This is the reason why the regulatory bodies and consumer groups make certain that the possible misleading claims are stopped and that the advertisers clear their stand on the made claims. The rules regarding advertising require the advertiser to make the necessary claims to stand the test of factual truthfulness, which should show that nothing is misleading and such a copy should be made public[5].

Indian Market

However, with the evolution of advertising in Indian market, the complexity and character of advertising has changed. This is because of a high reach to mass media that has been possibleowing to the incremented penetration of satellite channels, higher level of consumer spendingon items which can be classified as other than necessities, discerning choice behavior in context of consumer preference that need a better value for the money spent by them, and the availability of a high range

[3] "All Instant Noodles Harmful For Kids, Say Experts", *Deccan Herald*, 2015 <https://www.deccanherald.com/content/481835/all-instant-noodles-harmful-kids.html#:~:text=Maggi%20noodles%20came%20under%20the,children%2C%20said%20doctors%20on%20Fri day.> [Accessed 18 March 2022].

[4] "Misleading Advertisements | Department Of Consumer Affairs | Ministry Of Consumer Affairs Food AndPublic Distribution | Government Of India", *Consumeraffairs.Nic.In*, 2022 <https://consumeraffairs.nic.in/en/more/misleading-advertisements> [Accessed 18 March 2022].

[5] Priyanka Singh, Vijay Thawani and Alok Saxena, "Deceptive Food Advertisements In India", *Indian Journal OfBasic And Applied Medical Research*, 3.1 (2013), 132-135.

of services and products. One can state that this has been possible due to a growth in economy[6].

The advertisements have received a lot of dissension not solely, because of how they play a role in making sale of products but also due to the manner in which these advertisementshave an impact over the society. With the cutthroat competition present in this era, one can note that the advertisers resort to unethical practices like deception and puffery, resulting in misleading advertisements. Tall claims are made in advertisements that lead the consumersup the garden path of food and health products that are manufactured. In addition, it is not just that the issue surrounds misleading claims but the matters of governance as well[7].

Law, its Branch, and Examples:

In India, the FSSAI (Food Safety and Standard Authority of India) has the responsibility of safeguarding and promoting public health by supervising and regulating the safety of foods.

The Food Safety and Standards Act, 2006[8] (FSS) covers the provisions that are relevant tothis discussion. This act provides that any such individual who publishes or is a party in advertisement publication that describes the food in a false manner, and which is likely to be misleading in nature, substance or quality of food, or gives false guarantee, would be liable toINR 10 lakh penalty[9].

In the past, the FSSAI had put in a range of products under scanner for the misleading claims that were made and even begun prosecution proceedings in certain cases. Complan was made liable for violating section 24 of the FSS for making claim that an individual could grow two times post consumption of their product due to this being misleading in nature. Complan was also made liable for making claims of having memory charges and five brain charges that helped in improving memory. The label of the product depicted students holding books, which indirectly misled the consumers into believing that the consumer would becomestudious post consumption of Complan. Another health drink for kids saw similar violation. This was Boost as it was claimed that the product provided three times more stamina in comparison to a standard chocolate drink. The reason for this violation was absence of a study to prove this claim. Horlicks was also made liable for misleading consumers as it claimed that the children became stronger, taller and stronger. The violation of Clause

[6] Ibid
[7] Rishi Raj Sharma and Subhash Chander, "What's Wrong With Misleading Advertising? — An Empirical Investigation", *Asia Pacific Business Review*, 7.1 (2011), 191-205 <https://doi.org/10.1177/097324701100700116>.
[8] Food Safety and Standards Act, 2006
[9] At 6

2.3.1.5of FSS (Packing and Labelling) regulations, 2011[10] led to Emami being made liable as their label covered a picture where it was stated that the product uses seven stages European- refining technology[11].

Saffola was also made liable for misleading advertisements as they made use of heart symbol while claiming that the heart of the family was ensured by taking this product. Engine mustard oil aw the use of cholesterol 0 g and health and vigor claims being deemed as misleading advertisement. Nutricharge men also put forth misleading advertisements by putting a claim that the product enhanced immunity, energy and stamina as it had smart nutrition. Kellogg's was involved in deceptive and misleading advertisement when it claimed that the individuals who consumed Kellogg's special K were slimmer than the ones who did not. The claim of no sugar, diabetic friendly and complex carbohydrates by Britannia were deemed as breach of section 24 of FSS. Bournvita little champs claimed that the DHA presentin their product was beneficial to consumers, which could not be proven, leading it to be deemed as deceptive. Today premium tea, Pediasure, Real Active Fibre +, Nutrilite, Kissan cream spread, Rajdhani besan and Britannia vita Marie too faced similar violations for being involved in deceptive and misleading advertisements[12].

In majority of these cases, it was seen that the product's health value that was being put in advertisement was quite different from the one put on its label. The FSS clearly requires the nutrition values presented through oral, written or visual manner to be scientifically backed through proper data. There is also a noted gender marketing of food by focusing on health conditions. This is evident from the examples of Diet Coke and Special K cereal sold so as to keep women slim, and the healthy cooking oils to be directed at males so as to keep heart attack at bay. One can also see probiotics being directed toward women. The theme therefore is that women have obesity issues with sensitive stomach, while the men face heart attackrisk. However, this is quite untrue as these problems are gender neutral[13].

Junk Food and Kids

It is not just a matter of the advertisements misleading the consumers. The concern becomes grave when these advertisements are played at times so as to target the specific audience.This is the reason why the Union Women and Child Development Ministry put forth the recommendation of

[10] FSS (Packing and Labelling) regulations, 2011
[11] Ibid
[12] Ibid
[13] Ibid

junk food advertisements not to be aired during children programs. This was in context of the misleading claims present in such ads. The advertisements that cover celebrities performing dangerous stunts and promoting carbonated beverages, or promoting products that cover claims like the health supplements supporting brain development due to present of DHA omega 3 fatty acid, is a clear attempt at misleading. The reason for curbing such advertisements is that these promote children's obesity. In addition, it was necessary to prohibit such behavior as the same had an impact over the mental health of children while being dangerous for the children. Essentially these advertisements ignored the children's interest and took advantage of the inexperience of children, their sense of loyalty, credulity, and creating unrealistic expectations for the offered services or goods due to the exaggerationof features offered. The present advertisements targeted the children in a manner where they were ridiculed for their innocence. The suggestion also asked for a prohibition of alcohol or tobacco-based products[14].

Here, reference needs to be made to the Consumer Protection Act 2019[15] which covers the definition of misleading advertisement. Section 10 of the act requires the Central Consumer Protection Authority to regulate all such matters that relate to the breach of consumer rights, false or misleading advertisements, and unfair trade practices that act out to be prejudicial in consumer and public interest[16]. The penalty provisions covered in this act go as high as INR 10 lakh and also come with a possibility of the endorser being prohibited for a period of threeyears from endorsement of any product. Thus, the regulatory bodies do have the power and authority of stopping the negative impact on consumers, particularly the children. However, what lacks is a clear and precise application of law, which could ensure that no act of misleading advertisement is taken up by the advertisers[17].

Pandemic Claims

The pandemic shook the world and the manner in which the lifestyle of every person changedis pretty evident. In order to fight the pandemic, guidelines were issued by the WHO to use water, alcohol and soap for a minimum of 20-30 seconds. Hindustan Unilever Limited at this time, which owns the Lifebuoy soap merchandise, filed a claim against Reckitt Benckiser Healthcare (RBH) for their product Dettol hand wash in the Bombay High Court[18]. This was because of the advertisement of

[14] Harikishan Sharma, "On Govt Table, Suggestion To Take Junk Food Ads Off Kids' TV Shows", *The Indian Express*, 2022 <https://indianexpress.com/article/india/on-govt-table-suggestion-to-take-junk-food-ads-off-kids-tv-shows-7804216/> [Accessed 18 March 2022].
[15] Consumer Protection Act 2019
[16] Consumer Protection Act 2019, s10
[17] At 6
[18] Omkar Gokhale, "After Hindustan Unilever Moves Bombay HC, Dettol Suspends Handwash Ad", *The Indian Express*, 2020 <https://indianexpress.com/article/cities/mumbai/after-hindustan-unilever-moves-bombay-hc-

Dettol that claimed it to be ten times more efficient against viruses and bacteria when compared to soap. This was seen as an attempt of the Dettol hand wash conveying the message that soaps were useless and could not safeguard anyone against COVID. It was stated by the High Court that this advertisement went against the guidelines shared by the WHO and constituted as a misrepresentation of facts. This is the reason why Dettol had to stop the ad and suspended the same[19].

The Ministry of AYUSH of India does promote different practices and even some of the traditional healing therapies so as to boost the immunity of a person. There have been promotions of traditional remedies as a measure of warding of COVID by the Ministry. Through, there is no scientific base to back these claims. Yet, it was seen that Indiangovernment did reject false claims like the drinking of hot water or that of gargling with vinegar solution or salt as being effective against COVID[20]. One of the most substantial misleading and false claims seen during pandemic were made by a local company Arihant Mattress as it depicted itself to offer anti-coronavirus mattress. The product went viral on social media platforms like Twitter and Facebook. A case was registered against the manufacturer owner of the mattress for its half page ad titled "*Anti Corona Virus Mattress pe soyega India toh badhega India*"[21].

The pandemic was a critical time for everyone, yet millions of Indians were misled by the pharmaceutical companies. In India, the ASU product legislation is weak. The Patanjali Research Institute (PRI) and the National Institute of Medical Sciences & Research (NIMRS), on June 23rd, 2020 presided over a joint press conference for launching their Ayurvedic formulation innovation as a treatment for the COVID virus. Both the institutions claimed that the Ayurvedic medication kit could cure and treat the virus and that this was backed by proper scientific data. PRI stated that the use of '*Anu Taila, Swasari and Coronil* ' led to 68% patients recovering in a mere time frame of three days, which was deemed as a historical achievement. The institute also claimed a 100% favorable result when *Coronil* was taken, and this was attained in a controlled clinical trial on moderate and mild patients. Even though *Coronil* was a new product in the market, *Swasari* and *Anu*

Dettol-suspends-handwash-ad-6327211/> [Accessed 18 March 2022].

[19] Namratha Murugeshan, "India's First Covid-19 IP Dispute? Dettol Handwash Ad Claimed to Disparage Lifebuoy Soap Trademark", *Spicyip*, 2020 <https://spicyip.com/2020/03/indias-first-covid-19-ip-dispute-dettol-handwash-ad-claimed-to-disparage-lifebuoy-soap-trademark.html> [Accessed 18 March 2022].

[20] Gautam Mengle S, "FIR Against Furniture Firm For Advertising 'Anti-Corona Mattress'", *Thehindu.Com*, 2020 <https://www.thehindu.com/news/cities/mumbai/fir-against-furniture-manufacturer-for-advertising-anti- corona-mattress/article31102837.ece> [Accessed 18 March 2022].

[21] Ratna Bhushan, "Unproven Anti-Coronavirus Claims Under Ad Body'S Lens", *The Economic Times*, 2020 <https://economictimes.indiatimes.com/industry/services/advertising/unproven-anti-corona-claims-under-ad- bodys-lens/articleshow/74662632.cms?from=mdr> [Accessed 18 March 2022].

Taila were already present. The extracts used in *Coronil* were of *Giloy, Tulsi,* and *Ashwagandha* extracts. PRI also stated in a press conference that the Ayurveda medicine kit was available for home delivery and could be ordered through OrderMe app[22].

This AYUSH Ministry had not approved this medicine kit. On the very same day, theministry took a *Suo moto* action against the PRI claims and also issued an official notification and orders to them to stop the publishing and even advertising of medicine claims pertaining to COVID infection's cure. This was because the Ministry had no evidence to back the claimsthat were made in context of the Ayurveda kit. The kind of ad that was made here is covered under the regulations of Drug and Magic Remedies Act. Once the claims were made, the ministry asked the institutes to share the details regarding this medicine, including details like sample size, clinical trial certificate, and consent information. PRI applied for a license on June 10th, 2020, and two days after that, the Uttarakhand Ayurveda Department (UAD) gave them a license but this was not for COVID cure, rather it was for immunity boost, fever, and cough. The guidelines of the WHO clearly stated that the immunity boosters could not be deemed as a medicine or treatment for the virus of COVID. This is the reason why Coronil was being inspected for a potential breach of provisions of the Drug and Cosmetic Act, of 1940 and that of the Drug and Magic Act, of 1954. The Central AYUSH minister on June 24th, 2020 stated that the medicine kit offered by NIMRS and PRI should not be promoted till the time it had received the proper approval from the government. In the end, the ministry deemed this kit as an immunity booster kit rather than being medicine or cure for the COVID virus.

CONCLUSION

In the previous parts, a journey was taken on the false and misleading claims that are made in the health and food advertisements by the companies. The plethora of examples discussed in this regard show that despite the laws that are present in India, in context of consumer protections and misleading conduct, there continues to be cases where this conduct is present.The misleading advertisements take advantage of the lack of knowledge of the consumers by making the consumers hear what they want to hear and by simply putting words, which couldlead to a higher sale for them. This conduct is being undertaken by both local and international brands, irrespective of the size of the organization.

The problem is not that the companies are earning a higher profit percentage by making misleading, false or deceptive claims. The problem is the negative impact, which suchadvertisements have in long

[22] Tarif Hussian and others, "COVID-19 Pandemic: An Era Of Myths And Misleading Advertisements", *Journal Of Generic Medicines: The Business Journal For The Generic Medicines Sector*, 17.2 (2021), 49-54 <https://doi.org/10.1177/1741134320988324>.

run over the individuals. The prime example of this is the children, who are negatively impacted by what is shown on the advertisements and by what issold in such advertisements. When the dangerous stunts are performed by the celebrities in advertisements, which are often unrealistic in nature, the children put their lives at risk by aiming to replicate such acts. Apart from this, being told that things like Coca-Cola or Maggi are good for their health also proves detrimental for them, as this is far from true. Therefore, the advertisers are basically selling food by playing with health of children. And then there are concerns surrounding the health fads, which were particularly at a boom during the pandemic age. What was done by PSI in its claim for COVID medicine proved to be wrong and depicted the way even the adults are misled by the companies. This is also true in context of the gender bias created through targeted women as the ones needing weight loss and men needing protection from heart attacks. In summary, there is a need for the laws surrounding food and health to be revamped to make sure that the advertisers do not take an unfair advantage of consumers by misleading them.

A LEGAL PERSPECTIVE ON CLINICAL TRIALS IN INDIA

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ABSTRACT

Clinical trials are a sort of research that analyses the effects of novel tests and treatments on human health outcomes. Clinical trials use volunteers to test medical interventions such as medications, cells, other biological products, surgical operations, radiological procedures, equipment, behavioural treatments, and preventative care.

This study intends to educate and inform readers about the legal perspective of clinical trials in India, including ethical issues in clinical research, unethical behaviour, regulatory framework, court discourse on clinical trials, and legal loopholes.

INTRODUCTION

Clinical trials are human research studies that assess the effectiveness of therapeutic, surgical, or behavioural interventions. They are the most common technique for researchers to determine whether a novel treatment, such as a new medicine, diet, or medical equipment (such as a pacemaker), is free from side effects and effective in humans. In addition, a clinical trial is frequently performed to determine whether a new treatment is more successful than the current treatment and has fewer adverse side effects.

Human research is required and desirable to provide the most effective disease treatment. A clinical trial is any research study in which human volunteers or groups of individuals are randomly assigned to one or more health-related interventions to evaluate the effects on health outcomes. These interventions are drugs, cells, other biological products, surgical operations, radiologic procedures, gadgets, behavioural treatments, process-of-care improvements, and preventive care.

In India, set rules for the ethical conduct of studies are established to protect the rights of the patient or volunteers involved in the survey. However, the globalization of international clinical trials raises new ethical concerns about the conduct of human clinical trials and research on marginalized or oppressed communities. As a result, research subjects have remained problematic even after decades of discussion, experience, and regulation.

ETHICS IN CLINICAL RESEARCH: INDIAN PERSPECTIVE

In February 1980, the Indian Council of Medical Research (ICMR) issued a "Policy Statement on Ethical Considerations in Human Subjects Research." The first policy statement provided official recommendations for forming ethics committees (ECs) in all medical colleges and research institutions. However, like in other parts of the world, many researchers disobeyed these limitations, and India was not immune to controversial research. For example, in the 1970s and 1980s, researchers at the Institute for Cytology and Preventive Oncology in New Delhi studied 1158 women with cervical dysplasia, or precancerous lesions of the cervix, at various stages. These patients were left untreated to see how many lesions advanced to cancer and how many regressed. Seventy-one women had developed malignancies at the end of the research, and nine of the lesions had progressed to aggressive malignancy. Sixty-two women were treated after developing locally advanced cancer. After the study's controversy was made public in 1997, the ICMR began establishing 'Ethical Guidelines for Biomedical Research on Human Subjects,' which finished in 2000. It is a collection of guidelines that every researcher in India should adhere to when performing human subject research. These rules have added twelve broad concepts to the three core ethical principles of respect for person, beneficence, and justice:

1. **Principle of essentiality:**

   The study should be critical for the progress of information that benefits patients, clinicians, and everyone involved in health care and the planet's ecological and environmental well-being.

2. **Principles of voluntariness, informed consent, and community agreement:**

   The research participant should be fully conscious of the nature of the study and the possible outcomes of the experiments and then decide whether or not to participate in the study without the influence of the treating physician. When a community or group of people is treated as a research participant, voluntariness and informed consent should apply to the entire community and each member who is a study or experiment participant.

3. **Principle of non-exploitation:**

   Participants in research or experiments should be compensated for their time and effort. In addition, regardless of their social and economic circumstances or educational levels, participants should be aware of any dangers. Therefore, each research protocol should

include provisions for human subjects to be compensated, either through insurance or other suitable means, to cover all predictable and unknown risks.

4. **Principle of privacy and confidentiality:**
   All data collected for research purposes should be kept private to protect the participants' identity and should not be shared unless there are valid legal and scientific reasons.

5. **Principle of precaution and risk minimization:**
   To protect research participants, care and caution should be exercised at all stages of the research and experiment (from the conception of the research idea to the formulation of the research design/ protocol, the conduct of the research or experiment, and its subsequent application). In order to reduce risk, EC must take an active role.

6. **Principle of professional competence:**
   Clinical research should only be carried out by knowledgeable and skilled people in their disciplines.

7. **Principle of accountability and transparency:**
   After fully disclosing his or her study interests, the researcher should conduct experiments fairly, honestly, impartial, and transparently. They shall also save the research data for a least five years, subject to privacy and confidentiality principles, so that competent legal and administrative authorities can review it.

8. **Principle of the maximization of the public interest and distributive justice:**
   The study's findings should be used to benefit all humans, not just those who are socially better off, particularly the research participants and the communities from which they are drawn.

9. **Principle of institutional arrangements:**
   All institutional arrangements that must be made in connection with the study and its later usage or applications must be made transparently.

10. **Principle of the public domain:**
    Any study findings should be made public through papers or other means. Clinical study details should be made available before recruitment via clinical trial registration systems that allow free online access, even before publication.

11. **Principle of the totality of responsibility**:

    All people involved in the research, whether directly or indirectly, should accept professional and moral responsibility for adhering to all of the research's principles, standards, and prescriptions.

12. **Principle of compliance:**

    The guidelines relevant to the specific research topic should be followed by all those involved.

UNETHICAL BEHAVIORS IN CLINICAL RESEARCH

Clinical research has a long history of misdeeds. Unfortunately, many of today's ethical principles and codes of conduct developed due to abusive, irresponsible, or immoral medical experimentation. Here are a few instances of prior clinical experiments that were carried out without any ethical safeguards.

PLUTONIUM TRIALS

Government scientists worked on the Manhattan Project to learn more about the effects of plutonium on the human body. They organized a study in which dozens of people from around the country were given plutonium injections to obtain insight. However, documentation from that period indicates that the test volunteers were most likely not to provide explicit information about the risks. Furthermore, the method for selecting subjects is unknown.

Many of these individuals were given plutonium doses that were higher than recommended, and as a result, they had long-term health problems. In addition, the government's clinical research policies were reformed due to the "plutonium studies," which included a new emphasis on informed consent.

TUSKEGEE SYPHILIS STUDY

Tuskegee Institute recruited 600 Black men in 1932 to take part in a new study on syphilis transmission. On the other hand, researchers misled the men about the nature of the treatments they were receiving, and as a result, these patients gave their consent under duress.

The nature of this study was revealed in 1972, resulting in public outrage and a fresh government investigation. A federal panel found that, despite the men's agreement to participate, there was no information that researchers had notified them of the study or its true objective," according to the Centres for Disease Control and Prevention (CDC). In reality, they

have been deceived and had not been provided all the information they needed to make an informed decision.

WILLOWBROOK HEPATITIS EXPERIMENTS

During the 1950s, hepatitis outbreaks were widespread at Willowbrook State School in New York, a school for children with intellectual disabilities. The school's researchers conducted medical experiments on students, including one in which 60 healthy students were fed a live hepatitis virus.

The trials were halted due to public outcry, but they remind the significance of medical ethics, particularly in treating children and the mentally ill.

THE REGULATORY FRAMEWORK IN INDIA

The government's innate obligation in a welfare state is to offer access to adequate and high-quality medications, which gave rise to the notion of pharmacovigilance. As a result, the Indian regulatory regime has progressed from dealing with simple ideas such as drug sale and acquisition to considerably more complex topics such as clinical research and adverse drug response monitoring. In addition, because indigenous production was non-existent in the twentieth century, the Indian market experienced a proliferation of unscrupulous foreign manufacturers pushing their bogus medications. As a result, the government established "the Chopra Committee," whose recommendations resulted in the 1940 Drugs and Cosmetics Act.[23] The Central Drugs Standard Control Organization derives such rules (from now on "CDSCO") and the Controller's office, the Drugs Controller General of India (from now on "DCGI"). Pharmacovigilance has been nascent after the early spurs due to continued non-development.

DCGI is the licensing and monitoring authority for clinical trials. After receiving approval from DCGI, the sponsor must provide all trial-related information. The permission structure is dual-leveled, with approval coming from both the central authority and the local Ethics Committee on the ground, after which the trial can begin.

A typical clinical trial involves four phases—starting from a group of 8-10 healthy volunteers to determine the safety and tolerability of the new drug (Phase I), moving on to the involvement of a larger group of 100-200 patients to determine efficacy and side effects of the drug, thereby acting as precedent to Phase III in term of dosage (Phase II), then to an even larger group of

[23] The Drugs and Cosmetics Act, 1940 (Act 23 of 1940).

1000-3000 patients to determine the therapeutic benefits (Phase III), then various permutation and combinations of other medicines are tested with new drugs (Phase IV).

The heart of the regulatory system was Schedule Y of the Drugs and Cosmetics Rules, 1945 (as revised in 2005), read in conjunction with notices issued regularly. It has been replaced by the Indian Council for Medical Research's "Ethical Guidelines for Biomedical Research" and the CDSCO's "Good Clinical Practice" (hence "GCP"). Schedule Y is separated into three stages: application procedures for gaining permission and sponsor obligations; second, consent of subjects; and third, research involving special groups.[24] Suppose a Phase I trial on a drug discovered outside of Indian territory is approved. In that case, the DGCI can grant permission for subsequent phases without re-running Phase I or to refuse permission, in which case the applicant must conduct all phases following global standards for that drug. 18 All serious adverse events (hereafter "SAE") originating from earlier studies must be reported to the licensing authorities by the sponsor.

The Ethics Review Committee has been given responsibility for the subjects' safety, well-being, and protection; this role is increased if the subjects are from vulnerable groups, such as the elderly, children, and pregnant women. The guidelines stipulate that such subjects' consent must be freely given, informed, and written. If the subject is incompetent, the legal representative or power of attorney must be consulted.

The Ethical Guidelines for Biomedical Research on Human Participants were developed and issued by the ICMR following the goals of the Council for International Organizations of Medical Sciences (hereafter "CIOMS"), with indigenous factors taken into account. The recommendations begin with twelve fundamental biomedical ethics principles26, primarily questioning the necessity of involving human subjects in the trial. Other principles, such as free, informed consent, non-exploitation, openness, and accountability, become more prominent if such involvement is necessary. On a rudimentary level, the skeleton of the Guidelines appears to be transitioning from a general to a specific aspect of the pharmacovigilance mechanism.

The core responsibilities of the Ethics Committee, as well as the composition, training, regulation, management, review, and monitoring procedures, are outlined in Chapter II of the

[24] Ashna Ashesh and Zubin Dash, “Inadequacies of Clinical Trial Regulations in India," 5 *NUJS L Rev* 379 (2012).

Guidelines. The most significant function, reviewing, is separated into three categories based on frequency: interim, periodic, and continuing review.

The Committee will become familiar with any unfavorable events, the progress of the trial, and any violations of ethical principles implicated due to this division. Compared to a single inspection at the start of the trial, this evaluation is far more efficient. In Chapter III, general ethical considerations are discussed, with informed consent, the selection of vulnerable groups as participants, and compensation calculation being particularly significant. The Guidelines require an "informed" consent form to be completed together with a patient information page if consent is required. The trial's modus methodology, the pay policy, commercialization benefits of such pharmaceuticals, and the voluntary nature of the subjects' involvement, are all depicted on this page.

In contrast to Schedule Y, verbal or non-written documentation of consent is permissible under such Guidelines if the subject cannot communicate his assent. Though the Guidelines and the CIOMS Guidelines are similar, the Guidelines acknowledge parts of vulnerable groups with less autonomy, which may be due to incarceration or pressure from a person in a dominant position. The compensation provisions are applicable in circumstances of accidental injury or mere involvement. It is proposed that in the latter scenario, the sum should not be so large, as this would operate as a factor of influence in and of itself. In the first case, the Guidelines recommend that the sponsor's primary responsibility is to compensate the wounded, with the amount determined by the arbitration panel or an appeal body based on the circumstances. Although the Guidelines are extensive in ethical concepts, they are not legally binding.

In January 2005, the Good Clinical Practices (GCP) became law after a protracted wait. It is a reaffirmation of the ICMR Guidelines, which acknowledge several international codes such as the Declaration of Helsinki. GCP's core tenet is to protect the inviolability of human life. As a result, the two fundamental themes it discusses are preserving human subjects' rights and the inventiveness of biological data and results.

POLICY DEBATES AND JUDICIAL DISCOURSE CONCERNING REGULATIONS OF CLINICAL TRIALS - THE INDIAN CONTEXT

When analyzing clinical trial regulation in India, it is crucial to consider crucial legal discourse, such as judicial pronouncements and Lok Sabha debates. While there is limited jurisprudence in this area, it is still vital to examine these authorities' dialogue to isolate the concepts proposed thus far concerning clinical trial laws.

In AI Democratic Women Association v. Union of India,[25] The Supreme Court was dealing with a petition to prohibit the sale, manufacturing, and manufacture of Quinacrine pellets. The petition was dismissed because the government was already making efforts in that direction under sections 10A and 26A of the Drugs and Cosmetics Act of 1945. While the petition was dismissed, the decision is significant because it acknowledges that there was a violation of clinical trial protocols and a symbolic acknowledgment that the courts would not accept such misconduct.

Furthermore, while courts have banned Quinacrine, there have been indications that it is still used in parts of India, which only strengthens the case for those who believe a tighter regulatory framework is needed.

In its 59th Report on the Functioning of the Central Drugs Standard Control Organization (CDSCO), the Department Related Parliamentary Standing Committee on Health and Family Welfare noted that it was "the Central Drugs Standard Control Organization's skewed priorities and perceptions" that accorded excessive "propagation and facilitation" of the drugs industry, rather than ensuring that the interests of the consumers were protected first. It went on to say that India's regulatory system was less strict than that of the United States, the United Kingdom, and Australia. It also stated that India's infrastructure and staff fell short of the acceptable minimums, let alone the post-licensing needs.

In a writ petition now pending, the Allahabad High Court acknowledged that criminal clinical trials were widespread in India. It stated that there was a prima facie violation of human subjects' fundamental rights, as provided by Art. 21 of the Constitution, and that the Penal Code, 1860,[26] Sections 302, 304, and 304-A, might be invoked based on situations. Justices Umanath Singh and Rituraj Awasthi also stated that the Court would consider awarding damages and chastising pharmaceutical corporations for violating informed consent regulations and resulting in the deaths of people unaware that they were being utilized guinea pigs.

The case of Swasthya Adhikar Manch v. Union of India[27] It is another case that will hopefully change the dynamics of clinical trial legislation in India. The government was chastised by a bench led by Justices RM Lodha and H.L. Gokhale for its slowness in halting illicit clinical

[25] (1998) 5 SCC 214.
[26] The Indian Penal Code, 1860 (Act number 45 of 1860).
[27] WP(C) No. 33 of 2012.

studies. The destitute, mainly minors, tribals, and Dalits, were utilized as guinea pigs. While the case is still pending, one can only hope that the Supreme Court orders the government to take tangible steps within a specific time frame to ensure that such incidents do not occur again.

Examining the legal discourse demonstrates that the issue at hand is not a lack of awareness of India's inadequate clinical trial regulations. As can be deduced from the sparse discussion on the matter, insufficiency is not a point of controversy. The issue is the courts' and legislature's indifference to the problem. The judges' hands are tied in terms of enacting new legislation to fill the gap. After all, the judiciary's job is to interpret the law, not pass legislation. Respect for the legislature is welcome; nonetheless, there is a fine line between deference and indifference to the legislature's actions. The judiciary likewise protects individual autonomy. It is the guardian of fundamental rights, which pharmaceutical manufacturers and clinical trial investigators routinely violate. To suggest that nothing is done to protect persons who participate in clinical trials without sufficient laws would make us all participants in the holocaust caused by unregulated clinical trials. When it comes to enforcing unwritten rights, the judiciary has begun to read directive principles into fundamental rights to put positive responsibilities on the State and hold it accountable for failing to meet these requirements. As a result of the implicit reading, the directive principles have been indirectly enforceable. Until new comprehensive law is produced, the judge can use the ICMR guidelines' basic ethical principles to replace the provisions of Schedule Y if they are found to be insufficient.

While court inaction can be justified based on a lack of legislative power, the legislature's and regulatory bodies' inaction is reprehensible. In 2002, the ICMR prepared and submitted a comprehensive bill to regulate clinical trials to the Ministry of Health. In 2006, the Law Ministry gave its approval to the bill. Since then, there has been no development on the bill except for a remark from the Health Minister in October 2010 to the effect that it has been "fast-tracked." However, there is yet to be any empirical evidence of this fast-tracking.

LOOPHOLES IN THE EXISTING LAW

Schedule Y only allows just one type of consent: written consent. A provision like this would be ideal for a country with a high literacy rate. Unfortunately, that would not be the case in a country where some districts have lower adult literacy rates than the three worst-performing countries in Sub-Saharan Africa. The ICMR rules do, however, allow for various types of consent documentation. However, because they lack the legal power of law, investigators can readily get around them.

As previously stated, the law in the United Kingdom divides the mentally ill into three categories. Schedule Y's provision for studies on groups, limited to the elderly, children, and pregnant or nursing women, does not include the incapacitated. As a result, it has rendered a part of the vulnerable group's population invisible. The result is that the mentally ill are being used as study subjects for studies that are not useful to them, and they are left with no remedy due to a gap in the legal system.

Studies with women as participants and studies with pregnant women as research participants are separated in the CIOMS recommendations for dealing with special populations. The argument is that allowing women to participate in research is considered a form of emancipation from patriarchal cultural constructs prominent in most developing countries. It strengthens their right to self-determination by removing the possibility of gender discrimination, which is typically justified by 'protecting' women from the experimental technique to preserve their fertility. In a country like India, where patriarchal conceptions are not only perpetuated by society but reinforced by law, Schedule Y makes no such provision. The law's silence tacitly permits discrimination based on gender and indirectly contributes to excluding women from clinical studies.

In contrast, where women are utilized as subjects, in the absence of such a provision, it is highly likely that their boyfriends or spouses, who typically dominate them, will enlist them for monetary gain in the lower strata of society. However, suppose there was a provision stating that women can engage in clinical studies and that their involvement must be voluntary. In that case, this exploitation could be avoided, albeit to a limited amount.

The field of clinical trials is testimony to the commoditization of ethics, which can be described as an all-time low for humanity. As a result, forum shopping for the Ethics Committee ('EC') is now a typical occurrence.

Independent committees are springing up in the absence of any strict regulations governing the operation of Ethics Committees. These independent panels are guided solely by financial reasons, not by a non-negotiable set of ethics. Even though the ICMR Guidelines elaborate on the tasks of ethical committees and provide for frequent evaluations throughout the clinical trial procedure, the lack of a legally binding status renders such periodic review voluntary. IN THIS CASE, schedule Y of the statute states that an ethics committee would be formed and outlines the body's functions. While the Guidelines meticulously provide for both periodic and intermittent review, Schedule Y only requires that the "EC (s) make, at suitable intervals, an

ongoing review of the trials for which they evaluate the protocol(s)." The definition of a 'suitable' interval, on the other hand, is left vague and subject to interpretation. The question of conflict of interest is likewise unaddressed in Schedule Y. As a result, the ethics commission members in hospitals are the investigators themselves. What constitutes unethical behavior is thus determined according to the convenience of the investigators, whose primary goal is to expedite the trial. Aside from the genuine danger of prejudice, the issue here is how this loophole is being exploited to make a joke of the European Commission.

Given the Schedule's ineffectiveness lack providing tight ethical and legal oversight of clinical trials, one would imagine that, at the very least, a modest provision for compensation would be offered as a remedy for all the violations that inevitably occur in such legal limbo. However, compensation is only mentioned once in Appendix V of Schedule Y, and even then, it is only included as part of the informed consent sheet's checklist. Moreover, the process for supplying and computing such compensation is not specified in the law. The pitiful remuneration offered in the absence of a legal mandate attempts to lower the life lost, thus lowering the breaches committed during the trial. Life is currently worth a minimum of 50,000 rupees. In addition, there is no punitive clause in Schedule Y. As a result, clinical trials are conducted in a legal vacuum, and violators go unpunished. The Taldafil medication trial at MGM Memorial College and Maharaja Yashwantrao Hospital is an example. Two doctors conducted this trial without the DCGI and at a time when the medicine was not approved in the country for the treatment of pulmonary arterial hypertension. Following an examination into the case, the only sanction imposed against the doctors was a six-month restriction on conducting any future experiments. As a result, the sole disciplinary measure used was the suspension of license to conduct clinical trials, if it can be termed that at all. The irony of suspending permission that never existed in the first place and the requirement for stern action is lost on the Ministry.

Schedule Y specifies a reporting deadline of seven working days, contrary to global practice, which mandates that any SAE be reported to the EC within seven days of the calendar. When a quick reporting mechanism is critical, the timetable offered is excessively liberal. Schedule Y does not provide for any faster reporting of SAE to the CDSCO, which adds to the leniency. According to Schedule Y, such events must be reported to the CDSCO within fourteen calendar days. However, there is no requirement to distinguish between events with a causal relationship and incidents that are life-threatening or result in unexpected deaths in the reporting period.

Although the 2005 update to Schedule Y was intended to streamline the regulations, the altered version has its own set of flaws, flaws that call the amended version's good intentions into question. First and foremost, the change has eliminated the phase lag. The concept of phase lag stated that Phase II studies could not be done in India unless they had already been conducted overseas, to prevent Indian citizens from being used as guinea pigs. However, due to the modification, Phase II and Phase III trials can now be undertaken simultaneously, eliminating the protective provision.

There is a discrepancy between Schedule Y and the CDSCO's study approval letter. The new Schedule Y requires SAE reporting, while the trial letter allows for the reporting of Serious Adverse Reaction ('SADR'). The aspect of causation is the difference between SAE and SADR.

While an adverse occurrence may or may not be related to the medication research, an unfavorable reaction is evidence of causality. This jargon disparity raises questions about whether the aspect of causality should be accounted for in reporting. Furthermore, while Schedule Y mandates reporting significant and unexpected incidents, it leaves the term "unexpected" ambiguous, highlighting another legal flaw. It directs us to the GCP for such a definition, implying that the legislators have completely overlooked that the GCP lacks a definition of "unexpected." As a result, there is some ambiguity about what constitutes an unexpected incident, and this ambiguity brings subjectivity into the reporting of such events.

Despite its flaws, the amendment made a step forward by obtaining the GCP's statutory backing, effectively elevating the guidelines to the status of binding law. However, the status of trials that began before 2005 concerning applicable legislation and the larger question of the ground reality about such law's application remain unsolved.

CONCLUSION

In India, 483 persons died due to clinical studies as of 2011. Only 16 volunteers, however, were compensated. Pharmaceutical companies' ledger sheets rarely, if ever, reflect the human costs. The DCGI has released draught recommendations for allocating compensation to victims and their families in the event of damage or death during clinical trials. The irony of utilizing the binding force of law to provide a license to kill on the one hand and issuing hazy instructions with no binding value in any court of law to deal with reparations on the other, appears to have escaped the regulatory authorities. It is one thing to support science and technology progress; it is quite another to put it over sacred ideals of autonomy and life in the service of economic interests. The only business that should be pursued in the world of medicine and healthcare is

that of saving lives. Clinical trials have been created to liberate people and eradicate ailments. They have started removing people themselves somewhere along the way.

Clinical trials are used to determine the safety and efficacy of a new medicine before it is released into the market for human use. Unfortunately, instead of providing a clear direction, Committee after Committee has muddled the position of legal supervision of clinical trials. It is time for the major players and stakeholders to provide clear guidelines for regulating illegal and unethical clinical studies. Furthermore, their proposals went unheeded and uncared for in many circumstances, resulting in catastrophic national waste.

It is past time for the Central Government and State Governments to take adequate measures to protect India's defenseless and unfortunate citizens from being utilized as guinea pigs in scientific trials for the profit of foreign countries in many circumstances. This must be halted promptly, or otherwise, the great men of India's religious hopes of making every Indian healthy, affluent, and happy would remain a faraway dream.

A CRITICAL STUDY ON THE ISSUES AND CHALLENGES OF SURROGACY IN THE INDIAN LEGAL SYSTEM

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"Currently, the biggest risk to children in the surrogacy context comes not from the actions of either set of parents but from the uncertain status of the law, which can lead to the child being subjected to years of litigation to determine who will be considered to be his or her legal parents" - Lori B. Andrews[28].

ABSTRACT

India has emerged as a central hub in the world when it comes to surrogacy. In this phenomenon, birth arrangements are made for infertile married couples either through traditional surrogacy or gestational surrogacy. The article will discuss the conditions under which a woman agrees to surrogacy and how surrogacy has transformed into a commercial business involving the commodification of the female reproductive organ and parenthood of surrogate children. It shall shed light on the issues which encompass surrogacy in India, the rights of the surrogate mother, the identity crisis (if any) of a surrogate child, and the factors which make a normal couple commission parents of surrogacy. Some of the landmark judicial decisions on surrogacy and suggested guidelines by competent authorities like the Indian Council of Medical Research, 228th Report by the Law Commission of India, and some of the proposed bills under consideration for enactment shall be analysed. In India, the lack of specific legislation in India acts as a serious impediment to advocating the surrogacy issue. Therefore, the article shall suggest some of the issues and parameters that may be considered at the time of enactment of the law by the legislature covering all possible adversities and events.

Keywords: Surrogacy, the commodification of female reproductive organs, identity crisis, commissioning parents, Law Commission Report.

INTRODUCTION

There was a time when infertile couples, single men, or women and even people of the LGBT (lesbian, gay, bisexual and transgender) community who were in want of children were left with the only choice of adopting a child. But, with ,globalization and modernization emerging

[28] Lori B. Andrews, "Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood", 81 Virginia Law Review 2343, 2358 (1995).

rapidly now, such choice has diversified, and people who are unable to have children in the ordinary course of nature have the alternative option of choosing a surrogate child to fulfil their dream of completing their family. Surrogacy is a phenomenon where the motherhood of the child is outsourced by means of a neo assisted reproductive technique, where the services of any fertile woman are usually taken by any childless couple or single parent to give birth to any new-born child. Medical Science has advanced with the invention of new technologies, and surrogacy is one of the most popular among them, having techniques such as insemination by any donor or methods of embryo transfer causing a revolutionary change in the human reproductive environment. The financial arrangements made for surrogacy dealing are also very lucrative. However, commodifying a new-born child by making it part of a barter process of 'a baby for money' relationship attracts severe criticism and leads to controversies across society. Since, in the process of surrogacy, the rights of the surrogate mother, the child and the authorizing parents are questioned.[29]

In Surrogacy, a woman can conceive by accepting the donation of an egg from another woman or by using the sperm of any donor, thus making the practice ethically and legally very controversial. It is a practice where a woman bears a child on behalf of an infertile couple, any single parent or LGBT person. Many private agencies practice surrogacy by hiring women primarily from poor rural backgrounds and utilizing them for making babies for the rich in the society against a handsome charge for providing such service. Such a practice has transformed the normal biological function of giving birth to a child from a woman's body into a commercial contract where services are rendered against exorbitant charges that the rich can only afford. These services are advertised publicly by such agencies acting as 'Baby Factories'.[30]

The demand for surrogate mothers is gradually rising in this fast-paced modern world due to the high rate of infertility in modern-day couples because of lifestyle issues. The outgrowth of surrogacy has also substantially reduced the prevalent practice of adopting children from orphanages and other institutions. India is one of the countries in the world, out of approximately 34 countries, where surrogacy has been recognized and legalized in some form

[29] Dr. Nandita Adhikari, "Surrogate Motherhood", Law and Medicine 167 (2012).
[30]Surrogate Motherhood Ethical or Commercial, available at: https://wcd.nic.in/sites/default/files/final%20report.pdf; (last visited on Jan. 29, 2022, 12:34 PM).

or the other[31]. India has accepted the commissioning parents of surrogate children as their legal parents, and some states in India have also developed the practice of obtaining pre-birth Order from the Court ordering the names of the commissioning parents as legal parents and putting up their names in the birth certificate of the child born through surrogacy.

INDIA AND SURROGACY

The issue of surrogacy is a burning topic in India these days since India is a highly demanded destination in terms of international surrogacy. Surrogacy can be practiced by two methods, i.e. **(a)** Traditional Surrogacy (also known as Partial Surrogacy), wherein the traditional approach, when there is any infertile woman unable to conceive a baby in her womb, the husband of such woman has sexual intercourse with another woman with the condition that, the child born out of such sexual intercourse is handed over to the infertile woman and the other woman will not have any right over such child. With the advent of technology, Partial Surrogacy came into practice where in case of any infertile woman, the sperm of her husband is artificially inseminated in the ovary of another woman, whereby the eggs inside the embryo that gets fertilized in the foetus become genetically related to a partial extent in favours of the commissioning couple, where the man's sperm has been used thus forming Partial Surrogacy[32] and **(b)** Gestational Surrogacy (also known as Total Surrogacy), in this when the intending or commissioning couple are desirous of providing the surrogate child with a biological connection, then the male and female viable gametes of such couple are utilized to produced embryos by inducing in vitro fertilization (IVF). Such embryos containing the gametes of both the parents are then transferred into the ovary of another woman who volunteers to be the surrogate mother of the child and carry the pregnancy on behalf of the commissioning couple, and upon delivering the baby, the intending parents take the custody of the child. Such an arrangement is referred to as Gestational or Total Surrogacy as both parents are genetically involved in this act.[33] From a legal perspective, it is pertinent to mention that, in India, Section 112 of the Indian Evidence Act, 1872[34] provides that a surrogate child will also be considered the legitimate child of any married couple of a valid marriage[35].

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[31]Legal Positions of Surrogacy in countries other than India, http://shodhganga.inflibnet.ac.in/bitstream/10603/54478/11/11_chapter%205.pdf. (last visited on Jan. 30, 2022, 06:15 PM).

[32] Peter Brinsden, Clinical Aspects of IVF Surrogacy, Surrogate Motherhood: International Perspectives 101 (Hart Publishing, U.K., 2003).

[33] Ibid, note 6.Ibid.

[34] The Indian Evidence Act, 1872 (Act 1 of 1872), s.112.Section 112 of the Indian Evidence Act, 1872.

[35] Hindu Marriage Act, 1955(Act 25 of 1955), s. 5; Special Marriage Act, 1954(Act 43 of 1954), s. 4Section 5 of Hindu Marriage Act, 1955 and Section 4 of Special Marriage Act, 1954.

The process of adoption involves legal complexities making surrogacy a wider choice for infertile couples, single parents and even members of the LGBT community who are deprived of having a baby in the ordinary reproductive course of nature. Kanupriya alias Durga was India's first surrogate baby born in Kolkata on October 03, 1987, and she was also the second such instance in the world after Louie Joy Brown of British nationality, born on July 25, 1978, both being surrogates under the technique of IVF, which also developed the mechanism of Assisted Reproductive Technology (ART). The world was introduced to birth by means of gestational surrogacy in 1984, and after ten years, the same occurred in Chennai, India, where an Indian woman who for raising money for her ailing husband acted as a gestational carrier. In January 2004, a Gujarati woman gave birth to twins that belonged to her daughter by causing surrogacy through gestation, but she was not recognized legally as the mother of the twins after conducting DNA tests, and the genetic mother had to go through an adoption procedure to legitimize her parenthood over the twins. In India, surrogacy is still considered to be a social taboo, which results in most the cases of surrogacy being anonymous and unreported.[36]

With the availability of wombs and sperm donors in abundance and the lack of proper legislation to put control over the same, womb renting is a cost-effective and convenient option that has emerged in India these times, such a scenario encourages foreigners and NRIs' to target India for surrogacy. The wealthy, and affluent class of people usually target poor people who, due to their financial constraints, agree to enter a Contract for Surrogacy to support their families. For example, Savita and Reshma (both named changed) in a rural town of Jharkhand agreed to surrogate the children of Chinese couples despite having children of their own due to their inability to make ends meet for their family.[37] Similarly, Reena (32) of Vadodara (name changed) had taken up twice the task of surrogacy child for a childless couple in Ahmedabad due to her financial hardships since her husband had leukaemia and the cost of treatment, including repeated chemotherapy, was highly costly for her, so she had no other option left but to opt for taking up surrogacy to meet her husband's treatment, who worked at a private firm for a meagre salary. Surrogacy in India has grown into an industry of $2.3 billion or INR 13,800 crore.[38] In 2013, approximately 400 surrogate babies were delivered from the state of Gujarat in India itself to their parents, who are natives of the USA and other European Union countries.[39] However, Gujarat's state health or family welfare department has no official record

[36] Ramesh Vinayak, "A Womb for Rent" *India Today*, June 23, 1997.
[37] Archana Dhawan Bajaj, "Paving Path to Parenthood" *The Tribune*, December 30, 2011.
[38] Raja Aditi and Ajay Lakshmi, "Surrogacy: Just Another Normal Delivery" The Indian Express, July 14, 2013.
[39] Ibid, note 12.Ibid.

of counts of surrogacy being handled by different clinics across the state, and hence no monitoring over the same is done, and the count keeps increasing every year.[40]

The figures for surrogacy in India are literally doubling every year; as compared to 158 cases of surrogacy in 2005, there has been an increase to 298 reported cases in 2006 as per data collected from 116 fertility centres across the country from a survey conducted by Federation of Obstetrics and Gynaecological Society of India along with the Indian Society of Assisted Reproduction.[41] There are primarily two factors which are leading to this high rate of surrogacy in India, firstly, the low cost involved in the entire process and secondly, the general middle-class people have become so conscious of their social status that in fulfilment of their sexual infertility they are finding surrogacy as a lucrative alternative to avoid social embarrassment.[42]

SURROGACY IN INDIA FROM A JUDICIAL PERSPECTIVE

India is still a virgin country when it comes to having definite legislation and laws to monitor surrogacy despite being a culturally rich country and emerging as a surrogacy hub in the recent years. Every surrogacy that takes place in India is initiated through a surrogacy Agreement given effect under the Indian Contract Act, 1872, which binds the donor and the commissioning parents for the act of surrogacy against a consideration, which is deemed to be the remuneration of the surrogate mother and in breach of the covenants in such contract thereunder shall liable to legal recourse that are available at law.[43] Some of the landmark cases on surrogacy tried in Indian Courts are as follows:

1. In the landmark case of Baby Manji Yamada v. Union of India[44], this Japanese couple, Dr. Ikufumi Yamada and his spouse entered a contract with a woman who agreed to be a surrogate mother for the couple in the Anand district at Gujarat. The said couple gradually got divorced, and the fate of the surrogate girl child was put to question as the genetic Japanese mother refused the custody of the child; the surrogate mother had already parted with the girl child post her delivery. It was only the father, the Japanese man, who still wanted the child though he could not have the same being a single father of a girl child under the Adoptions and Maintenance Act, 1956. In the absence of any

[40] Supra, note 6.Supra note 6 at 4.
[41] Alifiya Khan, "Surrogacy is soaring in India" Hindustan Times, September 19, 2008.
[42] Ibid, note 15.Id. at 15.
[43] Priya Pareek, Surrogacy, Concept of Renting a Womb, available at: http://www.legalservicesindia.com/article/921/Surrogacy,-Concept-of-Renting-a-Womb.html. (Last visited on Jan. 29. 2022, 06:27 PM).
[44] AIR 2009 SC 84.

specific legislation, the Supreme Court was in a dilemma, the mother of the girl child was sent for taking the adoption, but the Apex Court, on a helpless note, considered the only feasible option of approaching the National Commission for Protection of Child Rights to take cognizance of the case.[45] This case created havoc within the nation through discussions and debates due to the absence of specific laws to deal with surrogacy cases and how such absence cant exploit the country's native surrogate mothers, and immediate intervention by the government was called for, to protect their rights.[46]

The Apex Court having legitimized surrogacy has invited severe debates as this ruling has been compared to commercial trade and business of motherhood, where the wealthy and affluent class of society and foreign nations who are unable to have babies in the ordinary course of nature have discovered a feasible and cost-effective alternative phenomenon to fulfil their want of completing their families by employing poor women against lucrative remuneration, who in order to support their families in a state of helplessness agree to get engaged in surrogacy. This decision has been considered an abuse and exploitation of the female body and puts a threat to their chastity. Such practice of surrogacy and legitimacy by the judiciary resulted in the widespread address of the surrogacy phenomenon as 'womb for rent', 'outsourced pregnancies' and 'baby farms'.[47] It is pertinent to mention that legitimization of surrogacy in India is based on a presumption. Since there is no law that forbids the practice; it is presumed to be legal in India. However, with the emergence of India becoming a central surrogacy hub, time is not too far before the Parliament comes up with legislation to monitor and advocate commercial surrogacy in India.[48]

2. In another case of Jan Balaz v. Union of India[49], the Gujarat High Court had granted Indian citizenship in favours of two newly born twins in Anand District at Gujarat, born out of a Gujarati surrogate mother, and fathered by a German national. The Court

[45] Ibid, note 18.
[46] "Indian born surrogate baby to unite with Dad" *The Tribune*, Nov. 04, 2008.
[47] Shekhar Bhatia, "Revealed: How more and more Britons are paying Indian women to become surrogate mothers" *The Telegraph*, May 26, 2012, *available at* https://www.telegraph.co.uk/news/health/news/9292343/Revealed-how-more-and-more-Britons-are-paying-Indian-women-to-become-surrogate-mothers.html (last visited on January 29, 2022)
[48] Commercial Surrogacy in India, Digvijay Singh and Divya Singh, ISSN 2581-8504, available at: http://www.penacclaims.com/wp-content/uploads/2020/06/Digvijay-Singh.pdf; (Last visited on January 29, 2022).
[49] 2010 (2) ALL MR (Journal) 14.

observed that the legal rights and recognition of the newly born twins are to be prioritized above the rights of the German nationalities who are genetic parents or even the surrogate mother. However, the emotions and sentiments of the surrogate Indian mother and her legal relationship with the surrogate infant will be considered. The judgement of the instant case stated was based on the existing laws on surrogacy in USA, Ukraine and Japan, where the Court has given its decision, and the Court also mentioned that a push is highly required for India to have her legislation to address such cases on surrogacy.[50] The Gujarat High Court gave Indian citizenship to the twin babies namely, Nikolas and Leonard, in spite of they having genetic parents of German nationality, namely, Jan Balz and Susan Anna Lohald, on the pretext that since the twins were born in India and from an Indian surrogate mother, the twins belong to Indian nationality. The Government of India intervened in this ruling of the Gujarat High Court and appealed before the Supreme Court since the parents of the twins were unable to take them to Germany because the German laws do not permit visas to surrogate children born in a foreign land. Finally, after a two-year tedious legal battle, the said parents of twins had to undergo an inter-country adoption process before they could take away their children back to Germany, where the Ministry of External Affairs, Government of India, gave away exit permits in their favour. This case again demanded domestic legislation to advocate surrogacy in India.[51]

3. In the case of B.K. Parthasarthi v. Government of Andhra Pradesh[52], the 'Right of Reproductive Autonomy' of an individual towards exercising his 'Right to Privacy' was upheld by the Andhra Pradesh High Court. The decision was in consonance and harmony with United States of America Supreme Court decision Jack T. Skinner v. the State of Oklahoma,[53] wherein the 'Right to Reproduce' has been granted as one of the fundamental civil rights available to people.

4. In the case of Javed v. State of Haryana[54], the principle of two children who are living norm was upheld by the Apex Court to debar a person from contesting the Panchayati

[50] *Ibid*, note 23.
[51] Anil Malhotra, "Surrogacy born, law still in womb" *The Tribune*, Feb. 25, 2012.
[52] AIR 2000 A.P. 156.
[53] 316 US 535 JT 2008 (11) SC 15.
[54] (2003) 8 SCC 369.

Raj elections; in this judgement, the Hon'ble Court refrained from stating that 'Right to Procreation' is not a basic human right.[55]

5. Even in the case of Shabana Hashmi v. Union of India[56], the Apex Court upheld that every person, irrespective of the religion he practices, has got the 'Right to Adopt' being a fundamental right guaranteed and enshrined under the Indian Constitution.

THE LEGAL AMBIT OF SURROGACY IN INDIA

With the Apex Court in India ruling in the landmark case of Baby Manji Yamada v. Union of India[57], surrogacy has become legalized in India. The only state legislation India has is 'The Delhi Artificial Insemination Human Act'. The Indian Council of Medical Research (ICMR) in 2005 has published certain guidelines regarding how surrogacy in India should be carried out, and the ICMR also prescribes the use of technologies such as ART in surrogacy cases practice by fertility clinics. Gradually, the Law Commission of India in 2009 also came up with its Report No. 228, which prescribed the guidelines for the functioning of ART clinics in India. The IMCR in the year 2008 had drafted the Assisted Reproductive Technology (Regulation) Bill, 2008 and sent it for approval before the Ministry of Health and Family Welfare (MOHFW); the Bill got subsequently modified and amended by the said ministry in 2010, 2013, 2014, 2015, 2016 and latest in 2019 before it came to the cabinet for their approval. The said Bill proposed to set up state and national boards for ART along with a national registry for the overall supervision and close monitoring of ART banks and clinics.[58] Recently, the MOHFW also came up with The Surrogacy (Regulation Bill), 2019, which is apprehended to be the first specific legislation, if approved, regarding surrogacy in India and shall be introduced before the Rajya Sabha or lower house of the Parliament of India is referred to its standing committee in the upcoming Budget Session, being numbered as Bill No. 257 of 2016.[59]

INDIAN COUNCIL OF MEDICAL RESEARCH: GUIDELINES

1. It has been mandated to conduct DNA tests upon the commissioning parents of surrogacy

[55] *Ibid*, note 28.
[56] (2014) 4 SCC 1.
[57] AIR 2009 SC 84, Supra, note 18 at 7.
[58] The Assisted Reproductive Technology (Regulation) Bill, 2016, available at: https://egazette.nic.in/WriteReadData/2021/232025.pdf (last visited on January 29, 2022).
[59] The Surrogacy (Regulation) Bill, 2016, *available at:* http://164.100.47.4/billstexts/lsbilltexts/asintroduced/257_ls_2016_eng.pdf; (last visited on January 29, 2020).The Surrogacy (Regulation) Bill, 2016, Jan. 29, 2022, http://www.prsindia.org/uploads/media/Surrogacy/SCR-%20Surrogacy%20Bill,%202016.pdf.

to ascertain their genetic parenthood. Failure of which, shall make liable such commissioning parents go through a proper legal process of adoption of the surrogate child.

2. Surrogacy should be exercised by only those parents for whom it is naturally impossible to have their own child in an ordinary course of nature.
3. The payments in form of remuneration to the surrogate mother advanced by the commissioning parents should be well documented and such payment must cover all costs related to the pregnancy of the surrogate mother.
4. The couple or the sperm bank has the responsibility of searching for a surrogate mother and not the fertility clinic.
5. The woman undergoing surrogacy must below 45 years in age and the ART clinics should take all necessary care to ensure all medical tests are conducted to the surrogate mother before the pregnancy cycle commences.
6. A single woman cannot undergo surrogacy more than thrice in her lifetime.
7. The surrogate mother cannot undergo any blood transfusion process except as prescribed by the certified blood banks under medical prescription and must not engage in any consumption of drugs whatsoever in nature, be it through intravenous or otherwise.
8. A near kin or relative of the commissioning parents can act as a surrogate mother.[60]

The above guidelines make it necessary for any childless couple and any surrogate mother to enter a contract. However, such guidelines fail to throw light upon what shall be the chief components of the contract and what are the legal recourses available to any aggrieved party in case there is any breach of any covenant contained in the contract. For instance, a story was reported in 'India Uncut' that a group of girls of an orphanage were hired for surrogacy by a childless couple, and upon delivery of the surrogate child, neither the clinics nor the childless coupled paid them their remuneration. Because most women who get engaged in surrogacy do so for financial needs, this unfair practice had to be ceased while the regulations by ICMR initiated by Dr. R.S. Sharma (Deputy Director-General of ICMR and member secretary of the

[60] Chapter 3, code of Practice, Ethical Considerations and Legal Issues, available at: https://main.icmr.nic.in/sites/default/files/guidelines/b.pdf;Code of Practice, Ethical Considerations and Legal Issues, (Jan. 29, 2022, 10:03 PM),

bill's drafting committee) emerged. However, such guidelines of ICMR are not exhaustive and consist of several lacunae that require an address.[61]

REPORT NO. 228 OF THE LAW COMMISSION OF INDIA:

Since there is the absence of any specific legislation to advocate surrogacy in India, the guidelines provided by ICMR act as regulations. The Report No. 228 of the Law Commission of India provided 'Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy'. The significant recommendations given by the Law Commission are as follows:

1. All practices of surrogacy shall be regulated by a contract that will be entered between the childless couple and the surrogate mother, who will act as parties to the contract. Such contract shall consist of terms and conditions that the parties shall mutually agree upon consisting of **(a)** the consent of the surrogate mother, her husband, and nearby kin for any act of surrogacy undergone **(b)** reimbursement of all medical expenses that will incur for the surrogate mother during the tenure of her pregnancy **(c)** the medical procedures to be followed for artificial insemination and **(d)** the wilful consent of the surrogate mother of delivering the surrogate child to the childless or commissioning parents after its birth. But such an agreement cannot be entered upon for any commercial gain by any of the parties thereto.

2. There should be a financial arrangement made in favour of the surrogate child, in the event the commissioning parents either both or any of them die before the child is delivered to them. Or in the event, the commissioning parents after getting the custody of the child get divorced or judicially separated and neither of the parents desires to take the child's custody.

3. One of the intended parents desirous of having a surrogate child must be a donor so that the bond of love and affection towards the child originates for the commissioning couple. The alternate option is legal adoption in case biological and adoptive parents are separate.

4. There should be legislation that will have provisions where the surrogate child will automatically become the legitimate child of the commissioning parents without undergoing any legal process or legal adoption.

[61] Hilary Brenhouse, "India's Rent a Womb Industry" *The Time Magazine*, June 05, 2010.

5. Only the Medical Termination of Pregnancy Act, 1971 should govern all abortion cases.

6. The birth certificate issued to the surrogate child must have the names of the commissioning parents.

7. The surrogacy agreement should cover vital aspects such as life insurance of the surrogate mother, protection against early sex-determination of the child, protection of the right to privacy of the donor and the surrogate mother.[62]

ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL, 2016 (AMENDMENT)

The Assisted Reproductive Technology (Regulation) Bill, 2016 (as per latest amendments made therein from time to time) unlike recommends for **(a)** Establishment, Powers and Functions of the ART authority **(b)** provides for what are the prohibited activities **(c)** rights of commissioning parents, donors and children in surrogacy **(d)** access to information from the ART register **(e)** licensing pattern for fertility clinics **(f)** financial provisions safeguarding the parties to the surrogacy Agreement **(g)** offenses and penalties in respect thereof and **(h)** the delegated powers and authorities for regulation of surrogacy practice.[63]

CRITICAL ANALYSIS OF THE SURROGACY (REGULATION) BILL, 2016:

The Surrogacy (Regulation) Bill, 2016 plays a pivotal role in controlling surrogacy practice in India whereby the Bill monitors certain aspects of the practice like making surrogacy a commercial business, exploiting surrogate mothers and children, and aspect enumerating guidelines for fertility clinics where surrogacy is practiced. However, there are certain issues and concerns that the Bill addresses in the following way[64]:

1. Commercial Practice of surrogacy is banned since the same is an abuse of the female reproductive organ and it cannot be exercised on the pretext of Right to Personal Liberty or Right to Procreation of Children. Technological advancement has gifted mankind with the option of surrogacy and the same is considered as a human right under Article 27 of the Universal Declaration of Human Right and Article 15 of the International Covenant

[62] Law Commission of India, "228th Report on Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy" (August 2009).
[63] The Assisted Reproductive Technology (Regulation) Bill, 2016, available at: http://www.parliament.go.ke/sites/default/files/2017-05/The__Assisted_Reproductive_Technology_Bill.pdf; (last visited on January 30, 2022).
[64] The Surrogacy (Regulation) Bill, 2016: A Critical Appraisal, available at: http://www.livelaw.in/surrogacy-regulation-bill-2016-critical-appraisal/ (last visited on January 29, 2022).

of Economic, Social and Cultural Rights.[65]

2. Surrogacy should be limited only to Indian childless citizens and not for people Surrogacy should be limited only to Indian childless citizens and not for people from foreign nations since India has emerged to be the central hub when it comes to international surrogacy. The concept of procreative tourism, where international tourist couples who are biologically infertile visit India to secure a cost-effective remedial measure to get their children by poor women who engages in surrogacy. This phenomenon that has developed in India for foreigners has to stop and surrogacy should be made available in India only for its own citizens.
3. The Bill also prescribes close kin or relatives of the intended childless couple to act as surrogate mother. However, the Bill fails to define and elaborate, who shall act as eligible kin and without such specification in case kin refuses or does not meet the minimum standards to surrogate then that shall create confusion and problem for the commissioning couple.
4. According to the Bill, medical infertility takes place when despite regular sexual intercourse between a couple, the female cannot conceive for a continuous period of two years. In such case, it is unwise for the childless couple to wait for five years and then opt for the surrogate child.
5. The Bill provides that married women need to take consent from their husbands before they engage in surrogacy.
6. A surrogate mother shall not undergo the transfer of embryo more than thrice for the same commissioning couple.
7. Identities of egg donors shall be kept confidential.
8. A detailed and rigorous accreditation procedure shall have to be followed by sperm banks and fertility clinics.
9. The National ART registry shall be established under the Department of Health Research.
10. The Bill also proposes the constitution of a national advisory board and state advisory boards comprising of workers from the Health Department, representatives of the medical industry, scientists, doctors, and other members as may be necessary from the civil society.

[65] *Ibid*, note 38.

11. The Bill fails to discuss the ART clinics where the identities of donors can be ascertained.
12. The Bill provides permission for gay or lesbian couples to have their surrogate child after a same-sex relationship gets legally recognized in India.
13. The Bill does not discuss maternity relief where the intended childless couple and the surrogate mother which has already been decided through several judgments of different High Courts.
14. The Bill prescribed that the intended couple and the surrogate mother must undergo certain medical tests and procedures, after which they shall be awarded eligible certificates. But the Bill is silent on the time stipulation by which such eligibility certificates shall be awarded and in case of failure to qualify and what right of appeal remains to the aggrieved person.
15. The Bill is also silent about the consequences in case there is a breach by any of the parties to the surrogacy Contract, be it the intended parents or the surrogate mother.
16. The Bill should have provided a mandate of vetting by competent authorities regarding the surrogacy contracts entered between the surrogate mother and commissioning parents before the medical process of artificial insemination commences.[66]

On a concluding note, regarding the proposed said Bill, the intentions of the legal draftsmen are very evident to be good where they have provided that commercial surrogacy practice should be prohibited, and foreign nationals will not be allowed to procure children through Indian surrogate mothers. Such brave steps signify means of protecting and respecting the body and soul of women, a gender whose chastity is a symbol of purity and divinity, which should not be compromised under any circumstances. Though it may be argued that many women voluntarily participate in surrogacy of children parented by foreigners but had the provision of their participation been illegal, then such women would not have indulged in such acts at the outset, no matter how financially desperate they were.

SUGGESTIONS AND RECOMMENDATIONS

Based on the above discussion and analysis, the following suggestions and recommendations can be advanced about the legal scenario of surrogacy in India:

1. The Surrogacy (Regulation) Bill, 2016, provides the right to exercise surrogacy only for a married infertile couple. However, there are cases when married fertile couples

[66] *Id*, note at 38.

face complications during the delivery of their baby, and at times, such complications can be life-threatening. In such cases, surrogacy in respect of such couples should be permitted.

2. The law should entrust certain rights in favours of the intending couple, such as

   (a)the right to choose the surrogate mother at their discretion who shall give birth to their child from her womb**(b)** the right to impose restrictions on such surrogate mother for the betterment of the unborn child **(c)** the right of the childless couple to make periodic visits to the surrogate mother to enquire about her well during pregnancy and **(d)** most importantly, the right to take custody of the surrogate child within 72 hours from its birth from the surrogate mother.

3. The proposed legislation should make provisions to avoid any dispute regarding the surrogacy arrangement made between the intending couples and surrogate mothers.

4. The anonymity of the surrogate mother should be maintained to secure her reputation and honour.

5. The NGOs' should also work to shelter surrogate mothers in case any woman is abandoned by her family for surrogacy.

6. Law should ensure that the surrogate mothers get a copy of the surrogacy Agreement and, in most cases taking undue advantage of their poor and illiterate background, no copies of the Agreement are provided to them.

7. In cases, where the intended parents refuse to take custody of the surrogate child for any reason whatsoever, the nearest kin of the commissioning couple shall be approached for taking custody of the child. If there are no such kin who agrees to it, then the child shall be sent to an orphanage and the intending couple shall be liable to provide maintenance for the child until its majority. In case, the child gets adopted by any person/couple then until the time the adoption process gets completed the intending couple being the genetic parents shall be held liable to provide maintenance.[67]

CONCLUSION

The concept of surrogacy if we look from the Indian perspective, it acts both as a boon and as well as a curse. For several married infertile couples, it gives them a ray of hope to fulfil their family by having a child with their genes itself through gestational surrogacy. Similarly, from

[67] Suketu V. Shah, "Issues of Surrogacy in India", 2(4) *International Journal of Culture and History*, 173 (2016).

the point of view of the surrogate mother, who primarily volunteers to get engaged in this act of surrogacy due to financial helplessness, through surrogacy they can earn a good amount of money which helps them to sustain their family and fulfil their dreams too. However, there is also a dark phase of commercial surrogacy where the woman's chastity is put under threat, and her reproductive organ is abused through hiring the same against money. Children born out of surrogacy and their commissioning parents become commodified then, which again is socially, ethically, and morally wrong. There is a lack of social and legal security in India to combat the prejudices faced by surrogate women. Despite the advancement of medical science and legal efforts being undertaken for the enactment of specific legislation to address surrogacy disputes, there seems to be a huge vacuum between these two dynamics of the subject which should be filled through feasible options being introduced by expert committees comprising of doctors, scientists, social activists, academicians, advocates, and other luminaries.

No matter how progressive we have become, certain cultures are so imbibed in our society that surrogacy is still considered a social taboo in India, because most women who become surrogate mothers are from a poor or rural backgrounds where education and enlightenment are practically nil, such surrogate mothers often get disowned by their own families and even outcast from the society they live in. They have no shelter and lead a miserable life without any refuge. These women in rural India are also on occasions declared witches, and they are killed brutally, often using stone-pelting till death or burning them alive. Such killings are committed with this mindset that executing such women from society shall act as a deterrent for others who will refrain from indulging in such acts of surrogacy.

For these women who face such adversities, the Advisory Boards should take the necessary cognizance to either reconcile and send such women back to their families or arrange for their rehabilitation and employment. The State and National Advisory Boards can also delegate some NGOs' to take necessary care of such women and ensure that they are adequately remunerated for their surrogacy, the intending parents do not cheat them, and the Surrogacy Agreement is strictly abided by a copy of the Agreement being supplied to the surrogate mother.

The law should hold the welfare of the child to be of utmost priority so that the child's identity or its parenthood is never questioned, merely because such child is a surrogate. The law must take into consideration all probable adversities that may happen with the child, for instance, refusal by the surrogate mother to deliver the child after its birth to its intended parents, refusal

by the commissioning parents to take the custody of the child after it is born, divorce of the intended parents, not providing of maintenance of the child, issuance of birth certificates and so on. The judiciary must address such issues frequently and give proper redress despite having no law for the same. Therefore, immediate action should be taken for this anomaly by the Parliament of India and develop dynamic and specific legislation that shall cover all possible aspects of disputes that may arise within the scope of surrogacy in India. We can now only hope that the sooner such legislation gets enacted, the better it shall be for all. India is no longer a developing country, but it has been declared as a newly industrialized country along with other countries such as Turkey, Mexico, Brazil, China, South Africa, and Malaysia, as stated by the International Monetary Fund and having her legislation on this burning issue of surrogacy will make her reach new horizons.

MISLEADING ADVERTISEMENT

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What is awareness? Awareness is a state, where one sees things and people without any true conditioning, idea, ego or opinion. It is a state, where we give our full attention, focus to whatever we encounter or do.

"A customer is the most important visitor on our premises. He is not dependent on us. We are dependent on him. He is not an interruption of our work. He is the purpose of it. He is not an outsider of our business. He is part of it. We are not doing him a favour by serving him. He is doing us a favour by giving us the opportunity to do so."

-By M.K. Gandhi[68]

Every product has a long journey. From manufacturing to purchasing. Mostly the daily necessity products are not being highly advertised but the luxurious commodities are immensely advertised by the brands. Various platforms of social media attempt to catch the eye of the consumers on their products. As without advertisement not a single product can grab its purchaser to buy the products unless or until it has some unique characteristics in it.

[68] https://www.laramyk.com/blog/gandhi-on-customer-service/ (last visited on APRIL 13, 2022)

This creates the important role of advertisement in today's start-up world. Advertisement not only promotes the product but is also a source to connect with buyers. It also works as a tool for the brands to build awareness in society to bring a new chain of change in consumer's life and to send an awareness message or to upraise the audience. Although there are few brands in the society which are letting consumer's to stay in the dark. They use illegal or unfair trade practices in order to earn more and more profit by vitiating the quality of products. They promote the product in their own way by misleading the advertisement i.e. providing asymmetric information.

Misleading, the word itself suggests the meaning of it i.e. providing wrong ideas or detail, deceiving someone by false action or words. According to the Consumer Protection Act, 2019 an advertisement which depicts misrepresentation, false claims, etc in various forms which can dupe buyers, or can affect the buying behaviour is called misleading advertisement.

In the ancient times during the war of Kurukshetra Lord Krishna told Arjuna about choosing a good leader who will guide you properly and will not mislead you. -

यद्यदाचरति श्रेष्ठस्तत्तदेवेतरो जनः ।
स यत्प्रमाणं कुरुते लोकस्तदनुवर्तते ॥ 3.21[69]

Which means that- "***Whatever action a great man performs, common men follow. And whatever standards he sets by exemplary acts, all the world pursues***". It means that people in general always need a good leader who can teach them and take them in the right direction. People follow their leader whatever he does. People follow their leaders so therefore always choose the right leader and be aware of what is true and what is not.

Let's understand a few aspects of misleading advertisements:-

A. Influencing advertisement: It is an ability to modify what customers ponder and perceive.
B. Delivering defective products: Delivering faulty goods, unsatisfactory quality, unfit for purpose or not as described. All these are a breach of the rights of consumers.
C. Product quality not worthy as per claimed: Received items are poor in quality, damaged or in worse condition. Therefore, a buyer can prefer to return, refund and replace the item.

[69] HIS DIVINE GRACE A.C. BHAKTIVEDANTA SWAMI PRABHUPADA, BHAGAVAD GITA AS IT IS 165.

D. Celebrity endorsement: Celebrities have a very strong command on social media. Millions of people follow them, respect them. These all abilities shift the needle of trading on any commodity which is influenced by them.

E. Hiding the true facts: The information that the brands does not want to disclose in the advertisement or intentionally left out from the banner due to the ill effect, such information can reduce the power of the product. For example: Hiding the high amount of sugar contained in the product or usage of harmful chemicals which can lead to illness in the long run.

F. Misleading Illustration: Using manipulating methods, creating simple photos of the commodity for luring people.

The habit of selling the products by misrepresentation not only affects the consumer's life but also affects the frame or profit of the brand in a longer journey.

"Advertisement! Advertisement! Advertisement!

Everything on sale, On its best quality,

Are all these appealing words pleasing you to purchase the goods?

Scotch your imagination,

Come to reality,

Check the commodity from top to bottom for originality.

Rolling & rolling the fake advertisement to make it popular in the world of illogicality,

Stop the dupes,

Stop the wrecking,

Beware of scepticism, Beware of all,

Jago Grahak Jago."

SUGGESTIONS:

Suggestion for Sellers

1. Place correct information in the display or commercials.

2. To make practical claims.

3. Abide by the law mechanism.

Suggestion for Consumers

1. Become more aware of consumer protection rights [*Caveat emptor*].

2. Step up & Report the misleading advertisement.

3. Check twice before the purchase.

Complaint sites:

1. The Advertising Standards Council of India (ASCI)[70]

2. Grievances Against Misleading Advertisements[71]

3. National Consumer Helpline[72]

Existing Statutory Mechanisms:

- The Consumer Protection Act, 2019.
- Drugs and Cosmetics Act, 1940.
- Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954.[73]
- Trade and Merchandise Marks Act, 1958.
- Cable Television Networks (Regulation) Act, 1995.

CASES ON MISLEADING ADVERTISEMENT:

Misleading advertisements cause viewers to misinterpret or make inappropriate decisions. False advertisements are those which are inconsistent with facts and Objectionable advertisement shows unsafe or dangerous acts, obscene visuals. Article 19(1)(a) of the Constitution of India[74] guarantees the right to speak freely of discourse and articulation to all residents of India, and the fundamental result of the equivalent is the option to be educated and admittance to data.

[70] https://www.ibfindia.com/advertising-standards-council-india-asci (last visited on APRIL 13, 2022).
[71] Department of Consumer Affairs :: Grievances Against Misleading Advertisements (GAMA) (last visited on APRIL 13, 2022).
[72] INGRAM | Integrated Grievance Redressal Mechanism (consumerhelpline.gov.in) (last visited on APRIL 13, 2022).
[73] DRUGS AND MAGIC REMEDIES (OBJECTIONABLE ADVERTISEMENT) ACT, 1954 (ACT 21 OF 1954).
[74] THE CONSTITUTION OF INDIA, art. 19(1)(a).

- In the case of *Romesh Thappar v. State of Madras*[75], Hon'ble Supreme Court held that Article 19(1)(a) includes the freedom of press, however, it was mentioned in Indian Express Newspaper v. Union of India that the Apex Court held that commercial speech comes and is protected under the ambit of free speech and expression under Article 19 of Indian Constitution which is Fundamental Right but with Reasonable Restrictions.

  Regarding this the Court (Supreme Court) observed that "*We are of the view that all business advertisements cannot be repudiate the immunity of Article 19(1)(a) of the Indian Constitution merely because they are issued by dealer and its true character is detected by the object for the promotion of which it is employed.*"

- The Delhi High Court in the case of *Horlicks Limited v. Zydus Wellness Products Limited*[76] passed an interim order to hold back Zydus from telecasting its advertisement to differentiate Complan to Horlicks on the basis that the same was fallacious and disparaging. The advertisement in contention was being telecast on multiple channels in through various languages i.e. English, Bengali and Tamil. High Court on the basis that the advertisement was misleading and amounted to depreciate.

- In the issue of the case *Reckitt & Colman of India Ltd. v. M.P. Ramchandran*, wherein the Calcutta High Court held that a vendor is allowed to declare that his/her goods are the best or better than that of his/her challenger's, despite the said statement being untrue. While making such proclamations, he/she may also collate the fors and against of his/her commodity and that of the contenders.

- *Dabur India v. Colortek Meghalaya Pvt. Ltd*[77], wherein the Court ((Delhi High Court) laid down the following guiding fundamentals while dealing with the issue of misleading advertisements/ confusing posters:

- Advertisements are protected under Article 19(1)(a) as commercial speech;
- An advertisement must not be erroneous, ambiguous/misleading or deceptive/illusory;
- However, certain cases where the advertisement/commercial/promotion/brochure must not be taken as false, but as a glorious representation of one's own product; and

[75] AIR 1950 SC 124.
[76] CS (COMM) 464/2019.
[77] FAO (OS) NO. 625 OF 2009.

- Only when the impugned advertisement goes beyond glorifying its product, and is deceptive and misleading, the protection under Article 19(1)(a) would not be available.

- The High Court while dealing with the essence of the law of decry laid down in *PepsiCo. Inc. v. Hindustan Coca Cola Ltd*.,[78] held that:-

(1) The purpose of the ads – this can be recognized from its story line and the information sought to be channelled.

(2) The overall impact of the advert. – does it aid the advertiser's merchandise or does it play down or diminish an adversary's product? In this conditions, it must be kept in sense that while advancing its product/merchandise, the advertiser may, while differentiate/compare it with a rival or a competing product/stock, make an unfavourable/unfriendly comparison, but that might not necessarily affect the dark comedy and statement of the publicized product/goods or have that as its overall effect.

(3) The mode/method of advertising – is the balancing by and large truthful or does it falsely belittle or downgrade a rival product/goods? While truthful disparagement is permissible, untruthful disparagement is not legitimate.

KEY TAKEAWAYS:

- There should be more awareness about the grievance system.[79]
- Many times people do not report about misleading advertisements.[80]
- Most of the time after complaining people don't get the compensation back.

CONCLUSION:

The aim to understand the topic "Misleading Advertisement" was to focus on the claims made by brands, misrepresentation made by the product manufacturer, to understand the aspects of false advertisement. Henceforth, all this leads to affecting the relationship of sellers and customers because if a poor quality goods are sent to consumers then the next time the consumer will not trust that particular brand unless or until they return or refund the product. The manuscript wants the reader to be aware of the various sites in order to be worldly about

[78] 2003 (27) PTC 305 DEL.
[79] https://www.rbi.org.in/scripts/FS_Notification.aspx?Id=12017&fn=2745&Mode=0 (last visited on APRIL 13, 2022)
[80] https://consumeraffairs.nic.in/en/more/misleading-advertisements (last visited on APRIL 13, 2022)

the mechanism provided by government or by procedure established by law. As society wants its citizens to walk on the path of genuinely. The laws which are created for the protection of the consumers or for its citizens are a source of light which will protect against the prejudice and unfair trade practices.

It's our duty to be aware of all our rights, to make others think about their rights, to step ahead and to boost up the voice against the wrong. Don't suffer in silence, make some noise to get rights.

JUDICIAL SUPPORT FOR CONSUMERS

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A consumer purchases goods and services for personal use or possession rather than resale or use in manufacturing and production. Consumer advocacy by non-profit organizations and individuals can also be considered a form of consumer protection. A consumer makes a purchase decision in a store or is influenced by advertising and marketing. When someone enters a store and purchases anything, they make a consumer decision.

CONSUMER'S RESPONSIBILITIES

Consumer protection encompasses not just the rights of customers but also their obligations. Some of them are listed below:

1) Advertisements have become an inextricable part of our life, and we cannot avoid them no matter how hard we try. Companies are attempting to promote their products by creating appealing audiovisuals, releasing only the parts that are likely to catch the attention, and concealing other critical information, among other things. Therefore, consumers should be wary of fraudulent marketing.
2) Numerous products have been certified as safe to ingest and high-quality by recognized organizations. The Indian Standard Institute (ISI), for example, conducts quality testing on a variety of consumer goods. If the product is confirmed to be in good condition, it is labeled with the ISI mark. The AGMARK seal ensures the quality of a wide range of food

products, and the same should be used to identify products. In addition, consumers must check the expiration date before buying food or pharmaceuticals.

3) After purchasing goods or services, consumers must request a purchase bill as the bill serves as proof of purchase and can be used to seek redress if the customer feels defrauded after purchasing the item. In addition, because the vendor needs to include the tax amount on the bill, the buyer ensures that the government gets tax on the product through the account. Such behavior on the consumer qualifies them as a responsible citizen of the country.
4) One must purchase items that do not pollute the environment as a consumer. People should utilize biodegradable materials that are disposable on land and water. Similarly, individuals should use power, gas, and other resources wisely. Consumers also cause automobile pollution in towns and cities. They should use the public transport system and drive eco-friendly vehicles.
5) Consumers can band together to meet necessities such as drinking water, health, and education for themselves and the community in a town or village.

Consumer protection law, also referred to as consumer law, is a subdivision of the law that governs private law relations between individuals and the businesses that provide them with goods and services. Consumer protection includes product liability, privacy rights, unfair business practices, fraud, misrepresentation, and another consumer/company interactions. In addition, it is a means of avoiding service and sales contract fraud, eligibility fraud, bill collector regulation, pricing, utility shutoffs, consolidation, and personal loans that may result in bankruptcy. Some argue that, given the intricacies of tax law, consumer law is a better option to engage in Large-scale redistribution is preferable to tax law because it does not necessitate legislation and could be more efficient.

BRAZIL

Consumer protection in Brazil is governed by the Consumer Defence Code enacted by the Brazilian Constitution in 1988. "The offer and presentation of products or services must ensure correct, clear, accurate, and visible information in the Portuguese language about their characteristics, qualities, quantity, composition, price, guarantee, validity, and origin, among other data, as well as the risks they pose to consumers' health and safety," according to Brazilian law. In Brazil, the consumer is not expected to display proof that the defender is at fault. Instead, the defence must present evidence demonstrating their innocence. In the case of Brazil,

they define a customer, a supplier, a product, and a service so that consumers are protected from international trade rules and the negligence and misconduct of foreign suppliers.

AUSTRALIA

The Australian Competition and Consumer Commission or individual State Consumer Affairs departments are the corresponding agencies in Australia. In addition, the Australian Securities and Investments Commission, which is in charge of consumer protection, regulates financial services and products. However, it is done through privately run EDR programs like the Financial Ombudsman Service (Australia).

GERMANY

As a member of the European Union, Germany is governed by the EU's consumer protection rules; EU regulations may directly impact inhabitants. A federal cabinet minister oversees consumer rights and protection. Steffi Lemke is a member of Olaf Scholz's current cabinet.

TAIWAN

The European civil law systems, mainly German and Swiss law, have significantly influenced modern Taiwanese law. General Principles, Obligations, Rights over Things, Family, and Succession are the five books that makeup Taiwan's Civil Code. Before the CPL's introduction, the second book of the Code, the Book of Obligations, served as the foundation for consumer product liability cases. The Consumer Protection Law (CPL) in Taiwan, which was promulgated on January 11, 1994, and went into effect on January 13, 1993, protects the interests and safety of customers who use company operators' products or services. The Executive Yuan's Consumer Protection Commission acts as an ombudsman, supervising, coordinating, reporting any harmful products/services, and reviewing the legislation regularly. According to a 1997 critical study by the Pacific Rim Law & Policy Association and the American Chamber of Commerce, "although many agree that the CPL's intent is fair, the CPL's various problems, such as ambiguous terminology, favouritism toward consumer protection groups, and the compensation liability defence, must be addressed before the CPL becomes a truly effective piece of legislation that will protect consumers," the law has been criticized.

NIGERIA

The Nigerian government has a responsibility to safeguard its citizens from any harm to human health caused by the usage and purchase of daily necessities. In light of this, the Federal Competition and Consumer Protection Commission (FCCPC) was established by an Act of Parliament to promote and protect consumers' interests over all products and services. Its mission is to protect and enhance consumers' interests through information, education, and enforcement of consumer rights. In a nutshell, it has the authority to remove dangerous and substandard products from the market. In addition, provide prompt resolution to consumer complaints and petitions arising from fraud, unfair practices, and exploitation. The new Federal Competition and Consumer Protection Commission Bill, 2018, were signed into law by Nigerian President Muhammadu Buhari on February 5, 2019. As a result, the bill became Federal Republic of Nigeria legislation, binding on the entities and organizations listed in the Act. "This Act establishes the Federal Competition and Consumer Protection Commission and the Competition and Consumer Protection Tribunal for the promotion of competition in the Nigerian market at all levels by eliminating monopolies, prohibiting abuse of dominant market position, and penalizing other restrictive trade and business practices," according to the Act's long title. The Act also repealed the Nigerian Consumer Protection Council Act and handed the new Commission fundamental responsibility.

UNITED KINGDOM

The Consumer Protection Act 1987 and the Consumer Rights Act 2015 are the two most important consumer protection laws in the UK. Although the United Kingdom has left the European Union, it remains bound by European Union directives during the transition period (until the end of 2020). The allocation of tasks between the EU and the UK is described in detail. Domestic (UK) laws began as a subset of contract and tort law, but they are now growing as a distinct area of law thanks to the influence of EU law. When domestic law is an issue, the courts frequently consider the matter a tort, contract, restitution, or even criminal matter. Before 2014, consumer protection problems were handled by the Office of Fair Trading. The Competition and Markets Authority has been in charge of this since then.

INDIA

The Consumer Protection Act of 2019 in India specifies consumer protection. Separate Consumer Dispute Redress Forums have been established throughout India in every district under this law, where a consumer can register a complaint on a simple paper with a minimal court fee, and the Presiding Officer of the District Level would decide the protest. A complaint can be submitted by either a consumer of goods or services. An appeal to the State Consumer

Disputes Redress Commissions and the National Consumer Disputes Redress Commission could be made (NCDRC). Compared to the years-long period taken by the traditional Indian judiciary, the procedures in these tribunals are less formal and more people-friendly, and they also take less time to decide on a consumer dispute. Some state and national consumer forums have passed many beneficial decisions recently. The Indian Contract Act of 1872 establishes the conditions under which promises made by contracting parties are legally binding on each other. It also specifies the remedies accessible to the aggregate party if the other party breaks his promise. The Sale of Items Act of 1930 protects buyers if the goods they buy do not meet the express or implicit terms and warranties. The 1937 Agriculture Produce Act establishes grade criteria for agricultural and livestock products. It provides the conditions that regulate the usage of standards and the grading, marking, and packing of farm products. AGMARK-Agriculture Marketing is the quality mark established under the Act.

Other Legislations governing Consumer Protection in India include:

1. Agricultural Products (Grading and Marketing) Act, 1937
2. Industries (Development and Regulation) Act, 1951
3. The Essential Commodities Act, 1955
4. Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980
5. The Consumer Protection Rules, 1987
6. Bureau of Indian Standards (Recognition of Consumers‘ Associations) Rules, 1991
7. Consumer Welfare Fund Rules, 1992
8. Competition Act, 2002
9. The Consumer Protection Regulations, 2005
10. Right to Information Act, 2005
11. The Legal Metrology Act, 2009
12. Consumer Protection (Amendment) Bill, 2011
13. The Consumer Protection Bill, 2015

FALSE ADVERTISEMENT: FACT, FACTOID AND FICTION

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We can see that now we are constantly surrounded by end numbers of advertisements, even for the trivial products like biscuits and brushes. Whether we are walking on the roadway, reading the newspaper, or using any electronic media. Companies are competing for the attention of customers, and for that, they tend to falsify their products and service. In India, false advertising information is an offense that is generally ignored by manufacturers, sellers, or any agent. They tend to use misleading words and tactics to trick consumers into purchasing their products. Earlier, there was no specific law for False advertisement, but now the offense has been addressed in the Consumer Protection Act 2019, and harsh punishment is incorporated for the same.[81]. In this article, I have discussed what a false advertisement is? What is the cause of the trend of rising cases of false advertisement? Component and examples of false advertisement, what were the laws that dealt with a false advertisements before the enactment of consumer protection law 2019? Stand of consumer protection act 2019 on the false advertisement and some lacunas and a straightforward solution.

INTRODUCTION

[81] Consumer Protection Act 2019

In the modern digital era, the advertisement is the only powerful tool for the companies to persuade and compete for the attention of customers. With the passage of time cut throat competition among companies is growing at higher momentum. In our daily lives, we are surrounded by advertisements everywhere, whether it is through radio, television, mobile phone, or any other electronic media, newspaper, posters, wall writing, handbill, billboards, etc. Today advertising has captured all aspects of one's life, from toothpaste to biscuits, hospitals to beauty products. Companies are investing huge money in marketing their products.

As the companies are competing for customers, they are willing to do anything even though it is misrepresenting their product and service, which is a crime. They have generalized it. Marketers or advertisers use various market strategies to attract customers by misrepresenting the nature, characteristics, qualities, or geographic origin of goods, services, or commercial activities, and they also provide false claims. They hide the truth behind their product to earn profit.

Advertisements are meant to introduce the product and its original features to customers. But nowadays, we can see that most advertisements are designed to grasp the emotional aspect of the customer instead of introducing their product just to trick consumers into purchasing their product and service. Even though their products contain harmful substances, they convince customers to purchase them by concealing facts and promising that their product is suitable for their health, skin, etc. some advertisements also set unrealistic beauty standards that this particular size of the body or this skin tone colour is superior.

The customers are getting trapped and becoming prey to misleading advertisements. The trend of misleading ads is growing at a faster pace due to the compulsion of competition. The advertisement should entail full, accurate disclosure of information because customers expect to make an informed decision.

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the offense has been addressed in the Consumer Protection Act 2019, and harsh punishment is incorporated for the same.[82]. In this article, I have discussed what a false advertisement is? What is the cause of the trend of rising cases of false advertisement? Component and examples of false advertisement, what were the laws that dealt with a false advertisements before the enactment of consumer protection law 2019? Stand of consumer protection act 2019 on the false advertisement and some lacunas and a straightforward solution.

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[82] Consumer Protection Act 2019

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CAUSE OF THE TREND OF RISING FALSE ADVERTISEMENT

The dilemma of misleading and false advertisement arises from the compulsion of competition. Potential buyers are targeted by manufacturer, seller, and their agents to persuade them to purchase their products and service by means of describing the advantages of their products. Then to counterattack it, the rival seller quotes some unrealistic advantages to demonstrate their product is superior, and this is how companies choose to surpass each other. They start to state misleading facts to achieve their targeted sale.

MEANING OF FALSE ADVERTISEMENT

When companies provide misleading, deceptive, or false statements made intentionally or recklessly about their product and service while promoting in the advertisement, it tends to be known as false advertisement.

False advertisement is based upon deceit. The buyer is deceived and is compelled to purchase a product and service that he would not purchase if he was fully informed with respect to all relevant facts. An advertisement may be false because it states untrue facts, conceals material facts, or states only half truth. Advertisement is not limited to representation that only appears in advertising media. It also involves the way product is represented, the trade name used, the ingredient mentioned on the packaging, etc., the way in which the seller represents their product will also be counted in the advertisement. Section 89 of the Consumer Protection Act 2019 provide punishment for false and misleading advertisement in India.

COMPONENTS OF FALSE ADVERTISEMENT.

Fraud:

Fraudulent advertisements are designed to deceive consumers. There are many ways to create misconceptions about goods or services in the minds of consumers. Fraud plays a role in influencing consumer decisions; However, this role can be "positive," as false information tends to be more optimistic about the item or service being offered for sale than the original.

Falsity:

For example, misrepresentation refers to a discrepancy in claimed facts. for example, when a car manufacturer claims that the car's gas mileage is higher than it actually is. Or by claiming that by eating this particular food, one will become slim. It is difficult for advertising to exercise regulatory controls on many channels where the legality of advertisements is problematic.

Misleading:

Some advertisements make assumptions about a product that is untrue or about features of a product that do not exist. Deceptive advertisements influence consumer choice and the purchase process.

EXAMPLE OF FALSE ADVERTISEMENT

- Airtel: The Advertising Standards Council of India (ASCI) recently ordered Airtel to withdraw its advertisement for the 4G fastest internet challenge, calling it "misleading." Airtel, on its part, said that it had supplied technical data to support its advertising claims.
- Maggi: The advertisements claimed that the noodle is a healthy fast-food option for people, with samples of Maggi collected from different states found to contain monosodium glutamate (MSG) and lead in excess of the prescribed limits in instant noodles.
- Kellogg's cornflakes: Kellogg's Special K ad with the Food Safety and Standards Authority of India (FSSAI) was also under scrutiny for making false health claims. In the ad, the company claimed that people who ate low-fat Kellogg's for breakfast could lose weight because it only adds 114 calories to a person's diet.
- Fair and Lovely: The beauty product claims that by applying the skin tone, a person will grow fairer within four weeks, which is a false promise on the part of the company.

LAWS RELATED TO A FALSE ADVERTISEMENT BEFORE THE ENACTMENT OF THE CONSUMER PROTECTION ACT 2019

Earlier, there was no specific law in relation to false advertisement. False advertisement is not a new thing; it was always there. But as the world was marching towards digitalization and now that a large population has access to the internet, the trend of false advertisement is also growing at a faster pace. Now every $^{\text{second}}$ ad has something that we can mark as unjust and misleading.

Over time, as the competition intensified, for better acceptance and sales of their products, some advertisements began to mislead the audience. Various laws were enacted to check this form of misleading advertisements, such as the Drugs and Magic Remedies (Objectionable

Advertisements) Act 1954. However, the Act was quite old, relating to misleading advertisements and other issues that were being faced, and furthermore, the law did not recommend any heavy penalty or imprisonment.

According to the Monopolies and Restrictive Trade Practices Act, 1969, providing false information about goods and services was considered a part of "unfair trade practices." The Consumer Protection Act, 1986 provides that any false representation of goods or services shall be treated as unfair trade practice.

The Cable Television Networks Regulation Act and Rules, 1995 lacked any enforcement agency, and the Food Safety and Standards Act, 2006, mentioned deceptive advertisements but did not talk about corrective advertisements. Notwithstanding these above Acts, none of them talked about the deterrents or penalties to be imposed on the manufacturers or promoters of these misleading advertisements.

Therefore, a dire need was felt to implement the Consumer Protection Act, 2019, repealing the Consumer Protection Act, 1986.

CONSUMER PROTECTION ACT, 2019 PROVISIONS ON MISLEADING ADVERTISEMENTS.

1. **Section 2(28)**

   "Defines deceptive advertisements as an advertisement in relation to any product or service which: misrepresents such products or services or makes false guarantees about the nature, substance, quantity, or quality of such products or services or is likely to mislead consumers or it gives an express or implied representation that, if made by the manufacturer or seller, or service provider, would constitute an unfair trade practice or Intentionally hides essential information."[83]

2. **Section 16**

   Power of District Collector (by whatever name called) to inquire into complaints in respect of violation of rights of consumers on complaint or reference by the Commissioner of the Central Authority or Regional Office. On matters relating to violation of consumer rights, unfair trade practices, and false or misleading advertisements within his jurisdiction and submit his report to the Central Authority or

[83] The Consumer Protection Act, 2019 (35 of 2019) LexisNexis.

the Commissioner of the Regional Office, as the case may be.

3. **Section 17**

   Complaints to authorities relating to violation of consumer rights or unfair trade practices, or false or misleading advertisements which are prejudicial to the interests of consumers as a class may be forwarded, in writing or electronic mode, to any one of the authorities, namely, District Collector or Regional Office or Commissioner of the Central Authority.

4. **Section 18(1)(c)**

   Power of the Central Authority to ensure that no false or misleading advertisement of any goods or services is made which contravenes the provisions of this Act or the rules or regulations made thereunder, and Section 18(1)(d) ensures that no person takes part in the publication of false or misleading advertisements.

5. **Section 19(1)**

   The power of the Central Authority to investigate or to refer the matter to another regulator: whether after receiving any information or complaint or direction from the Central Government its own motion, conduct or cause to be preliminary inquiry any preliminary inquiry exists into the violation of consumer rights or any unfair trade practices or false or misleading advertisements by any person, which is prejudicial to the public interest or interests of consumers and if it is satisfied that a prima facie case exists, So this inquiry should be made by District-General or District Collector.

6. **Section 21**

   Powers to the Central Authority to issue directions and punishments against any false or misleading advertisements: Where the Central Authority is satisfied after inquiry that any advertisement is false or misleading and is prejudicial to the interest of any consumer or infringes on consumer rights, it may, by order, issue directions to the dealer or manufacturer or endorser or advertiser concerned. Is. or the publisher, as the case may be, to discontinue such advertisement or modify it in such manner and within the time specified in that order.

   The penalty is determined and the points that one should be kept in mind while imposing a penalty.

7. **Section 89**

Punishment for a false or misleading advertisement: Provided that any manufacturer or service provider who causes a false or misleading advertisement that is prejudicial to the interest of consumers shall be punished with imprisonment of either description for a term which may extend to two years and fine which may extend to ten lakh rupees; and for every subsequent offense, shall be punished with imprisonment for a term which may extend to five years and with fine which may extend to fifty lakh rupees.

LACUNA

Even though after all these laws, companies get away with false advertisements by various methods. For example, they use some phrases that mislead consumers, like "could" and "get up to" for example, they use a phrase like "get up to 50% off,"' and that could mean 0%. They phrase their advertisement just to attract customers' attention and later provide them with nothing. Most of the time, what they say is technically accurate but misleading.

Another good reason is It is because of a lack of knowledge/partial knowledge of consumers; consumers do not register complaints even after knowing the truth as they feel that they do not want to waste time, effort, and money. Companies often write caution/warning or other helpful information in lowercase letters. Words in advertisements that are unable to be read by the consumer and hence saved in accordance with the law etc.

Under the Consumer Protection Act, even governments (states, governments, and Central government) can file complaints on behalf of the consumers, but here again, the consumer department cases hardly have the necessary infrastructure for such work. So, Complaints of false and misleading advertisements filed before Consumer courts today are filed mainly by people who are directly affected by such advertisements and have suffered financial loss. In fact, if you look at matters relating to Deceptive advertising—whether decided by consumer court it is clear that only those who filed the suit got relief, even though the advertisement must have influenced a large number of people.

CONCLUSION

Despite many laws to curb false and misleading advertisements and protect the consumer interest, consumers keep falling prey to such advertisements due to (a) poor enforcement of laws and (b) deficiencies or inadequacies in existing laws. There are end numbers of laws to deal with false advertisement, but these laws are often so complex for people that they do not consider filing a case for misleading advertisement and wasting their money and time over such things. We all know it takes years to solve cases, and the affected group is often ordinary

people. That's why they do not want to mess with big companies. There should be some small authenticate organization with experts, where consumers can file cases easily, even for the pettiest complaints. And the experts would take the matter to court and argue by their name.

STUDY OF CONSUMER PROTECTION ACT, 2019: IN CONTEXT OF E-CONSUMERS

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ABSTRACT

Electronic commerce in India has grown by leaps and bounds, it has greatly empowered the Indian consumers to access the international market to buy the products of their choice; this amplified scope for purchase of products through e-commerce websites has changed the consumer preferences from traditional offline shopping to modern online shopping. This research aims to study the current Indian legal framework that protects online consumers' interests, consumer rights, and the redressal mechanism.

"I dream of a Digital India where access to Information knows no barriers. I dream of a Digital India where the netizen is an Empowered Citizen"

–Narendra Modi

Keywords: consumers, consumer rights, e-commerce, online shopping, redressal mechanism, Consumer Protection Act, 2019

STATEMENT OF PROBLEM

1. While doing online shopping there is a high risk of quality issues of the product or services, the redressal of the same is tricky. Consumers are not aware of the institute, where they can go to file a complaint.
2. Consumers are not aware of their rights which are provided under the Act.
3. Online shopping is a boon for many consumers but not all, as still many consumers do not think that e-commerce is safe and is properly regulated.

RESEARCH HYPOTHESIS

The new Consumer Protection Act, of 2019 looks promising with a strong intent of protecting e-consumers as well.

RESEARCH OBJECTIVE

1. To study the new law.
2. To analyze the e-commerce industry in India and its regulatory framework.

3. To analyze the redressal mechanism available under the Act for the consumers.
4. To analyze the rights of consumers.

INTRODUCTION

The Consumer Protection Act, 2019

Consumers buy a variety of goods and services in their daily routine, whatever they buy they pay for it and enjoy the satisfaction from the consumption and use of such goods and services. But sometimes the situation may arise when the customers do not feel satisfied with the consumption of such product. This may be because of many reasons such as poor quality of the product, overcharging by the shopkeeper, lower quantity of contents, misleading advertisement, etc. so to avoid such malpractices the concept of consumer protection takes birth. The concept of Consumer protection refers to safeguarding the interest and rights of the consumers, it refers to the measures which can be implemented for the protection of consumers from dishonest, immoral, and unethical malpractices by the business and to provide them speedy redressal of their grievances.

The Consumer Protection Act is one of the main laws that protect consumers in India. The Consumer Protection Act, of 1986 was the first Act to protect the interest of the customers but is repealed after three decades by the Consumer Protection Act, of 2019. The new Consumer Protection Act, of 2019 has been enacted to widen the scope of consumer rights and also includes the new and emerging field of digitization i.e., e-commerce, direct selling, teleshopping, and other multi-levels of marketing. This new Act came into force on 20th July 2020 (while certain other provisions of the Act like establishing the Central Consumer Protection Authority came into effect on 24 July 2020.) to revamp the settlement and administration process by imposing stricter penalties. In the case of ***Om Prakash vs. Reliance General Insurance and Anr.***[84] of the Hon'ble Supreme Court of India inter-alia observed that it needs no emphasis that the Consumer Protection Act aims at providing better protection of the interest of consumers.

E-Commerce

Ecommerce (electronic commerce) states to all the online activities that include the buying and selling of products and services by the customers. In other words, it can be expressed as a

[84] Civil Appeal No. 15611 OF 2017, (Arising out of SLP (C) No.742 of 2015) Judgement dated October 4, 2017, Civil Appellate Jurisdiction, available at https://lawtimesjournal.in/om-prakash-vs-reliance-general-insuarance (last visited on 20th March 2022)

process for conducting transactions virtually, for example whenever a customer goes to any online retailer to buy any product/ service, he/she is engaging in e-commerce. The Department of Industrial Policy and Promotion (DIPP) in its Guidelines for Foreign Direct Investment (FDI) on E-commerce defines E-commerce as "E-commerce means buying and selling of goods and services including digital products over the digital and electronic network"[85]. E-commerce has changed the way consumers shop in India, with the help of increasing use of the Internet and smartphones, a rise in digital literacy, and the government's digital push. The Indian e-commerce market is expected to grow by 21.5% and hit $74.8 billion in 2022, according to Global Data, a data and analytics company.[86]

This increased use of e-commerce makes Indian consumers comfortable buying non-essential products (such as clothes and electronics) as well as essential products (such as groceries etc.) online. Blinkit (formerly Grofers) and BigBasket are the major e-commerce players for the essential products, while Amazon and Flipkart are also making their mark as major e-commerce players.

TYPES OF BUSINESS MODELS UNDER E-COMMERCE:

Before understanding the law governing the e-commerce in India, let's first understand the different types Of Business Models under E-Commerce:

The most commons business models facilitated by e-commerce in India are as follows:

1. **Business to Business (B2B)**

B2B refers to the transactions between businesses to the business thereby allowing various businesses to build new relationships with other businesses such as between a manufacturer and a wholesaler, or between a wholesaler and a retailer.

2. Business to Consumer (B2C)

B2C refers to the activities or transactions of businesses serving end consumers with products and/or services.

[85] Department of Industrial Policy and Promotion, Ministry of Commerce and Industry: Guidelines for Foreign Direct Investment (FDI) on E-commerce, Press Note 3 (2016 Series).

[86] India's e-commerce market to grow by 21.5% in 2022: Global Data, *The Economics Times* Jan 21, 2022, available at https://economictimes.indiatimes.com/tech/technology/indias-ecommerce-market-to-grow-by-21-5-in-2022-globaldata/articleshow/89038696.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst last visited on 20th March 2022)

3. Consumer to Consumer (C2C)

C2C refers to the transactions between consumers through some third party. Usually, consumers have had dealings with other consumers as well, but only a few of those dealings were in a total true commercial sense.

4. Consumer to Business (C2B)

C2B refers to transactions between consumers who provide goods/services to business entities to create value for the business.

5. Business to Business to Consumer (B2B2C)

This is a substitute for the B2C model in which there is an extra intermediary business entity that helps the first business entity to transact with the end consumer. For instance, Amazon provides a stage for consumers to purchase a wide range of products.

REGULATORY FRAMEWORK:

After understanding the concept of e-commerce, let us move forward to understand the regulation which governs this sector in India. The regulation which governs this sector in India is very scattered, as there are no devoted e-commerce laws in India. Various ministries and departments of the government deal with the different facets of e-commerce in India. For instance, the Ministry of Electronics and Information Technology looks after the technical aspects of e-commerce, data privacy issues, etc through the Information Technology Act, 2000, etc. However, various Acts rule e-commerce activities, which are segmented into broad categories: Laws Governing E-Commerce, Sectorial and Regulatory Compliance, and other laws.

A. LAWS GOVERNING E-COMMERCE

A. 1. The Information Technology Act, 2000 ("IT Act")

Different provisions under the IT Act govern the working of e-commerce activities. **Section 84A** of the IT Act is one such, it states that Central Government may for the promotion of e-governance and e-commerce prescribes the modes and medium for encryption of the transaction. Provisions about data protection are contained in **Section 43A** of the IT Act. **Section 66A** of the IT Act imposes a penalty in case of theft of identity and provides that

whosoever dishonestly uses the password, identity of other shall be punished with imprisonment that may extend to 2 years or with a fine of INR 1,00,000/- or both.[87]

Further, e-commerce entities are also required to conform to the compliance of the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011. Intermediary websites and the content they display will govern by the Intermediary Rules 2011, under the IT Act.[88]

On 25 February 2021, the Ministry of Electronics and Information Technology (MeitY) notified the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 ("Rules") [89] in consultation with the Ministry of Information and Broadcasting.

A. 2. The Consumer Protection Act, 2019 and The Consumer Protection (E-Commerce) Rules, 2020

The Ministry of Consumer Affairs, Food, and Public Distribution has notified the Consumer Protection Act, 2019 (CPA 2019) with the Consumer Protection (E-Commerce) Rules, 2020 (also known as the E-Commerce Rules). The CPA 2019 includes major amendments to the previous 1986 Act, the new Act address unique and current issues that are very prevalent in this era of digitization and e-commerce. The E-Commerce Rules provide a roadmap through which the online marketing, sale, and purchase of goods and services can be regulated.

The E-Commerce Rules apply to (a) All goods and services (including digital products) transacted over an electronic/digital network; (b) All models of e-commerce, including marketplace and inventory models; (c) All e-commerce retail (including multi-brand and single-brand retail trading); and (d) All forms of unfair trade practices across all e-commerce models.[90]

Further, the Rules also provide for the provisions for nonapplicability i.e., The Rules do not apply to a natural person if:

(a) The activities are performed in a personal capacity, and (b) the activities are not part of

[87] Available at http://kanoon.nearlaw.com/2017/10/28/information-technology-act-2000/ (last visited on 20th March 2022)
[88] available at https://www.wipo.int/edocs/lexdocs/laws/en/in/in098en.pdf (last visited on 20th March 2022)
[89] available at https://www.meity.gov.in/writereaddata/files/Intermediary_Guidelines_and_Digital_Media_Ethics_Code_Rules-2021.pdf (last visited on 20th March 2022)
[90] Rule 2(1) of the Consumer Protection (E-Commerce) Rules, 2020

any professional or commercial activity that is carried out on a regular or systematic basis.[91]

B. SECTORIAL AND REGULATORY COMPLIANCE

B.1. Foreign Exchange Management (Non–Debt Instruments) Rules, 2019

E-Commerce entities with Foreign Direct Investment (FDI) are governed by the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019[92]. An E-commerce entity as per the rules means a company incorporated under the Companies Act 1956 of the Companies Act, 2013.

B.2. Legal Metrology Act, 2009

The Legal Metrology Act defines the definition of "E-commerce entity" as any company incorporated under the Companies Act, 1956 of the companies Act, 2013 or a foreign company covered under Section 2(42) of the Companies Act, 2013, or an office, branch or agency in India covered under Section 2(ii)(v) of the Foreign Exchange Management Act, 1999 owned or controlled by a person resident outside India and conducting e-commerce business.

Every e-commerce entity needs to conform to the standards concerning labeling and packaging as laid down under the Legal Metrology Act, 2009 (read with Legal Metrology (Packaged Commodity) Rules, 2011).

C. OTHER LAWS

C.1.The Indian Contract Act, 1872

In e-commerce transactions, e-contracts are started to be in practice as standard form agreements, these e-contracts are governed under the Indian Contract Act, 1872, for an e-contract to be valid, it must be (i) entered with the free consent of the parties to the contract; and (ii) there must be a lawful consideration for the contract. The Contract Act governs the conditions for validity of contracts formed through electronic means; communication and acceptance of proposals; additionally, revocation, and contract formation between consumers, sellers, and intermediaries.[93]

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[91] Proviso to Rule 2(1) of the Consumer Protection (E-Commerce) Rules, 2020

[92] Consolidated FDI Policy Circular of 2020, available at https://dpiit.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020_0.pdf (last visited on 20th March 2022)

[93] Mohd Aqib Aslam, Contract And E-Contract under English And Indian Laws Available at https://www.legalserviceindia.com/legal/article-2268-contract-and-e-contract-under-english-and-indian-laws.html (last visited on 20th March 2022)

C.2.The Sale of Goods Act, 1930

This Act regulates the sales and shipping policy of the entity. It also includes terms such as the warranties, conditions, and the transfer of property in goods are also outlined for regulating the sale of goods. Further, the policy must also contain the fact of the existence or non-existence of return/refund options[94].

C.3.The Competition Act, 2002

This Act identifies areas of the e-commerce which are likely to come within the scope of the competition issues, for instance, exclusive agreements between the online retailers and the sellers, deep discounts offered on the online platforms, platform neutrality, and platform parity clauses. Under the Act provisions for e-commerce platforms are also provided, section 3 provides for provisions for anti-competitive agreements and Section 4 provides for abuse of dominant position.

E-CONSUMERS IN INDIA

Electronic Commerce is defined "electronic commerce" as "the production, distribution, marketing, sale or delivery of goods and services by electronic means. An e-commerce transaction can be between enterprises, households, individuals, governments, and other public or private organizations."[95]. E-commerce has emerged as a major opportunity for India, as with the remarkable blowout of mobiles and the introduction of the 4G technology in the country, buyers from small towns and cities are also moving forward for buying online rather than offline. It is now a fact that the internet has erased the discrimination factor between the small and the big cities enabling buyers from small towns to have access to the same branded goods, and quality products which earlier was a privilege of large city buyers. As per ICUBE 2020 estimates, of the population of 1433 million individuals in India, 622 million individuals are active internet users, this translates to about 43% of the total population across urban and rural India having used the Internet at least once in the last one month.[96]

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[94] THE SALE OF GOODS ACT, 1930 available at https://legislative.gov.in/sites/default/files/A1930-3_0.pdf (last visited on 20th March 2022)

[95] https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfecom_e.htm#:~:text=Electronic%20commerce%2C%20or%20e%2Dcommerce,other%20public%20or%20private%20organizations (last visited on 20th March 2022)

[96] Internet Adoption in India, ICUBE 2020, available at https://images.assettype.com/afaqs/2021-06/b9a3220f-ae2f-43db-a0b4 (last visited on 20th March 2022)

The necessity to ensure that the basic rights of consumers for the welfare has long been recognized the world over and so with India also. To ensure with the United Nations Guidelines on Consumer Protection (UNGCP), India enacted the Consumer Protection Act in 1986 to protect consumer interests, which is now been replaced by the Consumer Protection Act, 2019. According to **Section 2(7) of the Act**, consumer means any person who-

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person but does not include a person who obtains such goods for resale or any commercial purpose; or

(ii) hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such service other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person, but does not include a person who avails of such service for any commercial purpose.

Explanation.–For this clause,–

a. the expression "commercial purpose" does not include use by a person of goods bought and used by him exclusively to earn his livelihood, using self-employment;

b. the expressions "buy any goods" and "hires or avails any services" include offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing.

In a landmark judgment Spicejet Limited v. Ranju Aery[97], consumers opting for online purchase of products through websites can file a consumer complaint before any consumer court for deficiency in services.

CONSUMER RIGHTS

[97] 2017 SCC OnLine NCDRC 739. Available at https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Landmark_Judgements.pdf (last visited on 20th March 2022)

The Consumer Protection Act, 2019 under Section 2(9) states some Consumer rights which include–

(i) The right to be protected against the marketing of goods, products, or services which are hazardous to life and property

In a case, *Dinesh B. Patel v. the State of Gujarat*[98] it was found that medicines were sold by M/s. Denis Chemical Lab. Ltd., Chhatral, Ta. Kalol, District Gandhinagar, while testing in the laboratory the medicines were found to have to contain fungus. It was held that for an offense done by the company the whole company and the people related to the company will be liable for it.

(ii) The right to be informed about the quality, quantity, potency, purity, standard, and price of goods, products, or services, as the case may be, to protect the consumer against unfair trade practices

In the case *Godfrey Phillips India Ltd. v. Ajay Kumar*[99] The complaint was regarding unfair trade practices against cigarette advertisement; the advertisement in question carried a photo of an action hero, a slogan, and a statutory warning. There was no plea in the complaint that the use of a photo of a hero and slogan suggested that smokers of cigarettes can act as a superhero; no detraction of statutory warning was alleged.

(iii) The right to be assured, wherever possible, access to a variety of goods, products, or services at competitive prices

(iv) The right to be heard and to be assured that consumer's interests will receive due consideration at appropriate fora

In a case, *Spicejet limited, Gurgaon v. Sanjay Rahar*[100]. A complaint was filed by the Complainant as Rs. 125/- was charged as transaction fees despite the DGCA circular which specifically directs that no airline should charge transaction fees and also it is Supreme Court ruling that no transaction fees should be charged.

(v) The right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers

[98] (2011) 11 SCC 125
[99] AIR 2008 SC 1828
[100] 2017 SCC OnLine NCDRC 810.

(vi) The right to consumer awareness.

In a case, *National Insurance Company Ltd. Vs. Hindustan Safety Glass Works Ltd. & Anr.*[17] the insurance company had refused to compensate the respondent because of damage caused due to heavy rain during the mentioned period. The Insurance Company admittedly denied relief to the insured based on one of the conditions of the policy which stated that National Insurance would not be liable for any loss or damage 12 months after the event of the loss or damage to the insured. The insured filed a complaint with the National Commission under the provisions of the Consumer Protection Act, 1986. The National Commission held that the claim made by the insured is actionable. It also observed that the goods were insured at the time of the incident and he asked for the claim the next day. It rejected all the contentions urged by National Insurance and ordered the insurance company to award an amount of Rs. 21, 05,803.89 with interest at 9% per annum.

THE CONSUMER REDRESSAL MECHANISM IN INDIA

The consumer redressal system is a type of system under which a consumer can file a complaint in a consumer court to demand justice whenever they are been created by the manufacturer or seller of any goods and/or services bought from them.

Under the Act, all the consumers are provided with some rights one such right is to seek redressal, whenever a consumer is not happy or satisfied with the goods and/or services he/she can go for the redressal of the same. The Consumer Protection Act, 2019 prescribes a three-tier quasi-judicial mechanism for redressal of any consumer disputes further; the Act also stipulates the pecuniary jurisdiction of each tier of consumer commission.

These quasi-judicial mechanisms are namely

- The District commissions,
- The State commissions and
- The National Consumer Disputes Redressal

District Consumer Protection Council

The State Government is empowered to establish in every District with effect from such date as it may specify in such notification, a District Consumer Protection Council to be known as the District Council. The District Council is an advisory council and consists of the Collector of the district, shall be the Chairperson, and such other official and non-official members

representing interests as may be prescribed under the Act. The District Forum exercises only Original Jurisdiction[101].

The main object of every District Council is enumerated under **Section 9** of the Act as to render advice on the promotion and protection of consumer rights under this Act within the district. Further, as per **section 34,** the District Commission shall have jurisdiction to entertain complaints where the value of the goods or services paid as consideration does not exceed one crore rupees

State Consumer Protection Councils

Every State Government is empowered to establish a State Consumer Protection Council for the State to be known as the State Council. The State Council is an advisory council and consists of the Minister-in-charge of Consumer Affairs in the State Government who is the Chairperson; such other official or non-official members representing interests as may be prescribed under the Consumer Protection Act, 2019 and such number of other official or non-official members, not exceeding ten, as may be nominated by the Central Government.

The State Commission shall exercise Original, Appellate, and Revisional jurisdiction. The main object of every State Council is enumerated under **Section 7** of the Act as to render advice on the promotion of the protection of consumer rights under this Act within the State.

Further, as per **Section 47** of the Act, the State Commission shall have jurisdiction to entertain complaints where the value of the goods or services paid as consideration, exceeds rupees one crore but does not exceed rupees ten crores[102].

National Consumer Disputes Redressal

Section 53 of the Consumer Protection Act, 2019 deals with the National Consumer Disputes Redressal Commission to be known as the National Commission. It consists of the President and four Members. The President of the Commission has to be a person, who is or has been a Judge of the Supreme Court and is entitled to salary and perquisites as available to him in the Supreme Court, the National Commission exercises three types of jurisdictions viz. Original, Appellate, and Revisional, according **to Section 58** of the Act[103]. The National Consumer

[101] BAGLA COMMITTEE REPORT, available at http://ncdrc.nic.in/baglacommittee.html (last visited on 21st March 2022)
[102] Available at .https://www.pib.gov.in/PressReleasePage.aspx?PRID=1786342#:~:text=State%20Commissions%20shall%20have%20jurisdiction,not%20exceed%202%20crore%20rupees. (last visited on 21st March 2022)
[103] *Supra* note, 18

Disputes Redressal Commissions will hear complaints where the dispute value is worth more than Rs. 10 crores. Any person, aggrieved by an order made by the National Commission, may prefer an appeal against such order to the Supreme Court within thirty days from the date of the order[104].

THE CENTRAL CONSUMER PROTECTION AUTHORITY (CCPA)

Section 10 of the Consumer Protection Act, 2019 authorizes the Central Government to create a Central Consumer Protection Authority which will be known as the Central Authority, whose work will be to regulate the matters relating to violation of rights of consumers, unfair trade practices, and false or misleading advertisements which are prejudicial to the interests of public and consumers and to promote, protect and enforce the rights of consumers as a class[105].

The Act also provides that the Authority will have wide powers of enforcement the Authority will also have an investigation wing, headed by a Director-General, which may conduct inquiries or investigations into consumer law violations.[106] The objective of the Central Consumer Protection Authority (CCPA) is to promote, protect and enforce the rights of the consumers as a class, it will be empowered to conduct investigations into violations of the consumer rights and institute complaints, order recalls of unsafe goods and services, order discontinuation of unfair trade practices and misleading advertisements, impose penalties on manufacturers/endorsers/publishers of misleading advertisements. The Authority has also been provided with widespread powers to **file class-action suits** if a consumer complaint affects more than a single individual. The Central Authority shall consist of a Chief Commissioner and several other Commissioners as may be prescribed, to be appointed by the Central Government to exercise the powers and discharge the functions under the Act.

CONCLUSION

104 https://www.indiacode.nic.in/showdata?actid=AC_CEN_21_44_00007_201935_1596441164903&sectionId=50035&sectionno=10&orderno=10 (last visited on 21st March 2022)

105 AMLEGALS, The Consumer Protection Act, 2019, 21st May 2020 available at https://www.mondaq.com/india/dodd-frank-consumer-protection-act/938040/the-consumer-protection-act-2019 (last visited on 21st March 2022)

106 Central Consumer Protection Authority established to promote, protect and enforce the rights of consumers; will function from Indian Institute of Public Administration premises 30 JUL 2020, available at https://pib.gov.in/PressReleasePage.aspx?PRID=1642422 (last visited on 21st March 2022)

The Consumer Protection Act, 2019 has been passed with the motive to update the Consumer Protection Act, 1986 which has been repealed. The object of both the acts remains the same, that is, the safeguard of the "Consumer" and his rights. This new Act has widened the scope of the rights of the consumers, the nexus of goods and services as well as the modes of availing such goods and services. It has amended the legislation with the changing needs in the e-commerce industry as well as the digitization of the marketplace that the consumer is now open to. The astonishing growth of e-commerce has greatly influenced the way business is being carried out in today's generation. Apart from the new opportunities which this e-commerce industry had created, it has also given birth to numerous concerns and challenges which both the businesses and the consumers face.

The amended Act of 2019 has also put in place a proper structure for the implementation of its provisions and has put in place a much for accessible and categorical grievance redressal mechanism which is proven to provide for a generous amount of safeguards against the abuse or exploitation of the provisions of the Act.

The Act is another step toward the modernization of the dated legislations of our Democracy by the implementation of legislation that is better suited to the diverse and ever-changing socio-economic magnitudes of the modern world that could not have been predicted, by any stretch of the imagination by the drafters of these dated legislations. Consumers involving in e-commerce should be afforded adequate and transparent information about the business, products being sold, and the entire transaction details. Consumer education and awareness about the use of e-commerce platforms should be enhanced through wide media publications. To build this trust, businesses carrying out e-commerce should provide internal mechanisms that can guarantee cheap and effective enforcement of consumer rights.

ARUNA RAMCHANDRA SHANBAUG V. UNION OF INDIA & ORS.

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Case Name	Aruna Ramchandra Shanbaug v. Union Of India & Ors.
Citation	(2011) 4 SCC 454
Court	Supreme Court of India
Judgment Date	March 7, 2011
Relevant Provisions	Constitution of India - Article 19, Article 21, Article 32, Article 226; Indian Penal Code, 1860 - Section 306, Section 309; Transplantation of Human Organs Act, 1994 - Section 2(d), Section 3(6); Swiss Criminal Code, 1937 - Article 115; Criminal Code, 1985 - Section 241(1)(b)
Bench Composition	• Justice Markandey Katju • Justice Gyan Sudha Mishra
Judgement	Passive Euthanasia legalised, guidelines established; Petitioner denied Euthanasia, Writ Petition dismissed.
Current Status	Valid

1) TIMELINE

- 1st December 2009 - Writ petition filed under Article 32 of the Constitution by Ms. Pinki Virani on behalf of Ms. Aruna Shanbaug in the Supreme Court of India, claiming to be the next friend.
- 7th December 2009 – Writ Petition registered by the court.
- 16th December 2009 - Notice issued by the Supreme Court to all the respondents in the petition.
- 5th April 2010 - Fresh notice issued to the unserved respondents (1,2 & 5) by way of dasti.
- 15th December 2010 - Respondent Nos. 3 & 4 filed a counter affidavit.
- 2nd March 2011 – Ms. Pinki Virani's applications for being appointed as the next friend of the petitioner and intervention were rejected.
- 7th March 2011 – Writ Petition dismissed.

2) RELEVANT FACTS

- Aruna Ramachandra Shanbaug was a nurse working at King Edward Memorial (KEM) Hospital, Mumbai.
- Ms. Shanbaug was sexually assaulted on the night of 27th November, 1973 by Sohanlal Bhartha Walmiki, a sweeper of the same hospital, while changing her clothes in the hospital Basement.

- During the brutal act, the accused twisted the chain around Ms. Shanbaug's neck which led to the deprivation of the oxygen supply to her brain pushing her into a Persistent Vegetative State(PVS).
- Her fiancée and close relatives abandoned her after a few years and it was the staff of the KEM hospital that had been taking care of Ms. Shanbaug ever since.
- It had been 36 years and there was no possibility of any improvement in the condition.
- It was prayed to direct the Respondents to stop feeding Ms. Shanbaug and let her die in peace.

3) ISSUE(S)

1) When a person is in a permanent vegetative state (PVS), should Passive Euthanasia i.e. withholding or withdrawal of life-sustaining therapies, be permissible or 'not unlawful'?
2) If the patient has previously expressed a wish not to have life-sustaining treatments in case of futile care or a PVS, should his / her wishes be respected when the situation arises?
3) In case a person has not previously expressed such a wish, if the family or next of kin makes a request to withhold or withdraw futile life-sustaining treatments, should their wishes be respected?
4) Who should take decisions on behalf of the petitioner, who is in a permanent vegetative state?

4) CONTENTION OF PARTIES, DELIBERATIONS, AND JUDGEMENT

Appellants Contentions

1) That Aruna Ramachandra Shanbaug is in a permanent vegetative state (PVS), has no state of awareness and her brain is virtually dead, and it is only on account of mashed food which is put into her mouth that there is a facade of life which is totally devoid of any human element.
2) That she can neither see, nor hear anything nor can she express herself or communicate, in any manner whatsoever.
3) That her excreta and urine are discharged on the bed itself. Once in a while, she is cleaned up but in a short while again she goes back into the same sub-human condition.
4) That there is not the slightest possibility of any improvement in her condition and her body lies on the bed in the KEM Hospital, Mumbai like a dead animal, and this has been the position for the last 36 years.
5) That the prayer of the Petitioner is that the Respondents be directed to stop feeding Aruna, and let her die peacefully.

Respondents Contentions

1) That Aruna Ramchandra Shanbaug has the right to live in her present state.
2) That the state that Aruna Ramchandra Shanbaug is presently in does not justify terminating her life by withdrawing hydration/food/medical support.
3) That the aforesaid acts or series of acts and/or such omissions will be cruel, inhuman and intolerable.
4) That, in case hydration or food is withdrawn/withheld from Aruna Ramchandra Shanbaug, the efforts which have been put in by batches after batches of nurses of KEM Hospital for the last 37 years will be undermined.

5) That, in any event, these acts/omissions cannot be permitted at the instance of Ms. Pinky Virani who desires to be the next friend of Aruna Ramchandra Shanbaug without any locus.

Deliberations

1) The Court while delivering the judgment distinguished between active and passive euthanasia. It observed that causing the death of a person who is in a 'persistent vegetative state' with no chance of recovery, by withdrawing artificial life support is not a 'positive act of killing' which could be allowed considering the facts of each case. The withdrawal of life support by doctors is considered an omission & not a positive step to terminating life.
2) The Court opined that based on the doctors' report and the definition of 'brain death' under the **Transplantation of Human Organs Act**[107], Ms. Shanbaug was not brain dead. She could breathe without a support machine, had feelings and produced necessary stimuli. Though she is in a PVS, her condition has been stable. So, terminating her life was unjustified.
3) The Supreme Court had to deal with another issue & that was the constitutionality of **Section 309** of the **Indian Penal Code**[108]. It is a penal provision that provides punishment for an attempt to commit suicide. Bombay High Court struck down Section 309 of I.P.C and held that it was ultra-vires of Article 19 & 21. The court further opined that the "right to life includes the right to live as well as the right to end one's life if one so desires."
4) In **Airedale NHS Trust v. Bland**[109], the right to die was allowed through the withdrawal of life support systems including food and water. This case placed the authority to decide whether a case is fit or not for euthanasia in the hands of the Court.

Judgement

- The Court held that passive euthanasia is allowed under special circumstances and laid down guidelines prescribing the situation and procedure of administering passive euthanasia.
- Invoking the Parens Patriae principle (Latin for "parent of the nation", where the Court can step in and serve as a guardian) it held that the Court is the ultimate decider of what is best for the patient. It extended this power to the High Courts under Article 226 of the Constitution.
- By keeping all the important facts of the case in consideration, Aruna Ramachandra Shanbaug was denied euthanasia and thus, Ms. Virani's petition was declined. Court also opined that if at any time in the future, the hospital staff feels a need for the same, they can approach the High Court under the prescribed rules.
- With the result, the appeal is dismissed.

[107] Transplantation of Human Organs Act, 1994
[108] Indian Penal Code, 1860
[109] [1993] 1 All ER 821

5) ANALYSIS

Active and Passive Euthanasia:

To be able to adjudicate upon the aforementioned issues, the court distinguished between active and passive euthanasia. Active euthanasia is the use of some lethal substance or methods to kill a person. On the other hand, passive euthanasia entails stopping some medical treatment in the absence of which a person is likely to die. Passive euthanasia is further divided between voluntary and involuntary. When the consent from a patient is taken it becomes voluntary and in cases when a patient is not in a condition to provide consent and the decision on his/her behalf is taken by some other person, then it is involuntary.[110] This case deals with passive non-voluntary euthanasia.

The proponents of euthanasia criticize the "artificial and impractical" demarcation drawn by the court between active and passive euthanasia. The withdrawal of life support, a form of "passive" euthanasia, actually involves taking an "active" step to hasten the death of a terminally ill patient. Similarly, a physician administering a lethal dose of injection shouldn't be considered illegal or immoral as it allows the individual to die with dignity and shortens the suffering and grief of both the patient and the family. It also allows for channeling the resources of highly-skilled staff, equipment, hospital beds, and medications towards life-saving treatments for those in need.

Another argument that the court acknowledged was that this could be misused in a country like India. However, every right involves a risk of being abused but that doesn't mean that right itself should be denied by the people.

Ethical Perspective:

The ethical issue pertaining to euthanasia is broadly categorized into conservative and liberal.[111]

The conservatives argue that euthanasia is morally wrong because it is contrary to natural law, or against the commandments of God. It violates god's absolute dominion over human life. They appeal to the principle of 'sanctity of human life and say that the intentional termination of innocent human life is always immoral.

According to the liberal view, one can mention that liberals maintain that euthanasia is morally acceptable for the reason that it provides an end to the horrible pain and suffering of terminally ill patients. They argue that it is cruel and inhuman to refuse the plea of a terminally ill patient that his or her life be mercifully and peacefully ended to avoid further suffering and dignity.

In this judgement, we see that the Supreme Court takes a liberal standpoint to address the

[110] (2011) 4 SCC 454
[111] Satyanarayana, Y. V. (2010). Ethics:theory and practice.

ethical perspective of euthanasia while giving due acknowledgement to the conservative position in this regard.

Medical Ethics:
In this case, the consent of the petitioner could not be obtained and thus, the question as to who should decide on her behalf became more prominent. This was decided by beneficence. Beneficence entails acting in the best interest of the patient. This means following a course of action that is bona fide and in the best interest of the patient, and should not be biased or influenced by personal motives or convictions.

The patient's family that is the parents, spouse, close kin, or the "next friend" can make the decision, in the best interests of the patient, of the discontinuation of life support. However, this decision must be approved by an HC. Furthermore, the concept of 'living will' was also introduced in the Indian courts for the first time.

The mere legalisation of euthanasia could lead to widespread misuse of the provision and thus, the court looked at various jurisprudences to evolve with the safeguards and came up with guidelines to prevent abuse.

The guidelines:
India, with this judgement, became one of the few countries in the world to recognized Passive Euthanasia. The Supreme Court laid down guidelines for passive euthanasia which provided for the withdrawal of a life support system which can ultimately lead to a person's death. This verdict permitted passive euthanasia in certain special circumstances which will be decided by the High Court.

However, there are several loopholes in the execution of passive euthanasia. As per the guidelines, it has been made harder to give passive euthanasia an effect as now it involves the execution of the directive in presence of two witnesses, authentication by a Judicial Magistrate, permission from two Medical Boards and a jurisdictional collector. This tedious process not only extends the sufferings of the patient but also of the family and thus, defeats the main purpose of passive euthanasia and renders this judgment infructuous. However, if the process is made too liberal and easy to execute, it is always prone to great misuse.

Thus, we need some major reforms in this area of medical jurisprudence to make it more efficient and less cumbersome.

A Landmark Judgment:
There is no statutory provision in our country as to the legal procedure for withdrawing life support to a person in PVS or who is otherwise incompetent to take a decision in this connection. We agree with Mr. Andhyarujina that passive euthanasia should be permitted in our country in certain situations, and we disagree with the learned Attorney General that it should never be permitted. Hence, following the technique used in Vishakha's case

(supra), we are laying down the law in this connection which will continue to be the law until Parliament makes a law on the subject.[112]

This case marks the introduction of Passive Euthanasia to medical jurisprudence in India. It provides further clarification of the right to die with dignity within the ambit of the Right to Life and Liberty thus, enhancing the scope of Article 21 of the constitution[113]. It is the quintessence of the creative role of the judiciary to make laws regarding an issue that hadn't been legislated upon, by taking into account all the international conventions/laws on the same, as well as providing a safeguard against its misuse. Considering passive euthanasia goes against the religious and conservative values of the country, this judgement can be called progressive in the Indian context.

6) ADDITIONAL READING MATERIAL

https://www.thehindu.com/news/national/passive-euthanasia-is-arunas-gift-pinki-virani/article7220792.ece

https://indiankanoon.org/doc/235821/

[112] The Constitution of India, 1949
[113] (2011) 4 SCC 454

COPYRIGHT IN FOOD RECIPES: A DILEMMA

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There has been a lot of contemplation and speculation on whether food recipes fall within the subject matter of Copyright[114] and remains only partially answered.

Firstly, Indian and U.S.A. Copyright Act, 1957[115] and 1976[116] respectively provide that Copyright subsists in 'original' literary, dramatic, musical, and artistic works,[117] cinematographic films, sound recordings, and choreographic works, among others.[118] What is missing is the reference to food recipes, and it is restricted from the domain of copyright protection under the Idea-Expression dichotomy. Section 102(b) of the U.S. Copyright Act[119] and as Justice Farwell mentioned in Donoghue's v. Donoghue's case, "that ideas are not the subject matter of copyright, it was only confined to Expression and unless put to any tangible form, may not receive Copyright protection."[120] "Ideas, facts, methods, schemes, processes, and systems do not fall within the domain of copyright protection, and it was the form, manner, arrangement, and expression of an idea that received Copyright."[121]

Traditionally in U.S.A. and India, prior to the amendment (1909 Act), the subject matter of Copyright included "all writings of an author," which certainly means that the scope of protection was enormous as compared to the 1976 U.S. Act, where the scope is limited to only original works of the author. Therefore, the Fargo Mercantile case **w**as decided based on the prior definition.

where the Court decided that “recipes were more than mere advertisements, they were original compositions and served the purpose and must not be denied copyright protection.”[122]

[114] Section 13 of Copyright Act, 1957.
[115] Section 13 of the Indian Copyright Act, 1957.
[116] Section 17 of the Indian Copyright Act, 1957.
[117] Section 13(1)(a) &(b)&(c) of the Indian Copyright Act, 1957.
[118] 17 U.S.C. Section 102 of U.S. Copyright Act, 1976.
[119] 17 U.S.C. Section 102(b) of U.S. Copyright Act, 1976.
[120] Donoghue vs. Allied Newspaper Ltd (1937) 3 Ch. D. 503.
[121] R.G Anand vs. Delux Films A.I.R. 1978 SC 1613.
[122] Fargo Mercantile vs Brechet & Richter Co 295 F. 823 (8th Circuit).

The question of Recipe Copyright arose again in the Meredith Corporation case, where the Court applied the amended notion of original works under Section 102(b) of the U.S. Act. The Court did not rule out the possibility of recipe copyright but ruled that "mere listings of ingredients in recipes were ideas and facts which did not fit within the meaning of Original."[123] Originality in dishes could be met when accompanied by specific suggestions, advice, and presentations.

Further, a similar question arose in Barbour vs. Head, where the Court went a step further and stated that a Recipe may warrant Copyright protection if it was "accompanied by substantial literary expression in the form of explanations or directions or where there was a compilation of recipes like a cookbook and not mere listings of ingredients."[124] This decision aimed to enlarge the scope of Copyright in the recipe where the recipe was accompanied by literary expression or some kind of commentary in the form of suggestions or advice.

The Fargo Mercantile case produced its decision slightly based on the Sweat of the brow doctrine, which mitigates tests of originality and creativity to determine the constitution of the subject matter of Copyright and focuses more on the labor. Any work originating from the author[125] by virtue of his labor, capital, efforts, and due diligence would warrant copyright protection (including Facts) as mentioned by Peterson J in University of London press vs. University Tutorial Press Limited.[126]

In contrast, the Meredith Corporation case and the Barbour case were decided based on the Modicum of creativity doctrine, which was introduced by the Feist Publications Case, which emphasized "independent conception and a minimum degree of creativity."[127] As a ground to warrant copyright protection. Concerning compilations, the Court said there was a difference between creation and discovery where independent selection coordination and arrangement choices could be protected. However, mere copying of facts would be discovery and not creation.[128]

While the U.S.A. follows the Modicum of creativity doctrine, the Indian Supreme Court has not wholly negated an individual's efforts and labor. It has thus taken a midway approach, as

[123] Publications International Limited vs. Meredith Corp 88 F. 3d 473, 475 (7th Circuit).
[124] Barbour vs. Head 178 F. Supp 2d 758, 759 (2001).
[125] Walter v Lane [1900] A. C. 539.
[126] University of London press vs. University Tutorial Press Limited [1916] 2 Ch 610
[127] Feist Publications vs. Rural Telephone Service Company U.S. 340, 362 (1991).
[128] Feist Publications vs. Rural Telephone Service Company U.S. 340, 362 (1991).

expressed in the case of Eastern Book Company vs. DB Modak, where the Court applied a combined reading of both doctrines and stated that skill, judgment, minimum creativity, capital, and labor were all grounds to warrant Copyright protection.

Applying the above observations to the facts of our case, firstly, the facts do not expressly state that the renowned chefs performed the recipes to the viewers step by step. It only states that the chefs walked the viewers through their healthy dishes. Further, there was absolutely no literary expression of the recipe. Secondly, Tara hasn't infringed on broadcasters' reproduction rights under Section 37[129]She has not reproduced the show or attached any pictures or copied the script from the show. Instead, Tara has, among so many other recipes shown on the T.V. show which were already in the public domain, collated 12 such recipes which she found rewarding after trial and error by using her skill, judgment, capital, creativity, and labor posted pictures of them on Instagram and put them down in a cookbook as a compilation which proves literary expression, along with Tara's relationship with food which proves commentary, and her struggle with weight loss which proves suggestions and advice.

Thus, the conditions mentioned in the Barbour case were fulfilled, and thus Tara's book qualifies for Copyright protection in U.S.A. and India under original literary work.

Assuming that the show aired in U.S.A. and India, the question of territorial jurisdiction does not matter. The U.S.A. and India's stance on Copyright in Recipes are the same. In both jurisdictions, it has been established that recipes are mere listings of ingredients, and it is the compilation that is granted copyright protection and not the individual recipes.

In terms of morality and ethics, Tara should have provided credit for the inspiration she gained through the show under which she collated the recipes. However, that solely cannot be made a ground for infringement under the Right of Paternity.

Lastly, there are only specific ways in which a particular dish can be made; it is a common source and cannot be granted copyright protection, in my opinion. The dishes mentioned were already in the public domain by the show. If the renowned chefs wanted to prevent people from copying their recipes, they should've kept their ingredients and dishes a secret by virtue of Trade secrets.

[129] Section 37 of the Indian Copyright Act, 1957.

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