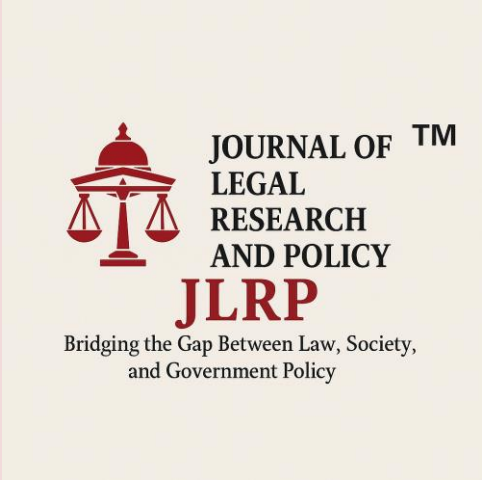

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The Role of Parliament in Promoting Peacebuilding in Ethiopia

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ABSTRACT

This conference paper examined the role of parliament in promoting peacebuilding and major causes of conflicts using qualitative research approach. Data is collected through document analysis and from the observed facts. The right to peace is not ensured by the government at all levels of administrative unities. Based on these premises, conflict and violence is common in Ethiopia and resulted in loss of human life, forced displacement and destruction of property. Conflict is inevitable, normal and even healthy or unhealthy part of people's relationships, particularly in the control of political power and resources like land. After all, two or more groups of people can't be expected to always agree on everything, so people need to change the way they understand and deal with the conflict. When conflict is mismanaged, not resolved, not prevented, and not transformed, we can't build any types of peace. Parliament have greater role in promoting peacebuilding through resolving grievances on time, reducing the repressive nature of the government, making clear separation of power to reduce the domination of the executive in the management of state affairs, realizing the resource based early warning and response mechanism at all levels of administrative unites to manage conflicts like political ethnic based, land ownership, and administrative boundaries. However, the involvements of Ethiopian parliament in such types of peacebuilding issues are very poor. The parliament should support all of the administrative units by enhancing synergies between the regional, zone, woreda and Keble councils/representatives. Furthermore, the parliament should provide the possible support to strengthening the formal and traditional mechanisms of peacebuilding.

Keywords: Parliament; Peacebuilding; Conflict; Ethiopia; Politics

1. INTRODUCTION

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Parliament is playing vital role in conflict prevention, resolution and management in different parts of the world. They are serving as venues where groups that have been fighting each other in the past now sit at the table and attempt to resolve their differences with words instead of bullets. Most importantly, parliament, where properly constituted and representative of the people, gives a stake to all citizens in the democratic process, and ultimately helps to consolidate peace (Draman, 2009). In the parliamentary democracy the essential role of the parliament is keeping an eye on the activities of the executive and holding the executive account on the behalf of the country's citizens (Tsekpo, and Hudson, 2009). In a democratic system, institutions can play a key role in resolving political crisis and bring sustainable peace. The parliament represents different people that have different interests and questions. Hence the parliament is one of the democratic institutions that help as bridge to bring together the people that have different interests and questions. The 1995 FDRE constitution is also granted this right to the Ethiopian parliament. However, in some countries, these institutions are strongly fused. For instance, in most African countries including Ethiopia, there are no independent democratic institutions as there is a tendency of interference of one institution in the affairs of the other. In Ethiopia, for more than four decades democratic institutions had been dominated by the king (Haile Selassie 1931-1974), and under the military government as well as under the rule of EPRDF it was dominated through executive organ. Underneath this condition it is difficult for parliament to function their constitutional responsibility (Solomon, 2023). According to the FDRE constitution that was adopted in 1995, The Ethiopian parliament, officially known as the Federal Parliamentary Assembly (FDRE constitution, 1995). It is responsible for making laws, overseeing the executive branch, and representing the interests of the Ethiopian people (Solomon, 2021). Based on this, Legal considerations play a crucial role in the functioning of the Ethiopian parliament. However, the Ethiopian parliament has been weak from the past to present. The formal functions of the Ethiopian parliament include representing the people in one of the most important institutions of national governance, scrutinizing the work of the executive, and taking measures to address government ineptitude where necessary; establishing and organizing different committees and other necessary structures of the House; approving or appointing government officials; and facilitating the conditions for members of parliament to meet with the electorate in their respective constituencies. In addition to its law making function, the House of People's Representatives (HoPR) approves general economic, social and development policies

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and strategies as well as fiscal and monetary policy of the country (Article 55/10); and approves and amends the federal budget and levies taxes and duties on revenue sources reserved to the Federal Government (Article 55/11). In fulfilling their representational duties, party rules stipulate that parliamentarians must interact with their constituencies at least twice a year so that they can consider voter concerns and preferences in the law and policy making process. In the final analysis, however, these ritual functions have been of little relevance in creating an effectively functioning parliamentary system of government, administration, scrutiny and engagement with the public. As a result, the country has to go a long way before 'deep democracy' takes root (Arjun, 2001).

2. METHODOLOGY

The analysis of this research is focused on secondary data sources on the role of Ethiopian parliament in peacebuilding. Various written documents are reviewed and employing an analysis of existing studies qualitatively. This study aims to investigate the role of Ethiopian parliaments in promoting peace building as the Ethiopian society is conflict ridden.

3. THEORETICAL FRAMEWORK

3.1. The Democratic Peace Theory

The democratic peace thesis, widely accepted among international relations theorists, posits that democracies rarely go to war with other democracies and, by extension, have non-violent methods of resolving internal disputes. Today, democracy is synonymous with peaceful conflict management. Conflicts occur in all societies but when managed peacefully, they can sometimes spark positive social and economic reforms. Societies are confronted daily with conflicts of all kinds, but only those societies that subscribe to the democratic ethos are able to manage conflictual situations within their borders and resolve them peacefully (Draman, 2009). This theoretical framework serves as a lens through which the researcher can examine the role of parliament in promoting peacebuilding.

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4. FINDINGS AND DISCUSSIONS

4.1. Sources of conflicts

Conflicts erode human progress and degrade the institutional infrastructure and capacity for sustainable peace and development. It disrupts commerce, learning and the provision of health services, and plunges people into poverty and destitution, with the most vulnerable and marginalized sections of society bearing the disproportionate burden of violent conflicts. Conflicts have many causes and kinds of causes for conflicts are the following: -

1. Repressive nature of government, the federal and regional governments do not create space for negotiation/dialogue for various interest groups like the Fanno Armed groups.

2. Government's negligence to resolve grievances on time. People with administrative grievance mostly take their own option to get solution to the problem and their final option is the use of force. Finding solutions to various public grievances is the role of parliaments/people's councils established at different levels. Parliaments provide an important venue where differences are getting resolved. In fact, in such situations, parliaments are able to substitute the resort to physical violence with dialogue, and the rule of force with the rule of law. Example: the land ownership grievance of the Amhara people in Metekele, and Raya Alamata area and other areas of Ethiopia are issues of administrative grievances which are taken as the major sources of conflict and violence.

3. Lack clear of separation of power: The Executive dominates the management of state affairs. In most fragile states, the Executive hides behind the cloak of "peacebuilding" to pursue policies that are dictatorial. These policies tend to take the country back to instability. The heavy hand of the Executive can be neutralized if parliament is strong and effective.

4. Natural resources: Conflict of resources scarcity relates to land and water rights.

5. The abuse of ethnicity by books, articles or any forms of paper writers for the benefit of producing their own publishable work without considering research and academic ethics. Political leaders also made speeches to promote ethnic hatred to achieve political goals. Such

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abuses prolong conflicts and create long term divisions and can reduce the effectiveness of peacebuilding efforts.

6. Limited Enabling Environment: Lack of the rule of law, access to basic services, lack of security and well-being.

4.2. The Role of Parliament in Promoting Peace Building

The constitution remits the HoF as the legislative governmental organ responsible for conflict mitigation. The House is responsible for issues relating to the rights of Nations, Nationalities and Peoples. It can decide on the right of self-determination, including the right to secession and it can identify solutions to disputes or misunderstandings. Based on Professor Nina Caspersen and Dr Gyda Sindre (2020), parliaments can have the following contribution or role in peace building

- Implementation of contentious legislation, such as truth commissions, national dialogue is championed by parliament
- Promoting Socio-Economic Equality among the communities
- Facilitating and supporting reconciliation and transitional justice: taking accountability on the wrong done today and in the past is important to work on poverty reduction to improve the living condition of citizens, using local custom based rituals, working for democratic elections are also important.
- Supporting the Justice Reform and reconciliation process: The base for peace is justice. Justice and reconciliation are critical for peace-building as a measure to transform conflict. Whatever policy action or methodology is adopted by government is informed by the imperative of how to balance the needs for different types of justice and reconciliation. Emerging practice suggests that legal accountability is conceived as an integral part of the reconciliation process, thus there can be no reconciliation without justice. Accordingly, parliamentarians need to work on the following issues:
- Making constitutional and legal reforms at the national and regional levels to consolidate peace, and democracy
- Ensuring impartial justice system
- Working for the improvement of the security sector

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- Strengthening the human right protection mechanisms like the human right commission and ombudsman
- Peace education: Working for the inclusion and provision of peace education in the formal education system: building social capital through the culture of peace necessitates the design and implementation of activities that generate knowledge, enhance leadership skills and inculcate attitudes that will allow people of all ages, and at all levels, to develop the behavioral changes that can education should incorporate the wider government policy on expanding access and improving quality of education. For peace education to optimize it positive role in building social capital, it needs to adopt a holistic approach that addresses multiple actors and multiple methods that link the wider policy environment to the local context and vice versa. Experience suggests that beyond the narrow objective of raising awareness, peace education should empower and encourage ownership of local initiatives which bring positive change in communities. For example, by focusing on community-based learning and learning in communities the capacity of Peace Clubs should be enhanced in various topics such as managing micro project of peace, reconciliation mechanisms, leadership, human rights, local governance (UNDP,2012).
- Supporting the local units to enhancing synergies between formal and traditional mechanisms on conflict prevention and peace-building: Considering these local communities and villages are resorting to traditional mechanisms for peace-building (Huyse and Salter,2008), there is need to explore policy options on how interpersonal and community-based practices can live side by side with state-organized forms of retributive justice.
- Making a law to enable the peacebuilding policy to resolve the current problem or grievances not the historical
- Creating and provide support to the Local Governance improvement program for the prevalence of peace: democratic institutions and good governance structures should be decentralized to promote inclusive politics and advocate for pluralism in a manner that contributes positively to nation building, and that links short-term intervention measures and long-term development perspectives, including dealing with root causes of the conflict, in particular poor governance. These institutions should focus on transformation

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of leadership (traditional and political) and society, through processes of developing a collective national vision that delivers more cohesive and responsive systems of governance from the national to the grassroots levels.

4.3. Direct Parliamentary Oversight of Government

There are a number of ways parliament can provide oversight to directly keep the government and public officials accountable. One of the most important tools at their disposal is the parliamentary oversight committee. Other tools include questioning Ministers on the floor of parliament at question time, conducting public hearings and inquiries, promoting the independent, adequate staffing of supreme audit institutions, anti-corruption commissions, and other specialized agencies. Another tool to support oversight is to promote a diverse media landscape, ensuring the protection of journalists, the support for freedom of information legislation and media accountability. Parliamentary oversight committees have the potential to contribute to conflict prevention by: (i) ensuring that the policies and actions of the government are responsive to public demand; and (ii) being aware of how their work reinforces the public's belief in the integrity of the government. Two types of committees essential for parliament to fulfill its oversight function and encourage peace and stability in conflict affected countries are: (a) specialized financial, or "money" committees which provide oversight of the budgetary process; and (b) parliamentary committees that provide oversight of the security sector so as to strengthen democratic control of the military, police services and intelligence sector.

4.4. Creating a more representative parliament

All people need to be represented whether they are living in the region of their ethnic group or not because parliament is a forum that utilizes dialogue and discussion to find workable solutions for problems within communities that satisfy, to a greater or lesser extent, all parties. Ultimately, a representative parliament is better able to contribute to peacebuilding by bringing together members from all groups in society who, through collaboration, begin to develop a common vision that accommodates the interests of all groups. As a constitutionally mandated institution, parliament provides a permanent forum where representatives from groups with divergent interests can come together and channel their actions to help shape legislation and policies. If

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each parliamentarian ensures that the legislature responds to the needs of her or his community, parliament can help stop communal discord from flaring into violent conflict.

4.5.Strengthening Parliamentary Oversight to Prevent Conflict

Parliament has the specific responsibility to exercise oversight of the executive in order to hold it and its agents accountable for their policies and actions. The important role of parliament in conflict-affected countries is even more pronounced since that that there is now a clearly established correlation between poverty and conflict. By addressing issues of poverty, equitable distribution of resources and economic development parliamentarians can attempt to guard against the creation of an environment that is prone to enabling conflict.

4.6.Building a Culture of Cooperation in Parliament

As a precondition for parliamentarians being able to conduct their business, members must respect parliament as an institution and exhibit a willingness to work together to solve common problems. For this reason, before seeking to conduct parliamentary business, whether on the floor of parliament or in committees, any potential animosities that exist need to be addressed. Only after parliamentarians from previously hostile factions reconcile to work together through the political process can they build relationships across party lines and beyond their original group allegiances. For parliament to exercise a leadership role in a broader reconciliation process, parliamentarians themselves need to be able to work together. Parliament must consider confidence-building measures between the governing party and the opposition. The level of confidence between different sides of parliament can be bolstered, for example, by ensuring transparency in decision-making, placing greater importance on the committee structure, and above all, ensuring that all parliamentarians participate in parliamentary business, rather than sidelining certain groups or members.

4.7. Committee Deliberations

Though there are a number of ways parliaments and parliamentarians are able to contribute to peacebuilding, the most notable is through the committee mechanism. There is no single model for the conduct of parliamentary committees. Some countries include the type of committee

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structure in their constitutions, whilst others have sectoral committees and other countries instigate ad hoc specialized public interest committees.

The decision-making process within committees lends itself to consensus decision making. This occurs when issues are brought up before the committee and are resolved through compromise. The committee system enables committee members to bring the specific concerns of their constituents to the decision-making process. In addition, the absence of the public and the media during private negotiations often makes it easier for parliamentarians to make compromises across party lines. This process helps parliamentarians to focus on the substance of the issues without having the pressure to perform in front of a broader audience.

Committees not only contribute to compromise and consensus building but also provide oversight of the executive by reviewing the budget and examining the conduct of ministers in both presidential and parliamentary systems. In order for committees to be effective, irrespective of the form of the committee structure, parliamentarians who are members of the committees and representatives of the people should be free to question any entity from government.

Parliamentary committees operate as effective peacebuilding models, particularly committees that are issue specific, as they ensure the conflict moves from a people centered approach to a debate about the issues. Furthermore, parliamentarians who have constituencies that are specifically concerned about certain issues, for instance rural communities or minority ethnic and religious groups, are able to bring their concerns to the table and ensure that a compromise solution is reached. In this way parliamentary representatives working in the committee structure are able to work towards satisfying the concerns of their constituents about issues that directly affect them. If the main concerns of all the groups with a vested interest are satisfied there will be no incentive for those groups to resort to violent conflict in order to have their interests met. Furthermore, a successful consensus outcome will act as an incentive for those same groups to continue using parliament as a means of resolving conflicting interests in future.

The size of the committee also has an impact on its effectiveness. Reaching a unanimous committee position across party lines on prospective legislation is far more influential than when a minority report is issued and, in general, the fewer the members on a committee, the easier it will be able to arrive at a consensus position.

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4.8. Legislative Development

Aside from providing a forum for the discussion of divergent views, parliament can assist the peacebuilding process by seeking to establish the legislative and institutional framework to help prevent further conflict. When given the opportunity, parliament should pass legislation that creates an environment assisting peacebuilding by encouraging a more accountable and informed system. This type of legislation is usually introduced by the executive, but an effective parliament can promote its introduction and, indeed, provoke it through effective political action.

4.9. Parliamentary Oversight of the Security Sector

It is well recognized as an international norm, having been included in the Warsaw Declaration and subsequent United Nations reports that in a functioning democracy a country's military must remain accountable to the democratically elected civilian government. From the perspective of conflict management, a security sector that does not operate to provide security for citizens in a legitimate fashion and is not democratically accountable is not only unable to prevent conflicts that occur but can also be a source of violence. Therefore, one of the most important tasks a parliament can perform is to assist the executive in its exercise of control over the security sector, thereby providing not just civilian control over the security sector but also democratic oversight, which can only be provided by the parliament as the direct representatives of the people. Oversight of the security sector has traditionally been vested with the executive, which has the ultimate responsibility for the proper operation of security institutions.

5. CREATING COOPERATION BETWEEN THE MEDIA AND PARLIAMENT

One segment of civil society that should be singled out for special attention is the media. The media plays a vital role in aiding parliament with its peacebuilding function. In particular, the media can muster public support or opposition to decisions made by parliament by disseminating information about the decisions made, such as the evidence parliamentarians considered when deliberating on issues, such as submissions from the community to parliamentary committees and testimony from representatives of relevant government departments, and the published reasons for the decisions. Furthermore, the media has the ability to act as a social barometer, channeling information to parliamentarians about public perception and opinion on the

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innumerable number of issues parliament must consider. In order to facilitate the media's important role in peacebuilding, parliamentarians should seek to create an environment in which the media sector can operate without undue interference. Parliament can assist the media in performing their vital functions by ensuring the availability of governmental and non-governmental information – or more precisely, parliament needs to ensure that the media has access to the information that is required in order to perform their function, as well as the freedom to report and discuss this information.

5.1. Experience sharing from other more democratic countries parliaments

By forging informal networks or participating in regional and international parliamentary associations, parliamentarians can have an impact on regional or international issues. Such forums or associations promote dialogue among parliamentarians from different countries and serve as an excellent peacebuilding and conflict prevention model, especially when disputes cross international boundaries. Parliamentary associations are uniquely qualified for this purpose, as those involved have specific knowledge about how parliaments work and the strengths and limitations of parliaments. Similarly, formal regional institutions promote dialogue, build confidence and facilitate learning between members of a region, while helping to mediate disputes and provide a neutral space for dialogue.

6. HOW DO PARLIAMENTS FORMALLY OPERATE IN RELATION TO PEACEBUILDING?

The role of parliaments in relation to peacebuilding does not stop once a peace agreement is implemented. Parliaments often play a role in formal policymaking in the areas of conflict resolution and peacebuilding, but this role depends on how they are organised. Parliaments can be organised in ways that ensure inclusiveness and enable and promote collaboration across conflict and cleavage lines. Parliamentary inclusivity is relevant in all post-conflict contexts, but the mechanisms designed to promote this differ significantly between the cases –between negotiated peace settlements and conflicts that ended in the victory of one side. Moreover, different types of inclusion are associated with different procedures and rules, and the issues at stake also differ. Below, we first examine the role of parliament in a deeply contentious area of policymaking: transitional justice. We then examine how parliamentary inclusivity is promoted

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in different post-conflict cases; when it comes to representation, decision-making rules, and parliamentary committee work. If effective, such rules can turn parliaments into sites of national dialogue and help them move away from violence. We examine the formal operation of parliaments, and some of the tensions this engenders, in relation to the inclusion of former combatants, marginalized communities and the main identity groups.

6.1. Contentious Policymaking

Parliaments can be a site for formal policy making in the areas of conflict resolution and peacebuilding. However, the establishment of committees to work specifically in the more contentious policy areas such as reconciliation, transitional justice, and human rights courts remains highly contested. As discussed above, although peace agreements stipulate the establishment of transitional justice mechanisms, parliaments often block or halt legislation that enables these mechanisms to be put in place.

6.2. Integrating Former Combatants

Another important function of post-war parliaments is the integration of former combatants. This is vital for successful peacebuilding, yet often a source of disputes and tensions. Parliaments are important as sites for collaboration across divides and between former enemies to reach an agreement.

6.3. Inclusivity Across the Main Conflict Cleavage

Perhaps the biggest challenge is to ensure inclusiveness of the main identity groups. Mechanisms for ensuring this are often at the heart of peace agreements signed in intra-state conflicts. However, the mechanisms vary significantly from case to case, depending on the specific conflict dynamics and the way the armed conflict ended. Below we will outline the main mechanisms, while the following section will examine examples of both positive and negative impacts on peacebuilding resulting from such inclusiveness. In power-sharing systems, parliaments play a vital role in minority representation and protection. Power sharing parliaments are typically elected through proportional representation (PR) systems and inclusive legislation is ensured through forms of minority vetoes.

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Inclusivity means that parliamentary committees can serve as a forum for inter-communal dialogue, although also sometimes conflict. Compromise tends to be easier when the focus is not on core conflict issues, but such collaborations can pave the way for compromise on more sensitive issues. Most committees in the Northern Ireland Assembly are statutory committees linked to government departments. While these are not directly tasked with peacebuilding, some will focus on issues of importance for this such as Education and Justice. The Committee for the Office of the First Minister and Deputy First Minister (OFMdFM) occasionally focuses more directly on peacebuilding work. For example, it launched an inquiry into the strategy for good relations and reconciliation in Northern Ireland: Together: Building a United Community (TBUC), which was published in 2005 (Potter 2014). Some ad hoc committees have also been set up to focus on aspects of the peace agreement, including the Ad Hoc Committee on a Bill of Rights. This bill of rights was mentioned in the Belfast Agreement but has still not been created (Potter 2020). Due to minority veto provisions and the need for power-sharing governments to bring their communities with them in compromise, parliaments in these systems often become a site of national dialogue, whether formally or informally. This can be highly conflictual, and result in deadlocks, but can also promote cross-communal collaboration. This will be further explored below. While formal inclusivity may be required as part of a peace settlement, inclusivity in parliamentary committees and inter-party collaboration is expected to be at least as important in contexts where the war ended with military victory and no peace agreement has been put in place. In the absence of a peace process, parliament has the potential to become a site for negotiation and interaction. In Sri Lanka, there are long traditions of ensuring formal inclusion in committees across ethnic cleavage barriers that persist within the party system. Such inter-party collaboration, especially across ethnic lines, has become especially important in the absence of a peace agreement and is seen as a way to secure legitimacy for specific legislation and to address minority parties' demands for representation in the policymaking process. However, as discussed below, such formal inclusion and cross-party collaboration is more likely to produce positive outcomes in relation to less contentious policy areas that are directly linked to the conflict. Supporters, spoilers or sidelines: the role of parliaments in peacebuilding. The extent to which parliament fulfils its role as opposition to the executive – and thereby can keep the executive in check – is also central to the formal function of parliament. Yet, assessing the relative role of parliament vis-à-vis the executive is not straightforward. In Sri Lanka following

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the 2015 election, to rein in the opposition, President Sirisena sought to create a unity government inviting the main Tamil party, the Tamil National Alliance, to join. Although the TNA formally supported opposition candidate Sirisena's peace platform ahead of the 2015 election as well as his wider reform policies, the TNA decided not to join the unity government, deciding the party would instead remain in opposition until a political solution had been found that addressed the national question. Ultimately, parliament has become the main arena for seeking minority representation and importantly minority influence. Even though the party held allow number of parliamentary seats (16 out of 225), the TNA leader, Sampanthan was chosen as the Leader of the opposition and the TNA emerged as the main opposition party (Sindre 2019). Sri Lanka's parliament became a site for a national dialogue much like Northern Ireland, despite the former not having a formal peace process. Ultimately, what these cases highlight is that inclusiveness in post-conflict parliaments plays an important role in peacebuilding: it provides a voice to those who would otherwise feel excluded, ensures a level of protection for minority groups and moves conflicts away from the battlefield and into the political realm. However, the latter function also points to the possibility of tensions and disillusionment if expectations of change are not met. This is especially likely when it comes to the integration of former armed groups. In addition, as some of the case studies highlight, due to the inherently political nature of parliaments, inclusive peace processes and well-articulated agreements that ensure gender quotas and women's representation may not be taken on board by MPs. Due to this inclusivity, which is often ensured through specific provisions in peace agreements, parliaments can become a forum for national dialogues and negotiation of hotly contested issues. Providing an opportunity for these issues to be debated is clearly important, but as the case studies suggest, reaching agreement on core conflict issues remains a huge challenge that many post-conflict parliaments will not be willing or able to rise to. We see this again when we look at how parliaments govern.

7. FOLLOW-UP AND SUPPORT TO RECONCILIATION PROCESS FOR PEACEBUILDING

Even if the process of reconciliation needs to be free from the intervention of political actors, parliamentarians should provide positive support for the successfulness of reconciliation. In long-running inter-group/inter-ethnic conflicts, after successful negotiation, peacebuilding and reconciliation is necessary to prevent a return to the conflict. In this practice of peacebuilding,

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disputants/communities who are in conflict begin to heal and to rebuild relationships, slowly putting their society back together. Kriesberg (1998:322) suggests there are four aspects of reconciliation for peace:

• Truth (coming to acknowledge there is some merit to the other side's interpretation of events like conflict and violence),

• Justice (gaining redress as a means of putting the past to rest and learning from the past not to return to unjust practices),

• Regard (forgiveness on the part of victims), and

• Security (expectations of peaceful coexistence).

8. CONCLUSION AND RECOMMENDATIONS

It is obvious that parliament can contribute to peacebuilding using various mechanisms like continuous policy making for peace, working to integrate combatants, reducing repressive nature of government, by making the executive and parliamentarians accountable to their action and decision. Parliaments also have a vital role to play in peacebuilding just by addressing contentious issues of conflict and relationship problems and by helping to equality and justice among all groups of people, development, and rule of law. The ethnic based established government creates unjust relationships and treatments among the Ethiopian people. Thus, parliaments have the responsibility to improve the laws and regional constitutions for the quall treatment of all people. The parliament should work together and cooperatively using and initiating essential peacebuilding projects to prevent, manage, resolve and transform conflict at the local level. This study suggested that why most members of the Ethiopian parliament are supporter of the political agenda of the ruling party even in the time of national peace and security crisis.

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Significance Of New Criminal Laws in Today's India – An Analysis

By: Pradipta Nath, Independent Researcher

INTRODUCTION

The new criminal laws will come into effect from 1st July 2024. The earlier laws namely Indian Penal Code, Code of Criminal Procedure and the India Evidence Act remind us about the British era and their imposed laws on us. New India while showing its leadership skills in the world, it also needs to have its own law which tallied with its culture and vision. In this article I have tried to furnish the main features of the new criminal laws and its significance with the 'India'. The new criminal laws will replace the erstwhile three criminal laws as furnished under: -

Sl. No.	Erstwhile Acts	New Replaced Acts of the erstwhile
1.	Indian Penal Code, 1860.	The Bharatiya Nyaya Sanhita, 2023.
2.	The Code of Criminal Procedure, 1973.	The Bharatiya Nagarik Suraksha Sanhita, 2023.
3.	The Indian Evidence Act, 1872.	The Bharatiya Sakshya Adhiniyam, 2023.

It is noteworthy to mention that while giving reply in the debate about these new criminal laws, the Home Minister gave reply that the new laws concentrate in giving justice rather than on imposing only punishment to the offender. The intent of the legislatures was to act on the principle 'Justice delayed is justice denied' and serve justice to the victim at proper time, which is within three years as per the new laws. However, the legislatures debated over bringing these three new criminal laws, but as per the record, it is found that these acts were debated in the house of people when 146 opposition Members of Parliament were on suspension (100 people from Lok Sabha & 46 people from Rajya Sabha)[1]. The three bills were passed with the least debate and without any hard time. There was hardly any scope of a good debate available for the opposition to provide feedback to the Government. In a democratic country the opposition plays an important role and without feedback no

[1] https://www.business-standard.com/india-news/new-criminal-laws-90-same-more-rigorous-than-colonial-ones-kapil-sibal-123122500736_1.html

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communication is successful or complete. This new criminal law has been passed as per the principle of 'Sovereign Command'. But never to forget that the criticisers of Austinian theory state that not all sovereign command can be termed as law. The big question lies is what if the public or the subjects disobey the laws. In a democratic government only the laws which are recognized and accepted by the maximum number of people may be termed as law, others are always subjected to contentious, litigations, protest or even strike. Laws which arise chaos or disobedience cannot be termed as laws. The 'scope of 'rule of law' in this regard that these are three new legislations are laws at present being received the assent from the President after following the due process. Unless the new criminal laws are declared as 'unconstitutional' by the Court of Highest Standard i.e. the Supreme Court of India it will be law and the people are bound to obey. There is every possibility that we will get a new era of Judicial Activism in this regard keeping in view of the recent trends of Judiciary to serve only the 'Constitution'.

Before moving into the significance of the new criminal laws it is indeed essential to draw out the various features of the three new legislations. Those are laid down as under: -

THE BHARATIYA SAKSHYA ADHINIYAM, 2023 (BSA)

1. The Bharatiya Sakshya Adhiniyam, 2023 replaces the Indian Evidence Act, 1972.

2. The BSA consists of 170 sections.

3. The legislatures have amended 23 sections, added 1 section and have repealed 5 sections in the new Act.

4. The legislatures have made changes in the new Act in the provisions related to 'Confessions', 'Relevancy of Facts', 'Burden of Proof'.

5. The new Act introduces admissibility of electronic or digital records as evidence.

6. The Act has expanded the scope of secondary evidence in the Court which now includes copies made from the original document by mechanical processes, counterpart of documents and establishment of oral accounts for documenting content.

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7. The legislatures wanted to bring unified rule for admitting evidence in the court of law. The section 2(2) of the Act, states that words which are not defined in this Act, but have been defined in the Information Technology Act, 2000, the Bharatiya Nagarik Suraksha Sanhita, 2023 shall have the same meaning as assigned to then in the said Act and Sanhitas.

8. Relevancy of Facts under the Bharatiya Sakshya Adhiniyam, 2023: - Chapter II of the Relevancy of Facts contains the provisions on evidence of facts in issue and relevant facts, relevancy of facts forming part of the same transaction, motive, preparation and previous or subsequent conduct, facts necessary to explain or introduce fact in issue or relevant facts. The substance of these provisions are more or less remains same.

9. The noteworthy changes have been noted with regards to the section 12 of the Indian Evidence Act, 1972 dealing with the determination of damages. The substance of the section remains unchanged, but its language has been modified a bit in section 10 of the BSA, 2023. Similarly, provisions concerning admissions including illustrations have been dealt with minor alterations. For example, section 16 of the BSA, addressing of admission of the party or his agent. Previously this provision was covered in section 18 of the Indian Evidence Act, dealing with admission by party to proceeding or his agent, by suitor in representative character. Although the section has been modified, the substance of the provision is mostly identical.

10. Section 22A of the Indian Evidence Act regarding when oral admission as to contents of electronic records are relevant has been excluded from the BSA.

11. Regarding confession a substantial modification is evident in section 24 of the Indian Evidence Act. It previously stated that confession made by an accused person is irrelevant in criminal proceeding, if the making of the confusion appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person. However, in section 22 of the BSA, 2023, while preserving the essence of the former section two provisions previously contained in section 28 and 29 of the Act, 1972 are now included in the provisos of the section 22 of the BSA, 2023. These provisos allow for certain type of confessions to be relevant in the court of law. The first proviso found in section 28 of the Indian Evidence Act. It stipulates that confession can a confession can be deemed relevant if as per the opinion of the Court threat, coercion, inducement has been fully removed. The second proviso originally contained in section 29 of the Act, 1972. It states that

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a confession does not become irrelevant merely it was made under a promise of secrecy or in consequence of a deception practiced on the accused person for obtaining confession or when the accused person was drunk or because it was made in answer to questions which he need not to have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

12. Section 25 and 26 of the Indian Evidence Act, address confessions made to a police officer have been consolidated in section 23 of the BSA, 2023 with the addition of a proviso. The new proviso provides that whenever a fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer so much of such information, whether it amounts to a confession or not, may be proved.

13. Section 39 of the BSA, previously section 45 of the 1972 Act, pertaining to the opinion of experts has been amended to specify that the opinion of the examiner of electronic evidence referred in section 79A of the Information technology Act, 2000, is a relevant fact for digitally stored information. This was formerly articulated in section 45A of the 1972 Act. Furthermore, 41 of the BSA, 2023 has consolidated the provision related to the opinion on handwriting and digital signature previously contained in section 47 and 47A of the 1972 Act without substantive alteration.

14. The chapter III of the BSA 2023 focuses on the facts which need to be proved. Within this chapter section 52 states deals with facts of which court shall take judicial notice. Section 52(1)(a) of the BSA, replicate section 57 (1) of the 1972 Act.

15. Section 52(1)(b) of the BSA, states that the courts shall take judicial notice on international treaties, agreements, and conventions with countries by India or decisions made by India at international associations and other bodies. Notable section 52 of the BSA excludes seals, proceedings, and sovereign concerning the United Kingdom and limits the scope of similar authority in India.

16. In chapter V of the BSA, specifically section 57 has been made some noteworthy changes regarding documentary evidence. Earlier this was provided under section 62 of the 1972 Act, new explanation has been incorporated in section 57 of the BSA, 2023 regarding primary evidence. These recognized instances where documents made using a uniform process, such as printing, lithography or photography where each is primary evidence of contents of the rest

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but where they are copies of original, they are not primary evidence of the contents of the original. The electronic or digital records are recorded or stored; each file is primary evidence. The electronic record or digital record in proper custody produced before the court will be considered as primary evidence unless disputed. Video recording stored in electronic form or transmitted, each of the stored recordings will be primary evidence. An electronic recording stored in multiple storage spaces in a computer resource, each such automated storage including temporary files, is primary evidence.

17. Under section 58 of the BSA, previously section 63 of the 1972 Act, has been expanded and amended. Now it includes additional categories such as oral admissions, written admissions, and evidence of a person examining a document within the meaning of secondary evidence.

18. Section 61 of the BSA, formerly section 61 of the 1972 Act, on electronic and digital record simplifies the existing definition. It provides admissibility of an electronic or digital record, on the grounds that it is an electronic or digital record, shall have the same legal effect, validity, and enforceability as per paper records.

19. In the modification of section 74 of the new Act, it now covers both public and private documents. This effectively combines section 74 and section 75 of the Indian Evidence Act, 1972 while remaining identical in substance.

20. Section 81 of the BSA, 2023, regarding presumption as to gazettes in electronic or digital record has adopted the broader version of the earlier section 81A of the 1972 Act. An explanation has been added to clarify the term ‘proper custody’. 21. Section 82 of the 1972 Act which deals with presumption about documents admissible in England, has been excluded from the new BSA 2023.

22. Section 88 of the BSA 2023 modifies the scope of section 86 of the 1972 Act which pertains to presumption as to certified copies of foreign judicial records. This modification excludes reference to the Great Britain dominions and adopts nomenclature indicating documents from any country beyond India.

23. Section 90 of the BSA 2023 as opposed to section 88 A of the 1972 Act, outlines the presumption concerning to the electronic messages as opposed to telegraphic messages as specified in section 88 of the 1972 Act.

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24. Examination of Witnesses: Section 142 of the BSA 2023 pertaining to examining of witnesses, draws its essence from section 137 of the Indian Evidence Act, 1972. Despite difference in structure, their substantive content remained identical.

25. Leading Questions: Section 146 of the BSA 2023 pertaining to leading questions has undergone modifications. It now specifically states circumstances which will lead to leading questions. This marks departure from the more generic approach of section 141 of the 1972 Act which relied on the same suggestive nature of questions.

26. Production of documents: Section 165 of the BSA 2023, previously section 162 of the 1972 Act, regarding production of documents have been subjected to modification. The amendment introduces a proviso prohibiting the production of any privileged communication between ministers and the President of India.

THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023 (BNSS)

1. Thia Bhartiya Nagarik Suraksha Sanhita, 2023 supplanted the erstwhile Code of criminal Procedure, 1973. This Sanhita 2023 comprises 531 sections which is a notable expansion of 484 sections found in the preceding Cr.Pc.

2. This Sanhita 2023 has amended 177 sections incorporating 9 additions and repealing 10.

3. The noteworthy deletions includes section 8, 10, 16, 17, 18, 27, 144A, 153, 197(3B), 355 from the code of criminal procedure 1973. In Parallel section 86 on identification and attachment of property of proclaimed person and 479 regarding bail and bail bond has been incorporated in the Bhartiya Nagarik Sanhita, 2023. These changes have been made to fit into the contemporary context of today's world.

4. Chapter I of the Sanhita 2023, section 2 introduces the provisions audio-video electronic and electronic communication, under the definition clause.

5. Chapter II of the Sanhita 2023, section 20 regarding directorate of prosecution previously section 25A of the Cr.Pc, here their power and function have been introduced.

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6. Section 25 of the Sanhita 2023 earlier section 31 of the Cr.Pc, deals with sentences of cases of conviction of several offences at one trial. The court now decides that the punishment should run concurrently or consecutively weighing the gravity of the offences.

7. Chapter V section 35 formerly section 41 of the Cr.Pc addresses when the police may arrest without warrant. Now if the offence is punishable less than 3 years, permission from the DSP is required.

8. Section 43 of the 2023 Sanhita, previously section 46 of the Cr.Pc deals with arrest how made now simplifies the procedure for making arrest especially for cases when it comes to handcuffing.

9. Section 51 of the Sanhita, 2023, formerly section 53 of Cr. Pc dealing with examination of accused by medical practitioner at the request of police officer. A new provision mandates that the medical examination report is to be forwarded to the investigating officer by the medical practitioner without any delay.

10. Chapter VI section 63 of the 2023 Sanhita, previously 61 of the Cr.Pc deals with the forms of summon and the provision of electronic commissions of summons is now included.

11. Chapter XI section 157 of the 2023 Sanhita, formerly section 138 of the Cr.Pc now as a provision stating that proceedings under section 157 shall be completed within 90 days may be extendable to 120 days reasons to be recorded in writing.

12. Chapter XIII section 193 of the Sanhita 2023, formerly section 173 of the Cr.Pc deals with the report of the police officer on completion of investigation. A time limit of 90 days is fixed for filing of the chargesheet and after this the investigation can only be conducted for another 90 days.

13. Chapter XVII section 230 of the 2023 Sanhita, formerly 207 of the Cr.Pc talks about supply to the accused of a copy of the police report and other documents. A new provision is inserted regarding the supply of documents in electronic form.

14. Section 232 of the BNSS 2023, previously section 209 of the Cr.Pc deals with commitment of cases to the sessions court when offence is exclusively triable by it. The new provision states that the proceeding under this section shall be completed within a period of ninety (90) days from the date of taking cognizance, and such period may be extended by the

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Magistrate for a period not exceeding one hundred and eighty (180) days for the reasons to be recorded in writing.

15. Chapter XIX section 250 of the BNSS 2023, formerly section 227 of the Cr.Pc deals with the provision on discharge of the accused person, which states that the accused may prefer an application of discharge within a period of 60 days.

16. Section 251 of the BNSS, 2023 formerly section 228 of the Cr.Pc deals with framing of charge and a provision is inserted with a time limit for the court for framing of charges is given that is sixty (60) days.

17. Chapter XXVI section 360 of the BNSS previously section 321 of the Cr.Pc deals with withdrawal from prosecution. The new rule is no withdrawal is allowed without an opportunity of being heard to the victim.

18. Chapter XXIX section 392 of the BNSS 2023, formerly section 353 of the Cr.Pc states with a fresh provision that the judgement must be pronounced within 45 days after the trial and they have to be got uploaded in online within 7 days of the judgement delivery date.

19. As per the BNSS 2023 the Police will have to register a FIR within three (3) days of the complainant. Further for cases with punishment between 3-7 years the police will register FIR after a preliminary investigation.

20. Chapter XXXIV section 474 of the BNSS, earlier section 433 of the Cr.Pc talks about power to commute sentences. Now the provision is inserted regarding limitation of power of the government to commute sentences.

21. Chapter XXXVI section 499 of the BNSS, formerly section 451of the Cr.Pc which deals with the order of custody and disposal of property pending trial in certain cases. Now the provision includes that the court is under obligation to prepare a description of the property within 14 days.

THE BHARATIYA NYAYA SANHITA, 2023 (BNS)

1. The Bhartiya Nyaya Sanhita 2023 replaces the old Indian Penal Code, 1860 marking a consequential transition.

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2. This replacement comprises 356 sections a notable reduction from the 511 sections of the IPC.

3. In the process of this transition substantial modifications have been made. A total of 175 sections have undergone alternation and 8 provisions have been newly introduced. Additionally, 22 sections have been repealed. Certain sections such as section 14, 18, 29A, 50, 53A, 124A, 103(2), 153AA, 264-267, 309-311, 376DA, 376DB, 377, 444, 446 and 497 have been removed from the erstwhile. On the other hand, section 48, 69, 116(3), 152, 226, 304, and 358 have been added to the BNS. These changes have been made to transform the legal code by a meticulous approach to address the contemporary legal intricacies and aligning with the system with evolving societal needs.

4. Section 2 of the BNS covers everything from section 6 to 52A of the erstwhile IPC. Section 2(10) defines the concept of gender. It states that "gender"—The pronoun "he" and its derivatives are used of any person, whether male, female or transgender. Explanation—"transgender" shall have the meaning assigned to it in clause (k) of section 2 of the Transgender Persons (Protection of Rights) Act, 2019.

5. Section 3 of the BNS addresses the general explanation and expressions, consolidating the aspects spanning from section 6 to 38 of the erstwhile IPC.

6. Section 4 of the BNS addresses the subject of punishment drawing inspiration from the erstwhile section 53 of the IPC. Notably community services have been introduced as a viable form of punishment. Furthermore section 11 of the BNS regarding solitary confinement a concept previously deal within section 73 of the IPC.

7. Section 20 of the BNS pertains to act of a child under seven of age. Previously section 82 of the IPC, have address the same provision.

8. Section 36 of the BNS, states provision regarding right of private defense against act of a person with mental illness. Previously this was provided in section 98 of the IPC. A noteworthy change has been made in this section is the introduction of the ground of mental illness.

9. Section 57 of the BNS states abetting commission of offence, by public or by more than ten persons. This is in consistent with the earlier provision section 117 of the IPC. Its worth

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noting that the provision for providing punishment has been increased which may extend to seven years which is a departure from the previous provision of the IPC where the punishment could extend to 3 years.

10. Section 61 of the BNS, addresses criminal conspiracy, a subject previously covered in section 120A and 120B of the IPC.

11. The BNS has introduced a new chapter which is chapter V related to offences against women and children of sexual offences. This chapter serves as a consolidated repository about all offences pertaining to women and children streamlining the classification that was previously dispersed across various chapters.

12. Section 63 of the BNS pertains to offences of rape. This provision was previously situated in section 375 of the IPC. As per the exception, sexual intercourse or sexual act by a man with his own wife, the wife not being under 18 years of age is not rape. However, under the previous IPC, age of wife for not to constitute rape was 15 years. In 2017, the Supreme Court in the judgement of Independent Thought Vs. Union of India[2], read 15 years of age of this exception to section 375 of the IPC as 18 years of age for a minor wife within the ambit of rape offence.

13. Section 73 of the BNS, address the challenges pertaining to printing or publishing any matter in relation to any proceeding before a court with respect to offences relating to rape, sexual intercourse by a husband upon his wife during separation, sexual intercourse by a person in authority, sexual intercourse by employing deceitful means, etc, gangrape without the previous permission of the Court, shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to a fine. The explanation to this section explicitly clarifies that the printing or publishing of judgement from any High Courts or the Supreme Court does not constitute an offence.

14. Section 80 of the BNS specifically deals with the dowry death previously found in section 304B of the IPC. This provision represents an essential component of the Act comprehensive approach to addressing offences against women and children.

15. Section 100 of the BNS pertains to culpable homicide as provide in section 299 of the previous IPC. Section 101 of the BNS addresses to the subject matter of murder, aligning

[2] (2017) 10 SCC 800

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with the provision of section 300 of the IPC. A noteworthy development resulting from the criminal law amendment involves the incorporation of the 'Terrorist Act' into section 113 of the BNS. This encompasses actions executed with intention of threatening or likely to threaten the economic security of India. Such actions which are causing or have the potential to cause damage to the monetary stability of India, through the production, smuggling or circulation of counterfeit Indian currency, coins, or other material fall within the purview of Terrorist Act. Furthermore, acts that pose a threat to unity, integrity, sovereignty, and security of India, inducing terror in the populace are also encompass by this offence. This act encompasses instances of death or property damage resulting from the use of bombs, explosives, firearms, or lethal weapons as well as poisonous, noxious gases or chemicals or any other hazardous substances whether biological, radioactive, nuclear or otherwise of hazardous nature. The section prescribe punishment as death or imprisonment for life. Those engage in conspiracy, abetment, incitement, or those knowingly facilitates terrorist acts may be subjected to imprisonment not less than 5 years extendable to life imprisonment.

16. Section 130 of the BNS pertains to assault correlating with the provisions of section 351 of the IPC. Following this section 138 of the BNS addresses the provision regarding offence of abduction aligning with the stipulation of section 362 of the IPC.

17. Section 139 of the BNS pertains to kidnapping or maiming the child for the purpose of begging with maximum prescribed punishment as life imprisonment.

SIGNIFICANCE OF NEW CRIMINAL LAWS IN TODAY'S INDIA

The criminal law reforms are not a new concept. The judiciary through its judgement or the legislatures have been time to time made reforms in the criminal law. However, these new criminal laws are not only reforms but also a shift from the colonial laws into desi laws. There have been amendments made due to happening of certain important events like Mathura rape case, Nirvaya etc. we have also noticed change in the year 1973 where the code of criminal procedure was drastically changed.

These criminal laws have been reforms because of the following reasons: -

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1. Modernizing the laws as per the present society. Human being is an important aspect of the democratic country. Despite the constitution guarantees certain right to the individual in Part III of the constitution, there have been a trend for the last decade that these rights were systematically removed. The State or the system were the main factor towards this removal. The reinstatement of the individual freedom as guaranteed by the constitution was very important from the aspect of criminal law. These new criminal laws ensures that the laws are better suited with the modern society than the erstwhile.

2. Accountability of the institutions and the investigation agencies.

3. Fair Procedure and fair investigations are the first step towards ensuring proper justice. Proper and fair investigation will lower the burden of criminal cases by unearthing the fact on false accusation. Fair investigation also ensures the right of the victim as well as the accused.

4. The provision on speedy Justice has been provided in the new laws to ensure speedy disposal of criminal cases. This is a fundamental right which have been often highlighted by the Supreme Court in many judgements.

5. The new criminal laws also took note on the victimology and contains many beneficial provisions with this respect which have been discussed here above.

CHALLENGES TO IMPLEMENT OF THE LAWS

1. There is no infrastructure of adequate training to the stakeholders.

2. The courts lacks proper infrastructure like computer, manpower, etc.

3. The rule of law vs human right eg. Handcuffing under the new law, Policing State etc.

4. The prosecutors are mostly in their mid-50s. These age group men may find difficulty to learn computer, digital evidence etc. Further the new laws and the old laws will be running parallel to each other will make the stakeholders to put an extra effort.

5. It is quite natural that when some drastic changes took place with regards to a law, mass protest is inevitable. Ther mind set of the people must be quite accommodative to bear and sustain the changes.

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6. It will take time to justify that whether the loopholes are sufficiently addressed or not. To justify this mainly three parameters are there i.e., how far or for how many cases timely justice as provided in the new BNSS have been served, secondly does the accused get a fair trial or not? And thirdly whether the victim has been provided with enough compensation?

7. The BNS mandate to inform the police officer or the magistrate if death is caused by a driver of a person by rash and negligent driving or else the accused will be imprisoned up to 10 years. The legislature did not take mob lynching into consideration of the accused person or other accompanied family members. Further the magistrates are always not accessible and there are chances that the accused person if goes before the Magistrate to inform, he will be taken into custody or take suo moto cognizance of the criminal case.

CONCLUSION

The name of the new codes is in Sanskrit and the language inside the act is in English. Sanskrit is our language. The new laws concentrate in justice and not on punishment. The new laws comprised some good provisions like digitization, involvement of forensic science investigators, strict timeline for submission of chargesheet, video recordings of the statements etc. In furtherance of all these good laws, we also need to think that whether Indian Judiciary especially the subdivision courts have the requisite infrastructure to accommodate the implementation of the new provision. Further the from sub-division courts to all the High Courts they don’t usually takes up the delegated matters of the absentee judge else the bail matters and automatically next date is provided to the litigants which means delayed justice. This situation is more pathetic in subdivision and District courts and has not been addressed in the BNSS.

End

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Decriminalization Of Section 138 of The Negotiable Instruments Act, 1881 For Ease of Doing Business – An Analysis

By: Pradipta Nath, Independent Researcher

ABSTRACT

In India, the negotiable instruments like promissory notes, cheques and bills of exchange are regulated by the Negotiable Act, 1881. India has been massively progressing towards digital India where we transact through online. The corporates make online payment through NEFT (National Electronic Fund Transfer) and RTGS (Real Time Gross Settlement) have come under the regulation of Payment & Settlement Act, 2007. These Negotiable Instrument Act and Payment & Settlement Act are interlinked with each other to the extent that section 25(5) of the payment & Settlement Act states that in case of dishonour of the electronic transfers Chapter XVII of the Negotiable Instruments Act will be applicable and the offence relating to the dishonour will be tried accordingly. Every document which entitles any person a sum of money and which can be transferred is called as negotiable instrument. The term Negotiable Instrument is not defined anywhere in the Negotiable Instrument Act. The most only in Section 13 of the Act we get reference about what can be called as negotiable instruments. According to Sec. 13 of the Act, negotiable instrument means 'a Promissory Note, Bills of Exchange or Cheque payable either to order or to bearer'. Thus, simply we can say that Negotiable Instruments are any written documents which are transferable on delivery. The transferee of the negotiable instrument holds a better title in compared to the transferor. The transferee gets the negotiable out of good faith and against consideration from the transferor. The title is a good title even if the transferor was suffering from defective title during the transfer.

Keywords: Negotiable Instruments, Cheque, Section 138, Payment & Settlement Act 2007, Defective Title.

PRESUMPTIONS UNDER THE NEGOTIABLE INSTRUMENTS ACT

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As per section 104 of the Bhartiya Sakshya Adhiniyam, 2023, it is the burden of the complainant to prove the offence committed by the offender. The Indian Evidence Act, 1872 has been replaced by the Bhartiya Sakshya Adiniyam, 2023. When the complainant has sufficed his assertion with evidence, the burden of proof shifted upon the accused person or the offender to prove his innocence. The law of presumption as enacted under section 118 of the Negotiable Instruments Act that unless contrary is proved the court will presume that negotiable instrument was drawn for consideration and that when it was accepted it was transferred for consideration. This section also furthers the following presumptions in addition the consideration. Those are stated below: -

i. The date endorsed in the instrument, were made on the date as specified therein.

ii. The negotiable instrument was accepted within the due time and before its maturity.

iii. The negotiable instrument was transferred within the due time and before its maturity.

iv. The lost promissory note, bill of exchange and cheque was properly stamped.

v. That the holder of the negotiable instrument is the holder in due course.

vi. Where it is asserted that the instrument has been obtained from its lawful owner by unlawful means, the burden of proving that the holder is a holder in due course lies upon him.

Thus, it has been found that when the complainant has made a complaint for offence committed under section 138 of the Negotiable Act, the court will presume the offence until any contrary is placed before the court with proper evidence.

Aside to section 118 of the Negotiable Act, we also get reference on presumption in section 119 of the Negotiable Act. To go through section 119 of the Act, it is essential to understand the protest. The protest is a formal certificate given by the notary public attesting the dishonour of the bill by non-acceptance or by non-payment, as the case may be. If the instrument remains unpaid even after noting made by the Notary Officer as mentioned under section 99 of the Negotiable Act, the next step is that the notary officer prepares a certificate of the fact of dishonour which is called as protest under section 100 of the Negotiable Act. Therefore, protest is nothing, but a formal declaration made by the Notary Public Officer on the bill or a copy thereof stating the fact of dishonour. The chief advantage of protest is that the court on proof of the protest shall presume the fact of dishonour and will readily issue

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process upon the accused person to face him the trial. Section 119 of the Act, states that if a complainant is made on dishonour of a negotiable instrument, on proof of the protest, the court will presume that the negotiable instrument was dishonoured unless the same is disproved by the offender.

WHAT TAKES IT TO COMPRISE AN OFFENCE UNDER SECTION 138 OF THE NEGOTIABLE ACT?

The offence committed under section 138 of the Negotiable Act, 1881 has to satisfy the following components (K. Bhaskaran v. Sankaran Vaidhyan Balan, (1999) 7 SCC 510): -

1. Drawing of the cheque.

2. Presentation of the cheque in the bank.

3. Returning of the cheque by the drawee bank.

4. Giving and subsequently receiving or successfully communicating of the statutory notice for making payment.

5. Failure of the drawer of the cheque to make payment within 15 days of the receiving of the notice.

In addition to the above components, in order to attract the offence under section 138 of the Negotiable Act, 1881, proper consideration also should be there. The general principle of the Law of contracts is that any agreement which is made without consideration is void. The law of contract cannot be detached from the negotiable instrument Act. It is presumed that when a bill of exchange is handed over to a person, the same has been done in lieu of consideration. This will be presumed unless contrary is proved otherwise. The consequences of lack of consideration are provided in section 43, 44 and 45 of the Negotiable Instrument Act. The crux of the sections is that if a bill of exchange is endorsed without any valid consideration it will be invalid and the immediate parties will be discharged from their liability of making payment. A holder for consideration is not affected by the prior absence of consideration, and he can recover the amount from the transferor for consideration, and also from all the parties to such transferor. Moreover, any subsequent holder who got the instrument from a holder for value can also recoup the sum from the transferor. In this way, when the instrument gets

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under the control of a 'holder in due course' he or some ensuing holder getting title from him, can recuperate the sum from transferor for consideration or from any prior party to such transferor. (K. Bhashyam 1963).

SECTION 138 OF THE NEGOTIABLE INSTRUMENT ACT

Section 138 of the Negotiable Instrument Act of the act talks about consequence the offender may face for dishonouring of cheque. Section 138 was introduced as a criminal offence in 1989 amendment of the Negotiable Instruments Act, 1881.The main objective of this section was to minimise cashless transaction and to increase the credibility of transactions.

Section 138 states on what circumstances the section will be attracted. Aside, there are many interpretation and observations of the High Courts' Supreme Court of India which are considered as an important aspect in deciding the application. The section suggests that the offender if proved guilty may be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or both. This offence is categorized under the category of non-cognizable offence.

THE NEGOTIABLE INSTRUMENTS (AMENDMENT) ACT, 2018 – AN ANALYSIS

Sections 143A and 148 were inserted in relation to cheque bouncing cases whereby the complainant has been given the option to pray interim compensation payable by the accused person during the pendency of the trial or appeal. The trial court and the appellate court are at its discretion to pass interim compensation under these two sections and cannot decide the payment of interim compensation in a mechanical way. Section 148 applies in appeal cases. The convicted person stands in a discomfort position in comparison to the trial of his case at the trial court.

The incorporation of these two sections in the 2018 amendment has obviously answers the accused persons and their lawyers who take a delaying tactics and trends to escape the justice by way of tactics but at the same time the provisions did not describe or state any parameters under which the court will exercise its discretionary power. This uncontrolled discretionary power of the court can be unjustified too which the aggrieved party can challenge it before the appellate court. This will ultimately lead to more filing of motions before the Sessions Courts or High Courts. It is quite natural, after filing revision application before the Sessions Court, the Session Court will call for the Lower Court Record, and this will consume more

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time. The accused person may be incapable of paying the interim compensation. The recourse is provided under section 421 of the Code of Criminal Procedure, 1973, and (With effect from 1st July 2024) section 461(1) of the Bharatiya Nagarik Suraksha Sanhita, 2023. The new section 461(1) of the 2023 prescribes that the court may order the recovery of the interim compensation by issuing a warrant for the recoverable amount by attaching and sale of moveable property of the offender. The court under this section may even issue warrant to the Collector of the District, authorizing him realise the amount of the interim compensation as arrears of land revenues from the moveable or immoveable property of the defaulter. This issuing of warrant to the district collector for collecting the moveable property also means wasting of resources and consumption of time of the Government. The core job of the District Collector will be affected if he is directed to implement the order of the Court. Aside, the complainant is hardly aware of any immoveable or moveable property of the accused person. The law does not prescribe the accused person to submit his every bank account or deposits or other property before the Court and this will entitle the accused person to play with the justice delivery system.

Both these provisions are Complainant centric and are aimed to safeguard their interests. The complainant suffers loss due to cheque bounce and beyond this loss the time it will take to final disposal of the case, apart from the litigation cost. This section 143A gives a ray of hope to at least sustain during the litigation. Further section 148 protects the Complainant from the endless appeals and stays. Though this provision stipulate that where the accused person is acquitted, the Court shall order the complainant to return the money sum received by him under Section 148, but in practice, the long term litigation has already made loss to the complainant which may turn out to be dishonouring the court's order and appeal before the appellate court. The statute should state that the amount paid by the accused person should be deposited in a bank account to be created for this specific purpose else it is quite natural that a needy person will spend the money in his hand in need and will not wait for any especial circumstances.

Whereas section 143A and section 148 of the Negotiable Instrument Act are a welcome section, but the High Courts and Supreme Court time and again have held that the court cannot exercise its discretionary power in a mechanical manner and should apply its judicial mind before making decisions. The main challenge of both the complainant is to satisfy the court to get the interim relief and the main challenge of the accused person is to object that

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interim prayer. However these sections are very welcome provisions and play a considerable important role in the entire trial process.

DECRIMINALIZING SECTION 138

On 8 June, 2020 the Ministry of Finance proposed decriminalizing various minor offences "for improving business sentiment and unclogging court processes". Reference to serial no. 18, of the annex of the proposal, the Government proposed to decriminalize Section 138 of Negotiable Instruments Act, 1881. Link: https://www.livelaw.in/pdf_upload/pdf_upload-376169.pdf

This was made in order to take a significant step towards fulfilling the Government of India's objective i.e. "Sabka Saath, Sabka Vikash and Sabka Vishwas". The Government of India has been trying its heart and soul to attract investment in India. The criminalization of section 138 of the Negotiable Instrument Act, 1881 will preclude investors from investing in India. The motive of the Government was to decriminalize only those offences which have happened due to the act or omission of the party and does not constitute 'fraud' in its stricter sense. The fear of imprisonment, interim compensation or paying of fine of the double amount of the cheque bounce will demotivate the market players in doing business. Apart, the long pendency of cheque bounce cases will only frustrate the business environment.

Now, the Government has obviously taken a generous step to boom the business environment, but at the same time the law should make some demarcation as to the what shall be the criterion to decide which are the act of omission or act of commission or otherwise. If proper yardstick is not formulated in the statute, it will only make the situation more contentious and litigious.

The main reason for this proposal was to increase the foreign investment in our country and will help in boosting the economy of the country during this condition during the corona period. The contact with people was a major issue and therefore cashless transaction was encouraged. The litigation during the corona period was needed to be controlled. Therefore, this proposal was made by the Government.

The Government requested feedback on the proposal from all the stakeholders. The objective of the proposal was to promote investment in the country in the corona period. While section 138 of the Negotiable Instruments Act, 1881 was brought into effect to punish the offenders

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of cheque bounce, this proposal was just opposite. The corona virus outbreak in the country have slowed down the economy the proposal to decriminalize section 138 of Negotiable Instruments Act will have an impact in the mind of business giants. Like it has been discussed earlier here before that what will be the negative or contentious effect of the proposal, therefore unless the law enacted properly and debated in its full nature, this proposal would have been only a time-pass and nothing else. In the report the following principles were made to deciding on reclassification of criminal offences to compoundable offences:

i. Decriminalizing will decrease the burden on businesses and will attract confidence among the investors.

ii. Increase in the economic growth, public interest and national security.

iii. Evaluating the nature of non-compliance to justify the mens rea (malafide or criminal intent).

iv. The habitual nature of non-compliance has to be kept in mind. Negligence must be differentiated with the non-compliance on regular basis.

These above parameters are all subject matters of dispute and depend on situation-to-situation basis. In the most, the parties will take judicial recourse to finally end the dispute, but again this will turn into more litigious.

DECRIMINALIZING SECTION 138 - IS IT DESIRABLE?

Section 138 of the Negotiable Instruments Act, 1881 is based upon the principle of ‘Deterrent theory of punishment’ as well as ‘restorative theory of punishment’. The imprisonment ensures that the offender will refrain himself from committing the offence and other future offenders will take it as an example to refrain themselves from committing the crime. The payment of fine as twice the amount of the cheque bounce and the interim compensation will provide compensation to the victim. Further trial of section 138 of the Negotiable Instruments Act, 1881 are considered as summary trial and are tried by the magistrate courts of first class. This decriminalize will make the victim to approach the civil court where delay and consumption of time is a serious issue. Still the Code of Civil Procedure is not reformed as

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per the digital India and still depends on the old ways of issuing summons to the defendants. Again, the Government also should come up with an alternative on decriminalize of the cheque bounce cases like solving dispute through Arbitration or mediation or otherwise. The legislature should take a note that not all parties will take the arbitration seriously and few will play with the 'appointment of Arbitrator by consensus' provision and employ delaying tactics. Decriminalize of the cheque bounce cases will convert it into taking judicial recourse for appointing of Arbitrator, which will make the situation more worrisome. Therefore, a specific law also should be laid down as an alternative too with regards to the decriminalization.

If the section got decriminalized, there would be an increasing risk of cheating and fraud. On one hand that court has pendency of cases and decriminalizing would help in reducing the piles of cheque bounce cases obviously but on the other hand there will be an increased number of cases on cheating and fraud. The fear of imprisonment and litigation charges along with fine are the main factors for either settlement of cheque bounce case outside court or timely payments of the cheques, which if it is not there, the offender will be prone to committing of more offences. In case the punishment is removed by decriminalising section 138, definitely creditors will have to incur lot of risk.

CURRENT STATUS OF SECTION 138 OF THE NEGOTIABLE INSTRUMENTS ACT

The section is not yet decriminalized. The offence committed under this Act is non-cognizable offence and is a bailable offence. The punishment prescribed is still prevailing. The offender if found guilty can be sent to imprisonment up to two years and fined with fine which can be double the cheque bounced amount.

CONCLUSION & SUGGESTION

In this study it has been found out that in cheque bounce case not only the Negotiable Instrument Act is applicable. The Laws of Contract, the Reserve Bank of India Act and its rules, Bhartiya Naya Sanhita, 2023, Barthiya Nagrik Suraksha Sanhita, 2023, and other laws are also applicable. Each law has its own specific purpose. The Government must come with

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an alternative against this decriminalization. Aside, the Government must encourage arbitration in the business community. The appointment of arbitrator through consensus ad idem must be sent into fire for those who prone to escape the dispute resolution system. When such situation arises, the Government must have a pre-set list of Arbitrators consist of representation from retired law professors, retired judges, Senior Advocates, Management Consultants, etc. Further the law on summary trials should be brought into practice. The Courts should give dates for consideration of the trial of the cheque bounce cases on weekly basis. The Negotiable Instruments Act, 1881 must set up a specialized court. Further the recovery of fine from the convicted person must be parted with the judiciary to build up its infrastructure.

The initiative of the Government in decriminalizing the cheque bounce cases is a good initiative, but without an alternative it will be litigious.

End

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Applicability of Writ Jurisdiction in Quashing FIR and the Inherent Powers of High Courts to secure Ends of Justice.

By: Pradipta Nath, Independent Researcher

Introduction

In Abhishek Vs. State of Madhya Pradesh[1], the supreme court of India discussed the scope of writ jurisdiction for quashing of criminal proceedings. The Supreme Court even clarified that section 482 of the Cr.PC[2] is eligible to be invoked even after submission of the chargesheet. While deciding the case, the bench took reference of Joseph Salvaraj A. vs. State of Gujarat and others[3] and Anand Kumar Mohatta and another vs. State (NCT of Delhi), Department of Home and another[4].

The quashing of criminal cases can also be done under Article 226 of the Constitution. Recently in Sri Abhijit Gangopadhyay & Anr. Vs. The State of West Bengal & Ors.[5], the Hon'ble Calcutta High Court entertained the writ petition and stayed the FIR against the petitioner. The petitioner in this case has challenged the FIR bearing no. Tamluk P.S. Case No. 411 of 2024 dated 4.5.2024 under Sections 143/323/325/307/354B/379/427/506/109/34 IPC read with Sections 25/27 of the Arms Act filed against him.

The landmark judgement on quashing is the State of Haryana Vs. Bhajan Lal[6], but the law did not remain stagnant over the parameters for quashing that was set in Bhajan Lal (Supra). In Salib @ Shalu @ Salim –vs- State of UP and ors.[7], the Hon'ble Supreme Court of India state that the court while exercising its jurisdiction under section 482 of the Cr.pc (now S. 530 of BNSS) or under Article 226 of the Constitution of India, need to take into account the overall circumstances leading to the initiation or registration of the case as well as the materials collected in the course of the investigation. In frivolous or vexatious proceedings, the court has a duty to look into the circumstances of the case and if needed read the FIR/complaint in between the lines.

[1] 2023 LiveLaw (SC) 731; 2023INSC779
[2] Section 530 of the Bhartiya Nagarik Suraksha Sanhita, 2023 w.e.f 01.07.2024
[3] (2011) 7 SCC 59
[4] (2019) 11 SCC 706.
[5] WPA 13815 of 2024
[6] 1992 Supp(1) SCC 335
[7] 2023 SCC OnLine SC 947

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Analysis of the Bhajan Lal Judgement (Supra)

1. Article 226 of the Constitution as well as Section 482 of the Code of Criminal Procedure can be exercised to quash a criminal proceeding. Section 530 of the Bhartiya Nagaril Suraksha Sanhita, 2023 is the new section w.e.f 01-07-2024 in place of section 482 of the Code of Criminal Procedure, 1973. Citations: 1992 AIR 604, 1990 SCR SUPL. (3) 259, AIR 1992 SUPREME COURT 604, (2006) 1 ALLCRILR 515, 1992 SCC (SUPP) 1 335, (1992) 3 SCR 735 (SC), (1991) 28 ALLCRIC 111, 1991 CHANDLR(CIV&CRI) 619, (1991) CRICJ 100, (1991) 1 ALLCRILR 68, (2005) 4 CAL HN 456, (2005) 2 CAL LJ 504, (2006) 1 CALLT 475, (1991) IJR 312 (SC), (1992) MADLW(CRI) 257, (1991) 1 RECCRIR 383, (2006) 1 CURCRIR 209, (1990) 4 JT 650 (SC), 1992 SCC (CRI) 426.

2. This is the decision based upon the division bench comprised of two judges. PANDIAN, S.R. (J) & REDDY, K. JAYACHANDRA (J)

3. Fact of the case: -

i. Chowdhury Bhajanlal was a minister at first and then became the chief minister of the State of Haryana. Then, he also became union minister. After the defeat of congress in the State of Haryana, Devi Lal came into power and became the new chief minister. After coming into power Devi Lal, his government filed cases against Bhajanlal and his family members on corruption charges. It was also alleged that Bhajanlal and his relatives possessed disproportionate properties which meant that the properties were not as per their income, and these were achieved when they were in political power.

ii. As Bhajanlal was the former chief minister, that’s why the complaint was forwarded to the SP. SP directed the SHO to register a FIR and start investigation into the alleged offence.

iii. The registration of FIR was done and accordingly an investigation was started. Bhajanlal approached the Punjab & Haryana High Court to quash the very FIR. It was pleaded that the FIR was politically rivalry, and all the allegations are totally alien to actuality.

iv. Punjab & Haryana High Court allowed the petition filed by Bhanjanlal stating that there is no ingredient of cognizable offence and quashed the FIR. In turn, the State of Haryana went to the Supreme Court to challenge the impugned order of the Punjab & Haryana High Court.

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4. The issue of the case is whether the SHO was a competent authority to investigate matters pertaining to corruption or not. The Supreme Court stated that as alleged that the accused persons were in possession of disproportionate properties and has acquired out of political influence is a matter of investigation and cannot be determined in this stage.

5. The Supreme Court held that section 482 of the cr.pc is the inherent power conferred to the High Courts and should not be used generally in all the cases. Only in appropriate or genuine cases or rare cases where in the opinion of the High Court the criminal complaint has been made out of revenge or vengeance, the inherent power under section 482 of the Cr.Pc can be used.

6. The Supreme Court also held that though it cannot provide a straight cut jacket formula regarding using section 482 of the Cr.Pc. as all the cases are unique in their very nature and cannot be compared with other cases. But the Supreme Court has laid down an overall principle comprised of different types of 7 (seven) conditions under which the FIR can be quashed.

7. The 7 conditions are: -

i. Where the allegations in FIR do not constitute offence.

ii. If the allegations of the FIR along with the material no cognizable offence is made.

iii. When the allegations along with the evidence do not disclose cognizable offence.

iv. When the allegation in the FIR constitutes only a non-cognizable offence, no FIR should be registered without the order of the Magistrate.

v. If the complaint is absurd and inherently improbable on the basis of which no man with reasonable prudence will ever reach conclusion that there are sufficient grounds to proceed against the accused.

vi. If the complaint is a malafide.

vii. Where there is a legal bar to institute a FIR, then to such, the FIR must be quashed or there is a specific provision under which the criminal proceedings must be drawn up but is not registered in that accordance, then the FIR must be quashed.

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7. If a case falls under any of the above stated parameters, then only the High Courts can exercise the inherent power to quash the criminal case or FIR else not.

8. The Supreme Court of India set aside the judgement of Punjab & Haryana High Court and allowed the appeal of the State of Haryana against Bhajanlal and his relatives.

9. The Supreme Court also held that the SHO was not the competent authority to investigate the matter pertaining to corruption and in case the State of Haryana wants to proceed with this case, it needs to have the investigation by a competent authority as provided under the Prevention of Corruption Act.

10. Though a complaint made from a grudge cannot be false, it may also be true. Criminal Law can be put into motion by any person and there is no attraction of limitation act. The complaint made from a grudge should not be considered as ground for quashing. If this happens, then trust in the judiciary will be diminished; the accused persons who may be victims as well will be more prone to select other alternatives other than approaching court to quench the thirst of vengeance. Rather the FIR may be quashed on the other six grounds as mentioned in the Bhajanlal case (supra).

11. The toss between grudge Vs. evidence collected so far, the latter should find place while invoking the inherent power. There may be a grudge or counterblast of complainants filed by the complainant, but that does not lower the value of evidence collected by the Investigating Officer which is sufficient to prove guilt.

12. The charge sheet may also be quashed under these laws (Article 226/Section 530 of the BNSS). The filing of chargesheet is not a bar in exercising the laws for the High Courts.

Comparative analysis of section 482 of the Code of Criminal Procedure with section 530 of the Bhartiya Nagarik Suraksha Sanhita

Section 530 of the Bhartiya Nagarik Suraksha Sanhita corresponds with the erstwhile section 482 of the Code of Criminal Procedure. However, the legislature did not change the substance of this section and remained ditto. In many of the availing resources from the net it has been noted that section 482 of the Cr.Pc has been mentioned to correspond with section 528 of the BNSS. Section 528 of the BNS is about ‘Practicing advocate not to sit as

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Magistrate in certain Courts' which is totally different from the provision of section 530 of the BNSS regarding the inherent powers of the High Court.

Scope of Section 530 of the BNSS

The phrase used in section 530 of the BNSS "or otherwise to secure the ends of justice" is substantially alike to Article 142 of the Constitution of India which talks about "may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it". If these two laws are read together, it is understood that the legislature gave a wide range of discretionary power to the judiciary to pass such order or orders for the end of justice. The phrase contained in section 530 of the BNSS "or otherwise to secure the ends of justice" has a larger connotation. It opens the scope of judicial review which will substantially give rise to judicial activism by the High Courts. In Tariq Ahmad Dar Vs NIA, it was held that where a person has been detained in custody in terms of section 306(4) of the Code of Criminal Procedure, the person can be released on bail in exercise of the inherent power as conferred under section 482 of the Code of Criminal Procedure.

The term 'Justice' is a very broad term and cannot be defined in one sentence or word. A theory of justice must rely fundamentally on partial orderings based on the intersection – or commonality – of distinct rankings drawing on different reasons of justice that can all survive the scrutiny of public reasoning. Prof. Amartya Sen spoke about 'Niti' and 'Nyaya'. The 'niti' relates to the political theory of the State, which if channelized properly then the State will be a welfare State, whereas the latter, Nyaya, is by product of niti. Nyaya deals with the enforcement of laws and regulations. For the supporters of Bentham, 'Nyaya' will mean to serve happiness to the majority people. But in a Gandhian State, 'Nyaya' cannot sustain the doctrine 'Greatest good to the greatest number' rather than it mean to sacrifice, compassion, forgiveness and survival of all. The Sarvodaya has its significance to kill the crime not the criminal. When an accused person is brought before the court, he may be a criminal, but in the passage of time his mind may change and be full of repentance. That may be the reason why the theory of restoration of justice system got a place in the new criminal codes.

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The Hon'ble Supreme Court in M Siddiq (D) Thr Lrs Vs. Mahant Suresh Das & Ors[8] the Hon'ble Supreme Court described its power under Article 142 – "The phrase 'is necessary for doing complete justice' is of a wide amplitude and encompasses a power of equity which is employed when the strict application of the law is inadequate to produce a just outcome. The demands of justice require a close attention not just to positive law but also to the silences of positive law to find within its interstices, a solution that is equitable and just. The legal enterprise is premised on the application of generally worded laws to the specifics of a case before courts. Even where positive law is clear, the deliberately wide amplitude of the power under Article 142 empowers a court to pass an order which accords with justice. For justice is the foundation which brings home the purpose of any legal enterprise and on which the legitimacy of the rule of law rests. The equitable power under Article 142 of the Constitution brings to fore the intersection between the general and specific. Courts may find themselves in situations where the silences of the law need to be infused with meaning or the rigours of its rough edges need to be softened for law to retain its humane and compassionate face. Above all, the law needs to be determined, interpreted and applied in this case to ensure that India retains its character as a home and refuge for many religions and plural values. It is in the cacophony of its multi-lingual and multi-cultural voices, based on a medley or regions and religions, that the Indian citizen as a person and India as a nation must realise the sense of peace within. It is in seeking this ultimate balance for a just society that we must apply justice, equity and good conscience."

Section 530 of the BNSS is not limited only to quashing of FIR or criminal proceedings. It can be used to challenge any order of the Magistrate Court or Session Court which needs to be corrected like if any Magistrate court unreasonably expunge any witness of the prosecutrix or issue non-bailable warrant unreasonably or otherwise.

The High Court has very limited discretion to exercise its power under section 482 of the Cr.Pc for quashing. The High Courts are known as the court of law, the lower courts are known as the court of facts. The trial courts are empowered to admit evidence. The High Court can only decide whether the admission of the evidence was in accordance with the law or not. While deciding a petition filed under section 530 of the BNSS, 2023, the High Courts should restrict themselves in conducting a mini trial. It is settled that the court needs to consider whether there are sufficient evidence or materials available against the accused

[8] Civil Appeal Nos 10866-10867 of 2010; AIRONLINE 2019 SC 1420, 2020 (1) SCC 1, (2019) 15 SCALE 1, (2019) 4 CURCC 182, (2019) 6 ALLMR 482, (2019) 6 ALL WC 5537, (2019) 8 MAD LJ 117

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person to conduct the trial or not. The charges against the accused person can only be proved during the trial by leading evidence. Prior to that i.e., filing of chargesheet or commitment or framing of charge, the matter is in preliminary stage where no court can decide whether the accused person is guilty or not. In Central Bureau of Investigation Vs. Aryan Singh[9], the Supreme Court did not consider the view of 'malicious prosecution' which was stated as one of the 7 (seven) guiding principle in its Bhajanlal (Supra) judgement. The Supreme Court withheld the decision of the High Court to set it aside, stating that whether the criminal proceeding is malicious or not, is not required to be considered at this stage. The same is required to be considered at the conclusion of the trial.

The development of the law regarding quashing has made an inordinate delay as a ground for quashing of the criminal case. The inordinate delay in lodging a criminal complaint was carried out after 8 years of the commission of the crime. This has been done in Chanchalapati Das vs State of West Bengal and Madhupandit Das vs State of West Bengal[10]. The Supreme Court opined that the inordinate delay of 8 years in filing the complaint is itself sufficient ground to quash the FIR.

Limitation of Section 530 of the BNSS

The BNSS has been enacted to streamline the procedures for conducting criminal trials. But this section also has an exception which is impliedly applicable in criminal jurisprudence. Any order passed under a special act; recourse should be availed from that very special act if it has been provided for the same. In Phoenix Arc Private Limited vs V. Ganesh Murthy, the Supreme Court held that an order under section 14 of the SARFAESI Act cannot be quashed under section 482 of the Cr.Pc as such remedy has been provided under the SARFAESI Act itself and the aggrieved person can only avail it under the Act. The erstwhile section has been changed which now corresponds to section 530 of the BNSS, but the principle evolved from this case laws is applicable countrywide. Likewise petition under section 482 of the Cr.Pc (now 530 of BNSS) is not maintainable for cases filed under section 12 of the Protection of Women from Domestic Violence Act, 2005. In Sanjeev Kumar & ors Vs Sushma Devi[11], the Himachal Pradesh High Court reiterated that petitions under Section 482 CrPC are not

[9] 2023 LiveLaw (SC) 292
[10] 2023 LiveLaw (SC) 446
[11] 2023 LiveLaw (HP) 48

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maintainable for challenging the proceedings under Section 12 of the Domestic Violence Act. The proceedings under section 12 of the PWDV Act are quasi civil in nature and thus cannot be equated with other usual criminal cases. Further the act itself provides for appeal under section 23, so the aggrieved person may avail the remedy under that section.

The scope of quashing criminal cases of a serious nature is more limited. The Supreme Court in Manik B vs Kadapala Sreyes Reddy[12], observed that the High Courts cannot go into the correctness of the material placed by the police officials in the chargesheet. The court can only exercise the discretion if in its reasonable opinion, no case is made out at all even if taken in its face value.

Section 530 of the BNSS did not provide any bar for placing a second application on new grounds after rejection of the first application. But this bar has been made a law by the Supreme Court in Bhisham Lal Verma V. State of Uttar Pradesh and another[13], where it was observed that even though there is not bar provided in section 482 of the Cr..Pc on second application based on new grounds, but such second application is not maintainable when the grounds for relief could have been availed at the first instance.

Conclusion

The law regarding quashing is still evolving. The new section has been made ditto with the erstwhile section. While exercising discretionary power for quashing any order or FIR, the court is guided by the judgements of the Supreme Court or take reference of other High Courts. Exercising of inherent power goes with the application of judicial application of human intellect which ought to vary from circumstances to circumstances. The High Court should step in where it is of the opinion that conducting of the trial will be abuse of the power.

End

[12] 2023 LiveLaw (SC) 642
[13] 2023 LiveLaw (SC) 935

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An Essay on the Employees State Insurance Act, 1948

By: Pradipta Nath, Independent Researcher

INTRODUCTION

The ESI Scheme is a statutory scheme and is regulated by the ESIC Act, ESIC Rules and ESIC Regulations. It is managed by an organization called as the Employees' State Insurance Corporation (ESIC). The organization is comprised of people represented by Employers, Employees, the Central Government, State Government, Medical Profession and the Hon'ble Members of Parliament. The organization has a CEO. The Director General is the Chief Executive Officer. The ESIC scheme is financed by the contribution received from the employees, employers and the State Government who shares $1/8^{th}$ of the cost of medical expenditure.

The Employees State Insurance Act, 1948 is welfare legislation. The objective of the act is to provide certain benefits to employees in case of sickness, maternity benefit and employment injury. Further the act also ensures to extend its beneficial provisions for other matters related to the employees. The act extends to whole of India. As per sub section 4 of section 1, the act applies to all the factories in the first instance irrespective that it is owned by the government or not. The act further extends the definition of factories in section 2(12). It states that 'factory' means any premises including the precincts where 10 or more persons are or were employed on any day of the preceding twelve months in part of the manufacturing process. This sub section exempts the mines operated under the Mines Act or a railway running shed. The Act also provides under the section 2(24) that any words or definitions which are not explicitly provided under the Act has to be referred with the Industrial Dispute Act, 1947 for having the interpretation. Employees earning less than Rs 21,000/- are covered under the ESIC Scheme.

SILENT FEATURES OF THE ACT

1. The employees are issued permanent identity card by the ESIC office to ensure their identity and coverage under the ESIC Act.

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2. In the same manner the family identity card is also issued by the ESIC office for their identification.

3. After registration of the factory or establishment under the ESIC Act, the employers are provided with a unique code number.

4. Under section 45 of the Act, a social security officer is appointed.

5. The contribution periods and the corresponding periods are expressed as under: -

i. Contribution period: 1st April to 30th September

Corresponding benefit period: 1st January of the following year to 30th June.

ii. Contribution period: 1st October to 31st March.

Corresponding benefit period: 1st July of the following year to 31st December.

6. A local committee is constituted under this Act. The duties of the local committee are to discuss the problems under the Employees' State Insurance Scheme and extend its advice to the regional board.

7. An Employer who fails to pay the contribution within the specified period is liable to pay simple interest at the rate of 12 per cent per annum in respect of each day of default or delay in payment of contribution.

8. The ESI Act is implemented by the Central Government through notification under section 1(3) or section 1(5) in an area where the factories, shop, hotels, restaurants, theatres, newspaper establishment, any other establishments defined under the Shops and Establishment Act employing 10 or more persons.

9. The ESI Act is also applicable in educational institutions where the same is run by proprietor or trust or societies or other type of ownership.

10. The ESI Act is also applicable in medical institutions which are run by proprietor or trust or societies or private ownership, nursing homes, diagnostic centre, pathological labs.

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11. In some states, the criterion of 10 or more people is 20 or more people. Aside in few States, the State Governments have not extended the scheme in medical and educational institutions.

12. Any factory or establishment which has a sub-branch located in the same State or different State has also to get registered as a sub-unit. In that case the employer has to obtain the registration using his primary credentials and in lieu the ESIC allot a sub-code number.

13. The rule ‘once member always a member’ is followed in the ESIC scheme. This means once the ESIC made applicable in a particular factory or establishment, it will be applicable lifetime even if the minimum number of employees is reduced, and the scheme will be applicable.

14. The employer can get exemption from the implementation of the ESIC Scheme. The condition for exemption is that the employees are getting similar or superior medical benefit that the ESIC. The appropriate government may grant exemption. The appropriate government need to consult with the corporation before granting any exemption. It cannot grant exemption for a period more than one year. The employer has to apply for its renewal 3 months prior to the expiry of the one year.

15. If the employee has exceeded his threshold limit of Rs 21,000/-, notwithstanding this fact, the employer needs to deduct his monthly ESIC contribution and complete the contribution period. Thereafter completion of the contribution period, the employer needs not to deduct the contribution. [Rule-50 of the Employee's State Insurance (Central) Rule 1950]

16. If the wages of employees increased their threshold limit and is applicable with retrospective effect, the contribution has to be paid till the completion of the contribution period during which the employer has declared the enhancement of the wages. There is no need to contribute on the arrears. [Rule-50 of the Employee's State Insurance (Central) Rule 1950]

17. In order to motivate the employers to employ more especially abled people (PWD) in his establishment, the ESIC has provided for exempting the employer from paying his part of contribution for a period of 10 years. There is no wage ceiling limit for the especially abled persons with effect from 01.04.2016 for availing the ESIC benefits. The Ministry of Social

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Justice & Empowerment, Government of India shall pay the employer's contribution to the ESIC.

18. Beside section 85 of the ESI Act, the non-compliance of the ESI statutory compliance are also offence to be tried under section Bharatiya Nyaya Sanhita, 2023, Section 316 and 316(2). [Earlier section 406 and 409 of the Indian Penal Code, 1860]

Section 39(5)(a) of the ESI Act, states that if contribution is not remitted to the ESIC within the due date, the employer is liable to pay a simple interest at the rate of 12% per annum or at such higher rate as may be specified under the ESIC provisions. This section also has a proviso which states that the levying interest of the ESIC shall not be exceeding the lending interest of bank. The word used in section 39(5)(a) is 'shall'. Therefore, the interest payable at the rate of 12 per cent is statutory liability which the employer is ought to pay and there is no exemption either to waive or to reduce the interest. This has been held in The Regional Director/Recovery Officer & Anr. Vs. Nitinbhai Vallabhbhai Panchasara in Special Leave Petition (c) No. 16380/2022 in the Supreme Court of India, Civil Appellate Jurisdiction dated November 17, 2022.

8. The ESI Scheme is based on the principle of 'minimum cost maximum benefit', wherein the health and medical benefits are extended to the employees and their family members through the Government, Employer and Employees.

CONTRIBUTION

E.S.I. Scheme being contributory in nature, all the employees and the employers need to make monthly contribution to the scheme as per the provisions. The rates of contributions are revised from time to time. Currently, the employee's contribution rate (w.e.f. 01.07.2019) is 0.75% of the monthly wages and that of employer's is 3.25% of the monthly wages. Employees in receipt of a daily average wage upto Rs.176/- are exempted from payment of contribution. However, the Employers are not exempted like the daily wage earners and will have to contribute as usual.

COLLECTION OF CONTRIBUTION

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It is duty of the employer to deduct the monthly contribution of the employees and pay the same in the ESIC scheme. The monthly ESIC contribution has to be paid within 15th day of every month of calendar month in which the contribution is due. The Corporation has also authorized designated branches of the State Bank of India and some other banks to receive the payments on its behalf.

DIGITIZATION OF PROCEDURES RELATED TO ESI

The Government is striving towards making digital India. The new code on Social Security (Central) Rules, 2020 provides for registration of establishments and employees, updating of their information through the 'Shram Suvidha Portal'. This digitization process will bring the ESIC under one roof which will ensure proper regulating the scheme and monitoring the compliance. Further this will also ease the statutory compliance for the Employers.

BENEFITS UNDER ESIC

The section 46 of the Act envisages following six social security benefits: -

(1) Medical Benefit

An insured person and his dependants are provided with full medical care of his or her medical expenses. From the day one an insured person and his dependants are entered into the ESIC Scheme are provided with the medical care. There is no maximum ceiling limit in the medical expenditure incurred by the insured person or his dependants. The ultimate goal of the scheme is to get 100% cure of the insured person. In case the insured is retired from his service or any permanent disabled person, the medical benefit is also extended to him subjected to an annual premium which may varies as per the notification by the Government. This medical benefit also covers the reimbursement facility too which the insured person can only avail if he or she has been referred by the doctors of the ESIC only to any other specialized hospital or doctors.

(2) Sickness Benefit (SB)

The sickness benefit is extended in the form of monetary compensation to the insured person at the rate of 70 per cent of wages. The sickness has to be certified by the ESIC doctors and is

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payable to insured person during the periods of his certified sickness for a maximum period of 91 days in a year. The insured person can is eligible for this monetary benefit only if he has contributed to the ESIC scheme for at least 78 days in a contribution period of six months.

1. Extended Sickness Benefit (ESB): SB extendable upto two years in the case of 34 malignant and long-term diseases as notified by ESIC at an enhanced rate of 80 per cent of wages.

2. Enhanced Sickness Benefit: Enhanced Sickness Benefit equal to full wage is payable to insured persons undergoing sterilization for family planning upto 7 days/14 days for Vasectomy and Tubectomy respectively.

Every claim for a benefit payable under the Act shall be made in writing, in accordance with these regulations, to the appropriate Branch Office on the form appropriate for the purpose of the benefit for which the claim is made, or in such other manner as the appropriate office may, subject to its being in writing, accept as sufficient in the circumstances of any particular case or class of cases. Provided, that in case of permanent disablement benefit and dependants' benefit, claim shall be required to be made only for the first payment and no claim shall be required for subsequent periodical payments.

(3) Maternity Benefit (MB)

Maternity Benefit is paid to the female insured workwoman for a period of 26 weeks. During this period the female workwomen is paid as per her full monthly wages. In order to eligible for this benefit, the insured workwomen must have made contribution in the ESIC Scheme for at least 70 days in the preceding two contribution periods. The insured workwoman needs to give notice of her pregnancy before confinement in Form 17 to the appropriate branch office by post or otherwise.

To claim maternity benefit before the confinement from ESIC, the insured women will have to submit the following documents to the appropriate branch office by post or otherwise: -

(i) A certificate of expected confinement in Form 18 given in accordance with these regulations, not earlier than fifty days before the expected date of confinement;

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(ii) A claim for maternity benefit in Form 19 stating therein the date on which she ceased or will cease to work for remuneration; and

(iii) Within thirty days of the date on which her confinement takes place, a certificate of confinement in Form 18 given in accordance with these regulations.

(4) Disablement Benefit

Temporary disablement benefit (TDB): From day one of entering insurable employment & irrespective of having paid any contribution in case of employment injury. Temporary Disablement Benefit at the rate of 90% of wage is payable so long as disability continues.

Permanent disablement benefit (PDB): The benefit is paid at the rate of 90% of wage in the form of monthly payment depending upon the extent of loss of earning capacity as certified by a Medical Board

(5) Dependants Benefit (DB)

DB paid at the rate of 90% of wage in the form of monthly payment to the dependants of a deceased Insured person in cases where death occurs due to employment injury or occupational hazards.

(6) Other Benefits

Funeral Expenses: An amount of Rs.15,000/- is payable to the dependents or to the person who performs last rites from day one of entering insurable employment.

Confinement Expenses: An Insured Women or an I.P.in respect of his wife in case confinement occurs at a place where necessary medical facilities under ESI Scheme are not available.

In addition, the scheme also provides some other need based benefits to insured workers.

Vocational Rehabilitation: To permanently disabled Insured Person for undergoing VR Training at VRS.

Physical Rehabilitation: In case of physical disablement due to employment injury.

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Rajiv Gandhi Shramik Kalyan Yojana: This scheme of Unemployment allowance was introduced w.e.f. 01-04-2005. An Insured Person who become unemployed after being insured two or more years, due to closure of factory/establishment, retrenchment or permanent invalidity not less than 40% arising out of non-employment injury are entitled to :-

Unemployment Allowance equal to 50% of wage for a maximum period of upto Two Years during the life time.

Medical care for self and family from ESI Hospitals/Dispensaries during the period IP receives unemployment allowance.

Vocational Training provided for upgrading skills - Expenditure on fee/travelling allowance borne by ESIC.

Atal Beemit Vyakti Kalyan Yojana (ABVKY): This scheme is a welfare measure for employees covered under Section 2(9) of ESI Act, 1948, in the form of relief payment upto 90 days, once in a lifetime. The Scheme was introduced w.e.f. 01-07-2018 on pilot basis for a period of two years initially. The scheme has now been extended upto 30 June 2022. It has also been decided to enhance the rate of unemployment relief under the scheme to 50% of wages from earlier rate of 25% along with relaxation in eligibility conditions, provided the Insured Person should have been in insurable employment for a minimum period of one year immediately before her/his unemployment and should have contributed for not less than 78 days in the completed contribution period in 12 months immediately prior to unemployment. In a significant relaxation, relief shall become due for payment after 30 days from date of unemployment and claim can be submitted directly to the designated ESIC Branch Office by the worker. Claims to get the relief can be made online at website www.esic.in along with submission of the physical claim with an affidavit, photocopy of Aadhaar Card and Bank Account details to the designated ESIC Branch Office by post or in person.

Incentive to employers in the Private Sector for providing regular employment to the persons with disability: Minimum wage limit for Physically Disabled Persons for availing ESIC Benefits is 25,000/-.

Employers' contribution is paid by the Central Government for 3 years.

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Benefits & Contributory Conditions: An interesting feature of the ESI Scheme is that the contributions are related to the paying capacity as a fixed percentage of the worker's wages, whereas they are provided social security benefits according to individual needs without distinction.

Cash Benefits are disbursed by the Corporation through its Branch Offices (BOs) / Pay Offices (POs), subject to certain contributory conditions.

MEDICAL COLLEGES OF EMPLOYEES STATE INSURANCE ACT 1948

Employees' state insurance corporation even have now advanced its infrastructure. Now the ESIC can produce its own MBBS Doctors. The ESIC regulates eight colleges throughout the county. The colleges conduct MBBS and MD degree programmes. The course fees are comparatively affordable for the parents. The different branches of this college are located in different parts of the country like Karnataka (Bengaluru), Tamil Nadu (Chennai), West Bengal (Kolkata), Haryana (Faridabad), and Telangana (Hyderabad), Karnataka (Gulbarga), Rajasthan (Jaipur). The list of colleges can be further referred at https://www.esic.gov.in/medical-institution/

COMPLIANCE UNDER ESI ACT

1. Registration of the establishment or factory within 15 days of the applicability of the ESIC. [Under Section 2 –A of the Act read with Regulation 10-B]

2. Registration of the employees in the ESIC portal. The employer will have to generate 'Temporary Identity Card' TAC for the employee. This TAC is valid for only 30 days. But if the aadhar is seeded in the TAC it will become permanent pehchan certificate.

3. Amendment of address or residence of the employee to be done by the employer using his ESIC credentials.

4. Maintenance of records:

i. Muster Roll.

ii. Wage register.

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iii. Attendance register

iv. Details of the Contractors.

v. Accident registers in Form – 11. The notice of accident must be given to the ESIC branch office via online within 24 hours of the accident.

vi. An inspection book.

vii. Aside the employer must ensure that the contractors are also maintaining the above registers and are also complying with the ESIC statutory compliance. To ensure that the contractors are doing compliance, the principal employer must conduct periodic statutory compliance audit.

CONCLUSION

ESIC is social welfare legislation. To deduct contribution from the employees is a statutory provision. It is noteworthy that howsoever the minimum insurance monthly premiums; the corporation is extending comparatively more benefits than any branded medical insurance company. There is no threshold limit of claiming medical claim in case of ESIC. The ESIC is also having its dispensaries, hospitals, tie-up hospitals and empanelled doctors list. The appropriate government is the central Government and in few cases is the State Government [Section 1(3) and 1(5) of the ESI Act]. The central government must take steps to bring more categories of people within the scope of ESIC Scheme like the unorganized sectors labourers or in areas which are not notified under the ESIC scheme.

End

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